S260598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

VINCE E. LEWIS,

Defendant and Appellant.

On Review From The Decision of the Court of Appeal,
Second Appellate Division, District 1
No. B295998

On Appeal From the Superior Court of the State of California,
County of Los Angeles,
The Honorable Ricardo R. Ocampo, Judge
No. TA117431

Application for Permission To File Amici Curiae Brief and Amici Curiae Brief on Behalf of The Honorable Nancy Skinner and The Justice Collaborative Institute

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APPLICATION FOR PERMISSION TO FILE
AMICI CURIAE BRIEF BY THE HONORABLE NANCY SKINNER, AND
THE JUSTICE COLLABORATIVE INSTITUTE

Pursuant to California Rules of Court, rule 8.520, The Justice Collaborative Institute and California State Senator Nancy Skinner respectfully apply for leave to file the following Amici Curiae Brief in support of Appellant, Vince E. Lewis.

This case concerns the procedure created by the Legislature, and codified in Penal Code[1] section 1170.95, to permit persons to seek resentencing following the passage of Senate Bill 1437 (SB 1437). (Stats. 2018, ch. 1015, eff. Jan. 1, 2019.) Specifically, the Court has granted review to answer two questions regarding that procedure: "(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? and (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?"

Amici – who are the author of the legislation and one of its principal drafters --have a significant interest in the proper interpretation and application of section 1170.95. Amici believe that the Court of Appeal's opinion, if allowed to stand, will in no small part defeat the Legislature's purpose of providing those who have been excessively punished the opportunity to seek a fairer result.

INTEREST OF AMICI CURIAE

A brief description of each amicus party's specific interest is as follows:

[1] All further statutory references will be to the Penal Code, unless otherwise specified.

Senator Nancy Skinner was elected to the California State Senate in November 2016 for California's 9th Senate District. Prior to that, she served in the California Assembly for three terms. In the Senate, Senator Skinner serves on eight committees and is chair of the Public Safety Committee and the Public Safety Budget Committee.

Senator Skinner was the author of Senate Concurrent Resolution 48 (SCR 48), (Resolution Chapter 175, 2017–18 Regular Session), the legislative resolution which set out the intent to change the felony murder rule and the natural and probable consequences doctrine. Senator Skinner was also the author of SB 1437, the interpretation of which is the subject of the current case.

Kate Chatfield, undersigned counsel, is the policy director of the Justice Collaborative. Prior to joining The Justice Collaborative, Chatfield worked as the interim director of the University of San Francisco School of Law Criminal Justice Clinic and co-founded and was the policy director for a California criminal justice reform organization, Re:store Justice. At the request of Senator Nancy Skinner, Chatfield worked with Senator Skinner's office and counsel for the Senate Standing Committee on Public Safety to draft SCR 48 and SB 1437.

DISCLOSURE OF AUTHORSHIP AND MONETARY CONTRIBUTION

Pursuant to California Rule of Court 8.520(f)(4), amici state that no party or counsel for a party in the pending appeal authored the proposed amici brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed amici brief.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court accept and file the accompanying brief in this case.

Respectfully Submitted,

November 16, 2020

/S/ KATE CHATFIELD

/S/ SENATOR NANCY SKINNER

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SUMMARY OF THE ARGUMENT

The plain text, design, and intended function of section 1170.95 are straightforward. Counsel must be appointed, if requested, at the outset of proceedings --when the petition is filed by petitioner. The trial court may not summarily deny a petition except for the strictly formal reasons as stated in section 1170.95, subdivision (b)(2). In making that determination, the trial court may not look past the contents of the petition itself.

At the prima facie hearing, with petitioner represented and with the benefit of briefing from the parties, the court then determines whether petitioner has made a prima facie showing of eligibility for relief. In that hearing the court may consider the record of conviction as well as the briefing that has been submitted by the parties to determine whether petitioner is ineligible for resentencing as a matter of law. However, at this stage the court must not weigh evidence, make credibility determinations, nor resolve factual matters that are subject to dispute.

Courts who 1) refuse to appoint counsel upon the filing of the petition requesting counsel; 2) summarily deny petitions – *except* for a failure to set forth the information specified in section 1170.95, subdivision (b)(2); or (3) make factual determinations and weigh evidence at the prima facie briefing stage are violating the plain language of the statue and frustrating the legislative intent to ensure that those who are entitled to relief receive that relief.

BACKGROUND INFORMATION

From before the time Senate Bill 1437 (SB 1437) was introduced until it was passed by both houses of the Legislature, Senator Nancy Skinner asked Kate Chatfield to work under her direction and the direction of her

staff to assist with negotiations, to meet with individual legislators and their staff to answer questions, and to draft amendments for the Senator to present to the Legislature. These amendments were made with input from other legislators and various stakeholders, including the California District Attorneys Association (CDAA), representatives from individual District Attorney's offices, and the Judicial Council.[2]

As soon as the law was signed by Governor Brown, Senator Skinner and her staff asked Chatfield and other attorneys involved in the drafting process to create a form petition that tracked the statutory language of SB 1437. Receiving relief under the new statute required understanding not only the facts in a particular case but also the various legal theories of homicide. Providing a form petition allowed uncounseled petitioners to alert the superior court that they believed they were eligible for resentencing and to begin their process of resentencing without having to retain an attorney or conduct legal research, submit records, or brief their eligibility. This is the form petition that was submitted to the trial court in this case. (CT 2-3.)[3] Chatfield also led the team of attorneys who wrote the guidebook to SB 1437, which was distributed in prisons to incarcerated people and prison staff. The petition and guidebook were also posted online and distributed to families and attorneys throughout the state.

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[2] The CDAA remained opposed to SB 1437, as did most, but not all, individual District Attorneys in California. As explained *infra,* II.B*,* the Judicial Council took a "support if amended" position.

[3] It was also the form petition that was filed in *People v. Verdugo* (2020) 44 Cal.App.5th 320, 324, fn. 2, review granted March 18, 2020, No. S260493; in *People v. Cooper* (2020) 54 Cal.App.5th 106, 110; and in many other cases now pending in superior and appellate courts.

Because the various legal theories of homicide are complex and not at all intuitive, the Legislature knew that some people would incorrectly believe they were eligible for relief under SB 1437. The Legislature anticipated there would be meritless petitions, not necessarily as a result of any knowing falsehood on the part of the petitioner, but as a result of a misapprehension of the law or facts as it applied to a particular person's case.

Accordingly, Senator Skinner and her office asked the California Department of Corrections and Rehabilitation (CDCR) to allow "SB 1437 law classes" to be taught in prisons for incarcerated people and CDCR counselors and staff. CDCR agreed and helped organize a tour of prisons for the classes, which were taught by Chatfield and Mariah Watson, who was Senator Skinner's lead staffer on the bill.[4] Along with providing instructions, Chatfield and Watson provided petitions and guidebooks in English and Spanish to incarcerated people, CDCR staff, and the prison libraries. The hope was, and is, that with continued education and assistance, people who are eligible to petition for a resentencing will file for relief and those who are ineligible as a matter of law will not.

After the law was signed, and despite its mandate to appoint counsel upon request, some lawyers began soliciting incarcerated people and their families to file petitions for relief. That drew the quick rebuke of the Chair of Assembly Appropriations--the committee that analyzes the fiscal impact of proposed bills.

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[4] See "California Inmates Convicted Under 'Felony Murder Rule' Prep For New Shot At Freedom" by Alex Emslie, Adam Grossberg, The California Report, December 26, 2018, KQED, which contains a video recording of portions of one such training: https://www.kqed.org/news/11714600/california-inmates-convicted-under-felony-murder-rule-prep-for-new-shot-at-freedom

The form petition to which Assemblymember Lorena Gonzalez refers in this tweet is the form petition that was created by amicus and filed in the instant case. Although this tweet was sent after the legislation was signed by Governor Brown, it reflects the Legislature's unambiguous intent to have counsel appointed for petitioners at the outset of proceedings.[5]

[5] *People v. O'Hearn,* No. A158676, 2020 WL 6556592 (Cal. Ct. App. Nov. 9, 2020), although not involving an attorney retained for an SB 1437 petition, provides an excellent illustration of the kind of lawyers who have arisen in the wake of SB 1437 to solicit incarcerated people and their families.

ARGUMENT

I. THE STATUTE MANDATES THAT A SUPERIOR COURT APPOINT COUNSEL UPON THE FILING OF THE PETITION IF THE PETITIONER REQUESTS THAT COUNSEL BE APPOINTED.

A. Introduction

There are four steps to a section 1170.95 resentencing process: (1) the filing of the petition which the court may deny if required information is missing (§ 1170.95, subd. (b)); (2) the prima facie review (§ 1170.95, subd. (c)); (3) an evidentiary hearing (§ 1170.95, subd. (d)); and (4) resentencing when applicable (§ 1170.95, subds. (d), (e), (g).) (*People v. Cooper* (2020) 54 Cal.App.5th 106, 114.)

The vast majority of those eligible for relief under section 1170.95 are in prison, and inferentially, the vast majority of them lack the financial resources to hire attorneys to file petitions and brief their eligibility on their behalf. Moreover, those in prison may not be present in court. Accordingly, the Legislature took great care to ensure that every person filing a section 1170.95 petition has the benefit of legal representation – retained or appointed – before any court makes a dispositive determination ruling on their petition. That trial courts and appellate courts are misinterpreting the statute and denying people the right to counsel when the legislation clearly mandates this frustrates the intent of the Legislature.

B. The Language of The Statute Shows A Clear Legislative Intent To Appoint Counsel At the Outset of Proceedings.

Three sections in 1170.95 – two in subdivision (b)(1) and one in subdivision (c)—mention or mandate the appointment of counsel. Whether read separately or together, they require that the court appoint counsel at the outset of proceedings. First, whether petitioner is requesting the appointment of counsel is among one of only three necessary components to an initial

petition as set forth in section 1170.95, subdivision (b)(1)(A)-(C).[6] Second, subdivision (b)(1) also mandates that the petitioner serve the public defender or the attorney who represented petitioner in the case being challenged so that representation can begin immediately. Finally, section 1170.95, subdivision (c) states, "If the petitioner has requested counsel, the court *shall* appoint counsel to represent the petitioner." (Emphasis added.) Thus, the Legislature made requesting (or declining) counsel essential to any petition, required that such request be made at the absolute earliest stage, and mandated the appointment of counsel when it is requested.

Reading the required and immediate appointment of counsel out of the statute for all petitioners not only means that there would be much statutory language that is surplusage but would also direct the petitioner to engage in the meaningless acts of serving anticipated defense counsel and requesting counsel. Incarcerated persons cannot easily find contact information for their prior counsel, district attorneys, and trial courts and then supply each with a copy of the petition. By requiring immediate notification of counsel on both

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[6] Section 1170.95, subdivision (b) (1) states:

> The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:
>
> (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
> (B) The superior court case number and year of the petitioner's conviction.
> (C) Whether the petitioner requests the appointment of counsel.

sides, the Legislature intended to involve counsel in litigating eligibility at the earliest possible state. Ignoring this intent renders the request of counsel and service requirements in section 1170.95 subdivision (b)(1) meaningless surplusage.

C. The Legislature Had Sound Policy Reasons To Allow For The Appointment Of Counsel At The Outset of Proceedings.

> It is for the Legislature, not the courts, to choose between conflicting public policies. (*Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 129.) 'The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function. [Citation.] *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53.'

(*Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319, 326.)

The lower courts that have ignored the statutory mandate for a court to appoint counsel at the outset of proceedings have reasoned it is "sound policy" to not appoint counsel and to bypass the statutorily-required prima facie determination because it could save court resources. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1138, review granted March 18, 2020, S260598; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 901, review granted August 12, 2020, S263219.) This is judicial overreach that frustrates the legislative intent in this remedial statute to offer relief to a specified class of defendants without placing roadblocks in their way.

1. The Legislature centered the needs of incarcerated people in this resentencing statute.

Many people in our prisons cannot read.[7] Many people in our prison system have a limited education.[8] Many people in our prisons have limited English comprehension. Many people in our prisons have intellectual disabilities or have been diagnosed with a mental disorder. (See *People v. O'Hearn,* No. A158676, 2020 WL 6556592 (Cal. Ct. App. Nov. 9, 2020), slip. op. *25-27.) The Legislature had these considerations in mind when it was

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[7] The Program for the International Assessment of Adult Competencies reports five proficiency levels for literacy and numeracy (Below level 1, Level 1, Level 2, Level 3, and Level 4/5). According to a November 2016 report by the United States Department of Education, 29% of incarcerated people had a literacy level that was below Level 2.

> Adults at Level 1 in literacy can 'read relatively short...texts to locate a single piece of information that is identical to or synonymous with the information given in the question or directive' and can 'enter personal information onto a document' when '[l]ittle, if any, competing information is present.' However, adults at Level 1 typically are not successful performing skills at the higher levels (e.g., 'compare and contrast or reason about information requested' or 'navigate within digital texts to access and identify information from various parts of a document,' both of which are Level 2 literacy skills).

(*Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training: Program for the International Assessment of Adult Competencies: 2014*, available here: https://nces.ed.gov/pubs2016/2016040.pdf, last accessed November 9, 2020.)

[8] "About 41% of [incarcerated people] in the Nation's State and Federal prisons and local jails in 1997…had not completed high school or its equivalent. In comparison, 18% of the general population age 18 or older had not finished the 12th grade." (Bureau of Justice Statistics, Education and Correctional Populations, (2003), available here: https://www.bjs.gov/content/pub/pdf/ecp.pdf, last viewed November 9, 2020.)

deciding what was "sound policy" in this legislation. The Legislature knew it would be critical to allow for the appointment of counsel in this process for many petitioners in order to brief petitioner's eligibility for relief and to bring evidence to the court's attention. This is why the petition requirements were kept simple and it was anticipated that a form petition could be submitted. This is why a tour of prisons to distribute the petitions, guidebooks, and to teach classes was arranged.

Further, there is nothing in this legislation that prevents a petitioner from hiring counsel. That being so, a situation would be created where petitioners with funds could have access to this process and indigent petitioners would have to proceed *pro se*. The Legislature intended to provide equal justice to all people potentially eligible for relief.

This Court may recall that at the same time that SB 1437 was being debated and voted on, so too was Senate Bill 10 (SB 10). (Stats. 2018, ch. 244 eff. Oct. 1, 2019.) SB 10, which would have ended cash bail, was rooted in the acknowledgement that wealth-based detention was unjust and inequitable. SB 10 was passed by both houses of the Legislature and signed by Governor Brown. Thus, the Legislature was not only very cognizant of wealth-based disparities as they existed throughout the criminal legal system, legislators were debating these issues daily. Just as there was a legislative intent to end pre-trial wealth-based detention, there was a legislative intent to enact a re-sentencing provision in this law that did not discriminate between those petitioners who could afford a lawyer and those who could not.

2. There was a public and lengthy process that provided Californians the opportunity to weigh in on this legislation before it was enacted.

The Legislature and the Governor made their sound policy decision to enact this legislation after a public, multi-year process that provided multiple opportunities for every possible stakeholder to suggest changes to the law.

The process included: a legislative resolution with two public committee hearings and floor debate; an extensive study of the opinions of this Court on the law at issue; a public and open legislative process in which the citizens of California – including judges who were acting as representatives of the Judicial Council and in their private capacity as citizens of California – had an opportunity to offer comments; press coverage of hearings and the legislation; and opportunities for residents, organizations, and stakeholders to contact their legislators. During this lengthy process, the Legislature determined what was sound policy and how best to implement it.

Because amicus Senator Skinner knew that these changes to California homicide law were significant, she began this process in 2017 with a legislative resolution, SCR 48 that discussed opinions of this Court and the need for statutory changes to the law of homicide in California.[9] With this resolution, passed by both houses of the Legislature in 2017, ample public notification was given of future legislative intent to change this area of the law.

Then, in February 2018, the initial version of SB 1437 was introduced.[10] Amicus Senator Skinner did not introduce it as a "spot bill," a process by which an author introduces generic language in order to hold a place for future legislation while the bill is being drafted. Rather, it was

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[9] The legislative history of SCR 48 is available on the California Legislative Information website here: https://leginfo.Legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SCR48, last viewed November 7, 2020.

[10] The legislative history of SB 1437, including prior introduced versions of the bill, vote history, and analyses are available on the California Legislative History Information website here: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437, last viewed November 15, 2020.

introduced as a detailed bill following on the changes that SCR 48 had promised. This gave all people – supporters and opponents – months of opportunity to weigh in on the substance of the bill. SB 1437 had four committee hearings and floor debate in each chamber.[11]

At committee hearings, lines of people who wanted to speak on the bill stretched outside the doors of the hearing room. This bill received national press coverage as well as press coverage in papers all over California.[12] Not only did Senator Skinner and her office solicit the Judicial Council to work with her office on amendments to the bill, but Senator Skinner solicited the opinions of respected jurists in California. Hundreds of individuals and

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[11] The Senate Public Safety Committee hearing, held on April 24, 2018, is available here: https://www.youtube.com/watch?v=M0FbvnSoBk4, last viewed November 9, 2020.

The Senate Appropriations Committee hearing, held on May 14, 2018 is available here: https://www.youtube.com/watch?v=BC_2pHx_7xE, last viewed November 9, 2020.

The Senate floor debate and vote held on May 30, 2018 is available here: https://www.youtube.com/watch?v=ggJflRkeNzU&list=PL_mQBkokl5hKSdoRnI5zYZKSWgSBgStd6, last viewed November 9, 2020.

The Assembly Public Safety Committee hearing, held on June 26, 2018 is available here: https://www.youtube.com/watch?v=BhOMrHWZ1sM, last viewed November 9, 2020.

The Assembly floor debate and vote was held on August 29, 2018 and is available here: https://www.sos.ca.gov/archives/calchannel, last viewed November 9, 2020. The debate on SB 1437 runs from 8:33:44-8:55:53 on the video player.

[12] A partial list of articles and other media covering this legislation published throughout California and nationally is contained within undersigned amici curiae's Request for Judicial Notice.

organizations throughout California contacted the Senator's office about this Legislature and contacted their own legislative representatives. Following debate, both houses of the Legislature passed the bill.[13] Thus people throughout California – including judges and legal commentators – weighed in on the legislation during the extended period of legislative debate. Consistent with its mandate, the Legislature carefully considered all of the policy ramifications of its bill.

3. This legislative process was marked by the Legislature's respect for their co-equal branch of government.

The other important point that must be made is that SCR 48 and SB 1473 reflect the Legislature's great respect for the California judiciary. SCR 48 discussed the felony murder rule and the natural and probable consequences doctrine not only by examining published opinions that described these doctrines, but also by highlighting the reasoning of opinions from denials of petitions for review. (*See* SCR 48, citing *People v. Cruz-Santos*, S231292, Denial of Petition for Review, March 25, 2016, Dissenting Statement [Liu, J].) Legislators and their staff discussed and debated decades-old opinions and concurrences from this Court. Indeed, posters and cards of California Supreme Court Justice Stanley Mosk and his words in an opinion of this Court came to decorate the doors and hallways of legislative offices. When SB 1437 was being drafted, counsel for the Senate Public Safety Committee analyzed for the Legislature this Court's body of case law interpreting ballot initiatives.[14] The Legislature wanted to closely adhere to

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[13] It was voted on twice by the Senate – once before it moved to the Assembly and once after Assembly amendments had been made.

[14] Gabriel Caswell, Consultant to Senate Public Safety Committee, Memorandum to Senate Public Safety File for Senate Bill No. 1437. (See *People v. Solis* (2020) 46 Cal.App.5th 762, 784.)

its constitutional role in enacting legislation as that role has been set forth in the case law of this Court. Just as the Legislature exhibited a great respect for their co-equal branch of government, trial and appellate courts should respect the policy decisions made by the Legislature and resist the urge to rewrite statutes based on what they believe to be "sound policy."

D. The Uncodified Section Of Senate Bill 1437 Reflects The Legislature's Understanding That Costs To Counties Would Be Incurred In Large Part Because Attorneys Would Be Appointed At County Expense.

As section 1170.95 mandates the appointment of counsel for petitioners, briefing by the prosecutor, the opportunity to present a reply brief by petitioner's counsel, and an evidentiary hearing when necessary, the Legislature understood there would be costs to local agencies. Thus, the final section of SB 1437 states,

> 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.)

From its introduction, this section was included in the statute as the Legislature understood that there would be costs to the counties, including the costs of providing appointed counsel to indigent petitioners.[15]

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[15] See also the Senate Committee on Appropriations Analysis, May 14, 2018 and the Analysis Addendum, May 25, 2018, available on the California Legislative Information website: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1437.

II. COURTS MAY NOT SUMMARILY DENY A PETITION BEFORE APPOINTING COUNSEL AND BEFORE ALLOWING BRIEFING, EXCEPT FOR THE REASONS AS STATED IN SECTION 1170.95, SUBDIVISION (b) (2).

A. Introduction

Subdivision (b)(2) describes the only reasons why a court may summarily deny a petition: if the petition is missing information and the court cannot easily determine what the missing information is.[16] The Legislature knew how to give power to courts to summarily deny petitions and did so in section 1170.95, subdivision (b)(2). (See *In re James H.* (2007) 154 Cal. App. 4th 1078, 1083-1084 ["The proper rule of statutory construction is that the statement of limited exceptions excludes others, and therefore the judiciary has no power to add additional exceptions; the enumeration of specific exceptions precludes implying others. (Citations.)"].) No other provision in the law permits a summary denial.

B. The Legislative History Reveals That The Legislature Did Not Give Trial Courts The Power To Summarily Deny Petitions Except As Stated In Subdivision (b)(2).

The initial version of SB 1437 provided for a procedure under which, upon the filing of a petition, the sentencing court would compile documents, notify the district attorney and petitioner's counsel of record, and "shall request" briefing.[17] There was opposition to this procedure, most especially

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[16] Section 1170.95, subdivision (b)(2) states,

> If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

[17] This initial version of SB 1437 stated,

from the Judicial Council. The Council negotiators believed, and undersigned amici agreed, that this would be an onerous process for a trial court. Accordingly, after the bill initially passed the Senate and was pending in the Assembly, representatives from the Judicial Council, legislative staff, Senator Skinner's office, and Kate Chatfield worked together to negotiate and draft amendments to this part of SB 1437.

Section 1170.95, was significantly amended so that the court no longer had the obligation to give notice to the parties, to compile records, and to request briefing. Instead, by requiring the petitioner to serve the parties, and by requiring briefing from the prosecution within sixty days of service of the petition, the tasks that initially fell to the court were shifted to the parties. Further, although the legislation always provided for the appointment of counsel, the initial legislation was insufficiently clear. Thus, the amendments clarified that a court "shall appoint an attorney to represent a petitioner if a petitioner requested one in his or her petition." (§ 1170.95, subdivision (c).)

(d) Upon receipt of the petition, the court shall request all of the following:
(1) A copy of the charging documents from the superior court in which the case was prosecuted. ¶ (2) The abstract of judgment.¶(3) The reporter's transcript of the plea, if applicable, and the sentencing transcript. ¶(4) The verdict forms, if a trial was held. ¶ (5) Any other information the court finds relevant to its decision, including information related to the charging, conviction, and sentencing of the petitioner's codefendants in the trial court.

(e) The court shall also provide notice to the attorney who represented the petitioner in the superior court and to the district attorney in the county in which petitioner was prosecuted. Notice shall inform each that a petition had been filed pursuant to this section and shall request that a response be filed from both parties as to whether the petitioner is entitled to relief.

The legislation was also amended so that petitioner's counsel could, but did not have to, file a responsive brief to the prosecution's initial brief. *(Ibid.*)

Virtually all proposed amendments of the Judicial Council were accepted by amicus Senator Skinner and presented to the Legislature for a vote.[18] However, one was rejected. The Judicial Council wanted judges to have the power to do what the lower court did here: to summarily dismiss a petition without appointing counsel, and without having to hear from the parties. This amendment was not only not accepted but during the amendment process, the legislation was amended to clarify that the court should not take on such an initial gatekeeping role. As the *Cooper* court correctly noted, "The legislative evolution of section 1170.95 demonstrates, if anything, an increasing reluctance by the Legislature to impose on trial courts the responsibility to perform an initial substantive review." (*Cooper, supra*, 54 Cal.App.5th at 122.)

This led the Judicial Council to take a "support if amended" position on the bill and to send a letter to Senator Skinner again requesting that the bill be further amended to allow a judge to summarily deny a petition that the judge deemed meritless, without appointing counsel and without any briefing.[19] This letter was received on August 28, 2018 – prior to the vote on

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[18] These amendments were made in Assembly Appropriations Committee on August 16, 2018. This history is available on the California Legislative Information website here: https://leginfo.Legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB1437, last viewed November 7, 2020.

[19] A copy of the letter to undersigned amici curiae reflecting their position on the bill and the letter to Governor Brown is available on the courts website: https://www.courts.ca.gov/documents/ga-position-letter-senate-sb1437-skinner.pdf, last viewed November 7, 2020.

the Assembly Floor and the vote in the Senate. [20] The requested amendment again rejected and the Assembly and the Senate passed the bill without so amending it.[21] This letter was later sent to Governor Brown and to all legislative co-authors requesting the same thing. The Governor did not veto the legislation.

There were many reasons why this suggested amendment was not taken. The drafters understood that determining eligibility is factually and legally complicated and could lead to erroneous denials of relief without the appointment of counsel. As noted above, they also understood that petitioners incarcerated in prison would need the help of counsel to gather the necessary documents and legal research to support the petitions. The drafters also understood, as did the *Cooper* court and the dissent in *Tarkington*, that this

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[20] The Assembly voted on this bill on August 29, 2018; the Senate voted on the bill concurring in the Assembly amendments that had been made, on August 30, 2020. The vote history of this bill may be found on the California Legislative Information website here: https://leginfo.Legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB1437.

[21] The majority in *Tarkington* declined to consider this letter as part of legislative history, suggesting no evidence showed that this letter, and the position of the Judicial Council, was given to other legislators. (*People v. Tarkington, supra,* 49 Cal.App.5th at 904-906, review granted, Aug. 12, 2020, S263219.) While the record does not indicate all of the Judicial Council's communications with other legislative offices, they have an active presence at the Capitol, lobbying on particular bills. Their positions on bills are public. Legislators and advocates solicit their positions on bills. The official website for the California courts has published the Judicial Council's position on bills from 2018. (This report is available at https://www.courts.ca.gov/documents/legislative-status-chart-2018.pdf, last viewed November 7, 2020.)

request to have judges summarily deny petitions did not, in fact, further judicial economy, either at the trial or appellate court level.

> [I]t does *not* conserve judicial resources to require trial courts to undertake a preliminary review of the record of conviction—which may not even be readily available—and to draw legal conclusions from this review without input from counsel, when prosecutors are simultaneously doing the same thing to comply with the statute and respond to petitions within 60 days. It seems to us that a court can more efficiently and effectively weed out unmeritorious petitions after the prosecutor has weighed in. And if the petition is clearly without merit, the prosecution will presumably say so.

(*Cooper*, *supra*, 54 Cal.App.5th at 121.)

And, as stated by Justice Levin in *Tarkington,* "But even assuming the practice leads to short-term efficiencies, those savings are a false economy that shifts work from trial counsel to appellate counsel and from the trial courts to the appellate courts. (*Tarkington, supra*, 49 Cal.App.5th at 917, review granted, Aug. 12, 2020, S263219 [dis. opn. of Lavin, J.].) This has proven to be the case. Petitions that were summarily denied are now in the appellate courts where appellate counsel and courts are doing the work that was not done in the trial courts below.

Finally, a person who was denied by a trial court has a right to appeal. A judge who summarily denied a petition would certainly not file a Notice of Appeal for the petitioner, nor would a judge necessarily advise a petitioner of their right to appeal. This would leave petitioners with no recourse but to file a successive petition.

C. <u>There Is Only One Prima Facie Determination, Which Is Made After The Appointment Of Counsel And The Opportunity For Briefing.</u>

For petitions that contain the information required in subdivision (b)(1), section 1170.95, subdivision (c) sets forth the full process to determine whether the petitioner has made the required prima facie showing.

> 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.

This subdivision describes one process to make one prima facie determination on one petition. There are not two separate prima facie determinations described in this section, nor in any section. The courts that have seized on the first sentence of section 1170.95, subdivision (c) as a separate "prima facie" determination have judicially rewritten the statute. They have done so in a way that defies the most natural, common sense reading of the subsection, renders it inconsistent with the statute as a whole, and frustrates the legislative intent of the statute.

1. The text of the statute does not support that there is an initial prima facie determination.

There is no silent "midpoint" process between (b)(2) and (c) during which the trial court can look through the record of conviction and deny the petition of an unrepresented and absent petitioner. (See *Verdugo, supra,* 44 Cal.App.5th at 329-330, review granted, March 18, 2020, S260493; *Tarkington, supra*, 49 Cal.App.5th at 921, review granted Aug. 12, 2020, S263219; *Lewis*, *supra,* 43 Cal.App.5th at 1137, review granted Mar. 18, 2020, S260598.) As an initial matter of statutory interpretation, if courts are required to make a prima facie determination first, based solely on the petition, then why is the statute silent on this process? Lower courts have acknowledged that this proposed process appears nowhere in the text of the

statute, but then ignore the problem, and purport to find "clear" legislative intent elsewhere. (See *Verdugo, supra,* 44 Cal.App.5th at 329, review granted March 18, 2020, S260493 ["Although *subdivision (c) does not define the process* by which the court is to make this threshold determination, subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature's intent." Emphasis added.].) In connection with this, they also ignore that the statute does, in fact, set explicit limits on the court's power to summarily dismiss petitions prior to appointing counsel and prior to briefing. This power is set forth immediately above in subdivision (b)(2). These courts' interpretation renders those legislatively-enacted limitations meaningless.

2. Every sentence in the statute was not intended to -- nor can be -- read in strict chronological order.

Court opinions that have erroneously concluded that because "prima facie" appears twice in this section the petitioner must make two prima facie showings to the court—one based solely on the initial petition, and the other after counsel is appointed and briefs are filed – are an extreme example of elevating form over substance. (See *Lewis, supra*, 43 Cal.App.5th at 1140, review granted March 18, 2020, S260598*; Verdugo, supra,* 44 Cal.App.5th at 332, review granted, March 18, 2020, S260493; *Tarkington, supra,* 49 Cal.App.5th at 898, review granted Aug. 12, 2020, S263219.) These courts have reasoned that because subdivision (c) must be read in strict chronological order, the first sentence is not, in fact, a topic sentence, but a separate prima facie determination that comes before any of the remaining process that follows. But the common sense reading of the subdivision reflects what was actually intended by the legislation: "**The first sentence [of subdivision (c)] 'states the rule' and 'the rest of the subdivision establishes the process for complying with that rule.'"** (*Cooper*, *supra*, 54 Cal.App.5th at 115, citing *Tarkington, supra*, 49 Cal.App.5th at 917,

review granted Aug. 12, 2020, S263219 [dis. opn. of Lavin, J], emphasis added.) This correct interpretation is amply supported throughout the statute.

First, although the statute proceeds in a general chronological order, not every sentence within each subdivision can logically be read in chronological order. As the *Cooper* court and the dissent in *Tarkington* correctly noted, the Legislature ensured that the briefing deadline mentioned in section 1170.95 subdivision (c) runs from service of the petition:

> If the Legislature had anticipated that the court would undertake its own review of the merits of the petition as an intermediate step before appointing counsel, it would have calculated the deadlines not from the date of service of the petition but instead from the date the court completed its initial review. And though the Legislature required the prosecution to respond within 60 days of being served with the petition, it did not create a deadline for the court to conduct an intermediate review. Nor is there any provision allowing the court to relieve the parties of these statutory requirements. [Fn. omitted.] [¶] By omitting those steps, the Legislature signaled it did not intend for the court and prosecutors to duplicate their efforts by conducting the same review of the same documents at the same time.

(*Cooper*, *supra*, 54 Cal.App.5th at 121, citing *Tarkington*, *supra*, 49 Cal.App.5th at p. 920, review granted August 12, 2020, S263219, [dis. opn. of Lavin, J.].)

Second, other subdivisions in the statute cannot be read in a strict chronology. As the dissent in *Tarkington* stated,

> [Each sentence within each subdivision] plainly are not [chronological.] Take subdivision (b) for example. Subdivision (b)(1) starts by explaining that the petition must be filed in the sentencing court. Then, it lists the people and agencies that must be served. Next, it circles back to note that if the original sentencing judge is not available, the presiding judge can appoint

> someone else to rule on the petition. Only after addressing filing, service, and the decision-maker does it mention what the petition should say. Then, its focus returns to the decision-maker, who may deny the petition if it is missing required information. I see no reason to assume subdivision (c) proceeds chronologically when subdivision (b) clearly does not.

(*Id.* at 918, fn. 6.)

Moreover, section 1170.95, subdivision (b)(1) states: "If the judge that originally sentenced the petitioner is not available to *resentence* the petitioner, the presiding judge shall designate another judge to rule on the petition." (Emphasis added.) Obviously, the Legislature and the drafters knew the court could resentence a petitioner who is eligible to be resentenced only *after* briefing and an evidentiary hearing, which only could arise well past the point at which the presiding judge had initially designated a judge to rule on the petition.

Third, not only can each sentence in a subdivision not be read strictly chronologically, the statute as a whole does not proceed entirely chronologically. In the lower court's opinion in the instant case, the court states that the statute is organized chronologically but ignores the subdivisions of the statute that clearly refute this proposition. (*Lewis, supra*, 43 Cal.App.5th at 1139-1140, review granted March 18, 2020, S260598.) This is their analysis:

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

However, in this analysis, the court entirely omits any reference to subdivisions (e) and (f).[22] Subdivision (f), which appears between two portions of the statute that address the resentencing process, cannot be read chronologically within the statute; obviously a petitioner's other rights or remedies may arise prior to the filing of a petition, during the petitioning process, or after.

This is where understanding the legislative process shows why dogged fidelity to a chronological reading of the statute makes little sense. Subdivision (f) appears where it does in the statute, *not* because the statute should be read as if the process proceeds in a strict chronological order, but due to the nature of legislative negotiations. In conversations with some legislators, they said would feel more comfortable with the resentencing process if courts had the discretion to impose a term of parole in the appropriate case. Their suggestions were accepted near the end of

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[22] The final three subdivisions of section 1170.95 state:

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

negotiations and the section – section (g) -- was added to the end of the statute. That's it. That's how the sausage was made. This example of how legislation is altered and amended proves the wisdom of the rule of statutory interpretation that directs a reviewing court to read each section of a statute in relation to the others. (See *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 52.)

3. The courts that have determined that there are two prima facie determinations have misread the legislative history.

Other than for the reasons as stated in subdivision (b)(2), the Legislature never intended to give the court a power to summarily deny a petition without briefing from counsel; in fact, the statute was clarified to *amend out* the court's role to even compile or review court records.[23] The *Cooper* court and the *Tarkington* dissent correctly explain the legislative history which revealed that the "gatekeeping function" that trial courts are claiming to exercise was amended out of the statute, even over the objection of the Judicial Council. (See *Tarkington,* 49 Cal.App.5th at 921, review granted Aug. 12, 2020*,* S263219 (*Tarkington*) [dis. opn. of Lavin, J.]). Further, in the legislative hearings on SB 1437, amicus Senator Skinner and others discuss *one* initial burden on the petitioner (the prima facie determination) and a subsequent burden on the prosecution at an evidentiary hearing.[24]

4. There was no legislative intent to distinguish between "eligibility" and "entitlement" to relief.

Courts have also mistakenly inferred that there is a distinction between "eligibility" for relief and "entitlement" to relief in support of their proposition that the Legislature must have intended there to be two separate

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[23] See Footnote 17, *supra.*
[24] See Footnote 11, *supra.*

prima facie determinations. (See *Tarkington*, *supra*, 49 Cal.App.5th at 902, review granted Aug. 12, 2020, S263219; cf. *Cooper*, *supra*, 54 Cal.App.5th at 119.) This is incorrect. The words "eligibility" and "entitlement" were used interchangeably in the statute, as can be read in subdivision 1170.95, subdivision (d)(3).[25] Until this issue was raised by appellate courts, amici never even noted the difference. None of the stakeholders discussed the issue during the legislative process.

5. Conclusion

This "statute [was] passed as a whole and not in parts or sections[,] ... each part or section should be construed in connection with every other part or section so as to produce a harmonious whole," ' "(See *Rajanayagam, supra,* 211 Cal.App.4th at 52.) Subdivisions (a), (b), and (c) of section 1170.95 were written together and as the text reveals, address *one* petition, *one* briefing process, and *one* determination by the court as to whether the petitioner, represented by counsel, has made a prima facie case following briefing. "[N]either other subdivisions of section 1170.95, nor subdivision (c) can bear the weight of [an interpretation that there are two different prima facie reviews.]" (*Cooper*, *supra*, 54 Cal.App.5th at 118.) As the Judicial Council understood, neither the drafters nor the Legislature intended to give the court the power to conduct its own prima facie determination and to

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[25] "At the hearing to determine whether the petitioner is *entitled* to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is *ineligible* for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3), emphasis added.)

summarily deny the petition of an unrepresented petitioner who is asserting eligibility for relief.

D. In Contrast To Other Resentencing Statutes, Determining Whether A Petitioner Is Eligible For A Resentencing Hearing Pursuant To Section 1170.95 Can Be A Complicated Factual And Legal Inquiry.

The lower court here and other courts have held that they should be able to summarily deny petitions as they are allowed to do in resentencing hearings under Proposition 47 and Proposition 36. (*Lewis, supra*, 43 Cal.App.5th at 1138, review granted March 18, 2020, S260598; *Verdugo, supra,* 44 Cal.App.5th at 329, review granted, March 18, 2020, S260493.) These same arguments were made in the legislative process as reflected in the Judicial Council letter and were rejected. The resentencing procedures in Propositions 36 and 47 are not analogous.

In Proposition 36, The Three Strikes Reform Act of 2012, (§ 1170.126) and Proposition 47, The Safe Neighborhood and Schools Act of 2014, (§ 1170.18), a court may review the convictions to determine eligibility for a resentencing with reference to undisputed documents. For example, in order to review a petition to see if a petitioner is eligible for a resentencing hearing as a result of Proposition 36, a court need only assess whether a petitioner's current conviction is for an offense that appears on a list of "strike" offenses, contained in sections 667.5 or 1170.12.[26] This information can be ascertained simply by reviewing an abstract of judgment. This document would not only

[26] In this discussion, amici are only addressing the process by which a court determines if a person is eligible for a re-sentencing hearing in these different statutes, not whether a person is eligible for resentencing following an evidentiary hearing. Thus, how a court determines whether to grant relief following a hearing under section 1170.95 and 1170.126 (Proposition 36), or section 1170.18 (Proposition 47) as compared to the statute at issue here, section 1170.95, is not at issue.

be found in a court file, but also in the central file of every person who is incarcerated at CDCR. (15 CCR § 3075.) Thus, prison officials, if inclined, could identify and notify candidates for relief. Proposition 47 reduced certain crimes from felonies to misdemeanors. A court presented with a petition for resentencing as a result of Proposition 47 is able to evaluate a person's eligibility for a resentencing hearing simply by looking to see if a person was convicted of a crime listed in section 1170.18, subdivision (a).

In contrast to the resentencing provisions of Propositions 36 and 47, a petitioner's eligibility for resentencing SB 1437 cannot be determined without a thorough review of the court records and facts underlying the convictions being challenged. Relevant facts include what role a person had in the offense, what actions a person took or did not take, and the theory of homicide liability that was used to convict the person. Under SB 1437, a court cannot determine whether a person may be eligible for a resentencing hearing simply be reviewing the crime of commitment. For example, for a person convicted of murder, an abstract of judgment merely states that a person was convicted of "section 187" and its degree. The only way to determine whether a petitioner was convicted as an accomplice after trial and what legal theories the jury was offered is to review, at a minimum, the jury instructions and argument of counsel. If the conviction was obtained pursuant to a plea and if there was a preliminary hearing or grand jury hearing, these transcripts would need to be reviewed. In other cases, other documents, such as a pre-sentence report, would need to be reviewed. There could be evidentiary problems, including hearsay objections that could be raised, to many such documents.

Moreover, even reviewing the full record of conviction may not provide enough information to a court. There is no requirement that a jury instructed

on multiple theories of homicide indicate upon which theory they relied to convict petitioner. There may be evidence that the petitioner can present in light of the new law that they--or the prosecution--would have had no reason to present at a trial before. For example, before the change in the law in felony murder *simpliciter*, the prosecutor did not have to prove, and the defendant had no reason to raise a reasonable doubt regarding: who was the "actual killer;" whether the defendant acted with reckless indifference to human life; or whether the defendant was a major participant in the felony. Thus, the statute allows the parties to present "new or additional evidence" to the court to meet their "respective burdens." The petitioner's initial burden is one of production, a showing that there is a prima facie case for relief.[27] Without counsel, a petitioner may be unable to present such information in order to obtain relief.

To be sure, there will be cases where the facts are unassailable, the petitioner is clearly not entitled to relief, and a judge will be able to determine that quickly with a review of undisputed documents. These cases can be addressed expeditiously while still complying with the statute and providing a petitioner the process he or she is due. However, more troubling than this is that there are going to be many cases – in fact there already have been—in which trial judges believe that the petitioner is ineligible and

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[27] Section 1170.95, subdivision (d) (3) states, "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens."

summarily deny the petition erroneously when in fact there are additional facts and arguments that can only emerge with the participation of counsel and briefing to the court.[28]

E. The Legislature Anticipated That There Would Be Meritless Petitions And So Created A Single Prima Facie Process To Weed Those Out Before The Court Orders An Evidentiary Hearing.

Section 1170.95, subdivision (c) does not require that everyone who files a petition asserting eligibility for resentencing be granted an evidentiary hearing. Instead, by mandating briefing, section 1170.95 allows the court to test the legal sufficiency of the petition before issuing an order to show cause. In this way it is similar to the process of petitioning a court for a writ of habeas corpus.[29] (See *People v. Romero* (1994) 8 Cal.4th 728, 737 ["When presented with a petition for writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief —and also whether the stated claims are for any reason procedurally barred."])

This briefing stage does not have to be onerous — if the facts of a petitioner's case are clearly without merit, the prosecutor can submit a simple brief that summarizes why the petitioner is not entitled to a resentencing hearing. Significantly, section 1170.95, subdivision (c) does not mandate a reply brief from petitioner's counsel. In the case of a clearly meritless petition, in response to a brief pleading from the prosecutor that clearly establishes, for example, that a petitioner acted alone, or was not

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[28] Appellant highlights some examples in his brief. (Appellant's Opening Brief on the Merits, pp. 32-34.)

[29] But not identical, as, for example, there is a right to counsel the filing of the petition in section 1170.95, and the prosecutor's brief is mandatory.

prosecuted under a theory of murder addressed in SB 1437, counsel for petitioner may simply submit on the record.

Conversely, extensive briefing is also unnecessary if the petitioner is clearly eligible and the parties so stipulate of if a court or jury has already made a determination that a person did not act as a major participant in a felony or with reckless indifference to human life. (Section 1170.95, subdivision (d)(2); *People v. Ramirez* (2019) 41 Cal.App.5th 923.)

The Legislature understood that there would be petitioners who were ineligible and amended the statute to attempt to dissuade petitioners. Initially, the legislation required the petitioner to make a "statement" that they were eligible.[30] This was amended to require a declaration. This amendment was made to discourage knowingly false petitions from being filed. Further, as detailed above, there was a sustained effort to teach people in prison about the new law.

III. THE COURT MAY REVIEW THE RECORD OF CONVICTION AT THE PRIMA FACIE HEARING BUT ONLY TO DETERMINE IF THE PETITIONER IS INELIGIBLE AS A MATTER OF LAW.

Allowing either party to rely upon the "record of conviction" was added to section 1170.95, subdivision (d)--the section that governs the evidentiary hearing-- during the amendment process. Legislators and others expressed concerns for victims and witnesses having to return to court.[31] Prosecutors

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[30] The version history of SB 1437 is available on California Legislative Information website: https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB1437.

[31] See the CDAA letter submitted to Senate Public Safety Committee, April 17, 2018 noting at the time, "[This] bill provides no exception to allow for the trial transcript to be used in a resentencing hearing."

also expressed concerns regarding the high bar set for the prosecution in section 1170.95, subdivision (d), as the prosecution must prove beyond a reasonable doubt that a petitioner is ineligible for relief.[32] In response to the latter concern, the Legislature kept this high bar for the prosecution.[33] However, the legislation was amended to allow either party to rely upon the record of conviction or introduce "new or additional evidence" to meet their "respective burdens." (See § 1170.95, subd. (d) (3).)

That the Legislature allowed the trial court to consider the record of conviction at a later evidentiary hearing should not be interpreted as undermining the prima facie standard that courts should apply at the earlier

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[32] This issue was raised in multiple committee hearings and in floor debate while the bill was in the Legislature. The CDAA letter, *supra*, fn. 31, raises this issue as well.

[33] The statute is clear that the prosecution must prove beyond a reasonalbe doubt that the petitioner is ineligible for relief. To hold, as one court has, (*People v. Duke* (2020) 55 Cal.App.5th 113), that the trial court may rely on an appellate opinion using the substantial evidence standard of review, the review used by appellate courts in reviewing sufficiency-of-the evidence claims in direct criminal appeals, is error. The legislative language is clear, as noted by opponents of the legislation. The prosecution must prove beyond a reasonable doubt that the petitioner is ineligible, and the court may not employ the "substantial evidence" test used in an appellate opinion to justify a denial. (See *People v. Lopez* (2020)___Cal.Rptr.3d___at *7 (2020 WL 6376642), disagreeing with *Duke, supra* ["[T]he substantial evidence standard is one applied by an appellate court on appeal of a judgment of conviction. It is not a standard of proof to be employed by a factfinder."]

prima facie determination. [34] At this prima facie stage, the court must limit its review as to whether the petitioner is ineligible as a matter of law and the petitioner cannot establish eligibility for resentencing, even with the presentation of new and additional evidence in an evidentiary hearing, as allowed for in section 1170.95, subdivision (d). The court must not engage in factfinding involving the weighing of evidence as indeed, there is no requirement to present evidence at this stage. (*People v Drayton* (2020) 47 Cal.App.5th 965, 980-981 ["[The] authority to make determinations without conducting an evidentiary hearing pursuant to section 1170.95, subd. (d) is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime."].) Instead, the trial court asks whether if, assuming the facts asserted in the

[34] Amici concur with Appellant's points and authorities regarding the prima facie burden as set forth in the Opening Brief on the Merits at pp. 18-19: A prima facie burden is a low bar, involving an issue of pleading, not of proof at which the court must take the factual allegations as true. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857.) The trial court must "draw every legitimate favorable inference" from the evidence of the petitioner [the party tasked with the showing]. (*Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109, 1117.) It 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.) The court must not weigh credibility or engage in fact finding. (*Aguilar, supra*, 25 Cal. 4th at p. 856.) Such a weighing of evidence and fact finding is to be done at an evidentiary hearing. (*People v. Johnson* (2015) 242 Cal.App.4th 1155, 1163.)

petition are true, the petitioner would be entitled to relief. If so, then an evidentiary hearing is warranted, should one be needed.[35]

This does not mean that the trial court must credit factual assertions that are untrue as a matter of law. There will be, and have been meritless petitions, as when it is undisputed that petitioner acted alone, or was not, nor could have been, prosecuted under a felony murder or natural and probable consequences theory. In these cases when the court's own records are: undisputable; admissible under the Evidence Code, including for the truth of the matter asserted; and reveal that the petitioner does not fall within the provisions of section 1170.95 as a matter of law, the court need not order an evidentiary hearing.

CONCLUSION

The Legislature took great care to ensure that every person filing a section 1170.95 petition has the benefit of legal representation before any court makes a dispositive determination ruling on their petition. Courts must honor that intent. The Legislature also set the petitioner's initial burden as a prima facie showing. Trial courts must allow petitioners their right to an evidentiary hearing unless they are ineligible as a matter of law.

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[35] An evidentiary hearing is not always required. Section 1170.95, subdivision (d) (2) allows the court to resentence some petitioners without one: "The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner."

November 16, 2020 Respectfully submitted,

/S/ KATE CHATFIELD
/S/ SENATOR NANCY SKINNER

CERTIFICATE OF WORD COUNT

This Application For Permission To File An Amici Curiae Brief and Brief contains 11,458 words.

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

/s/
KATE CHATFIELD

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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