IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	) No. S260598
Plaintiff and Respondent,	)
	) No. B295998
vs.	)
	) Los Angeles
VINCE E. LEWIS,	) Superior Court
	) No. TA117431
Defendant and Appellant.	)
	)

APPELLANT/PETITIONER'S
OPENING BRIEF ON THE MERITS

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/Petitioner

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ISSUES FOR REVIEW

The issues to be briefed and argued are stated as follows in the order of March 18, 2020, granting review:

"(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95?

"(2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?"[1/]

* * * * *

1. Unexplained section references are to the Penal Code.

STATEMENT OF THE CASE

The facts and the course of proceedings are stated in the opinion of the Court of Appeal. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1133-1134.) 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 shot and 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.)[2/] 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.)

While the case was on appeal, this Court held in *People v. Chiu* (2014) 59 Cal.4th 155, that the natural and probable consequences theory will only support a conviction for second-degree, not first-degree, murder. The instructions at Mr. Lewis's trial did not reflect this limitation.

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

The Court of Appeal nevertheless affirmed. Resolving a fact-intensive dispute between the parties about the trial evidence, the Court of Appeal held that the 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].)[3/]

Mr. Lewis filed a petition for resentencing in the superior court under section 1170.95 (enacted by Senate Bill 1437 of 2018 [Stats. 2018, ch. 1015]; hereafter sometimes "SB 1437"). (CT 1-3.) He requested counsel, but none was appointed. No order to show cause was issued. 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.)

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

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3. 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 "evidence that could rationally lead to a *contrary* finding" establishes prejudice) (emphasis added); and *In re Martinez* (2017) 3 Cal.5th 1216, 1225-1227 (*Chiu* error prejudicial even though there was "sufficient evidence" of direct aiding and abetting).

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's 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).

the Court of Appeal so he could appoint counsel and thereafter 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 brief *passim*, the superior court judge was correct and the Court of Appeal should have granted his request.

In the decision now under review, the Court of Appeal affirmed the denial of the section 1170.95 petition in a published opinion. (43 Cal.App.5th 1128.)

* * * * *

SUMMARY OF ARGUMENT

The two issues on which the Court granted review are closely related: At any stage at which the superior court may consider the record of conviction, the defendant is entitled to counsel. Conversely, once the defendant has the assistance of counsel – but not before – the court may, with the benefit of adversary briefing, consider the record of conviction. This brief discusses the Court's issue 2 under heading 2, and the Court's issue 1 under heading 3, but there are necessarily multiple cross-references between the sections.

This brief sets out many factors that support this conclusion: It is the most appropriate reading of the text of section 1170.95. It is supported by legislative history and general principles of statutory construction. It is consistent with the definition of a "critical stage" at which the right to counsel attaches. It minimizes the risk of erroneous denials of petitions, without an inappropriate burden on judicial resources. It avoids unfairness to unrepresented litigants.

The case should be remanded with instructions to appoint counsel for Mr. Lewis.

* * * * *

ARGUMENT

1. Introduction: The text of section 1170.95, and established principles of statutory construction, require section 1170.95 to be construed more generously to defendants than it was construed by the courts below

A. *The structure of section 1170.95, subdivision (c)*

SB 1437 narrowed the felony-murder rule and eliminated natural and probable consequences liability for murder by amending sections 188 and 189, effective January 1, 2019. It gave the change retrospective effect by enacting section 1170.95, which gives defendants whose convictions are already final an opportunity to receive the benefit of the change in the substantive law. It provided them with the assistance of counsel to claim this benefit, and did not limit them to the evidence presented at trial.

Subdivision (c) of section 1170.95, the portion at issue in this case, 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.

The courts below shut the door to Mr. Lewis at the first of the two prima facie stages set forth in subdivision (c), concluding

he failed to make a prima facie case that he "falls within the provisions of this section." Although the plain words of the first sentence limit the court to reviewing the *petition*, the courts below improperly looked beyond Mr. Lewis's petition, inconsistently with the text of the statute and the concept of a prima facie case. (43 Cal.App.5th at pp. 1139-1140.)

In context, the meaning of the initial prima facie case in the first sentence of subdivision (c) is explained by subdivisions (a) and (b)(2).

Subdivision (a) establishes which defendants "fall[] within the provisions of" section 1170.95: defendants whose charging document "allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine"; who were convicted of murder; and who could not now be convicted under the amended law. By filling out the form petition and signing it under penalty of perjury, Mr. Lewis alleged a prima facie case – a case that puts aside the possibility of impeachment or contradiction – on each of those three elements. (*People v. Drayton* (2020) 47 Cal.App.5th 965, 975-976.)

Subdivision (b)(2) allows a petition to be denied without appointment of counsel if any necessary information is missing from the petition and cannot readily be ascertained. The court can search for *missing* information, but not for *contradictory* information. A denial for missing information must be without prejudice and the defendant must be so advised. (§ 1170.95, subd. (b)(2).) Nothing was missing from Mr. Lewis's petition, and the denial was not stated to be without prejudice. This is the only

reference in section 1170.95 to denial of a petition prior to appointment of counsel, so the reasonable inference is that denial is not authorized for any reasons other than those stated in subdivision (b)(2). The *expressio unius* principle of statutory construction is well established: "the explicit mention of some things in a text may imply other matters not similarly addressed are excluded." (*People v. Soto* (2018) 4 Cal.5th 968, 975.)

In context, the first sentence of subdivision (c) appears to be declarative of the procedure for implementing the limited gatekeeping function set forth by subdivision (b)(2), without conferring any greater authority to deny petitions beyond that conferred by subdivision (b)(2). *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328-329, *petn. for review granted & held*, No. S260493, held to the contrary. But *Verdugo*'s conclusion that the court "must" examine portions of the record of conviction at this stage (*id.* at pp. 329-330) is inconsistent with the statutory directive to assess the first prima facie case by "review[ing] the petition." (§ 1170.95, subd. (c).)

The limited nature of the first step is further indicated by the third sentence of subdivision (c), which requires the prosecutor to file a response within 60 days after the petition is *served*. The defendant, not the court, must serve the petition on the district attorney. (Subd. (b)(1).) The prosecutor is not expected, or even permitted, to wait until the court has conducted an initial review of anything other than the petition itself before preparing a response. Court review of the petition alone, to establish that it alleges the three elements that subdivision (a) says are required

in order to "fall[] within the provisions of this section," and that none of the few items of information required by subdivision (b) is missing, is a simple process that will require minimal time. No deadline is stated for the court's initial review, presumably because none is necessary given how little is required of the court at this step. Any broader initial review would be inconsistent with these elements of the statute.

The first prima facie case ("falls within the provisions of this section") is contrasted with the *second* and 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*." (Emphasis added; see *Drayton, supra,* 47 Cal.App.5th at p. 976.) 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; contra, Couzens, et al., *Sentencing California Crimes* (Rutter Group 2019) § 23.51(H)(1) [hereafter "Couzens"] [reading the statute to require only a single prima facie showing].) A defendant may, prima facie, fall within the provisions of the statute set forth in subdivision (a) based on the face of the petition, but in light of the record of conviction his counsel may be unable to make a prima facie case that he will be entitled to relief.

The second prima facie case has some similarity to the prima facie case that entitles a petitioner for habeas corpus to an

order to show cause, but there are important differences. (See *Drayton, supra*, 47 Cal.App.5th at pp. 977-980.) The most important differences are that under section 1170.95, unlike in habeas, the defendant is entitled to the assistance of counsel in making this prima facie case, and once the defendant makes this prima facie case the burden of proof shifts to the prosecution.

B. *A prima facie case is a very low bar*

In determining whether a litigant has stated a prima facie case, 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.*)

C. *Section 1170.95 is a remedial statute that should be construed broadly to serve its remedial purpose*

A remedial statute is to be liberally construed to extend the remedy broadly in order to promote the public policy animating the statute, "for the benefit of those it is intended to protect." (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082; accord, e.g., *People v. Barrajas* (1998) 62 Cal.App.4th 926, 930.) This is such a statute. The substantial barrier the Court of Appeal erected 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 with unusual clarity the statute's remedial purpose, and its intention to benefit those convicted of murder based on vicarious liability for the conduct of others:

> 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); see also *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 256; *People v. Munoz* (2019) 39 Cal.App.5th 738, 763.) 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 Legislature expressly made the new remedy more broadly available than would the default retroactivity rule of *In re Estrada* (1965) 63 Cal.2d 740.

The construction the Court of Appeal gave to this statute frustrates those broad legislative objectives. It sets an unrealistically high bar for unrepresented litigants to surmount, on pain of losing any ability to advocate, with the assistance of counsel and with new evidence if available, for the benefit of the remedial change in the substantive law. It unnecessarily compromises the legislative purpose of proportionate punishment by overlaying a new level of arbitrariness based on the date of finality. It diminishes the ability of the statute to fulfill the legislative purpose to reduce prison overcrowding by reducing prison terms that are unnecessarily lengthy, not just new commitments to prison but terms that prisoners are already serving.

By contrast, the interpretation set forth in this brief fulfills the rule of liberal construction of remedial statutes.

D. *Section 1170.95 establishes a special proceeding; courts may not deviate from the statutory terms of such a proceeding*

A section 1170.95 petition is a "special proceeding," such that the courts are required to adhere strictly to the statutory procedure.

The Code of Civil Procedure divides all judicial remedies into two classes: "actions" and "special proceedings." (Code Civ. Proc., § 21.) "An action is an ordinary [civil or criminal] proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22.) "Every other remedy is a special proceeding." (Code Civ. Proc., § 23.) "Special proceedings … generally are 'confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. [Citations.]' Special proceedings instead are established by statute." (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 725.)

"Special proceedings are creatures of statute and the court's jurisdiction in such proceedings is limited by statutory authority. [Citations.]" (*Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1387.) "As special proceedings are created and authorized by statute, the jurisdiction over any special proceeding is limited by the terms and conditions of the statute under which it was authorized and … the statutory procedure must be strictly followed." (*People v. Quiroz* (2016) 244 Cal.App.4th 1371, 1379 [competency proceeding; internal brackets and quotations omitted].)

The courts below violated this rule when they looked beyond the four corners of Mr. Lewis's petition to erect a non-statutory barrier to his right to counsel. What the courts below did here can be contrasted with *In re Kinnamon* (2005) 133 Cal.App.4th 316, a special proceeding under section 1405 to

obtain post-conviction DNA testing. The Court of Appeal remanded with directions to appoint counsel for the defendant because his "request for the appointment of counsel met the statutory criteria mandating that his request be granted." (*Id.* at p. 323.) They did so despite their belief that the Legislature had established too broad a right to counsel, and that the "lax statutory standard will result in a wasteful expenditure of time and money." (*Id.* at p. 324.) The *Kinnamon* court would have preferred to conclude, based on the record of conviction, that even with counsel the defendant would be unable to establish his entitlement to DNA testing, but recognized that that was not the standard prescribed by the Legislature. (*Ibid.*) The Court of Appeal in Mr. Lewis's case was similarly troubled by the policy implications of a broad right to counsel under section 1170.95 (43 Cal.App.5th at pp. 1138-1139) but, unlike the *Kinnamon* court, it drew the wrong conclusion, second-guessing and overriding the legislative judgment about the role of counsel and the role of the record of conviction.

E. *Summary*

The two questions on which the Court granted review must be addressed in light of a statutory text, and established principles of statutory construction, that establish a minimal burden on unrepresented defendants and a low threshold for appointment of

counsel. The statute is to be construed more generously to defendants than it was construed by the courts below.

* * * * *

2. Upon filing a facially sufficient petition, the defendant has a right to counsel prior to the court's consideration of the record of conviction

A. *Introduction*

The statutory and constitutional right to counsel attaches upon the filing of a facially sufficient petition. Subdivision (c) is appropriately read – both intrinsically and with the constitutional right to counsel in mind – to provide that the superior court may not go outside the four corners of the petition and consider the record of conviction for any purpose until after counsel has been appointed and has had the opportunity to advocate on behalf of the defendant. The Court of Appeal erred by placing a heavier burden on an unrepresented defendant, prior to appointment of counsel, than either the text or purpose of section 1170.95 or the constitutional right to counsel will permit. Mr. Lewis was entitled to appointment of counsel, and it was error to deny his petition before his request for counsel had been granted.

B. *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 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 appear in the bill as enacted.

But of significance here, one of the Judicial Council's proposed amendments was not incorporated into the bill. 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.[4/]

Failure to adopt a proposed amendment sheds light on the meaning of a statute as ultimately enacted. It is inappropriate to read the enacted statute as though the unsuccessful amendment had been included. (See *Kelly v. Methodist Hospital* (2000) 22 Cal.4th 1108, 1116; *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 984-985.) Here, while the Legislature accommodated the Judicial Council on other matters, the Legislature did not accede to the Judicial Council's additional request to give superior courts the power to summarily deny petitions in the manner that the Court of Appeal authorized in this case.

C. *The Legislature recognized that local agencies would incur costs for counsel, and invoked the reimbursement process for state-mandated local programs*

The Legislature understood that it was creating a state-mandated local program under which local agencies would incur costs for counsel on both sides. The Legislative Counsel's Digest

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4. In its order granting review, the Court took judicial notice of these letters.

of the bill states, "By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program." Section 5 of the bill provides: "If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code." (Stats. 2018, ch. 1015, § 5.) In light of this recognition, any financial impact on local governments from the appointment of counsel cannot be relied upon to imply legislative endorsement of summary denial of section 1170.95 petitions.

D. *Section 1170.95 should be construed to avoid serious constitutional questions that would be presented by the denial of counsel*

Even if it is not clear from the text and history of section 1170.95 that appointment of counsel must precede consideration of the record of conviction, the statute should be construed in that manner. An interpretation of the statute to the contrary would impair the right to counsel under the Sixth Amendment and Article I, section 15 of the California Constitution. The constitutional question is, at a minimum, a serious one, and it can be avoided entirely by construing the text to confer a *statutory* right to counsel prior to any consideration of the record of conviction.

It is a "prudential rule of judicial restraint that counsels against rendering a decision on constitutional grounds if a statu-

tory basis for resolution exists…." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357 [quoting *NBC Subsidiary*].) Thus, "courts should, if reasonably possible, construe a statute in a manner that avoids *any* doubt about its constitutional validity." (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 346 [original italics; brackets and quotation marks omitted].) "If a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional (or raises serious and doubtful constitutional questions), the court will adopt the construction which will render it free from doubt as to its constitutionality, even if the other construction is equally reasonable." (*People v. Fryhaat* (2019) 35 Cal.App.5th 969, 980.)

Subdivision (c) can be, and therefore should be, construed to require the appointment of counsel before the court may conclude, based on the record of conviction, that the factual averments in the petition are so incorrect that an order to show cause and hearing are not required.

E. *The constitutional right to counsel attaches at a "critical stage," that is, any stage at which advocacy is required*

1. *A stage at which a section 1170.95 petition could be denied is a critical stage*

Under article I, section 15 of the California Constitution, a defendant's right to the assistance of counsel is not limited to trial, but instead extends to

> other, 'critical' stages of the criminal process. This rule, which was first articulated in cases interpreting the Sixth Amendment, recognizes that the right to the assistance of counsel is fashioned according to the need for such assistance, and this need may very well be greater during certain pre- and posttrial events than during the trial itself. [¶] For purposes of determining whether the right to counsel extends to a particular proceeding, we have described a critical stage as 'one "in which the substantial rights of a defendant are at stake" [citation], and "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial" [citation].' More broadly, critical stages can be understood as those events or proceedings 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.

(*Gardner v. Appellate Division* (2019) 6 Cal.5th 998, 1004-1005 [internal citations omitted].)

People v. Rodriguez (1998) 17 Cal.4th 253, which affirmed the right to counsel in response to a much more modest change in the law than SB 1437, demonstrates that a defendant has a right to counsel before a SB 1437 petition may be denied. In *Rodriguez*, the case had been remanded for the trial court to exercise the discretion, newly conferred by *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, whether to strike prior conviction allegations. The Court rejected the argument that "defendant would have an opportunity to appear with counsel before the trial court only if the court decides in advance to rule in defendant's favor." (17 Cal.4th at p. 257.) The Court found the exercise of that discretion to be a critical stage. "The evidence and argu-

ments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Id.* at p. 258.) The Court rejected the prosecution's assertion that a "concern for efficiency" would allow the trial court to summarily refuse to strike prior convictions without the benefit of advocacy. (*Id.* at pp. 258-259.)

Section 1170.95 does not create a discretionary procedure, unlike *Romero*. If the prosecution cannot carry the burden of proof specified in paragraph (d)(3), the defendant has a mandatory right to relief. Section 1170.95 is not limited to an opportunity to reduce an existing sentence, unlike *Romero*. A petition under section 1170.95 presents the question whether the defendant is *guilty of murder* as that offense is now defined. The remedy for a successful petition is "to vacate the murder conviction." (§ 1170.95, subd. (d)(1).) *Rodriguez* requires that the defendant have the assistance of counsel prior to any stage at which the court can categorically shut the door to his opportunity to litigate his entitlement to that form of relief.

An analogy to habeas corpus does not defeat this principle. Even courts that interpret the section 1170.95 right to counsel narrowly recognize that subdivision (c) requires the appointment of counsel *before* the court decides whether to issue an order to show cause. (*Verdugo*, 44 Cal.App.5th at p. 328; *Lewis*, 43 Cal.App.5th at p. 1140; Couzens, *supra*, § 23.51(H)(3).) By con-

trast, a habeas petitioner's right to counsel arises only upon issuance of an order to show cause. (Rule 4.551(c)(2), California Rules of Court.) Moreover, a habeas corpus petitioner must overcome a presumption of validity of the judgment of conviction. (*In re Clark* (1993) 5 Cal.4th 750, 764.) Such a presumption would not be appropriate under section 1170.95, where the judgment is being tested against *different* legal principles than those on which it is based, and an order to show cause shifts the burden to the prosecution.[5/]

Once it is established that this is a critical stage at which a defendant has a right to counsel, it is constitutionally unacceptable as a matter of 14th Amendment due process for the court to make "an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the … court to have counsel appointed." (*Douglas v. California* (1963) 372 U.S. 353, 355, quoting and disapproving *People v. Hyde* (1958) 51 Cal.2d 152, 154.) The language disapproved in *Douglas* accurately describes what the superior court did here.[6/]

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5. What is said here about habeas corpus also applies to writs of error coram nobis. (See *People v. Shipman* (1965) 62 Cal.2d 226, 232 [coram nobis], cited with approval in *Clark,* 5 Cal.4th at pp. 779-780 [habeas].)

6. The Supreme Court cited *Douglas* with approval in its most recent examination of California procedures. (*Smith v. Robbins* (2000) 528 U.S. 259, 280-284 [approving *People v. Wende* (1979) 25 Cal.3d 436].)

2. *In numerous situations, including this case, advocacy by counsel could demonstrate that a section 1170.95 petition should not be denied*

It will frequently not be self-evident from the record of conviction whether or not the defendant has made, or can make, either of the prima facie cases set forth in subdivision (c), bearing in mind that both the procedural and the adjudicative facts must be viewed in the light most favorable to the defendant. Advocacy of counsel can make a difference.

At first glance it may seem that there are categories of cases in which the superior court could confidently examine the record of conviction sua sponte and, applying a prima facie case standard, summarily deny a section 1170.95 petition. But upon analysis one after another of these categories evaporates. The defendant needs, and is entitled to, counsel before the possibility of denial of the petition can be entertained.

● While a grant of relief is mandatory if there is a prior "not true" finding on a felony-murder special circumstance (subd. (d)(2)), the converse will not always be true. With the assistance of counsel, a defendant will frequently be able to make both the prima facie showings of subdivision (c) notwithstanding a true finding on a special circumstance. The trial judge in *People v. Torres* (2020) 46 Cal.App.5th 1168, *petn. for review filed*, No. S262011, looked to the record of conviction and discovered that the jury had made a true finding on a felony-murder special circumstance. He summarily denied the petition in the belief that this finding established that Torres would be guilty of first-

degree murder under amended section 189. He was wrong. The jury verdict preceded *People v. Clark* (2016) 63 Cal.4th 522, 609-623, and *People v. Banks* (2015) 61 Cal.4th 788, so it did not establish his culpability under the law in existence today. (Accord, *People v. Smith* (2020) ___ Cal.App.5th ___, ___ [2020 Cal.App. LEXIS 418 at pp. *11-*13].)

The Court of Appeal in *Torres*, while correcting the superior court judge's error, made errors of its own: It held that the judge had correctly looked to the record of conviction without appointing counsel (46 Cal.App.5th at p. 1178); it did not require the judge to appoint counsel before reconsidering the case on remand; and it invited the judge to search the record of conviction for alternative reasons to deny the petition (*id.* at p. 1180). But the judge's resort to the record of conviction without the benefit of advocacy by counsel is what caused the error to begin with. And the instructions on remand – focused on reasons to deny the petition – appear inconsistent with the concept of a prima facie case, which must be viewed in the light most favorable to the defendant.

Besides the *Banks/Clark* situation, among the other examples demonstrating the need for advocacy by counsel before the court looks to the record of conviction are these:

● Section 1170.95 by its terms allows a petition only from a defendant convicted of murder. But if either the petition, or the record of conviction, reveals that the defendant stands convicted of *attempted* murder, not murder, summary denial would be inappropriate and the defendant would be entitled to the assis-

tance of counsel to advocate for him. 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 granted & held*, No. S259983, and *People v. Medrano* (2019) 42 Cal.App.5th 1001, *petn. for review granted & held*, No. S259948, with *People v. Lopez* (2019) 38 Cal.App.5th 1087, *review granted*, No. S258175.)

● Subdivision (a)(2) allows section 1170.95 relief to a defendant who "accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder." Although the obvious plea offer in such a case would be manslaughter, there are at least three published opinions affirming summary denials of section 1170.95 petitions by defendants convicted of manslaughter under these circumstances, on the theory that section 1170.95 relief is limited to those convicted of murder. (*People v. Turner* (2020) 45 Cal.App.5th 428; *People v. Flores* (2020) 44 Cal.App.5th 985; *People v. Cervantes* (2020) 44 Cal.App.5th 884.) A defendant is entitled to the assistance of counsel to navigate a question of statutory construction sufficiently unclear as to warrant published appellate opinions.

● In *People v. Offley* (2020) 48 Cal.App.5th 588, 598-599, the trial court summarily denied a section 1170.95 petition because the section 12022.53, subdivision (d), enhancement for intentionally discharging a firearm proximately causing the victim's death had been imposed. The Court of Appeal reversed, because this is a general intent enhancement that does not

require proof of either express or implied malice. The jury was instructed on natural and probable consequences and might have convicted on that theory, inconsistently with amended section 188. The case was remanded with directions to appoint counsel.

● *People v. Garcia* (2020) 46 Cal.App.5th 123, 149-155, *petn. for review filed*, No. S261560, a direct appeal from a conviction, vacated a finding of a felony-murder special circumstance. The Court of Appeal held that CALCRIM No. 730 allowed the jury to interpret "actual killer" in section 190.2 too broadly. Suppose a similarly situated defendant, convicted on the same facts and the same instruction, filed a pro se form petition under section 1170.95. *Garcia* demonstrates that summary denial of that petition would be error, for the special circumstance finding may be invalid. But sua sponte review of the record of conviction, without the adversary briefing that the Court of Appeal received in *Garcia*, is highly unlikely to lead the judge to recognize that a CALCRIM pattern instruction may be legally erroneous in a way that allows the defendant to establish a prima facie case for relief.

● In Mr. Lewis's own case, the superior court's resort to the record of conviction without the benefit of briefing by counsel resulted in an improvident summary denial. On Mr. Lewis's prior appeal, the Court of Appeal, resolving a fact-intensive dispute between the parties about the trial evidence, held that instructional error was harmless, and that he was convicted as a direct aider and abetter, even though the jury had also been instructed on natural and probable consequences liability. (*People v. Lewis* (July 14, 2014) 2014 Cal.App. Unpub. LEXIS 4923 at pp.

*28-*30 [No. B241236].) When Mr. Lewis filed a section 1170.95 petition, the superior court summarily denied it on the basis of the prior appellate holding, inferentially concluding that he had not made a prima facie case that he had been convicted on a natural and probable consequences theory. (CT 4-5.) The superior court's minute order, based on factual inferences favorable to the prosecution set forth in the prior appellate opinion, is manifestly at odds with Mr. Lewis's prima facie case – the factual case in the light most favorable to him – on the question of his eligibility for relief. Collateral estoppel may not be invoked against a litigant when the standard of review or proof is more favorable to him than it was 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.) The Court of Appeal's 2014 decision did not make appointment of counsel for Mr. Lewis futile.

SB 1437 is still new, so it is likely that there are other issues like these that remain to be decided or, indeed, remain to be clearly identified and joined. Some of these may not be foreseen by even a conscientious judge acting sua sponte. That is likely why the Legislature chose to provide a right to counsel.

Determining whether a defendant, prima facie, "falls within the provisions of" section 1170.95 (the first prima facie case) is unlike section 1170.126 (Proposition 36), where the abstract of judgment will show if the defendant's current conviction is on the list of "strikes" in section 667.5 or 1170.12. Summary denials of

section 1170.95 petitions filed without benefit of counsel have a far greater chance of resulting in erroneous denials of relief.

F. *Practical considerations also demonstrate the need for the assistance of counsel whenever the court may consider the record of conviction*

In addition to the fact that legal questions such as those just discussed are likely to figure in the subdivision (c) analysis in many cases, purely practical considerations demonstrate why the Legislature concluded that the defendant is entitled to counsel at any stage at which the record of conviction may be considered.

Whenever the superior court *may* refer to the record of conviction, it follows inexorably that the defendant *must* do so, on pain of having his petition summarily denied. The Court of Appeal expected 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. But 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.[7/] Nothing instructs the defendant that he must plead the

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7. A blank copy of the form petition is published as an appendix to the Court of Appeal opinion in *Verdugo*, 44 Cal.App.5th at pp. 337-339. The version published there differs slightly in form, but not in substance, from the version Mr. Lewis used (CT 1-3). At no point does either version of the form suggest the possibility of attaching anything to the petition, or instruct the defendant to write any substantive information onto the petition itself. (See argument 4.A, *infra*; cf. Form HC-001 (rev.

(continued...)

facts that explain *why* he can no longer be convicted of murder, before he will be entitled to the assistance of an attorney to investigate and marshal those facts.

Even more troubling, the Court of Appeal faulted Mr. Lewis for not proffering *new evidence* – *beyond* the record of conviction – in his initial petition, and faulted his appellate counsel for not proffering new evidence, never presented to the superior court, for the first time on appeal. (43 Cal.App.5th at p. 1139 & 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 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 with their petition and have it considered, the Court of Appeal decision effectively created a very different and untenable rule: that an unrepresented defendant *must* proffer new evidence at this stage or have his petition summarily denied.

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 subdivi-

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7. (...continued)
January 1, 2019), the form petition for habeas corpus, which at six separate points instructs or invites the petitioner to attach additional papers, besides filling out the form itself.)

sion (a) and the first sentence of subdivision (c). Mr. Lewis's petition made the 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.

G. *Superficially attractive considerations of judicial economy are likely to produce false economies and are outweighed by the right to counsel*

By requiring the appointment of counsel before consideration of the record of conviction, the Legislature struck the balance between the right to counsel and considerations of judicial economy and allocation of resources.

The Court of Appeal believed that policy reasons related to the conservation of judicial resources justified striking a different balance than the Legislature did, and adopted a broad rule allowing summary denial of section 1170.95 petitions from unrepresented defendants. (43 Cal.App.5th at p. 1138.) The concern is a legitimate one, but does not justify the conclusion the Court of Appeal reached. For a variety of reasons, appointment of counsel based on the allegations of the petition is *not* "a gross misuse of judicial resources," nor, indeed, a misuse of judicial resources at all. (*Ibid.*, quoting Couzens, *supra*, § 23.51(H)(1).)

The Court must look, as the Court of Appeal did not, to the manner in which and the extent to which the text of the statute takes this concern into account. It would be inappropriate to

strike the balance less favorably to defendants than did the Legislature, particularly given that the right to counsel is on the other side of the balance. "[C]ourt congestion and 'the press of business' will not justify depriving parties of fundamental rights and a full and fair opportunity to be heard." (*Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1319.) "Simply stated, [a litigant's] private interest in having a meaningful hearing and all that that right encompasses outweighs any state interest in conserving and allocating finite judicial resources in an efficient and expedient manner." (*Id.* at p. 1329.)

The cost-benefit analysis was for the Legislature to conduct. There are many reasons why the Legislature could reasonably decide the benefit of early appointment of counsel would outweigh its costs, given that section 1170.95 requires legal and factual inquiry into complex legal theories (felony murder, and natural and probable consequences) not easily understood by an unrepresented litigant. As discussed in argument 2.E.2, in a broad range of cases appointment of counsel cannot be conclusively assumed to be futile. The Legislature with good reason concluded that sua sponte judicial review of the record of conviction, without the benefit of advocacy from counsel, would not be an appropriate basis on which to deny petitions.

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,

with the assistance of counsel, he may be able to marshal facts that create a reasonable doubt as to one or more of the elements of robbery, or may negotiate a disposition without trial. And if a defendant appears to be subject to a mandatory sentence as to which the court has no discretion, we do not dispense with the right to counsel at sentencing.

Briefing of a section 1170.95 petition in the superior court need not consume inordinate resources. If a petition is clearly without merit, the prosecutor can submit a simple brief summarizing why the defendant is not entitled to a hearing. Subdivision (c) does not *require* a reply brief from defendant's counsel. Appointed counsel who, after thorough examination of the case with an advocate's eye, concludes that there is no good-faith argument, even prima facie, that the defendant is entitled to section 1170.95 relief may recommend that the defendant withdraw the petition. Alternatively, counsel may submit the case to the superior court without argument, written or oral. The expenditure of resources by the superior court and the prosecution in such a case would likely be minimal, far smaller than would be required for an appeal from an uncounseled summary denial.

The economy obtained by summarily denying petitions without counsel may be a false economy, even putting aside the defendant's countervailing statutory and constitutional right to counsel. Summary denials create a new and unnecessary inefficiency that burdens the Courts of Appeal. In appeals such as this one, the record consists 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 are without the source of information they are accustomed to and entitled to: a record developed in superior court. A litigant has a due process right to a record that is adequate to enable "the reviewing court to conduct a meaningful review" and for him "to properly perfect his appeal." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1381.) In the present case, after the appeal was taken, the trial judge asked for the case back because he realized that an appeal following a summary denial would "waste the Court of Appeal's … resources unnecessarily." (5/22/19 RT 3.) He was right.

With no factual record having been made in superior court, the Court of Appeal in this case even expected Mr. Lewis's appellate counsel to proffer new evidence, never presented to the superior court. (43 Cal.App.5th at p. 1139, fn. 9.) This is patently 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.)

Interpreting the statute to allow summary denials without appointment of counsel would create a false economy, not a real one. The Legislature could reasonably require the appointment of counsel prior to any consideration of the record of conviction.

H. *Denial of counsel cannot be harmless error*

Mr. Lewis and similarly situated defendants are entitled to appointment of counsel because a court cannot say, based on an uncounseled section 1170.95 petition alone, that the assistance of counsel would necessarily be futile. The same principle demonstrates that the denial of counsel, if error, cannot be harmless.

Denial of the Sixth Amendment right to counsel at a critical stage of the proceedings is structural error reversible without a showing of prejudice. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166, quoted in *People v. Lightsey* (2012) 54 Cal.4th 668, 699-700.) While it may sometimes be possible to isolate the effect of denial of counsel "for a discrete time or hearing only" and find it harmless, this is not such a case. The exception comes from *Satterwhite v. Texas* (1988) 486 U.S. 249, where the defendant was denied counsel at a psychiatric interview and a reviewing court could assess whether admission of the psychiatrist's testimony at trial was harmless.

The present case is more like *Lightsey*, in which denial of counsel was structural error, than *Satterwhite*, where it was not. Lightsey was denied counsel at the entirety of a competency hearing under section 1368. In *Lightsey,* "[a]s with a pervasive Sixth Amendment violation, the statutory violation here cannot be likened to 'trial error' akin to that at issue in *Satterwhite v. Texas, supra,* 486 U.S. at pages 258-259. We cannot simply excise some item of evidence in order to 'make an intelligent judgment' (*id*. at p. 258) about whether the competency determination might

have been affected by the absence of counsel to represent defendant." (54 Cal.4th at p. 701.)

Mr. Lewis was denied counsel for the entirety of his section 1170.95 proceedings. Beyond that, the effect of the summary denial of the petition without appointment of counsel was to deprive him of any opportunity to take advantage of the fact-development process provided for in subdivision (d) of section 1170.95. As in *Lightsey*, we do not know how counsel would have litigated the case. We do not know what investigation counsel might have conducted and what additional evidence counsel might have presented. "[S]tructural errors affect the very composition of the record and harmlessness review would require 'difficult inquires concerning matters that might have been, but were not, placed in evidence.'" (*Lightsey*, 54 Cal.4th at p. 701, quoting *Rose v. Clark* (1986) 478 U.S. 570, 579, fn. 7.) That is true here.

Although the Court in *Lightsey* discussed at length the structural nature of a denial of counsel under the Sixth Amendment, the rule and the outcome would be the same even if the Court concludes that Mr. Lewis's right to counsel was based only on state law, constitutional or statutory, and not on the Sixth Amendment. The Court held that Lightsey had been denied a *statutory* right to counsel under section 1368. (54 Cal.4th at p. 698.) The same reasoning that demonstrated that a denial of the Sixth Amendment right to counsel under these circumstances would be structural error, reversible per se, led the Court to conclude that this *statutory* violation was a miscarriage of justice requiring reversal under article VI, section 13 of the California

Constitution. (See also *People v. Blackburn* (2015) 61 Cal.4th 1113, 1133 [applying *Lightsey* to hold that denial of a *statutory* right to jury trial was "a 'miscarriage of justice' requiring reversal [under article VI, section 13] without regard to the strength of the evidence"].)[8/]

I. *Conclusion*

To understand whether one is eligible for relief under section 1170.95 can require a complicated legal and factual inquiry. It is not surprising that some defendants who are not eligible mistakenly believe that they are, or may be, entitled to relief. However, what both the text of section 1170.95 and the amendments that were – and were not – adopted make clear is that a concern that meritless petitions would be filed did not outweigh the concern that a meritorious petition would be erroneously denied. The concern for judicial economy did not outweigh the concern that a defendant who was eligible for relief, at least prima facie, would be denied an opportunity to have counsel

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8. *People v. Law* (2020) ___ Cal.App.5th ___, ___ [2020 Cal.App. LEXIS 381 at pp. *23-*24], held – without citation to any authority – that denial of counsel for a section 1170.95 petition was harmless beyond a reasonable doubt because "the trial evidence" meant that nothing counsel could have done would have established Law's entitlement to relief. *Law* should be disapproved; apart from its square inconsistency with the principles discussed in text, it overlooks subdivision (d)(3) which entitles counsel to produce "new or additional evidence." (See *People v. Smith, supra*, 2020 Cal.App. LEXIS 418 at pp. *16-*17 [disagreeing with *Law*].)

investigate and argue the case, denied the opportunity to make a record and present relevant evidence in the superior court and, when necessary, to avail themselves of their right to appeal. Put in constitutional terms, the Legislature recognized that consideration of the record of conviction in connection with a section 1170.95 petition is a "critical stage" of the criminal process.

Either by statutory construction or by constitutional interpretation, the Court should require that appointment of counsel precede any consideration of the record of conviction.

* * * * *

3. Superior courts may consider the record of conviction only in connection with the second prima facie showing, after counsel has been appointed

A. *Introduction*

The Court phrased its first issue for review, "May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95?" This issue appears to refer to the second of the two prima facie cases set forth in subdivision (c), a showing that the defendant "is entitled to relief." This step comes after counsel has been appointed, and the answer is yes, the court may – with the benefit of advocacy for both sides – consider the record of conviction at that stage.

But Mr. Lewis never reached that stage. He is entitled to reversal regardless of the answer to the Court's question. Mr. Lewis's petition was summarily denied, based on the record of conviction, before counsel was appointed to represent him. Resort to the record of conviction at this stage was error and requires reversal. The limitation of the Court's question to the second prima facie case appears to recognize that the plain words of the first sentence of subdivision (c) preclude reference to the record of conviction in deciding whether the defendant has made the *first* prima facie case: "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." [Emphasis added.]

Defendant's counsel, in the course of making the *second* prima facie showing of entitlement to relief, and a prosecutor arguing to the contrary, can and should make use of the record of conviction. But it is improper for a court to rely on the record of conviction to defeat the *first* prima facie case in subdivision (c). Use of the record of conviction at the first stage, as the courts below did in this case, is inconsistent with the text, structure and purpose of section 1170.95.

B. *Prior to the appointment of counsel, the statute limits the court to considering the petition, not the record of conviction*

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 v. Eden Council, supra*, 19 Cal.4th at p. 1117.)

As originally introduced, the bill would have directed the superior court to assemble the record of conviction sua sponte as soon as the petition was received. (SB 1437, as introduced Feb. 16, 2018, § 6 at p. 9, adding Penal Code § 1425, subd. (d); see

Verdugo, 44 Cal.App.5th at pp. 330-331.) When the Assembly amended the bill into its final form on August 20, 2018, this section was deleted and replaced with section 1170.95 in the form in which it was ultimately adopted, directing the superior court to review the *petition*, not the record of conviction, as soon as the petition was filed, before appointing counsel.

Before the August 20 amendments, the bill required the court, upon receipt of the petition, to notify the *trial* attorneys for both parties and request them to respond to the petition. (Proposed § 1425, subd. (e).) The August 20 amendment provided for the appointment of new counsel for the defendant, rather than notice to trial counsel.

"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 argument 2.B, *supra*). Here, the successive drafts support the conclusion that the bill as enacted does not call for sua sponte consideration of the record of conviction.

Under section 1170.95, subdivision (a), Mr. Lewis's prima facie case that he "falls within the provisions of this section" (*id.*, subd. (c)) is that the information "allowed the prosecution to proceed under … the natural and probable consequences doctrine"; 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. That may or may not be part of his second prima

facie case "that he or she is entitled to relief," but Mr. Lewis was never allowed to reach that stage, and was never given counsel to marshal the law and the facts in his favor on that question.

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); see *People v. Smith, supra*, 2020 Cal.App. LEXIS 418 at pp. *15-*16.)

The Court of Appeal approved resort to the record of conviction at this preliminary step by analogy to cases interpreting the resentencing provisions of Propositions 36 and 47. (43 Cal.App.5th at pp. 1137-1138, citing, e.g., *People v. Page* (2017) 3 Cal.5th 1175, 1189 [§ 1170.18; Proposition 47]; and *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341 [§ 1170.126; Proposition 36].) The analogy fails, and this Court should disapprove it.

Section 1170.95 prescribes specific procedures that have no parallel in sections 1170.18 and 1170.126. Neither of those statutes mentions appointment of counsel. Unlike section 1170.95, neither of those statutes specifically directs consideration of the record of conviction only at a *later* stage of the process. Section 1170.126, subdivision (f), sets forth a single step: "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would

pose an unreasonable risk of danger to public safety." *Bradford* says of section 1170.126: "no particular statutory procedure describes *how* the trial court is to go about making the eligibility determination. Consequently, it is necessary for the courts to determine what evidence should be considered and whether to impose additional procedural protections…." (227 Cal.App.4th at p. 1337 [emphasis added].) Section 1170.18, subdivision (b), is structured identically. Section 1170.95 has no similar gap to be filled, and a court should not replace the specific procedures prescribed by the Legislature with the judicial construction of these very different statutes. (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].)

In a case such as this one, in which the defendant did not have the assistance of counsel in making the first prima facie case, use of the record of conviction at the first stage is also improper for the reasons discussed in argument 2.F, *supra*. It is fundamentally unfair for the court to use 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. (Cf. *Vesely v. Sager* (1971) 5 Cal.3d 153, 167-168 [a motion to dismiss or strike a facially sufficient civil complaint asserting, based on extrinsic evidence, that the allegations are false or a sham, must

be treated as a motion for summary judgment].[9/] Surely the superior court could not make and grant a motion for summary judgment sua sponte, without giving the plaintiff notice and an opportunity to respond.)

C. *The record of conviction will often yield incomplete, inaccurate, or irrelevant information when consulted in connection with the first prima facie case in subdivision (c)*

The record of conviction is a poor fit for assessing whether the defendant has, prima facie, alleged that he falls within the provisions of section 1170.95. It would be inappropriate for the court to consult the record of conviction before appointing counsel and receiving counsel's arguments, even if subdivision (c) of the statute did not expressly limit the court to examining the *petition* at this stage.

A section 1170.95 petition is very different from the context in which records of conviction are most often considered. The Court of Appeal cited *People v. Woodell* (1998) 17 Cal.4th 448, 454-455, for the proposition that the record of conviction includes an appellate opinion. (43 Cal.App.5th at p. 1136, fn. 7.) That begs the relevant question: whether the record of conviction, thus defined, may be appropriately relied on at the threshold, sua sponte, to shut the courthouse door to a section 1170.95 peti-

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9. Abrogated on unrelated grounds, *see Ennabe v. Manosa* (2014) 58 Cal.4th 697, 701.

tion.[10/] *Woodell*, like many cases involving review of records of conviction, concerned a sentencing enhancement for a prior conviction. In such a case, "the ultimate question is, 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. The record of conviction is direct, indeed likely conclusive, evidence for the proposition at issue in *Woodell*. It is, at best, relevant circumstantial evidence for the proposition at issue under section 1170.95.

Section 1170.126, enacted by Proposition 36, is similar to *Woodell*. Proposition 36 changed only the law of sentencing, not the substantive law. The record of conviction is consulted to determine if the defendant was convicted of one of the offenses for which Proposition 36 authorizes resentencing. (*Bradford, supra*, 227 Cal.App.4th at pp. 1337-1339, citing *Woodell*.)

Woodell indicates that reliance on an 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 what the opinion on Mr. Lewis's prior appeal showed on the question whether he might have been convicted on a natural and probable consequences theory.

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10. "The question of precisely which items in the record of conviction are *admissible* appears to be a different issue from what items actually *constitute* the record of conviction." (*People v. Smith* (1988) 206 Cal.App.3d 340, 345, fn. 8 [emphasis original].)

But the concern is a broader one, far beyond this somewhat unusual aspect of Mr. Lewis's own case. Any section 1170.95 petition presents the question whether the defendant could be convicted under the law as amended by SB 1437, not the law that prevailed at the time he was convicted. The *contents* of the record of conviction reflect, directly or indirectly, the state of law at the time of conviction. For example, in an accomplice felony-murder case tried before *Banks* and *Clark*, the evidence, the argument to the jury, and the argument on appeal are likely to have been presented differently than they would have been in a case tried more recently. The elements of the special circumstance may not have been contested as fully and vigorously – at trial or on appeal – as they would have been after *Banks* and *Clark*. The sufficiency of the evidence of the special circumstance might not have been challenged on appeal, whereas it would be today. If it was challenged, the description of the evidence in the appellate opinion will necessarily reflect the former law. The record of conviction will not reflect decision of the case based on the law the court must now apply in reviewing the section 1170.95 petition.

Advocacy by counsel may assist the court in assessing the extent to which the record of conviction does and does not inform decision of the questions presented by section 1170.95, subdivision (c). But the record of conviction is sufficiently far removed from the subdivision (c) questions that sua sponte consideration of the record without guidance of counsel creates an unacceptable, and unnecessary, risk of error. The Legislature's choice to

require appointment of counsel before consideration of the record of conviction should be honored.

D. *The statement of facts in an appellate opinion cannot be relied on to defeat the statutory prima facie case requirement*

Both courts below referred to the Court of Appeal's prior holding on an appellate issue in this case. (43 Cal.App.5th at pp. 1138-1139; CT 4-5.) That was error because the prior holding did not in fact control whether Mr. Lewis had set forth the first prima facie case required by section 1170.95 and was entitled to counsel. (See argument 2.E.2, *supra*.)

But allowing reliance on the prior appellate opinion as part of the record of conviction presents a much broader risk of error, one that will arise in numerous cases even – or perhaps especially – when the court does not point to a specific holding in the prior appellate opinion.

Appellate opinions generally begin with a statement of facts in the light most favorable to the prosecution. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 795.) This is the opposite of the prima facie requirement of section 1170.95, subdivision (c), under which the facts must be viewed in the light most favorable to the *defendant*. It follows that the statement of facts in the appellate opinion does not and cannot inform the question whether the defendant has established a prima facie case under section 1170.95.

But this limitation is not self-enforcing if the superior court is permitted to do what was done in this case: review the appellate opinion, without advocacy from counsel, in deciding whether or not appointment of counsel would be futile. *People v. Law* (2020) ___ Cal.App.5th ___, ___ [2020 Cal.App. LEXIS 381 at pp. *3-*5], explicitly relied on the statement of facts in an appellate opinion, as opposed to the holding on a legal issue, to summarily deny a section 1170.95 petition without appointment of counsel.[11/] The *Law* court further erred by concluding – without reference to the prima facie case standard – that the section 1170.95 petition must be summarily denied because the evidence, as set forth in the appellate opinion, would be *sufficient* to permit conviction under the amended section 189. (*Id.* at *14-*15.)

A section 1170.95 petition permits, where available, the presentation of new evidence that by definition will not be mentioned in the appellate opinion. The Court must be very cautious

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11. In some of the cases granted review and held for this case, the courts below made the same error. (*People v. West,* No. S261178 [see 2020 Cal.App. Unpub. LEXIS 969 at pp. *1-*7, *10 (superior court cited appellate opinion for the proposition that there was 'substantial evidence' of guilt)]; *People v. Miller*, No. S260857 [see 2020 Cal.App. Unpub. LEXIS 591 at pp. *1, *5].)

In another, the superior court relied on the statement of facts in a probation report, likewise set forth in a manner favorable to the prosecution, to hold that no prima facie case had been established and to deny the petition without appointment of counsel. (*People v. Forch*, No. S260788 [see 2020 Cal.App. Unpub. LEXIS 174 at p. *2].)

Unpublished opinions are referred to not as authority but to set forth the breadth of the issues pending in this Court.

in allowing reference to the appellate opinion to shut the door to this opportunity. (See *People v. Smith, supra*, 2020 Cal.App. LEXIS 418 at pp. *15-*16.)

Reliance on the prior appellate opinion is also 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, the statements of facts in appellate opinions are not comparable to the documents there listed. (See also *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7.) A reviewing court is not, at least not in ordinary circumstances, a finder of fact and does not determine "the truth of facts."

E. *Summary*

The Court should disapprove use of the record of conviction to deny defendants the assistance of counsel for the purpose of seeking section 1170.95 relief. Once counsel has been appointed, a court may, with the assistance of advocacy from counsel for both parties, consider the record of conviction in determining whether the defendant has established a prima facie case of his entitlement to relief.

* * * * *

4. If summary denials of uncounseled petitions are permitted, the denials must be without prejudice and with leave to amend

To the extent, if any, that the statute allows the court to refer to the record of conviction before affording the defendant the assistance of counsel, it violates the defendant's state and federal constitutional right to due process. Any summary denial based on information beyond the petition, if permitted at all, must be without prejudice and with leave to amend, and the defendant must be so informed.

A. *The courts below construed the statute in a manner not reasonably foreseeable to unrepresented litigants such as Mr. Lewis, in violation of their right to due process*

Following enactment of SB 1437 and before its effective date, a form petition and a "Guide to Resentencing" were widely distributed in the prisons by Re:Store Justice. This organization's staff had worked closely with legislators and their aides to draft and secure passage of the bill. (https://restorecal.org/sb1437-resentencing/, last visited May 23, 2020.) The "Guide" stated that "a significant aspect of SB 1437 is that it provides for the appointment of counsel just upon submitting the signed petition with the appropriate boxes checked to the court." (*Id.* at p. 9.)

Prior sections of this brief explain that Re:Store interpreted the statute correctly. But the point in this section is that, whether Re:Store was right or wrong in its interpretation of the

statute, unrepresented prisoners reasonably relied on the information it provided. This reliance interest is an element of due process. Decisions such as the one under review here upset the reasonable expectations of unrepresented litigants. If the statute is interpreted differently, they are entitled to an opportunity to comply with the statute as this Court interprets it. If the form and instructions were more clear and unambiguous than the statutory text, despite the good faith of those who prepared and distributed the form and instructions, that was beyond the knowledge or control of unrepresented litigants like Mr. Lewis. Any inadequacy of their petitions is "the fault of the form, rather than [the] defendant." (*People v. Perkins* (2016) 244 Cal.App.4th 129, 141 [Proposition 47].)

"[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.) An unrepresented litigant's opportunity to be heard is not meaningful if he is sandbagged after the fact about both the extent of the burden of persuasion he must bear and the breadth of the factual record on which the decision will be made.

"It is a cardinal principle of our jurisprudence that a party should not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be duly cited

to appear and afforded an opportunity to be heard and to offer evidence at such hearing in support of his contentions." (*Spector v. Superior Court* (1961) 55 Cal.2d 839, 843.) "A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1244, quoting *People v. Marsden* (1970) 2 Cal.3d 118, 124.) Especially is this so if an unrepresented litigant has been given reason to believe that he need not "present argument or evidence" until after his request for counsel has been granted, and if his petition is denied before the time to "present argument or evidence" ever arises.

Mr. Lewis's predicament is comparable to self-represented litigants whose right to due process was violated where they were in court for other reasons and, once there, were subjected to substantial financial obligations about which they had no notice and no opportunity to defend. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166; *In re Marriage of Siegel* (2015) 239 Cal.App.4th 944, 955; *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1330-1331; 7 Witkin, *Summary of California Law* (11th ed. 2019) Constitutional Law § 708.)

Mr. Lewis was not given this opportunity, and the Court of Appeal did not address this constitutional deficiency in its holding. The superior court consulted the record of conviction without notifying Mr. Lewis that it intended to do so, under circumstances in which he was reasonably entitled to believe that the court

would not do so. Once the court looked beyond the four corners of his petition, it told Mr. Lewis that it had done so only in a summary order of denial. (CT 4-5.) It did not inquire whether Mr. Lewis had access to the parts of the record of conviction it had relied on, or whether he interpreted the record of conviction differently than the court did. It gave him no opportunity (with or without counsel) to shoulder the substantial additional pleading burden it put on him. The order did not mention Mr. Lewis's affirmative request for the appointment of counsel. (See generally argument 2.F of this brief.)

The order ended, "petitioner does not qualify for resentencing." (CT 5.) An unrepresented litigant would not reasonably read this as a denial without prejudice or a denial with leave to amend.

The due process violation was not cured by Mr. Lewis's right to appeal the denial. Initially, the superior court did not notify him that he had this right, and it appears he was only able to appeal because of a combination of circumstances that will not occur in every case.[12/] In any event, for the reasons stated in argument 2.G, *supra*, an appeal on a record made in a proceeding

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12. At trial, Mr. Lewis was represented by the Office of the Alternate Public Defender. That office learned of the summary denial within the time allowed for a notice of appeal, and filed the notice. (CT 7.) The trial occurred in 2014, not in the last century. The deputy who tried the case was still on staff. It is open to serious question whether Mr. Lewis would have been able to appeal if he had been tried in the 1980s and had been represented by a sole practitioner appointed by the court who had died, retired, or moved out of state in the intervening decades.

that denied due process is impractical and wasteful, not an adequate substitute for providing due process in the first instance.

B. *If counsel is not appointed for Mr. Lewis to litigate the petition already on file, he is entitled to the opportunity to file an amended petition*

In implementing Proposition 47, this Court and the Courts of Appeal have recognized that if decisional law raises the bar and imposes new prerequisites for relief not reasonably foreseeable to an unrepresented defendant reading the statute and the form petition, a defendant is 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 *Page, supra,* 3 Cal.5th at pp. 1189-1190; *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909, 921; *Perkins, supra,* 244 Cal.App.4th at pp. 141-142.) The same is true of section 1170.95.

Mr. Lewis submits that he is entitled, without more, to appointment of counsel to litigate his section 1170.95 petition in the superior court. Should the Court disagree, the case should be remanded with instructions to allow Mr. Lewis to amend his petition.

* * * * *

CONCLUSION

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 May 28, 2020.

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

CERTIFICATE OF BRIEF LENGTH
(Rule 8.520(c)(1))

This brief contains **13,673** 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 May 28, 2020, I served **APPELLANT/PETITIONER'S OPENING BRIEF ON THE MERITS** by placing a true copy in an envelope addressed to each person 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, CA 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's trial attorney, jcheng@apd.lacounty.gov

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

Signed on May 28, 2020, at Oakland, California.

/s/ Robert D. Bacon