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.

Case No. S260598

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

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

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)?

INTRODUCTION

In January 2019, Senate Bill 1437 changed certain theories of criminal liability for murder in California. It also added Penal Code[1] section 1170.95, which established a procedure for defendants convicted of murder under the old law to be resentenced if they could no longer be convicted of that crime under the amended law. Numerous individuals like appellant have sought this relief, including many, like him, who are clearly ineligible for it. Based on principles of statutory interpretation, public policy, judicial efficiency, and common sense, courts must be permitted to consider a section 1170.95 petitioner's record of conviction, before appointing counsel, to determine whether he has made a prima facie showing of eligibility for relief under that statute.

The prima facie showing that the petitioner must make has two steps. Step one consists of the court's sua sponte review of the record of conviction, in which it dismisses a petition where the petitioner is ineligible for relief as a matter of law. If the

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[1] All further undesignated statutory citations are to the Penal Code unless otherwise indicated.

record available to the court does not indicate ineligibility as a matter of law, then step one is satisfied, and the court must appoint counsel for the petitioner if requested. Step two consists of participation by both the petitioner's counsel and the People, with the same goal of determining whether the petitioner is ineligible as a matter of law. However, step two differs from step one in that the court has the benefit of briefing and the assistance of both parties, which may be helpful in particularly old or complex cases. If, after briefing, nothing has come to light that indicates the petitioner is ineligible as a matter of law, then the court must issue an order to show cause why relief should not be granted. At that point, for the first time, both parties may present new evidence outside the record of conviction and argue the merits of the petitioner's entitlement to relief based on both the existing record and the new material, if any. The trial court weighs the evidence and acts as the trier of fact.

This case is concerned solely with the two-step prima facie assessment before issuance of an order to show cause. Step one allows courts to efficiently and equitably deny meritless petitions without appointing counsel. It also protects petitioners by ensuring that those with legally colorable claims, no matter how factually weak, will obtain appointed counsel and will not have their petitions summarily denied. There are four published Court of Appeal opinions agreeing in detail with the decision on review here, which supports the above framework, and many more which have simply followed it en route to holdings on related matters. There is no contrary authority. Appellant's

opposing view should be rejected, as it favors the wasteful litigation of petitions and the appointment of counsel even when both parties and the court are aware there is no legal possibility for relief.

The Court of Appeal's decision should be affirmed.

STATEMENT OF THE CASE

A. Appellant's conviction and initial appeal

Appellant Lewis was a gang leader who, in concert with Mirian Herrera and several others, decided to kill fellow gang member Darsy Noriega due to her supposed disloyalty. The details of how this plan was carried out were proved at trial via text messages and the testimony of other gang members. In short, Noriega was ordered to attend a gang meeting with appellant and, after the meeting, Herrera shot her to death in an alley. (*People v. Lewis* (July 14, 2014, B241236) [2014 WL 3405846, at *1-3, nonpub. opn.] (*Lewis I*).)

The prosecution charged appellant with one count of willful, deliberate, and premeditated murder. (§ 187, subd. (a)). At trial, the court instructed the jurors that they could convict appellant based on either the principle of direct aiding and abetting or the natural and probable consequences doctrine. Appellant was convicted as charged. (*Lewis I*, *supra*, 2014 WL 3405846, at *1, 10.)[2] Appellant appealed his conviction, arguing in relevant part that under *People v. Chiu* (2014) 59 Cal.4th 155, the use of a

[2] In the proceedings below, the Court of Appeal took judicial notice of this non-published opinion.

natural and probable consequences jury instruction as a theory of accomplice liability for first degree murder was erroneous. (*Lewis I*, *supra*, 2014 WL 3405846, at *10.)[3]

Lewis I noted that *Chiu* "held that '[a]n aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine.' [Citation.] [*Chiu*] made clear, however, that '[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles.'" (*Lewis I*, *supra*, 2014 WL 3405846, at *10, italics original.) *Lewis I* thus considered whether, under *Chiu*, the use of the natural and probable consequences instruction in appellant's trial justified reversal. It held that the use of the instruction was wrong but observed that reversal was not required if the error was "harmless beyond a reasonable doubt" because "there is a basis in the record to find that the verdict was based on a valid ground." (*Lewis I*, *supra*, 2014 WL 3405846, at *10, quoting *Chiu*, *supra*, 59 Cal.4th at p. 167.)

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[3] To be guilty as a direct aider and abettor, a person must "act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560, italics omitted; *People v. Jurado* (2006) 38 Cal.4th 72, 136.) Alternatively, under the natural and probable consequences doctrine, "[t]he liability of an aider and abettor extends also to the natural and probable consequence of the acts he knowingly and intentionally aids and encourages." (*Beeman*, *supra*, 35 Cal.3d at p. 560; accord, *People v. Avila* (2006) 38 Cal.4th 491, 567.)

Based on *Chiu*, the court in *Lewis I* determined that the use of the natural and probable consequences instruction at appellant's trial was harmless because the record showed beyond a reasonable doubt that he personally harbored the intent to kill under direct aiding and abetting principles:

> [T]he evidence that the defendants directly aided and abetted Herrera in the premeditated murder of Noriega is so strong that we are convinced beyond a reasonable doubt that the instructional error was harmless.
>
> The undisputed facts of this case provide strong evidence of guilt. The evidence established that [appellant] was the gang's shot-caller, that only the shot-caller could authorize the killing of a gang member, that [appellant] called a gang meeting that Noriega was required to attend, that he made up the story about needing to buy beer and that he drove Herrera, armed with a gun, to a dark alley where she shot Noriega. The evidence also included Coronel's texts setting up the meeting to "take Mickey outta the hood" and her text the day after the murder: "I stayed in the car with [appellant] because obviously me and the RIP don't get along so the RIP would have smelt it.... *I wanted to do it* but it w[as] gonna b[e] to[o] ob[v]ious [and] she felt comfortable with both of [th]em so it w[as] [c]ool." (Italics added.) These facts constitute strong evidence that defendants invited Noriega to go with them for a car ride and agreed to kill her.

(*Lewis I*, *supra*, 2014 WL 3405846, at *10, original.)

B. The enactment of Senate Bill 1437

A few years after *Lewis I* was decided, the Legislature enacted Senate Bill 1437. The bill contained various statutory amendments designed to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to

murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Senate Bill 1437 amended section 188 by adding a requirement that all principals to murder must act with express or implied malice to be convicted of that crime, with the exception of felony murder under section 189, subdivision (e). (Stats. 2018, ch. 1015, § 2.) This "eliminated liability for murder under the natural and probable consequences doctrine." (*People v. Lee* (2020) 49 Cal.App.5th 254, 262.) Senate Bill 1437 also amended section 189 by adding a requirement to the felony murder theory of liability that defendants who were not the actual killer or a direct aider and abettor must have been a major participant in the underlying felony and acted with reckless indifference to human life. (Stats. 2018, ch. 1015, § 3.)

In addition, Senate Bill 1437 added section 1170.95, which established a procedure for defendants already convicted of murder under the old law to obtain resentencing if they could not be convicted of that crime given the above amendments to sections 188 and 189. (Stats. 2018, ch. 1015, § 4.) Section 1170.95, subdivision (b)(1)(A), requires a petitioner to file a petition in the sentencing court averring that (i) an accusatory pleading was filed against him allowing the prosecution to proceed under a felony murder theory or murder under the

natural and probable consequences doctrine, (ii) that he was convicted of murder, and (iii) that he could no longer be so convicted because of Senate Bill 1437's changes to the law of murder.

Assuming the petition is properly pleaded, section 1170.95, subdivision (c), explains how the petition must be screened and when an order to show cause is merited. The interpretation of this portion of the statute constitutes the dispute in this 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*. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. 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.

(§ 1170.95, subd. (c), italics added.)

If an order to show cause issues, then the court must schedule a hearing where the parties may submit evidence and the court acts as the trier of fact. (§ 1170.95, subds. (c)-(d).) The details of that process are not at issue here.

C. Appellant filed a section 1170.95 petition which the trial court denied after consulting the record of conviction, and without appointing counsel

Appellant filed a section 1170.95 petition in 2019 claiming that he had been convicted of murder under a felony murder theory or the natural and probable consequences doctrine, and

was entitled to resentencing. (CT 1-3.) The trial court denied the petition without appointing counsel for him, reasoning that he was not entitled to relief as a matter of law because, in *Lewis I*, the Court of Appeal held it was evident beyond a reasonable doubt that appellant was convicted under a direct aiding and abetting theory, which requires malice. (CT 4-5.) Thus, the court concluded that appellant's conviction remained valid notwithstanding the amendments Senate Bill 1437 made to sections 188 and 189, and he "does not qualify for resentencing" pursuant to section 1170.95, subdivision (a)(3). (CT 5.)

D. The Court of Appeal affirmed the denial of appellant's section 1170.95 petition

Appellant appealed the denial of his section 1170.95 petition and, in the case here on review, the Court of Appeal affirmed. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1132 (*Lewis II*).)

Lewis II observed that Senate Bill 1437 had amended section 188 to require proof of actual malice of all murder defendants, which effectively eliminated the natural and probable consequences theory of liability for that crime. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1135.) Section 1170.95 permits vacatur of a murder conviction for individuals convicted of murder under pre-Senate Bill 1437 law, who can demonstrate that they could not be convicted under the new law of murder. However, direct aiding and abetting, which requires the aider to share the mental state of the actual perpetrator, remains a valid theory of conviction. (*Id*. at pp. 1135-1136.)

Lewis II analyzed the nature and scope of the prima facie showings required under section 1170.95, subdivision (c). The

court reasoned that because a direct aider and abettor could still be convicted of murder under the amended law of murder, appellant "was required to make a prima facie showing that he was not such an aider and abettor" before the trial court could issue an order to show cause. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1137.) A prima facie showing is generally defined as "one that is sufficient to support the position of the party in question." (*Ibid*., quoting *Aguilar v. Atlanic Richfield Co.* (2001) 25 Cal.4th 826, 851.) *Lewis II* noted that there was no published authority at that time on whether courts were permitted to consider a petitioner's underlying record of conviction when weighing whether he had made a prima facie case under section 1170.95, subdivision (c). (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1137.)

Therefore, *Lewis II* turned to the prima facie analyses in sections 1170.18 and 1170.126 for guidance. Under section 1170.18, enacted by Proposition 47 to reduce certain felonies to misdemeanors, the court considering a petition for relief conducts an initial screening to determine whether the petitioner is eligible, and this screening may include review of his record of conviction. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1137, citing *People v. Washington* (2018) 23 Cal.App.5th 948, 953.) The same is true under section 1170.126, enacted by Proposition 36, which permits recall of a prior strike conviction. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1138, citing *People v. Thomas* (2019) 39 Cal.App.5th 930, 935.) Similarly, in habeas corpus proceedings, courts may summarily deny petitions which make claims that contradict the record of conviction. (*Lewis II*, *supra*, 43

Cal.App.5th at p. 1138, citing *In re Serrano* (1995) 10 Cal.4th 447, 456.)

Lewis II held that it would be "sound policy" to allow courts to consider the record of conviction in section 1170.95 cases as well. Accordingly, it held the trial court did not err in doing so here. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1138.) The court observed that it would be a "gross misuse of judicial resources to require the issuance of an order to show cause *or even appointment of counsel* based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief." (*Ibid*., quoting Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) ¶ 23:51(H)(1), pp. 23-150 to 23-151, italics added.) For example, a petitioner whose trial records show the jury was never instructed on either a felony murder or natural and probable consequences theory could never satisfy the prima facie analysis. (*Ibid*.)

Lewis II then analyzed appellant's record of conviction, including its own prior opinion in *Lewis I*. There, it had held that "the record established that the jury found defendant guilty beyond a reasonable doubt on the theory that he directly aided and abetted the perpetrator of the murder." As a matter of collateral estoppel, this issue had been litigated and finally decided against appellant. His unsupported averment in the section 1170.95 petition stating that he did not directly aid and abet the murder was contrary to the record, and the denial of his

petition at the prima facie stage was proper. (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1138-1139.)

Lewis II also concluded that appellant was not entitled to the appointment of counsel before his petition was denied. Because the framework of section 1170.95 is chronological, the timing of the acts it describes should be construed in the order they appear in the text. (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1139-1140, citing *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1477.) The first sentence of section 1170.95, subdivision (c), sets forth the requirement of a prima facie showing that the petitioner "falls within the provisions" of the statute. The appointment of counsel appears later in that paragraph. Therefore, the failure to satisfy the initial prima facie requirement obviates the appointment of counsel. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1140.)

Lewis II recognized that there is a second prima facie analysis described in the last sentence of section 1170.95, subdivision (c), which states that the petitioner must make a prima facie showing that he is "entitled to relief." This provision appears after the language providing for the appointment of counsel. However, the court did not decide what substantive difference there is between the two prima facie analyses because the trial court correctly decided that appellant could meet neither test. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1140, fn. 10.)

ARGUMENT

I. Section 1170.95, subdivision (c), requires a two-step prima facie analysis, and counsel is not appointed for the petitioner until satisfaction of the first step

Section 1170.95, subdivision (c), sets forth a two-step prima facie inquiry that a court must undertake before it issues an order to show cause why relief should not be granted. During both prima facie steps, the court may consider the record of conviction to determine whether the petitioner is ineligible for relief as a matter of law. The right to appointed counsel is triggered only after step one is satisfied; if that occurs, counsel assists in the step two analysis. This approach has been adopted by all the courts that have considered the issue and should be adopted by this Court as well.

A. The two-step prima facie analysis as construed by the courts below

The two-step prima facie analysis is set forth in the first and last sentences, respectively, of section 1170.95, subdivision (c). *Lewis II* correctly held that a petition must be dismissed at step one—which occurs before the appointment of counsel—if the petitioner is ineligible for relief as a matter of law based on the record of conviction. (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1138-1140.) Numerous Court of Appeal decisions have explicitly agreed with *Lewis II* or taken essentially the same approach. (See, e.g., *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58, review granted Mar. 18, 2020, S260410 [decided before *Lewis II*, and holding that summary dismissal is proper if the petitioner is

statutorily ineligible]; *People v. Edwards* (2020) 48 Cal.App.5th 666, 674-675 [agreeing with *Lewis II*].) There is no contrary authority.

There are two decisions in accord with *Lewis II*, however, that deserve particular attention because they expanded upon its reasoning. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 327-332, review granted Mar. 18, 2020, S260493; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 896-911.) *Verdugo* agreed with *Lewis II* but went further by describing in greater detail *both* steps of the prima facie process and explaining that summary denial of a petition must be permitted in order to give meaning to all language in the statute. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 327-333.) *Tarkington* agreed with both *Lewis II* and *Verdugo* and provided a detailed explanation of why the legislative history of Senate Bill 1437 supported those decisions. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 901-907.)

Rather than examining each of the above decisions independently, it is more instructive to synthesize them into a full description of the prima facie analysis as it has been developed in light of *Lewis II*. As noted, step one states that "[t]he 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).) This is an initial sua sponte screening step in which the court reviews a petition and dismisses it if, based on the record of conviction, the petitioner is ineligible for relief as a matter of law. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330; *Edwards*, *supra*,

262 Cal.Rptr.3d at p. 206; *Tarkington*, *supra*, 49 Cal.App.5th at pp. 897-898.) There are a variety of ways in which a petitioner could be deemed ineligible:

> [T]he court must at least examine the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment. Based on a threshold review of these documents, the court can dismiss any petition filed by an individual who was not actually convicted of first or second degree murder. The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding Senate Bill 1437's amendments to sections 188 and 189 (see § 1170.95, subd. (a)(3))—for example, a petitioner who admitted being the actual killer as part of a guilty plea or who was found to have personally and intentionally discharged a firearm causing great bodily injury or death in a single victim homicide within the meaning of section 12022.53, subdivision (d).

(*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330; see also *Edwards*, *supra*, 48 Cal.App.5th at pp. 674-675 [step one not met because the trial record and prior appellate opinion showed defendant was not charged or convicted under either a felony murder theory or the natural and probable consequences doctrine]; *Tarkington*, *supra*, 49 Cal.App.5th at p. 899 [same, because defendant was tried and convicted as the sole assailant and actual killer]; *Cornelius*, *supra*, 44 Cal.App.5th at p. 58 [same].)

If the record of conviction appears devoid of any indication that the petitioner is ineligible as a matter of law, then the court

must find that the petitioner has satisfied the step one showing, and subdivision (c) requires it to appoint counsel if requested by the petitioner. The petitioner and the People then brief the issue to be decided in step two, set forth in the last sentence of subdivision (c), of whether the petitioner is "entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330.)

The substantive question in step two is the same as in step one—whether the record of conviction shows the petitioner is ineligible for relief as a matter of law. But, 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.)

The petitioner's opportunity to obtain an order to show cause—even if his claims are factually weak—is fully protected during the two-step process. During the prima facie steps, the court must make "all factual inferences in favor of the petitioner." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) And, although the parties brief and argue the issue of eligibility during step two, the court may not engage in "factfinding" there. (*People v. Drayton* (2020) 47 Cal.App.5th 965, 982.) In other words, both steps of the prima facie process are only concerned with examining the record of conviction in order to determine whether the defendant is

ineligible for relief as a matter of law—not to weigh any disputed facts or evidence.

Following briefing, if the court determines there is still nothing in the record of conviction indicating the petitioner's ineligibility as a matter of law, then it must issue an order to show cause and schedule a hearing where the parties may submit evidence and the court for the first time acts as the trier of fact. (§ 1170.95, subds. (c)-(d).) The details of that process are not at issue here.

B. Principles of statutory interpretation, judicial efficiency, and common sense support the reasoning of *Lewis II* and its progeny

All relevant legal principles support *Lewis II*'s interpretation of the prima facie process in section 1170.95, subdivision (c). Appellant's claims to the contrary are meritless.

1. *Lewis II*'s interpretation of section 1170.95, subdivision (c), is correct as a matter of statutory construction

Lewis II, *Verdugo*, and *Tarkington* correctly interpreted the prima facie requirements of section 1170.95. When interpreting a statute, the primary goal is to effectuate the legislative intent. (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 surplusage are to be avoided." (*People v. Loeun* (1997) 17 Cal.4th 1, 9, citation and quotation marks omitted.)

The fact that two different prima facie tests are mentioned in two different places within section 1170.95, subdivision (c) (i.e., "falls within the provisions" and "entitled to relief") indicates that the Legislature intended two separate steps.[4] "'Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections . . . concerning a related subject, it must be presumed that the Legislature intended a different meaning.'" (*Tarkington*, *supra*, 49 Cal.App.5th at p. 902, quoting *Rashidi v. Moser* (2014) 60 Cal.4th 718, 725.)

In the statutory text, the sentence discussing appointment of counsel appears in *between* the description of the two prima facie steps, and states, "If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." *Lewis II* acknowledged that, "when viewed in isolation," the second sentence does not indicate exactly when the appointment occurs. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1139.) However, it recognized that provisions within statutes should *not* be construed in isolation. (*Ibid.*, citing *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.) Rather, they should

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[4] *Verdugo* referred to this process as a "three-step evaluation" by counting the initial pleading stage under section 1170.95, subdivision (b), as the first step. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330.) Respondent refers instead to a two-step process because the focus here is on the prima facie analysis.

be construed in a chronological manner according to their text (*KB Home Greater Los Angeles, Inc.*, *supra*, 223 Cal.App.4th at p. 1477), and the sentence discussing appointment of counsel comes after the description of the first prima facie step. (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1140.)

Lewis II's holding that "[a]llowing the trial court to consider its file and the record of conviction is . . . sound policy" was also a correct interpretation of legislative intent. (*Lewis*, *supra*, 43 Cal.App.5th at pp. 1138.) The Legislature could not have intended to force courts to ignore their own records and find that a petition which makes obviously false or inaccurate claims nevertheless "falls within the provisions" of the statute under the first sentence of section 1170.95, subdivision (c). To hold otherwise would lead to absurd results by encouraging the litigation of, and appointment of counsel in, frivolous cases. (*Loeun*, *supra*, 17 Cal.4th at p. 9 [statutory interpretation should avoid absurd results].)

Furthermore, if courts were required to appoint counsel for petitioners before conducting the step one analysis, it would render the first sentence of section 1170.95, subdivision (c) meaningless. Under that interpretation, in order to obtain counsel, a petitioner would merely need to satisfy the pleading requirements in section 1170.95, subdivision (b). The reference to prima facie review in the first sentence of subdivision (c) "would be surplusage," and therefore this view of the law would fail "to give meaning to all parts of the statute to the extent possible." (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 328-329.) It

would also improperly render the first and last sentences in subdivision (c)—the step one and step two analyses—surplusage with respect to each other. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 ["[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage"].)

The two steps in the prima facie analysis under section 1170.95, subdivision (c), are meaningfully different. As *Verdugo* observed, during step one, the court may conclude that there is nothing evident in the record of conviction showing ineligibility as a matter of law, but that the materials are voluminous, unclear, or complex, and that briefing would be helpful. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330, fn. 9.) In such a case, step one would be satisfied, but the prima facie review would continue in step two. This makes sense because section 1170.95 petitions may be filed years or even decades after the murder conviction, and cases may involve multiple codefendants and theories of liability. By creating a second step to account for such cases, the statute protects the integrity of the process and the rights of both parties.

Appellant attacks the above framework, claiming that the "only reference" to any form of summary denial in the statute occurs in section 1170.95, subdivision (b)(2), based on pleading deficiencies, and the only reference to the "record of conviction" occurs in subdivision (d)(3). He argues that the explicit mention of some things in a statute may imply that other matters, not similarly addressed (i.e., in subdivision (c)), are excluded. (OBM

16, 48, citing *People v. Soto* (2018) 4 Cal.5th 968, 975.) But the first sentence of subdivision (c) explicitly contains a prima facie step, and there must be some way to fail that test, or it would be meaningless. Examination of the record of conviction is the most reasonable interpretation of how that test should operate. *Soto* is distinguishable. In *Soto*, there was an "enumerated list" of items in a statute, and the relevant item was absent from it. (*Soto*, *supra*, 4 Cal.5th at p. 975.)

Appellant dismisses *Verdugo*'s concern about the meaning of the first sentence of subdivision (c), which constitutes the first step analysis. He claims the sentence "appears to be declarative of the procedure for implementing the limited gatekeeping function set forth by [the pleading requirements in] subdivision (b)(2), without conferring any greater authority to deny petitions beyond that conferred by subdivision (b)(2)." (OBM 16.) But describing the language as merely "declarative" effectively strikes it from the statute, just as *Verdugo* explained. It is similarly inadequate to characterize the sentence as a clarifying or narrative statement, as courts disfavor interpretations of a statute that suggest it merely clarifies some other provision of law. (See *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1197 ["particularly when there is no definitive 'clarifying' expression by the Legislature . . . we will presume that a substantial or material statutory change . . . bespeaks legislative intention to change, and not just clarify, the law"].)

Appellant also argues that under section 1170.95, subdivision (b), the People are to file a response to the petition

within 60 days, and there is no mention of an intervening sua sponte dismissal that could render the response moot. (OBM 16-17.) However, as *Tarkington* pointed out, there is "no contradiction" there. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 904, fn. 9.) "It 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 . . . ." (*Ibid.*) The court can easily conduct the step one analysis without the People running afoul of the 60-day deadline.

In addition, appellant faults *Lewis II* for comparing the prima facie language of section 1170.95 to those of sections 1170.18 (felony reductions to misdemeanors) and 1170.126 (Three Strikes reform), because he claims those other statutes are vague in a way that section 1170.95 is not. Therefore, he says, analysis of the petitioner's record of conviction should not be construed as part of the first sentence of subdivision (c), even if the other statutes permit it. (OBM 50-51, citing *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337.) But appellant's solution, to simply skip over the sentence as a narrative flourish, is untenable. Statutes are not to be interpreted in that manner. (*Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 204 [principles of statutory interpretation disfavor interpretations that render provisions of the statute meaningless or inoperative].)

Appellant claims that section 1170.95 is more similar to section 1405, which *requires* the appointment of counsel upon a

"request" by a convicted defendant for DNA testing of evidence. (OBM 22-23.) The defendant must merely make certain averments to satisfy the statute (§ 1405, subd. (b)(1), (b)(3)), and it does not matter if his claims are contradicted by the record. (OBM 22-23, citing *In re Kinnamon* (2005) 133 Cal.App.4th 316, 321-323.) However, appellant's analogy is inapt. Section 1405 explicitly states that a "court must appoint counsel for an indigent convicted person if the person's request includes the required information . . . ." (*Kinammon*, *supra*, 133 Cal.App.4th at p. 321.) Section 1170.95, in contrast, vests the trial court with the authority to "*review the petition* and *determine* if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section" before the statute discusses the appointment of counsel. (§ 1170.95, subd. (c).) If the Legislature intended to provide counsel to all section 1170.95 petitioners who merely "request" an attorney and include certain information, it would have said so in a manner similar to section 1405.

2. The legislative history of Senate Bill 1437 supports a two-step prima facie analysis

The legislative history of Senate Bill 1437 also indicates that a two-step prima facie analysis is required, with the appointment of counsel taking place only after step one. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 330-332; *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 344 [legislative history may be relevant to shed light on statutory meaning if statutory language is ambiguous].) A prior, unpassed version of the bill *did not* include language in the proposed retroactive relief process that created

the two-step procedure described above. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 902-904, citing *Verdugo*, *supra*, 44 Cal.App.5th at p. 331.) Rather, it directed as follows:

> *Upon receipt of the petition*, the court *shall* provide notice to the attorney who represented the petitioner in the superior court, or to the public defender if the attorney of record is no longer available, and to the district attorney in the county in which the petitioner was prosecuted. 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).

In the next subdivision, the May 25 version of the bill 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. . . ." (Sen. Bill No. 1437, *supra*, as amended May 25, 2018, § 6.) The court was to automatically alert the parties and allow briefing regardless of whether the petition was plainly meritless. That version of the bill had no step one showing.

The final version of the bill revised this section and introduced language creating the two-step process. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 331; see § 1170.95, subd. (c).) The Legislature added the step one analysis ("falls within the provisions of this section") to the *first sentence* of subdivision (c), signaling its intent to create a gatekeeping provision to screen meritless petitions. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 331.)

The final version also retained the 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). There, the petitioner must demonstrate that he is "entitled to relief" before an order to show cause issues. (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].) Thus, the Legislature created a two-step process, with the language governing appointment of counsel placed in between them, where there had previously been only one step.

Curiously, appellant claims the above amendment supports his interpretation of the statute because the first sentence refers only to a court's review of "the petition" and not the record of conviction. (OBM 48-49.) His argument is illogical. The bill was amended to *add* the step one analysis where none existed before, while *retaining* the original prima facie test but making it the second step. It follows that the addition of step one must have some substantive meaning. If appellant's narrow view of the statute is correct, then the Legislature added the first sentence of subdivision (c) for no reason at all.

Appellant argues that two letters sent by the Judicial Council to the author of Senate Bill 1437 and former Governor Brown, respectively, also support his interpretation of section 1170.95. He claims that because these letters urged the statute be amended to allow for summary dismissals of petitions, yet no such amendment occurred, the Legislature must have rejected that idea. (OBM 25-26.) *Tarkington* correctly disagreed with this claim. These letters are not cognizable legislative history because one was sent to the State's chief executive and the other directly to the bill's author; there is no indication they were even considered by the Legislature as a whole, let alone rejected by it. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 905, citing *People v. Garcia* (2002) 28 Cal.4th 1166, 1175-1176, fn. 5.)

Indeed, "[h]ere, we do not have even a statement of the author's intent; instead, we have a letter opining that the law should be amended, and the bill's author's inaction in response. If the views of particular legislators are not cognizable legislative history, certainly letters written to them in an attempt to influence their views must be disregarded." (*Tarkington*, *supra*, 49 Cal.App.5th at p. 906, citing *People v. Patterson* (1999) 72 Cal.App.4th 438, 443-444.) Moreover, the letter to the Governor was sent *after* Senate Bill 1437 was enacted, meaning it cannot possibly shed light on the Legislature's intent. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 906.)

3. Principles of collateral estoppel and law of the case support *Lewis II* and its progeny

Lewis II also correctly noted that collateral estoppel barred appellant from proceeding beyond step one because he was not permitted to relitigate whether he was a direct aider and abettor after that issue was decided adversely to him in *Lewis I*. (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1138-1139.) Indeed, both collateral estoppel and the law of the case doctrine compel that conclusion.

The law of the case doctrine provides that when a court decides a legal issue, that decision will continue to govern subsequent stages in the same case. (*Musacchio v. United States* (2016) __ U.S. __ [136 S.Ct. 709, 716].) This means that an appellate court's decision on a legal argument "must be adhered to throughout the case's subsequent progress *in the trial court and on subsequent appeal*, as to questions of law (though not as to questions of fact)." (*City of West Hollywood v. Kihagi* (2017) 16 Cal.App.5th 739, 749, italics added.) In other words, if the *facts* of the case are substantially the same in the subsequent proceeding, the prior legal holding will not be disturbed. (*Capron v. Van Horn* (1931) 114 Cal.App. 630, 631.)

Similarly, collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. (*People v. Cooper* (2007) 149 Cal.App.4th 500, 518.) Collateral estoppel has five elements: (1) The issue to be precluded must be identical to one decided in a prior proceeding, (2) it must have been actually litigated at that

time, (3) it must have been necessarily decided, (4) the prior decision must be final and on the merits, and (5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. (*Ibid.*)

When considering whether a petitioner has satisfied the prima facie tests of section 1170.95, subdivision (c), these principles require courts to abide by previous decisions affecting that petitioner, as shown by the record of conviction. A jury finding or prior appellate decision may indicate that the petitioner was the actual killer (*Tarkington*, *supra*, 49 Cal.App.5th at p. 910), or a direct aider and abettor who acted with malice (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1138-1139), or who had the express intent to kill (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 335-336). Such findings place a petitioner outside the ambit of section 1170.95. (See § 188, subd. (a) [law of murder as amended by Senate Bill 1437 requires malice]; *Martinez*, *supra*, 31 Cal.App.5th at p. 723 [setting forth purpose and scope of Senate Bill 1437].)

Appellant argues that collateral estoppel does not apply because the standard of review was more favorable to him at the section 1170.95 proceeding than it had been in *Lewis I*. (OBM 35-36, citing *Lucas v. Los Angeles* (1996) 47 Cal.App.4th 277, 286-290 and *In re Nathaniel P.* (1989) 211 Cal.App.3d 660, 668, 670 [collateral estoppel requires the legal standard to be as stringent or more so in the prior case than the latter one].) However, in *Lewis I*, the court concluded that appellant was a direct aider and abettor under the most stringent possible standard of review,

that of harmlessness beyond a reasonable doubt. (*Lewis I*, *supra*, 2014 WL 3405846, at *10.) This mirrors the burden of proof applicable to the prosecution in a criminal trial where a defendant, unlike appellant, *is presumed innocent*. There is no higher standard of proof that could reasonably apply.

4. *Lewis II* is consistent with the policy goals of Senate Bill 1437

The parties agree that Senate Bill 1437 was intended "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." (OBM 20, quoting Stats. 2018, ch. 1015, § 1.) That is why individuals like appellant, whose convictions place them squarely *outside* the ambit of section 1170.95, should not be permitted to burden the process with patently meritless claims. "[W]here ineligibility is ascertainable based on the record of conviction, no additional record need be 'developed' . . . [and] no further record development could change the fact that" the petitioner is ineligible. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 910.)

The parties also agree that a prima facie case for relief is generally construed as a low bar. (OBM 18-19.) But that does not aid appellant's argument. Under the *Lewis II* framework, the court makes "all factual inferences in favor of the petitioner." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329; *Tarkington*, *supra*, 49 Cal.App.5th at p. 909.) And the court may not engage in "factfinding" contrary to the petitioner's claims. (*Drayton*, *supra*, 47 Cal.App.5th at p. 982.) But, as on habeas review, that does

not mean the court must disregard its own record and credit a petitioner's claims that directly contradict it. (*Serrano*, *supra*, 10 Cal.4th at p. 456.)

Therefore, appellant is wrong to claim that *Lewis II* placed an "unrealistically high bar for unrepresented litigants to surmount . . . ." (OBM 21.) The bar is exceedingly low and there is nothing petitioners need to do to "surmount" it. Because the analysis is not fact- or evidence-dependent and does not involve weighing disputed issues, "there is no danger the court will find ineligibility based upon an unclear or missing record. Unless the record conclusively shows that the defendant is ineligible as a matter of law, the court should move to the next step and appoint counsel." (*Tarkington*, *supra*, 49 Cal.App.5th at p. 909.) A petitioner's record of conviction either makes him absolutely ineligible for relief, or it does not. There is nothing counsel, if appointed, could do to avert a step one denial that comports with the framework of *Lewis II*. (*Id*. at p. 910 ["counsel's representation could have done nothing to change [the] fact" that the petitioner was ineligible as a matter of law].)

Next, appellant claims that because a petition for resentencing under section 1170.95 is a "special proceeding," the trial court exceeded its jurisdiction when it denied the petition without appointing counsel. (OBM 21-22.) But, even assuming that section 1170.95 establishes a "special proceeding" rather than an ordinary civil or criminal action (see Code Civ. Proc. §§ 22-23), that has no bearing on the question of jurisdiction. Lack of jurisdiction means "an entire absence of power to hear or

determine the case, an absence of authority over the subject matter or the parties," or the lack of power "to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*People v. Burnett* (1999) 71 Cal.App.4th 151, 178-179, internal quotation marks omitted.) Under section 1170.95, the trial court not only had fundamental subject-matter jurisdiction to consider appellant's petition, it also *must* have had the power to deny the petition at either of two prima facie steps, in order to give meaning to the first and last sentences of subdivision (c).

5. The appellate courts have ably resolved disputes over whether particular types of convictions render a petitioner ineligible as a matter of law under *Lewis II*

Appellant cites several cases in which trial courts' denials of section 1170.95 petitions were reversed on appeal, and he claims this shows why it is impossible to "confidently examine the record of conviction sua sponte and, applying a prima facie case standard, summarily deny a section 1170.95 petition." (OBM 32-37.) But appellant's argument fails because none of the cases he cites disagreed with *Lewis II* or offered an alternative interpretation of section 1170.95. The most appellant can do is cite examples where it was disputed whether a particular petitioner was actually ineligible as a matter of law within the framework of *Lewis II*. Yet the mere fact that such disputes have arisen does not suggest the Legislature intended that counsel be appointed in *all* cases, no matter how meritless, as a prophylactic

measure.[5] To the contrary, the Courts of Appeal, applying *Lewis II*, have equitably handled the cases appellant cites where counsel was not appointed, the petition was denied, and the petitioner appealed. The Legislature's choice not to require counsel be appointed in all cases strikes a sensible balance between providing counsel where the petitioner makes a colorable claim, but not in the vast number of cases that can be easily dismissed as a matter of law. Appellate review, of course, is also available as a safeguard.

For example in *People v. Torres* (2020) 46 Cal.App.5th 1168, review granted, June 24, 2020, S262011, the trial court summarily denied the section 1170.95 petition as a matter of law based on the petitioner's conviction for special circumstance felony murder under section 190.2, subdivision (a)(17), which mirrors the new standard of felony murder set forth in the amended section 189, subdivision (e)(3). (OBM 32-33; *Torres*, *supra*, 46 Cal.App.5th at p. 1173.) On appeal, *Torres explicitly agreed* with the premise of *Lewis II* that petitions may be summarily dismissed, but sided with the petitioner on whether

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[5] In holding that summary dismissal is permissible, *Lewis II* obviously did not intend to decide all future cases where disputes may arise as to whether a particular petition should be dismissed. *Verdugo* set forth a few salient examples of what may constitute ineligibility, but also did not purport to provide an exhaustive list. (See *Verdugo*, *supra*, 44 Cal.App.5th at p. 330.)

this particular *type* of conviction necessarily meant he was ineligible. (*Id*. at pp. 1173, 1180.)[6]

The same is true of *People v. Offley, et al.* (2020) 48 Cal.App.5th 588, which was decided by the same court that decided *Lewis II*. (OBM 34-35.) In *Offley*, the trial court summarily denied two codefendants' section 1170.95 petitions on the basis that they acted with malice as a matter of law. (*Id*. at p. 594.) *Offley* reaffirmed its own decision in *Lewis II* and favorably cited *Verdugo* and *Cornelius*, but reversed the denial of the petitions. (*Id*. at p. 600.) As to one of the petitioners, the trial court mistook a *principal* firearm use enhancement (§ 12022.53, subd. (e)(1)) for a *personal* firearm discharge enhancement (§ 12022.53, subd. (d)). The principal use enhancement did not indicate malice as a matter of law. (*Offley*, *supra*, 48 Cal.App.5th at pp. 599-600.) As to the other petitioner, the trial court overlooked the fact that the jury was instructed with the natural and probable consequences theory of co-conspirator liability, which permitted a conviction for murder without malice. (*Id*. at pp. 598-599.) These were ordinary trial court errors, and were corrected on appeal with reference to *Lewis II*.[7]

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[6] The dispute in *Torres* was based on whether *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522, redefined special circumstance felony murder after the petitioner was convicted.

[7] *Drayton* is analogous. There, the petitioner pleaded guilty to felony murder without a special circumstance. However, the trial court at step two of the prima facie analysis considered

(continued…)

Next, appellant cites the pending dispute on review in this Court in *People v. Lopez* (2019) 38 Cal.App.5th 1087, review granted Nov. 13, 2019, S258175, regarding whether Senate Bill 1437 changed criminal liability for attempted murder. (OBM 33-34.)[8] This issue simply has no impact on *Lewis II*'s interpretation of section 1170.95. *Lopez* correctly held that Senate Bill 1437 did not affect the definition of attempted murder, but *even the courts that disagreed with Lopez* and held that Senate Bill 1437 does apply to attempted murder (see *Medrano*, *supra*, 42 Cal.App.5th at p. 1018), have explicitly held that section 1170.95 *does not*. (*Larios*, *supra*, 42 Cal.App.5th at p. 970.) The only avenue for relief under *Medrano*'s and *Larios*'s expanded construction of Senate Bill 1437 is via direct appeal of a non-final conviction, not a section 1170.95 petition. (*Ibid.*; see also *Medrano*, *supra*, 42

(…continued)
the egregiousness of the crime and independently decided that he was ineligible for relief, reasoning that the crime satisfied the new elements of felony murder under the amended section 189, subdivision (e)(3). On appeal, the People conceded, and *Drayton* agreed, that while the court need not accept assertions in a section 1170.95 petition that are "untrue as a matter of law," it also must not conduct "factfinding" before issuing an order to show cause. (*Drayton*, *supra*, 47 Cal.App.5th at pp. 980-982.)

[8] See also *People v. Munoz* (2019) 39 Cal.App.5th, 738, review granted Nov. 26, 2019, S258234 [agreeing with *Lopez* that Senate Bill 1437 does not affect attempted murder]; *People v. Dennis* (2020) 47 Cal.App.5th 838 [same]; *People v. Medrano* (2020) 42 Cal.App.5th 1001, review granted Mar. 11, 2020, S259948 [disagreeing with *Lopez*]; *People v. Larios* (2019) 42 Cal.App.5th 956, review granted Feb. 26, 2020, S259983 [same]; *People v. Sanchez* (2020) 46 Cal.App.5th 637, review granted June 10, 2020, S261768 [same].

Cal.App.5th at pp. 1016-1022; *Sanchez*, *supra*, 46 Cal.App.5th at pp. 639-640.)

Appellant also discusses several section 1170.95 cases involving manslaughter, but the outcome of these militates against his own argument. (OBM 34.) In *People v. Cervantes* (2020) 46 Cal.App.5th 213, 225-226, *People v. Turner* (2020) 45 Cal.App.5th 428, 432, and *People v. Flores* (2020) 44 Cal.App.5th 985, 989, the trial courts summarily denied, and the reviewing courts unanimously affirmed, the denials of section 1170.95 petitions for individuals convicted of manslaughter rather than murder. Appellants sought depublication and review by this Court in all three cases, and those requests were denied. Although this Court's denial of review is not necessarily an expression of its position on the merits, it nevertheless carries some "significance." (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178.) The significance here is that allowing summary dismissal of patently meritless section 1170.95 petitions—such as where the petitioner was not even convicted of murder—clearly has not been deemed to be an inherently unfair process, and the Courts of Appeal are capable of adjudicating any disputes about what constitutes a meritless petition as a matter of law.

Appellant also points out the split in authority between *People v. Law* (2020) 48 Cal.App.5th 811, review granted July 8, 2020, S262490, and *People v. Smith* (2020) 49 Cal.App.5th 85, review granted July 22, 2020, S262835, as an alleged example of the problems that arise out of the *Lewis II* framework. (OBM 45,

fn. 8.) However, neither of those cases purported to disagree with *Lewis II*. *Law* implicitly agreed with *Torres* that a pre-*Banks* special circumstance felony murder conviction (§ 190.2, subds. (a)(17), (d)) does not necessarily render a section 1170.95 petitioner ineligible for relief. But *Law* held that the peculiar nature of a *Banks* and *Clark* claim means the trial court—or a reviewing court conducting a harmless error analysis—can decide *as a matter of law* whether the conviction comports with the *Banks* and *Clark* factors. If it does, then the court may deny a section 1170.95 at the prima facie steps. (*Law*, *supra*, 48 Cal.App.5th at pp. 822-826.) As in *Offley*, the question in *Law* was simply whether *a particular type* of conviction falls within the matter-of-law analysis set forth in *Lewis II*, or instead raises a factual dispute that must be resolved in favor of the petitioner during the two-step prima facie process. (See *Verdugo*, *supra*, 44 Cal.App.5th at p. 329.)

Smith disagreed with *Law* and held that it is impossible to adjudicate as a matter of law whether a pre-*Banks* special circumstance felony murder conviction satisfies the *Banks* and *Clark* factors. (*Smith*, *supra*, 49 Cal.App.5th at pp. 95-96.) On its face, that holding has no bearing on the issues here; in fact, *Smith* favorably cited *Lewis II* and *Verdugo* when describing the overall procedural framework. (*Id*. at p. 92.) But *Smith*'s underlying reasoning implicitly violates *Lewis II*.[9] Specifically,

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[9] Respondent's petition for review on this basis has been granted and this Court has ordered the matter held behind *Lewis II* in case number S262835.

Smith disagreed with *Law*'s harmless error analysis because it held the petitioner was entitled during the prima facie steps to "offer new or additional evidence" under section 1170.95, subdivision (d)(3), "with the aid of counsel," in order to "evaluate whether there has been a *prima facie* showing of entitlement to relief." (*Smith*, *supra*, 49 Cal.App.5th at p. 95, italics added.) That is incorrect because subdivision (d)(3) pertains to the hearing *after* issuance of an order to show cause, not before.[10] Prior to issuance of an order to show cause, the parties are limited to the record of conviction. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330.)

In any event, this split in authority can and should be resolved wholly within the *Lewis II* framework, especially considering *Smith*'s own citations to *Lewis II* and *Verdugo*. That is, if a *Banks* and *Clark* claim requires a factual analysis, then dismissal of a petition based on a pre-*Banks* special circumstance felony murder conviction would not be permitted at the prima facie steps. (*Drayton*, *supra*, 47 Cal.App.5th at p. 982.) But if such a claim presents a purely legal question, then summary dismissal would be permissible. Despite the inapt language in *Smith*, the dispute between *Law* and *Smith* is therefore

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[10] Section 1170.95, subdivision (d), discusses the hearing after the prima facie steps have been satisfied, and "after the order to show cause has issued . . . ." (§ 1170.95, subd. (d)(1).) Subdivision (d)(1) assigns the trial court as the trier of fact, and subdivision (d)(3) permits both parties to rely on the record of conviction or to present new evidence; the burden at this evidentiary hearing is on the People to prove the petitioner's ineligibility for relief beyond a reasonable doubt.

tangential to the instant case, which is concerned with the foundational question of whether the dismissal of a petition without the appointment of counsel is appropriate *at all*.

Next, appellant's reliance on *People v. Garcia* (2020) 46 Cal.App.5th 123—which did not involve Senate Bill 1437 issues—is inapposite and would lead to absurd results if applied in the way he suggests. (OBM 35.) There, the defendant's section 190.2, subdivision (a)(17), felony murder special circumstance was reversed on appeal due to an instructional error in conveying the meaning of an "actual killer" in section 190.2, subdivision (b). (*Garcia*, *supra*, 46 Cal.App.5th at pp. 156-157.) Appellant speculates that there could be section 1170.95 petitioners whose trials were similarly flawed, but whose petitions would be summarily denied on the basis that they were the actual killers because they went "without the adversary briefing that the Court of Appeal received in *Garcia* . . . ." (OBM 35.) This argument lacks merit principally because it is purely speculative and has no bearing on appellant's own conviction. But it also fundamentally misconstrues the nature of section 1170.95.

Section 1170.95 is a special retroactive resentencing provision with a narrow focus. (See *Cervantes*, *supra*, 46 Cal.App.5th at pp. 223-224; cf. *People v. Dehoyos* (2018) 4 Cal.5th 594, 603.) It is not a substitute for ordinary appellate review or habeas corpus and does not provide a forum to adjudicate claims of trial error such as instructional deficiencies. Instead, the inquiry is focused on, and confined to, a comparison of the petitioner's judgment of conviction with the statutory changes

made by sections 188 and 189. (§ 1170.95, subd. (a)(3) [petitioner must show he could not be convicted of murder "because of changes to Section 188 or 189"].) Indeed, section 1170.95, subdivision (f), specifically provides that defendants retain all other "rights or remedies otherwise available" to them.

Appellant's reliance on *Garcia* suggests he favors allowing defendants to piggyback ordinary challenges to the merits of a conviction onto section 1170.95 proceedings. This would undermine the usual rules governing the orderly litigation of appellate and habeas claims. Any appellate or habeas claim that would ordinarily be untimely, non-cognizable, or procedurally barred could simply be raised in a section 1170.95 proceeding, which has no explicit time bar or limitation on repetitive or successive petitions. There is no language in section 1170.95 suggesting the Legislature intended this outcome, and it would lead to absurd results by allowing defendants with long-final convictions, including those whose claims have already been rejected, to circumvent the normal procedures governing review. (*Loeun*, *supra*, 17 Cal.4th at p. 9 [statutory interpretation should avoid absurd results].)

By analogy to all the above examples, appellant claims the summary denial of his petition was "improvident" because it was based on a holding in *Lewis I* that involved a "fact-intensive dispute" about whether the instructional error at his trial was harmless. (OBM 35-36.) But whether the litigation in *Lewis I* was fact-intensive or not is irrelevant. The decision in that case is only relevant for its ultimate legal holding that appellant acted

with malice as a direct aider and abettor beyond a reasonable doubt. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 908 [petitioner's claim that appointment of counsel is necessary because implementation of section 1170.95 is "complicated," and could lead to erroneous denials, is "unfounded" because prima facie determinations "will generally be straightforward and uncomplicated"].)

Essentially, appellant claims that because it is *possible* for trial courts to err in applying the *Lewis II* framework, then that framework should be jettisoned altogether. That logic is faulty. As noted, where ordinary disputes arise as to whether a petitioner is ineligible as a matter of law, the appellate courts have ably resolved them under *Lewis II*. There is no basis to simply assume that errors frequently occur or that the Legislature intended for counsel to be appointed in every case to guard against that possibility. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 909-910 ["the 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 theories have petitioned [for relief]"].)

6. *Lewis II*'s interpretation of section 1170.95, subdivision (c), does not lead to fundamental unfairness

Appellant reframes many of the arguments discussed above in terms of due process and fundamental unfairness, arguing that if the court may sua sponte refer to the record of conviction at step one, then it "follows inexorably that the defendant *must* do so, on pain of having his petition summarily denied," without the

assistance of counsel. (OBM 37-38, italics original.) He argues that many petitions may be summarily denied without the court even pointing to anything in the record of conviction to support the dismissal. (OBM 55.)

But *Lewis II* does not impose any requirements on petitioners that are not already present in the statute, nor does it permit the prima facie denial of petitions on fact-based grounds. The court makes "all factual inferences in favor of the petitioner" (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329), and may not engage in any "factfinding" during the prima facie process (*Drayton*, *supra*, 47 Cal.App.5th at p. 982). Inchoate fears that there "will be a plethora of erroneous ineligibility findings and resultant appeals" are not well-founded, as the analysis "will generally be straightforward and uncomplicated . . . [and] based on clear and indisuptable portions of the record." (*Tarkington*, *supra*, 49 Cal.App.5th at p. 909.) Any errors at the margins, such as in *Offley*, may be corrected on appeal.

Appellant also attacks *Lewis II* as unfair and impracticable because it faulted him for failing to present new evidence to support his claim of eligibility during step one. He correctly notes that his ability to present new evidence would only have been triggered after an order to show cause issued, at the hearing under section 1170.95, subdivision (d)(3). (OBM 38, citing *Lewis II*, *supra*, 43 Cal.App.5th at p. 1139 & fn. 9.) However, *Lewis II* did not hold otherwise. The language appellant challenges is *Lewis II*'s statement that "[e]ven if we assume, *without deciding*, that section 1170.95 permits a petitioner to present evidence

from outside the record to contradict a fact established by the record of conviction, defendant did not include or refer to such evidence in his petition" or the briefing on appeal. (*Id*. at p. 1139 & fn. 9, italics added.)

The phrase "without deciding" means *Lewis II*'s discussion of new evidence was dicta and cannot be a basis for disagreeing with its holding. (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155 [an appellate decision is not authority for everything said therein, but only for the points actually decided].) In any event, the court's comment was merely a response to appellant's argument that summary dismissal meant he would never reach the subdivision (d)(3) stage. *Lewis II* suggested that *if* appellant were correct that the statute permitted him to reach that stage, where he could present new evidence to rebut the record of conviction, then perhaps he should at least state what he believed the new evidence would show. But the court never adopted this framework, and its actual holding obviates any such considerations. (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1138-1139.)

Next, appellant wrongly suggests that *Lewis II*'s principal reason for adopting its approach was to cut court costs, which he argues should not override concerns of fairness. (OBM 39-42.) But this is a mischaracterization of *Lewis II*. The court's concern was not simply cost-saving for its own sake, but rather that it would be unreasonable for the step one analysis to be strictly limited to a petitioner's claims, no matter how far-fetched they may be. (*Lewis II*, *supra*, 43 Cal.App.5th at pp. 1137-1138.)

Verdugo engaged in more detailed statutory interpretation that also was not strictly based on cost-cutting concerns. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-331.) And *Tarkington* similarly performed a legislative history analysis explaining why the Legislature intended a two-step process with counsel appointed only after the first step. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 901-909.) All of these decisions took fairness, common sense, and legislative intent into account.

Appellant also claims the record of conviction "is a poor fit" for determining ineligibility as a matter of law because section 1170.95 presents a different question from that in which the record of conviction is most often considered. He claims that under *People v. Woodell* (1998) 17 Cal.4th 448, the record of conviction may be considered to determine what crime the defendant was convicted of, but claims the question here is whether the defendant "*should have been convicted*" of that crime. (OBM 52-55, italics original.) Appellant's description of section 1170.95 and his interpretation of *Woodell* are both wrong.

The question posed by section 1170.95 is *not* whether the petitioner "should" have been convicted of murder, but whether his conviction—as it currently stands—is of the variety that the Legislature has chosen to reduce as an act of lenity. (*People v. Howard* (2020) 50 Cal.App.5th 727 [2020 WL 3248210, at *8]; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156.) To shed light on this question, the record of conviction is instructive, and *Woodell* is in accord. It held that courts may consider a prior appellate opinion for the limited purpose of "show[ing] the basis"

of a conviction, even if the opinion also includes extraneous, disputed information such as hearsay. The court does not rely on the prior opinion for the truth of the factual statements, but simply to reveal what was ultimately proved or found. (*Woodell*, *supra*, 17 Cal.4th at p. 460.) What *Lewis II* held was fully consistent with *Woodell*. It did not rely on the factual summary in *Lewis I* or independently weigh the persuasive force of the testimony or evidence. It merely held that the *legal conclusion* in *Lewis I* that appellant was a direct aider and abettor had been proved.

Finally, appellant claims that the record of conviction is unreliable in section 1170.95 proceedings because the original trial or prior appeal occurred at a time when the law of murder was different, and thus the elements now relevant to a petitioner's request for relief "may not have been contested as fully and vigorously" as they would be today. (OBM 54-55.) This argument misses the point of section 1170.95. *Both* parties were affected by the change in the law in ways they could not have anticipated. In a pre-Senate Bill 1437 murder case, the People may have chosen to pursue a felony murder or natural and probable consequences theory of liability, rather than direct aiding and abetting, for purely tactical reasons. And yet, the Legislature limited the potential for retroactive relief to defendants who were *actually* convicted under the former theories and could not have been convicted under the latter. That is simply the nature of the reform the Legislature enacted,

and the record of conviction is crucial to know whether a petitioner is eligible under that system.

7. *Lewis II* did not modify any pleading or proof requirements in section 1170.95

Appellant argues that it would be a due process violation to penalize unrepresented section 1170.95 petitioners like him who sought relief before *Lewis II*, or who were unaware of it, because *Lewis II* changed the pleading or proof requirements in the statute. (OBM 58-62.) But *Lewis II* did not add any pleading requirements to the section 1170.95 process, and there is nothing more petitioners need to do to satisfy *Lewis II*'s interpretation of the statute. The pleading requirements set forth in section 1170.95, subdivision (b), remain unchanged. Neither petitioners nor their counsel can possibly plead any allegation or prove any fact that would undo a proper *Lewis II* step one denial as a matter of law, because they cannot change past legal decisions. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 910.)

Relatedly, appellant raises a due process claim arguing that appellate review is inadequate to cure incorrect dismissals under *Lewis II* because "[i]nitially, the superior court did not notify him that he had [the] right" to appeal, and he was simply fortunate that the public defender from his original trial happened to be notified. (OBM 61 & fn. 12.) This fear is unfounded. The record of *Lewis II* shows that appellant's petition was denied on February 4, 2019 (CT 4-5), and that he timely filed a notice of appeal on February 13 (CT 7); it is also clear from the docket that appellant was notified of his right to counsel on appeal on March 1, 2019, and that present counsel was appointed for him on May

6.[11] The mere fact that errors hypothetically *could* occur in other unknown cases does not justify overturning the approach that worked well here.

In conclusion, appellant demands that even if this Court agrees with *Lewis II*, it should remand the matter and grant him permission to amend his petition. (OBM 62.) But for all the above reasons, this claim lacks merit. There is nothing appellant can add to his petition to change the result, so remand would be futile. (*People v. Davis* (2020) 48 Cal.App.5th 543, 548 [remand is inappropriate where it would be a futile act in light of the law].)

C. The superior court properly considered appellant's record of conviction when determining that he failed to satisfy the step one prima facie analysis in section 1170.95, subdivision (c)

Based on the above process, the trial court properly considered appellant's record of conviction, which showed that *Lewis I* held beyond a reasonable doubt that appellant was a direct aider and abettor to murder. *Lewis II* was thus correct to hold that appellant failed as a matter of law to satisfy step one and was not entitled to the appointment of counsel (*Lewis II*, *supra*, 43 Cal.App.5th at p. 1138-1140), because it is undisputed that the amended section 188 did not change murder liability for direct aiders and abettors who share the perpetrator's mental state of actual malice. (See § 188, subd. (a); *Martinez*, *supra*, 31 Cal.App.5th at p. 723.)

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[11] See *online docket of Lewis II*, available at <https://appellatecases.courtinfo.ca.gov> [case number B295998].

II. Appellant had no state or federal constitutional right to counsel

Apart from the question of how the procedures in section 1170.95, subdivision (c), are designed to operate (and the due process concerns attendant to that), appellant separately claims that *Lewis II* erred because both the federal and California constitutions required that counsel be appointed before his petition could be denied. (OBM 27-31.) This claim fails because the constitutional right to counsel is not implicated during the prima facie phases of a collateral resentencing process where the petitioner has already been convicted of a crime beyond a reasonable doubt.

A. The right to counsel under the federal and California constitutions applies in criminal trials and plenary resentencing hearings, but not during the prima facie stages of a request for resentencing

The Sixth Amendment right to counsel is fundamental at all critical stages of ordinary *criminal prosecutions*, and complete deprivation of it is a structural error which is not subject to harmless error review. (*United States v. Cronic* (1984) 466 U.S. 648, 659.) That is so "because of the effect [the right to counsel] has on the ability of the accused to receive a fair *trial*." (*Id.* at p. 658, italics added.) The California Constitution also guarantees criminal defendants the right to counsel during "all critical stages of the trial." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 465.) That right is designed to "preserve the defendant's basic right to a fair trial" by protecting his interests in "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 of Superior Court* (2019) 6 Cal.5th 998, 1004-1005.)

However, "[a]bsent some effect of challenged conduct on the reliability *of the trial process*, the Sixth Amendment guarantee [of counsel] is generally not implicated." (*Cronic*, *supra*, 466 U.S. at p. 658, italics added.) For example, defendants have no right to counsel to aid in collaterally attacking a conviction, even when the attack is predicated on a claim of trial error, i.e., prejudicial unfairness. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [the "right to appointed counsel extends to the first appeal of right, and no further"].)

That said, there are some non-trial contexts where the Sixth Amendment right to counsel may apply. For example, it is implicated "when a criminal sentence is vacated" on direct appeal and the cause remanded for a new sentencing hearing, because the sentence has been "wholly nullified and the slate wiped clean." (*Hall v. Moore* (11th Cir. 2001) 253 F.3d 624, 627-628, internal quotation marks omitted.) There may also be a limited right to counsel under the Sixth or Fourteenth Amendments after a petitioner for collateral sentence modification has successfully satisfied *all* the prima facie phases of the process and the burden has shifted to the prosecution. (*People v. Rouse* (2016) 245 Cal.App.4th 292, 299-300 [considering the right to counsel under section 1170.18].)

Cases concerning the Sixth Amendment right to a jury trial also shed light on the scope of constitutional protections at a collateral proceeding. For example, a resentencing proceeding which "authorize[s] only a limited adjustment to an otherwise final sentence and [is] not a plenary resentencing proceeding" does not implicate the right to a jury. (*Dillon v. United States* (2010) 560 U.S. 817, 826.) As such, there is no Sixth Amendment right to a jury for petitioners during litigation of a section 1170.126 or section 1170.18 petition. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 [following *Dillon* and holding that section 1170.126 resentencing does not require a jury because the statute is an act of lenity that merely provides for downward modification of the original sentence]; *Bradford*, *supra*, 227 Cal.App.4th at p. 1336 [same]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 452 [following *Dillon* and *Kaulick* with respect to section 1170.18].) A key issue in this context is that where "the potential reduction of the sentence is narrowly circumscribed by the statute," the petitioner may well fail to obtain relief, meaning his "originally imposed, lawful sentence remains undisturbed." (*Bradford*, *supra*, 227 Cal.App.4th at p. 1336.) If that remains a possibility, then plenary resentencing is not underway, and the Sixth Amendment does not apply. (*Ibid.*)

B. The constitutional right to counsel is not implicated during the prima facie steps of a section 1170.95 proceeding

There is no constitutional right to counsel during the prima facie steps of section 1170.95 because it is neither a criminal trial nor a plenary resentencing, and it does not implicate the

petitioner's fundamental rights or liberty interests. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 907-909.) Under the statute, there is no issue of trial or sentencing error at all; the only question is whether the petitioner potentially qualifies for a reduction of his conviction based on an act of lenity. (*Anthony*, *supra*, 32 Cal.App.5th at pp. 1156-1157 ["the Legislature's changes constituted an act of lenity that does not implicate defendants' Sixth Amendment rights"]; see also *Howard*, *supra*, 2020 WL 3248210, at *8.)

In other words, the section 1170.95, subdivision (c), process is simply the opening stage of a sentence reduction mechanism in which the petitioner has not yet even established his eligibility. All that is at stake at that point is the *possibility* that punishment may be *reduced*, and the constitutional right to counsel is not implicated. (See *People v. Epps* (2001) 25 Cal.4th 19, 28-29 [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"].)

Here, when appellant's petition was denied, he had not yet obtained any relief at all, much less earned the right to "a plenary sentencing hearing." (See *Rouse*, *supra*, 245 Cal.App.4th at p. 299.) To the contrary, his petition was denied at a time when the burden of proof was still on him. (See *Tarkington*, *supra*, 49 Cal.App.5th at p. 908 [where petitioner "is categorically ineligible for relief . . . it follows ipso facto that he could have had no liberty interest in the appointment of counsel, and could have had no expectation that counsel would be appointed for him"].)

Appellant was not in the same position as a criminal defendant who is presumed innocent and who is in jeopardy of losing that status pending the result of a trial. Nor was he in the same position as a defendant who had obtained reversal of his conviction and was facing plenary resentencing. As explained in Argument I, he filed a meritless petition for collateral relief which was denied at a prima facie stage because he was ineligible as a matter of law. During the prima facie steps of section 1170.95, there is no legal process being brought against the petitioner by the People. Rather, section 1170.95 petitioners are movants affirmatively seeking to benefit from an act of legislative lenity.

Appellant's reliance on *People v. Fryhaat* (2019) 35 Cal.App.5th 969, is misplaced. (OBM 28.) That case raised "due process concerns" because it involved the erroneous deprivation of counsel at a section 1473.7 hearing, which permits individuals to petition for vacatur of prior convictions if they did not understand or accept the immigration consequences of their guilty pleas or have discovered new evidence of actual innocence. (*Id.* at p. 981; § 1473.7, subd. (a).) All movants are entitled to a hearing. (§ 1473.7, subd. (d).) Section 1170.95, in contrast, does not guarantee all petitioners an evidentiary hearing, and appellant was not deprived of counsel at such a hearing.

The same basic analysis undermines appellant's reliance on *People v. Lightsey* (2012) 54 Cal.4th 668, which defined certain structural errors requiring reversal of a judgment. (OBM 43-45, citing *id.* at pp. 699-700.) *Lightsey* held that the California

Constitution provides protections against fundamental miscarriages of justice, such as holding a competency hearing without counsel. (*Id*. at p. 690.) But there was no miscarriage of justice here because when appellant's petition was denied, the record showed that he had a presumptively valid criminal conviction that barred his claim for relief. (*In re Avena* (1996) 12 Cal.4th 694, 710 [for purposes of collateral attack, all presumptions favor the validity of the conviction].)

Appellant's claim of structural error under *Lightsey* also fails because the provision of counsel at the prima facie phase of a section 1170.95 proceeding is purely statutory in nature, and any error is subject to harmless error review under *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks if it is reasonably probable that appellant would have obtained a better result but for the error. (*Epps*, *supra*, 25 Cal.4th at pp. 28-29 [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"]; *In re Melvin A*. (2000) 82 Cal.App.4th 1243, 1252; *In re Kristin H*. (1996) 46 Cal.App.4th 1635, 1668.)

In other words, even assuming this Court finds some procedural infirmity in *Lewis II* and holds that counsel should have been appointed, this would not justify reversal because appellant's petition was bound to be dismissed in any event. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 910 ["Nor do we detect any possibility that counsel's absence could prejudice a petitioner in a significant way, or that counsel's presence at this stage is necessary to preserve his or her rights" because "counsel's

representation could have done nothing to change [the] fact" of ineligibility as a matter of law].)

Nor did appellant have a constitutional right to counsel based on *People v. Rodriguez* (1998) 17 Cal.4th 253. (OBM 29-30.) *Rodriguez* held that "when a trial court has made a *mistake* in sentencing" and "the record before us affirmatively indicates the trial judge did misunderstand the scope of his sentencing discretion," then remedying the error on remand requires a hearing at which the defendant is present and represented by counsel. (*Rodriguez*, *supra*, 17 Cal.4th at pp. 258-259, italics added.) But there was no trial or sentencing error here. As noted, section 1170.95 does not even provide a forum to correct trial error. It is merely establishes a test by which individuals may demonstrate eligibility for lenity. (*Anthony*, *supra*, 32 Cal.App.5th at p. 1156-1157.) Appellant's inability to show trial error is not merely a technical or semantic distinction; it means the justice system has not inflicted any prejudicial unfairness on him, and he simply wishes to avail himself of a mechanism to reduce his conviction.

Finally, appellant claims that the mere *possibility* he could obtain vacatur of his murder conviction requires the appointment of counsel during "any stage at which the court can categorically shut the door" to such relief. (OBM 30.) This makes little sense. By that logic, the Legislature's provision of relief for a narrow class of intended beneficiaries would implicitly confer the right to counsel on anyone who claims eligibility, no matter how facially

meritless or absurd the claim. Neither section 1170.95 itself, nor *Rodriguez*, nor any constitutional principle requires this.

CONCLUSION

The judgment should be affirmed.

Dated: July 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 13,143 words.

Dated: July 28, 2020

XAVIER BECERRA
Attorney General of California

IDAN IVRI
Deputy Attorney General

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

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

No.: **S260598**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On **July 28, 2020**, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on **July 28, 2020**, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

THE HONORABLE RICARDO R. OCAMPO, JUDGE
SOUTH CENTRAL DISTRICT
COMPTON COURTHOUSE
200 WEST COMPTON BOULEVARD
DEPARTMENT J
COMPTON, CA 90220

On **July 28, 2020**, I served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

BROCK H. LUNSFORD
DEPUTY DISTRICT ATTORNEY
COURTESY COPY BY E-MAIL

CAPDOCS@LACAP.COM
COURTESY COPY BY E-MAIL

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

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

No.: **S260598**

On **July 28, 2020**, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On **July 28, 2020**, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Subsmission system.

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 **July 28, 2020**, at Los Angeles, California.

S-Farr	/s/
Declarant	Signature

II:sf
LA2020600060
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v. LEWIS**
Case Number: **S260598**
Lower Court Case Number: **B295998**

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CA Attorney General's Office - Los Angeles
Law Firm