Date of Hearing: July 13, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 775 (Becker) – As Amended July 6, 2021

SUMMARY: Clarifies that persons who were prosecuted under a theory of felony murder, the natural and probable consequences doctrine, or any theory in which malice was imputed to them based solely on their participation in a crime, and who were convicted of attempted murder or manslaughter, may apply for the same resentencing relief as persons who were convicted of murder under those same theories. Specifically, **this bill**:

1) Clarifies that the petition process through which qualifying defendants can have their convictions of felony murder or murder under the natural and probable consequences doctrine vacated and be resentenced, when specified conditions are satisfied, also applies to:

    a) Murder convictions under any theory in which malice is imputed to the defendant based solely on their participation in a crime;

    b) Attempted murder convictions under the natural and probable consequences doctrine; and,

    c) Manslaughter convictions.

d) Clarifies that upon receiving a petition in which the required information is set forth or readily ascertainable, the court shall appoint counsel if the petitioner has requested counsel.

e) Provides that a single prima facie hearing on a petition is to be held after briefing has been submitted.

f) Requires a court that declines to issue an order to show cause to provide a statement fully setting forth its reasons for declining to do so.

g) Specifies that when the court issues and order to show cause and holds a hearing to determine whether the petitioner is entitled to relief, the rules of evidence apply at that hearing.

h) Clarifies that at the hearing, the burden is on the prosecution to prove beyond a reasonable doubt that the petitioner is guilty of murder or attempted murder under the current law.

i) Clarifies that a finding that there is substantial evidence to support a conviction of murder, attempted murder, or manslaughter is insufficient to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing.

j) States that a person convicted of murder, attempted murder, or manslaughter, whose conviction is not final, may challenge the validity of that conviction on direct appeal rather

than via the petition.

k) Reduces the time a judge may place a resentenced petitioner on parole following completion of their sentence from three years to two years.

EXISTING LAW:

1) Defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

2) Defines malice for this purpose as either express or implied and defines those terms. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen. Code, § 188, subd. (a).)

3) Provides that for conviction of murder generally, a participant in a crime must have the mental state described as malice, unless specified criteria are met. (Pen. Code, § 188, subd. (a)(3).)

4) States that malice shall not be imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).)

5) Provides that when it is shown that the killing resulted from an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. (Pen. Code, § 188, subd. (b).)

6) Defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189, subd. (a).)

7) States that a participant in one of the specified felonies is liable for first degree murder only if one of the following is proven:

   a) The person was the actual killer;

   b) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or,

   c) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified. (Pen. Code, § 189, subd. (e).)

8) Allows a defendant to be convicted of first degree murder if the victim is a peace officer who was killed in the course of duty, where the defendant was a participant in one of the specified felonies and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of duty, regardless of the defendant's state of mind.

(Pen. Code, § 189, subd. (f).)

9) Prescribes the penalty for first degree murder as death, imprisonment in the state prison for life without the possibility of parole (LWOP), or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190, subd. (a).)

10) Provides that when a prosecutor charges a special circumstance enhancement and it is found true, a person found guilty of first degree murder who is not the actual killer, acted with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of one of specified felonies which resulted in death shall be punished by death or LWOP. (Pen. Code, § 190.2, subd. (d).)

11) Provides a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or second degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or second degree murder. (Pen. Code, § 1170.95.)

12) Provides that an attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. (Pen. Code, § 21a.)

13) Defines manslaughter as the unlawful killing of a human being without malice. (Pen. Code, § 192.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "When the Legislature passed Senate Bill 1437 (Skinner) in 2018, it changed California's long-held and unjust Felony Murder law that was overly punitive to those who did not kill or intend to kill. It allowed a pathway for people who took plea deals to lesser charges, such as manslaughter to apply for resentencing. It was a landmark piece of legislative that transformed our criminal justice system to be one that lives up to our ideals of fairness, justice, and equity. However, what has occurred since SB 1437 is that some courts incorrectly reasoned that it only applied to murder and not attempted murder. These courts have barred people from applying for re-sentencing, which has led to an absurd and unfair situation where people are eligible for resentencing if the victim died, but are ineligible if the victim did not die. This means the least culpable people are still serving decades in prison even though they should be eligible for relief.

   "SB 775 builds on SB 1437, by clarifying existing law to include voluntary manslaughter and attempted murder convictions as eligible for relief under SB 1437. This simple reform would assist hundreds of incarcerated people that the appellate courts deemed to have been excluded by the technical language of SB 1437, and the thousands of similar people who did not file petitions yet because of the court rulings."

2) **Background: Murder and the Enactment of SB 1437**: Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Malice may be express or implied. (Pen. Code, § 188, subd. (a).) "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature" – i.e., intent to kill. (Pen. Code, § 188, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188, subd. (a)(2).)

   There are legal theories under which a person can be convicted of murder even if they do not personally kill anyone and/or even if they do not intend to kill anyone. SB 1437 (Skinner), Chapter 1015, Statutes of 2018, changed the law by limiting the legal bases for convicting someone of the crime of murder. In particular, it limited the scope of vicarious liability (accomplice liability) for the crime of murder by changing the mens rea (mental state) requirement for that offense. SB 1437 provided that, except in limited circumstances, in order to be convicted of murder, a principal in a crime had to act with malice aforethought. SB 1437 precluded malice from being imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).) This is sometimes referred to as the "no imputation rule" for murder.

   a) **Felony Murder**: Prior to the enactment of SB 1437, any person involved in the commission of a specified felony (such as rape, murder, or robbery) that resulted in death was liable for first degree murder under the felony murder rule, regardless of their specific intent or conduct. (See *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275-276.) SB 1437 amended the felony murder statute so that the felony murder rule only applies if the defendant: 1) was the actual killer; 2) harbored the intent to kill and assisted the actual killer in committing first degree murder; or 3) was a major participant in the underlying felony and acted with reckless indifference to human life. (*Id*. at p. 276; Pen. Code, § 189, subd. (e).) However, this limitation does not apply to the killing of a police officer where the defendant knew or reasonably should have known the victim was a peace officer engaged in the performance of their duties. (Pen. Code, § 189, subd. (f).)

      SB 1437 also appears to have eliminated California's second degree felony murder law. (See Couzens, *Accomplice Liability for Murder: SB 1437* (June 2020) at pp. 20-21.) Second degree felony murder "imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life. [Citation.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1182.) Again, under SB 1437, malice cannot be imputed to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3); see *In re White* (2019) 34 Cal.App.5th 933, 937, fn. 2 [under Sen. Bill No. 1437 (2017–2018 Reg. Sess.) "the second degree felony-murder rule in California is eliminated"]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1142, fn. 3 [Sen. Bill No. 1437 "brings into question the ongoing viability of second degree felony murder in California"].)

   b) **Natural and Probable Consequences**: Prior to SB 1437, under the natural and probable consequences doctrine, an aider and abettor was guilty not only of the intended crime (target offense), but also for any other offense (nontarget offense) that was a natural and probable consequence of the crime aided and abetted. (*People v. Chiu* (2014) 59 Cal.4th 155, 158.) Liability for murder attached if the defendant aided and abetted a target

offense of which murder was the natural and probable consequence – i.e., murder was a reasonably foreseeable consequence of the crime aided and abetted. (*Id*. at pp. 161, 164-165.) It was irrelevant whether the aider and abettor had the intent to kill. (*Id*. at p. 164.)

The natural and probable consequences doctrine did not apply to first degree murder (*People v*. *Chiu, supra*, 59 Cal.4th at pp. 166-167); an aider and abettor could not be guilty of first degree murder unless they personally deliberated, premeditated, and intended to kill. (*Id*. at p. 166.) However, it did apply to second degree murder. (*Id*. at pp. 165-166.)

SB 1437 eliminated the natural and probable consequences rule as applied to murder. (*People v*. *Gentile* (2020) 10 Cal.5th 830, 843.)

3) **Retroactive Application of SB 1437 through the Petition Process**: SB 1437 made these changes to the felony murder rule and the natural and probable consequences doctrine retroactive by allowing a defendant who was convicted of murder before its passage to petition to vacate their murder conviction and be resentenced if their criminal conduct did not meet these newly-established criteria. (Pen. Code, § 1170.95.) Specifically, a person convicted of first or second degree murder may petition a trial court for resentencing "when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code, § 1170.95, subd. (a).)

4) **SB 1437 and Attempted Murder**: Courts are of differing views on the question of whether SB 1437 abrogated vicarious liability for attempted murder, in addition to murder. In engaging in statutory interpretation to determine the Legislature's intent, and noting the omission of any reference to attempted murder in SB 1437, some court have held that the abrogation of vicarious liability by SB 1437 does not apply to attempted murder. The issue is under review before the California Supreme Court. (See e.g. *People v*. *Lopez* (2019) 38 Cal.App.5th 1087, 1103, rev. gr. Nov. 13, 2019, S258175 [does not apply]; *People v*. *Sanchez* (2020) 46 Cal.App.5th 637, 642-644, rev. gr. June 10, 2020, S261768 [does apply]; *People v*. *Larios* (2019) 42 Cal.App.5th 956, 964-968, rev. gr. Feb. 26, 2020, S259983 [does apply].)

A separate question is, assuming SB 1437 abrogated vicarious liability for attempted murder, does an attempted murder conviction fall within the ambit of the petition process under Penal Code section 1170.95, which provides retroactive relief. While appellate courts have held that it does not, the California Supreme Court has also granted review in these cases. (See e.g. *People v*. *Larios* (2019) 42 Cal.App.5th 956, 964-968, rev. gr. Feb. 26, 2020, S259983 [does not]; *People v*. *Medrano* (2019) 42 Cal.App.5th 1001, 1015-1016, rev. gr. Mar. 11, 2020, S259948 [does not].)

In concluding that SB 1437 did not abrogate vicarious liability for attempted murder, the court in *Lopez, supra*, 38 Cal.App.5th at page 1104, noted:

> [T]here is nothing ambiguous in the language of Senate Bill 1437, which, in addition to the omission of any reference to attempted murder, expressly identifies its purpose as the need "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."
>
> [Citation.] Had the Legislature meant to bar convictions for attempted murder under the natural and probable consequences doctrine, it could easily have done so.

The court reasoned the Legislature's intent to exclude attempted murder from the ambit of SB 1437 reform was underscored by the language of the petition process, which does not reference attempted murder. (*Lopez, supra,* 38 Cal.App.5th at pp. 1104-1105.)

On the other hand, the court in *Larios, supra*, 42 Cal.App.5th at p. 968, held that SB 1437's abrogation of the natural and probable consequences doctrine necessarily applies to attempted murder.

> As noted by our state Supreme Court, "where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy [than the principal offender]." (*People v. Lee*[(2003)] 31 Cal.4th [613,] 624.) Our interpretation of Senate Bill 1437 comports with its stated goal of ensuring a defendant's culpability is premised upon his or her own actions and subjective mens rea. (Stats. 2018, ch. 1015, § 1, subds. (d), (g).)

(*Larios, supra*, 42 Cal.App.5th at p. 968.) The court nonetheless concluded the petition process for retroactive relief does not apply in light of the unambiguous language of the statute which does not reference persons convicted of attempted murder. (*Id.* at pp. 968-970.)

This bill would clarify that the petition process under Penal Code section 1170.95, providing retroactive SB 1437 relief, applies to attempted murder convictions under the natural and probable consequences doctrine. By implication, this would appear to clarify that SB 1437's abrogation of vicarious liability for murder applies to attempted murder.

5) **SB 1437 and Manslaughter**: Manslaughter is an unlawful killing without malice. It is a lesser offense to murder. (*People v. Rios* (2000) 23 Cal.4th450, 453, 464.) Sudden quarrel, heat of passion, or unreasonable self-defense can negate the malice element of murder. (*Id.* at pp. 460-461.)

A question has also been raised regarding SB 1437's application to manslaughter convictions. The court in *People v. Flores* (2020) 44 Cal.App.5th 985, concluded it does not apply. There the applicant had been convicted of manslaughter pursuant to a plea agreement. (*Id.* at p. 990.) Citing subdivision (a)(2) of Penal Code section 1170.95, the applicant contended that she had accepted a plea offer in lieu of a trial at which she could have been convicted of first or second degree murder under the now erroneous theories of vicarious

liability. (*Flores, supra*, at p. 994.) The court rejected her argument, holding that "[h]ad the Legislature intended to make section 1170.95 available to defendants convicted of manslaughter, it easily could have done so" and that the "absence of any reference to manslaughter implies the omission was intentional." (*Flores, supra*, at p. 993.) The applicant was found to be statutorily ineligible for relief under the petition process because manslaughter is not listed in Penal Code section 1170.95, subdivision (a). (*Flores, supra*, at pp. 990, 993, 997.)

People v. Cervantes (2020) 44 Cal.App.5th 884, also concluded that a manslaughter conviction did not qualify the applicant for resentencing under section 1170.95. The court held that the "decision not to include manslaughter in section 1170.95 falls within the Legislature's 'line-drawing' authority as a rational choice that is not constitutionally prohibited" (*Cervantes, supra,* at p. 888), rejecting, an equal protection challenge to section 1170.95.

This bill would clarify that the petition process for retroactive relief applies to manslaughter convictions by plea or jury trial. Specifically, this bill would provide for relief only if "[t]he petitioner could not presently be convicted of murder or attempted murder *because* of changes to Section 188 or 189 made effective January 1, 2019." (Emphasis added.) In other words, for resentencing to be granted, it would have to be established that the petitioner could not have been convicted of murder or attempted murder under the law as it reads after January 1, 2019. Changes made by SB 1437 to Penal Code sections 188 and 189 regard the liability of certain accomplices under first degree felony murder, the application of the natural and probable consequences doctrine, and, likely, conviction of second degree felony murder. Therefore, relief would be granted if the only way to have convicted the petitioner was through first degree felony murder, the natural and probable consequences doctrine, or, likely, second degree felony murder as they existed prior to January 1, 2019. (See Couzens, *supra*, at pp. 28-29.) Or, as this bill would clarify in a catchall provision, relief would be granted if the only way to have convicted the petitioner was under any other theory in which malice was imputed to them based solely on their participation in a crime. Changes made by SB 1437 to Penal Code section 188 prohibit imputing malice to a person based solely on their participation in a crime. (Pen. Code, § 188, subd. (a)(3).)

Because generally neither felony murder nor the natural and probable consequences doctrine are theories on which one can commit voluntary manslaughter (*People v. Turner* (2020) 45 Cal.App.5th 428, 439-440), the bill appears largely inapplicable to voluntary manslaughter convictions by jury trial. However, a petitioner may have pled guilty or no contest to voluntary manslaughter in order to forego the risk of being convicted of murder or attempted murder under one of these subsequently abrogated theories of liability. (*Ibid*.)

6) **Appointment of Counsel**: The California Supreme Court is also considering the issue of when the right to appointed counsel arises under the petition process of Penal Code section 1170.95, as enacted by SB 1437. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, rev. gr. Mar. 18, 2020, S260598; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 326, rev. gr. Mar. 18, 2020, S260493.) A petition for relief under Penal Code section 1170.95 must include: "(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." (§ 1170.95, subd. (b)(1).) If any of the information is missing "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." (Pen. Code, § 1170.95, subd. (b)(2).) Subdivision (c) provides:

> 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.

(Emphasis added.)

This has been interpreted as "a two-step process" for the court to determine if it should issue an order to show cause. (*People v. Verdugo, supra,* 44 Cal.App.5th at p. 327.) First, the court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (*Id.* at p. 332.) If the petitioner has made this initial prima facie showing, and has requested that counsel be appointed, the petitioner is then entitled to appointed counsel. (*Id.* at pp. 332-333; *People v. Lewis, supra,* 43 Cal.App.5th at p. 1140 ["trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner 'falls within the provisions' of the statute."].) The court then reviews the petition a second time. If, in light of the parties' briefing, it concludes the petitioner has made a prima facie showing that they are entitled to relief, it must issue an order to show cause. (*Verdugo, supra,* 44 Cal.App.5th at p. 328.)

This view allows a court to summarily deny a petition during the first step without appointing counsel or holding a hearing. (*Verdugo, supra,* 44 Cal.App.5th at pp. 332-333; *People v. Lewis, supra,* 43 Cal.App.5th at p. 1140.)[1]

This bill would clarify that the right to counsel attaches when the court receives the petition, if the petition includes the required information or where missing information can readily be ascertained by the court, and if the petitioner has requested counsel. Following briefing, the court would then determine whether a prima facie case for relief has been made.

7) **Appropriate Standard of Proof at a Hearing after an Order to Show Cause Issues on a Petition**: Penal Code section 1170.95 provides in pertinent part: "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 [section 1170.95]. . . . 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." (Pen.

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[1] Review has also been granted on the question of whether the court can consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief. (*People v. Lewis, supra,* 43 Cal.App.5th 1128; *People v. Verdugo, supra,* 44 Cal.App.5th 320, 326.)

Code, § 1170.95, subd. (c).) "Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner . . . ." (*Id*., subd. (d)(1).) "At the hearing . . . , the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. . . . The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Id*., subd. (d)(3).) The primary requirement for eligibility for resentencing under Penal Code section 1170.95 is that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code, § 1170.95, subd. (a)(3).)

The appellate courts are divided as to the appropriate standard of proof at a hearing conducted after the issuance of an order to show cause. (*People v. Mary H.* (2016) 5 Cal.App.5th 246, 255 ["'The function of a standard of proof … is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."' [Citation.]"].)

In *People v. Duke* (2020) 55 Cal.App.5th 113, 123, review granted January 13, 2021, S265309, the court concluded, "To carry its burden, the prosecution must . . . prove beyond a reasonable doubt that the defendant could still have been convicted of murder under the new law—in other words, that a reasonable jury could find the defendant guilty of murder with the requisite mental state for that degree of murder. This is essentially identical to the standard of substantial evidence…."

On the other hand, in *People v. Lopez* (2020) 56 Cal.App.5th 936, 949, review granted February 10, 2021, S265974, the court stated, "[W]e construe the statute as requiring the prosecutor to prove beyond a reasonable doubt each element of first or second degree murder under current law . . . ." The court explained:

> As noted, the 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 fact finder. The substantial evidence standard is a deferential one under which the court of appeal "'presume[s] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 104 [206 Cal.Rptr.3d 83].) As such, the "standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S. Ct. 2781], fn. omitted, superseded in part on other grounds by 28 U.S.C. § 2254(d).) By contrast, the section 1170.95 ineligibility inquiry is made by the trial court. And, in making that inquiry, the trial court may be confronted with new evidence (§ 1170.95, subd. (d)(3)) and frequently will be asked to find newly relevant facts not previously admitted or found by a trier of fact (i.e., whether the petitioner acted with malice or was a major participant in an underlying felony and acted with reckless indifference to

> human life) (§§ 188, subd. (a)(3), 189, subd. (e)(3)). Given these circumstances, the rationale underlying the application of the deferential substantial evidence standard is not implicated.

(*People v. Lopez, supra*, 56 Cal.App.5th at pp. 950-951.)

This bill would clarify that the substantial evidence standard is not the applicable standard in determining whether a petitioner is ineligible for resentencing. The bill would expressly state that a finding of substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing. The bill would also clarify that the prosecution's burden at the hearing is to prove beyond a reasonable doubt that the petitioner is guilty of murder or attempted murder based on the new law.

8) **Application of the Rules of Evidence at the Eligibility Hearing**: At the evidentiary hearing on eligibility for relief following the issuance of an order to show cause, the parties may rely on the record of conviction or offer new or additional evidence to meet their respective burdens. (Pen. Code, § 1170.95, subdivision (d)(3).) The "record of conviction" consists of "those record documents reliably reflecting the facts of the offense for which the defendant has been convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the accusatory pleadings, appellate court opinions, preliminary hearing and trial transcripts, a change of plea form, a reporter's transcript of the defendant's change of plea, and the abstract of judgment. (22A Ca. Jur. Criminal Law: Posttrial Proceedings § 306.)

This bill would specify that the rules of evidence apply at the hearing on eligibility. It is not entirely clear whether this means a statement in the record of conviction that is offered to prove the truth of the matter stated would have to fall within an exception to the hearsay rule in order to be admissible at the hearing. This raises a concern that parties would be required to recall witnesses from the trial to testify again at the Evidence Code section 1170.95 evidentiary hearing, even where there is a prior transcript of the trial testimony as part of the record of conviction; this may not be possible in older cases in which witnesses are no longer available.

Importantly, a criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and California Constitutions, to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) However, there is an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant and was subject to cross-examination. This exception is codified in the Evidence Code, which provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] … [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).) An absent witness is not unavailable in the constitutional sense unless the prosecution has made a good faith effort to obtain their presence at the trial. (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) Similarly, under the Evidence Code, a witness is unavailable when they are absent from the hearing and the proponent of their statement has been unable to procure their attendance by the court's

process despite having exercised reasonable diligence. (Evid. Code, § 240, subd. (a)(5).) There are additional reasons a court could find a witness unavailable, including if the witness is deceased or unable to attend due to physical or mental illness or infirmity, or absent and the court is unable to compel their presence, or if the witness would suffer physical or mental trauma from being required to testify, as established by a doctor/psychiatrist/psychologist. (Evid. Code, § 240, subds. (a)(3), (a)(4) & (c).)

Thus, it would appear that assuming the prosecution must prove witness unavailability in order to use prior testimony from the record of conviction, they would be able to make this showing in a number of circumstances. That being said, the author should consider clarifying this point.

9) **Raising SB 1437 on Direct Appeal**: In *Gentile*, the California Supreme Court found that the petition process set forth in Penal Code section 1170.95 is the exclusive remedy for retroactive SB 1437 relief on nonfinal judgments. (*People v. Gentile*, *supra*, 10 Cal.5th at pp. 851–859.) Generally, the rule is that a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

This bill would provide that where a conviction is not final, it may be challenged on SB 1437 grounds on direct appeal from that conviction.

10) **Argument in Support**: According to the *California Public Defenders Association*, a sponsor of this bill, "For decades, under California's felony murder rule and another old doctrine known as the "natural and probable consequences doctrine," all people who committed a crime – even a misdemeanor –could be charged with murder if one participant caused the death of another. Thus, people who never killed anyone, did not aid and abet the murder, and never even intended for a death to occur could be charged with murder and get a life sentence in prison. Then in 2018, the Legislature passed SB 1437 (Skinner, 2018) which changed this archaic and unjust law. SB 1437 also allowed people who were eligible for relief under the new law to go back to court to ask to be resentenced. The passage of SB 1437 meant that people could no longer be prosecuted for murder solely because a death occurred. SB 1437 also allowed eligible people who took plea deals to apply for resentencing. Many of these pleas were to manslaughter or other charges less than murder because the District Attorney had already determined they were not culpable for murder.

"Although SB 1437 changed California's long-held and unjust homicide laws that were overly punitive to those who did not kill or intend to kill, some appellate courts have reasoned, incorrectly, that SB 1437 applies only to murder and not to attempted murder. These courts have also barred people from applying for re-sentencing. This has led to an absurd and unfair situation where people are eligible for resentencing if the victim died but are ineligible if the victim did not die. Furthermore, although SB 1437 allowed a pathway for people who took pleas deals to lesser charges, such as manslaughter, to apply for resentencing. However, the bill did not explicitly include these people for resentencing. As a result, this has led to a situation where the least culpable people are still serving decades in prison even though they should be eligible for relief.

"SB 775 clarifies existing law to include voluntary manslaughter and attempted murder convictions as eligible for relief under SB 1437. This simple reform would assist hundreds of

incarcerated people who have been deemed by the appellate courts to be excluded by the technical language of SB 1437, and the thousands of similar people who did not file petitions yet because of the court rulings. For these reasons, CPDA is proud to sponsor SB 775."

11) **Argument in Opposition**: According to the *California District Attorneys Association*, "The purpose of SB 1437 was to reduce lengthy sentences that were not commensurate with the culpability of the individual. The language of SB 1437 regarding the new requirements for imposing first degree *felony murder* liability is adopted from Penal Code Section 190.2, which in turn, derives from United States Supreme Court cases imposing limitations on punishing non-killers in felony murder cases through an Eighth Amendment analysis. The Court premised its arguments in those cases on the idea that punishing someone by death (or life without the possibility of parole) could be unconstitutionally disproportionate to the offense. The punishment for first degree murder is "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." The punishment for second degree murder is a state prison term of 15 years to life.

"The sentences imposed for the crimes of voluntary manslaughter and attempted murder are significantly shorter than the sentences imposed for murder. The punishment for voluntary manslaughter is imprisonment for 3, 6, or 11 years. The punishment for attempted murder is imprisonment for 5, 7, or 9 years. If a jury finds a premeditation allegation to be true (which demonstrates an intent to kill and falls outside of both SB 1437 and this bill), then the punishment is life with the possibility of parole after 7 years.

"No state or federal court case has ever held that the sentences imposed for voluntary manslaughter, attempted murder, or premeditated attempted murder are "not commensurate with the culpability of the individual." Moreover, nothing in SB 1437 indicated that the sentences for the crimes of voluntary manslaughter or attempted murder were not commensurate with an individual's culpability for the crime.

"In addition to the substantive objections of this bill, there are similar logistical issues in this bill as the ones in SB 1437 that are still the subject of timely and costly litigation. The application of this bill to convictions that resulted from negotiated pleas that contain no admissible record of conviction for an evidentiary hearing is problematic.

"Additionally, the effect of a number of the procedural provisions of the bill would be to allow everyone convicted of voluntary manslaughter or attempted murder to successfully petition to have a resentencing hearing regardless of the underlying theory advanced by the prosecution. Combined with the burden on the prosecution to prove beyond a reasonable doubt the petitioner's ineligibility for a resentencing, this bill will effectively authorize the release of those who attempted to kill and those who played major roles in the killing of others.

"We are committed to working to find a reasonable and measured approach to felony murder reform. Unfortunately, this bill falls short and creates some potentially disastrous and costly problems that render this bill unworkable."

12) **Related Legislation**: SB 300 (Cortese), of the 2020-2021 Legislative Session, would repeal the provision of law requiring punishment by death or imprisonment for LWOP for a person convicted of murder in the first degree who is not the actual killer, but acted with reckless

indifference for human life as a major participant in specified dangerous felonies. SB 300 is pending consideration on the Senate Floor.

13) **Prior Legislation**:

a) SB 1437 (Skinner), Chapter 1015, Statutes of 2018, limited liability for individuals based on a theory of first or second degree felony murder, and allowed individuals previously sentenced on a theory of felony murder to petition for resentencing if they meet specified qualifications.

b) AB 3104 (Cooper), of the 2017-2018 Legislative Session, would have limited the sentence for specified first degree murder convictions where the person is not the actual killer, but participated in specified felonies, to 25 years to life. Would specify that a person who is not the actual killer and who does not act with reckless indifference to human life and is not a major participant in the crime, but who is an accomplice in a specified felony that results in the death of a person, is guilty of second degree murder, punishable by 15 years to life. AB 3104 died on the Assembly Inactive File.

c) SB 878 (Hayden), of the 1999-2000 Legislative Session, would have required the court in a case involving felony murder with a defendant who did not physically or directly commit the murder, whether imposition of a sentence of first degree murder is proportionate to the offense committed and to the defendant's culpability in committing that offense by considering specified criteria and to state its reasons on the record. SB 878 failed passage on the Senate Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA) (Sponsor)
California Attorneys for Criminal Justice (Co-Sponsor)
ACLU California Action
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
California Catholic Conference
Californians for Safety and Justice
Californians United for a Responsible Budget (CURB)
Drug Policy Alliance
Ella Baker Center for Human Rights
Fresno Barrios Unidos
Friends Committee on Legislation of California
Initiate Justice
Legal Services for Prisoners With Children
National Association of Social Workers, California Chapter
Re:store Justice
San Francisco Public Defender
Smart Justice California
We the People - San Diego
Young Women's Freedom Center

Opposition

California District Attorneys Association
Los Angeles Professional Peace Officers Association
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego District Attorneys Association

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