HOT ISSUES IN S.B. 1437 LITIGATION

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Senate Bill No. 1437 is almost four years old. Some issues have been settled, and new issues are emerging. In the early days, the superior courts were finding there was not a prima facie case. After many of those decisions have been overturned, the new area of most – but not all – of the litigation concerns the evidentiary hearing under Penal Code section 1172.6, subdivision (d)(3) (formerly section 1170.95).

A. The Policy of S.B. 1437

In litigating S.B. 1437, it sometimes useful to return to the policy for the legislation. The California Supreme Court has recognized: "In 2017, the Legislature adopted a concurrent resolution declaring a need to reform the state's homicide law 'to more equitably sentence offenders in accordance with their involvement in the crime.' (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175 (Resolution 48).) The next year, the Legislature followed through with Senate Bill 1437, which made significant changes to the scope of murder liability for those who were neither the actual killers nor intended to kill anyone, including certain individuals formerly subject to punishment on a felony-murder theory. (See Stats. 2018, ch. 1015, § 1, subd. (c) [measure intended to address need for change identified in Resolution 48].)" (*People v. Strong* (2022) 13 Cal.5th 698, 707.)

As the court in *People v. Ramirez* (2019) 41 Cal.App.5th 923 observed:

> "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) In this case, we have the Legislature's own expression of its intent and the purpose of the law in the statute itself. (See Stats. 2018, ch. 1015, § 1.) In section 1 of the statute, the Legislature declared in relevant part as follows: [¶] "(a) . . . . [¶] "(b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides. [¶] "(c) . . . . [¶] "(d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability. [¶] "(e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual. [¶] "(f) It is necessary to amend the felony murder rule and

> the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life. [¶] "(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea."

(*Id*. at p. 931.)

As for felony murder, it was noted that California had an "unusually broad felony-murder doctrine." (See *Jackson v. Giubino* (9th Cir. 2004) 364 F.3d 1002, 1011.) "Almost since its inception, the felony-murder rule has been criticized by some courts and commentators as an artificial and unnecessary doctrine that erodes the relation between criminal liability and moral culpability." (*People v. Vang* (2022) 82 Cal.App.5th 64, 81.)

B. Evidence Considered at the Prima Facie Stage

Some controversies remain at the prima facie review stage. There is currently a conflict in the law whether the court can review the transcript of the preliminary hearing to determine if there is a prima facie case, especially after the defendant pled and ongoing controversies whether the court can consider facts from appellate court opinions and if certain convictions automatically preclude relief.

1. Reliance on the preliminary hearing transcript

The early cases held the court may review the preliminary hearing transcript. (*People v. Nguyen* (2020) 53 Cal.App.5th 1154, 1167; see also *People v. Perez* (2020) 54 Cal.App.5th 896, 905-906,[1] review granted Dec. 9, 2020, S265254.) This was based on an old practice of the superior courts resolving factual disputes at the prima facie case by reviewing the record of conviction. The Supreme Court has since made it clear that the factual disputes can be resolved only after issuing an order to show cause; all inferences in favor of the petitioner must be made at the prima facie stage. (*People v. Lewis* (2021) 11 Cal.5th 952, 971; see also *People v. Drayton* (2020) 47 Cal.App.5th 965, 980.)

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[1]The court in *People v. Davenport* (2021) 71 Cal.App.5th 476, however, distinguished *Perez* because the defendant here did not stipulate the transcript of the preliminary hearing as the basis of the plea. (*Id*. at pp. 483-484.)

Some prosecutors continue to cite *Nguyen* or related cases. However, after "*Nguyen* . . . [was] decided, our Supreme Court has emphasized that the prima facie review is limited, and 'the "prima facie bar was intentionally and correctly set very low." ' (*Lewis, supra*, 11 Cal.5th at p. 972.) Furthermore, at the prima facie stage, the court is prohibited from engaging in ' "factfinding involving the weighing of evidence or the exercise of discretion." ' (*Ibid*.) Instead, the court must ' " 'take[ ] [the] petitioner's factual allegations as true' " ' and make a ' " 'preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved.' " ' (*Id*. at p. 971.) Only where the record of conviction contains facts conclusively refuting the allegations in the petition may the court make credibility determinations adverse to the petitioner. (*Ibid*. . . . .) Additionally, it is now well settled that the prima facie determination is a question of law. (*Lewis*, at p. 966.) To the extent *Nguyen* suggests a section 1170.95 petition may be denied based on sufficient or substantial evidence to support a conclusion the petitioner was convicted under a valid theory, it is contrary to *Lewis*. (*Nguyen, supra*, 53 Cal.App.5th at pp. 1167–1168; see *Lewis*, at p. 966.)" (*People v. Flores* (2022) 76 Cal.App.5th 974, 991.) Further, S.B. 775 now prohibits the court from relying on hearsay conveyed through the peace officer under Penal Code section 872, subdivision (b). (*Id*. at p. 988.)

Even before *Lewis*, the court in *People v. Rivera* (2021) 62 Cal.App.5th 217 disagreed that the court may rely on the transcript of the defendant's grand jury proceeding. "We disagree with *Nguyen* to the extent it suggests that relief under section 1170.95 is precluded as a matter of law simply because there is no mention in the preplea record of an underlying offense that could support liability for felony murder or murder under the natural and probable consequences doctrine. (See *Nguyen, supra*, 53 Cal.App.5th at pp. 1167-1168.) In our view, when a petitioner disputes that the evidence presented at a preplea proceeding demonstrates his or her guilt under a still-valid theory of murder, and no ' "readily ascertainable facts" ' definitively prove otherwise, a trial court cannot deny a petition at the prima facie stage without resorting to ' "factfinding involving the weighing of evidence or the exercise of discretion." ' " (*Id*. at p. 238.) A grand jury or a magistrate only finds whether there is probable cause. While a grand jury receives instructions, " a grand jury's return of an indictment after being instructed on only certain theories of murder does not reflect a determination that those are the only viable theories available, much less that murder has been proven under them beyond a reasonable doubt." (*Id*. at p. 237.)

Some prosecutors argue the preliminary hearing transcript is dispositive when the defendant stipulates the transcript as the factual basis for a plea. However, stipulating to a factual basis should not preclude relief because a factual basis might be no more than sufficiency of evidence; it does not follow that the allegation can be proven beyond a reasonable doubt. (See *People v. French* (2008) 43 Cal.4th 36, 52.) In *Rivera, supra,* 62 Cal.App.5th 217, the defendant stipulated to the grand jury transcript as the factual basis for

the plea, but the Court of Appeal held this did not show as a matter of law he was ineligible for an order to show cause, stating "[h]is stipulation to the grand jury transcript as the factual basis for his plea does not establish" that he admitted acting with malice. (*Id*. at p. 235.)

2. Considering the facts from an appellate court opinion

The Supreme Court said in *Lewis, supra,* 11 Cal.5th at pages 970 to 971 that the superior court can rely on the appellate court opinion from the underlying conviction. However, S.B. 775 amended subdivision (d)(3) to state that generally "[t]he admission of evidence in the hearing shall be governed by the Evidence Code." Further, "[t]he court may also consider the procedural history of the case recited in any prior appellate opinion." The implication is that the court cannot consider the factual background of the opinion, as this is not admissible under the Evidence Code. Consequently, one appellate court has said the superior court cannot consider the factual summary of an appellate opinion at a hearing under subdivision (d)(3). (*People v. Cooper* (2022) 77 Cal.App.5th 393, 400 fn. 9.) The court in *Flores, supra,* 76 Cal.App.5th 974 held the court cannot consider the factual summary of an appellate court opinion in the prima facie stage. (*Id*. at p. 988.)

3. Record of the Codefendant's case

Sometimes, the district attorney presents the record of the codefendant's conviction to show the defendant's role in the crime. This is improper. (*Flores, supra,* 76 Cal.App.5th at p. 988.)

4. Special circumstances

The Supreme Court determined that the existence of a felony murder special circumstance before 2015 did not automatically preclude relief for an aider and abettor under S.B. 1437. (*Strong, supra,* 13 Cal.5th at pp. 717-718.) That is because the Supreme Court had narrowed the scope of the felony murder special circumstance for aiders and abettors in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522.

There are other special circumstances that require the defendant to be the actual killer or have the intent to kill, and this would appear to preclude relief under S.B. 1437. In *People v. Bentley* (2020) 55 Cal.App.5th 150 (review granted on other grounds Dec. 16, 2020 and dismissed Dec. 15, 2021, S265455), the court decided the drive-by special circumstance automatically precluded relief because it required the defendant to be the actual killer or have the intent to kill. (*Id*. at p. 154.)

However, in *People v. Pacheco* (2022) 76 Cal.App.5th 118 (review granted on other grounds May 18, 2022, S274102), the court decided the gang murder special circumstance did not automatically preclude relief. The statute required the defendant and the actual killer have the intent to kill, the defendant actively participated in a criminal street gang, and the murder be carried out to further the activities of the gang, but it did not require the defendant directly aid and abet in the murder. (*Id*. at pp. 127-128.) This issue is on review in *People v. Curiel* [nonpub. opn.] (review granted Jan. 26, 2022, S272238).

5. Personal use of a firearm

An enhancement for personally using a firearm does not automatically mean the defendant was the actual killer. The firearm could have been used without malice. (*People v. Offley* (2020) 48 Cal.App.5th 588, 600.) Alternatively, the firearm might have only been displayed. (*People v. Garrison* (2021) 73 Cal.App.5th 735, 743.)

6. Second degree felony murder

Some actual killers are entitled to relief under S.B. 1437 or at least an order to show cause. If one of the theories was second degree felony murder, this theory is not valid under current law. (*People v. DeHuff* (2021) 63 Cal.App.5th 428, 442; see also *Strong, supra,* 13 Cal.5th at p. 707, fn. 1.)

C. Theories for a Conviction Under Current Law

1. Is there direct aiding and abetting in an implied malice murder?

S.B. 1437 applies to a "person convicted of felony murder or murder under the *natural and probable consequences doctrine* or *other theory under which malice is imputed to a person based solely on that person's participation in a crime*, attempted murder under the natural and probable consequences doctrine, or manslaughter . . . . " (Pen. Code, § 1172.6, subd. (a), italics added.) There is a bit of tension between the two italicized phrases.

There are two natural and probable consequence theories that applies to homicide. There is the natural and probable consequence theory of aiding and abetting. Generally, one who aids and abets in the commission of a crime is as guilty as the perpetrator. (Pen. Code, § 31.) "An aider and abettor is one who acts with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Chiu* (2014) 59 Cal.4th 155, 161, superseded by statute as stated in *People v. Gentile* (2020) 10 Cal.5th 830, 849.) A "person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the

unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beemon* (1984) 35 Cal.3d 547, 561.)

Before 2014, it was possible for a person, who was not the actual killer, to be convicted of first degree murder without malice or committing an enumerated felony. Under the natural and probable consequence theory of aiding and abetting, it was sufficient for the defendant to aid and abet in the commission of a crime and murder was a natural and probable consequence of the crime. "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." (*Chiu, supra,* 59 Cal.4th at p. 161, internal quotation marks omitted, brackets in original.) "A nontarget offense is a natural and probable consequence of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*Chiu, supra*, 59 Cal.4th at pp. 161-162.)

As with aiding and abetting, a defendant can enter a conspiracy to commit a crime where murder is a natural and probable consequence, even if a killing is not contemplated at the time the defendant who entered the conspiracy. In these situations, the malice of the actual killer is "imputed" on the aider and abettor or on the co-conspirator. (See, e.g., *People v. Johnson* (2013) 221 Cal.App.4th 623, 630-631.) The Supreme Court in *Chiu* decided that a person convicted of murder under the natural and probable consequence theory is guilty of only second degree murder. (*Id*. at p. 166.) After S.B. 1437, a defendant cannot be convicted of even second degree murder under the natural and probable consequence theory of aiding and abetting or of a conspiracy; malice can no longer be imputed. (Pen. Code, § 188, subd. (a)(3); *Gentile, supra,* 10 Cal.5th at pp. 838-839.)

There is also the natural and probable consequence doctrine for second degree murder. Even if the defendant does not have the intent to kill, he or she could act with malice when he or she does something so reckless as to endanger the lives of others. Malice is thus implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 189, subd. (a).) "We have noted in the past that this definition of implied malice 'has never proved of much assistance in defining the concept in concrete terms' [citation], and that juries instead should be instructed that malice is implied 'when the killing results from an intentional act, the natural

consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

Courts have made it clear that the natural and probable consequence language for implied malice is not the same as the natural and probable consequence doctrine for aiding and abetting. (*People v. Daniel* (2020) 57 Cal.App.5th 666, 677, fn. 4, review granted Feb. 24, 2021, S266366; see also *People v. Roldan* (2020) 56 Cal.App.5th 997, 1004, review granted Jan. 20, 2021, S266031 [*Watson* murder].)

On one hand, the natural and probable consequence theory of implied malice when the defendant is not the actual killer looks a lot like the natural and probable consequence doctrine for aiding and abetting. In both situations, the defendant lacks the intent to kill and did an act, a natural and probable consequence of which, leads to a confederate killing the victim. On the other hand, malice is not being imputed. The trier of fact necessarily finds the defendant harbored malice. This is why several courts of appeal have held that aiding and abetting in an implied malice murder is a valid theory. (*People v. Glukhoy* (2022) 77 Cal.App.5th 576, 592, review granted July 27, 2022, S274792; *People v. Powell* (2021) 63 Cal.App.5th 689, 712-713; *People v. Superior Court (Valenzuela)* (2021) 73 Cal.App.5th 485, 499.) There were two recent cases holding that the defendant can be guilty as a direct aider and abettor in an implied malice murder. In both cases, the defendant was fully participating in a group attack against the victim. (*People v. Vizcarra* (2022) 84 Cal.App.5th 377, 389-393; *People v. Schell* (2022) 84 Cal.App.5th 437, 442-443.)

No published case before S.B. 1437 discussed whether there is such a thing as aiding and abetting in an implied malice murder. Much of the controversy stems from the decision in *Gentile, supra*, 10 Cal.5th 830. A jury convicted the defendant of second degree murder, and one of the theories was the natural and probable cause doctrine of aiding and abetting. (*Id*. at p. 841.) After the filing of an S.B. 1437 petition, the prosecution sought to salvage the conviction by concocting a "hybrid" natural and probable consequence theory to aiding and abetting in a murder. It asserted the conviction was still valid if the trier of fact finds the defendant aided the confederate in a target offense, the natural and probable consequence was murder, and the defendant possessed malice. (*Id*. at p. 849.) The court rejected the notion that S.B. 1437 permitted a hybrid natural and probable consequence doctrine to aiding and abetting. (*Ibid*.) At the same time, in what was really dictum, the court said a defendant can be convicted of "direct" aiding and abetting of an implied malice murder: "notwithstanding Senate Bill 1437's elimination of natural and probable consequences liability for second degree murder, an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life." (*Id*. at p. 850.) However, this

formulation appears to be the same as the district attorney's hybrid natural and probable consequence theory the court rejected a few paragraphs earlier. This appears to be an issue on review in *People v. Reyes* [nonpub. opn.] (review granted Oct. 27, 2021, S270723).

The court in *Powell, supra,* 63 Cal.App.5th 689 spelled out the elements to aiding and abetting in an implied malice murder. For a defendant "to be liable for an implied malice murder" as a direct aider and abettor, (1) the defendant "must, by words or conduct, aid the commission of the life-endangering act" (2) "knowledge that the perpetrator intended to commit the act," (3) the defendant must have the "intent to aid the perpetrator in the commission of the act," (4) with "knowledge that the act is dangerous to human life," and (5) the defendant must act "in conscious disregard for human life" (*Id*. at p. 713.)

The Supreme Court has explained that the intent of a direct aider and abettor must be at least what is required for the perpetrator. "[A]n aider and abettor's mental state must be at least that required of the direct perpetrator. To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citation.] When the offense charged is a specific intent crime, the accomplice must share the specific intent of the perpetrator; this occurs when the accomplice knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118, internal quotation marks omitted.) Thus, if there is such a thing as direct aiding and abetting in an implied malice murder, this would apply only if the perpetrator exhibited implied malice. If the perpetrator acted with express malice, a direct aider and abettor could not be guilty of second degree murder. Otherwise, this is just a reformulation some sort of hybrid natural and probable consequence theory of aiding and abetting that the Supreme Court rejected in *Gentile, supra,* 10 Cal.5th at page 849.

The United States Supreme Court has also rejected an attempt to reformulate the homicide doctrine as a means to avoid precedent. It had held in *Enmund v. Florida* (1982) 458 U.S. 782 that simply being a getaway driver in a robbery that results in a killing is insufficient to qualify for the death penalty under the Eighth and Fourteenth Amendments (*Id*. at pp. 798-799.) The Court returned to the subject of when an accomplice is eligible for the death penalty in *Tison v. Arizona* (1989) 481 U.S. 137. The defendant was not the actual killer. He lacked the intent to kill, but he was instead found to have an implied intent to kill in the sense that he "intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." (*Id*. at p. 150, internal quotation marks omitted.) The Supreme Court said Arizona's "attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder

rule itself. Petitioners do not fall within the 'intent to kill' category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment." (*Id*. at p. 151.) By analogy, it could be argued the new theory of aiding and abetting in an implied malice murder is merely a reformulation of the invalid theory of the natural and probable consequence theory of aiding and abetting.

2. Did the instructions permit the jury to convict the defendant under the natural and probable consequence theory of aiding and abetting, despite the absence of an explicit instruction on the theory?

Even if the court never gave the standard jury instruction on the natural and probable consequence doctrine of aiding and abetting, it is possible in some older cases that the jury convicted the defendant on this doctrine. The standard CALJIC instruction for direct aiding and abetting only said that the defendant need to aid and abet in the "crime." If the court also instructed the jury on the natural and probable consequence theory of implied malice, the jury would be able to combine the two instructions to find a defendant guilty of second degree murder if he intended to aid and abet in a "crime" where a natural and probable consequence was murder. This would be the same as the natural and probable consequence doctrine of aiding and abetting, even if the court does not give this explicit version of the aiding and abetting instruction. (*People v. Langi* (2022) 73 Cal.App.5th 972, 980-983.) Consequently, courts have disapproved of the use of this language in homicide cases. (*People v. Prettyman* (1996) 14 Cal.4th 248, 257-258, 268-269; *Glukhoy, supra,* 77 Cal.App.5th at pp.at p. 592, review granted July 27, 2022, S274792; *Powell, supra,* 63 Cal.App.5th at p. 714; but see *People v. Lopez* (2021) 73 Cal.App.5th 327, 337 [the instruction did not lead to a natural and probable cause theory to the first degree murder convictions].)

3. Conspiracy

Like aiding and abetting, one can directly conspire to commit murder, or one can conspire to commit a target offense where a natural and probable consequence is murder. S.B. 775 applies to conspiracy when the jury is not instructed that the defendant must have the specific intent to commit murder. (*People v. Whitson* (2022) 79 Cal.App.5th 22, 34-35.) Sometimes, the court instructs on an uncharged conspiracy to permit the admission of statements by the codefendants. One needs to be careful to determine if the instruction might permit the jury to convict the defendant on a conspiracy theory under the natural and probable consequence theory.

4. Personally killed vs. proximate cause

S.B. 1437 permits a felony murder conviction if the defendant is the "actual killer." (Pen. Code, § 188, subd. (e)(1).) By implication, one who is not an actual killer would be an aider and abettor. The issue also arises when the defendant is the only culprit but the victim died indirectly from the defendant's actions.

In *Vang, supra,* 82 Cal.App.5th 64, the court held the defendant was not the actual killer, though acting alone, when the victim of a kidnapping jumped out of the car and died. (*Id*. at pp. 84-91.) It relied on the meaning of actual killer for the felony murder special circumstance (Pen. Code, § 190.2, subds. (a)(17) & (b)). "[T]he meaning of actual killer under section 190.2 is literal: the actual killer is the one who personally killed the victim. [Citation.] To personally kill the victim is to directly cause the victim's death, not just to proximately cause it. [Citation.] While handing a murder weapon to the person who actually kills the victim might result in liability as an aider and abettor under section 190.2, subdivision (c) or (d), it does not qualify as an act of an 'actual killer' under section 190.2, subdivision (b)." (*Id*. at p. 90.) Indeed, case law states "[p]roximately causing and personally inflicting harm are two different things." (*People v. Bland* (2002) 28 Cal.4th 313, 336, 337-338 [defendant who did not fire bullets that hit victims "did not personally inflict, but he may have proximately caused, the harm"]; see also *People v. Lopez* (2022) 78 Cal.App.5th 1, 17-19 [lack of evidence the defendant was the one who bludgeoned the victim to death].)

Nonetheless, the proximate cause doctrine has been applied in S.B. 1437 cases to avoid reducing a conviction. In *People v. Garcia* (2022) 82 Cal.App.5th 956, the court disagreed with *Vang* that "actual killer" under Penal Code section 189 has the same meaning as it does for section 190.2, but even if it did, the court concluded that the defendant personally killed the victim when the victim died of a heart attack during a robbery. (*Id*. at pp. 959-970.)

The question of proximate cause is whether the death was caused by an intervening supervening cause. (See, e.g., *People v. Roberts* (1992) 2 Cal.4th 271, 312 [bad medical care is not an intervening cause]; *People v. Stanley* (2006) 39 Cal.4th 913, 945-946 [apparent medical malpractice]; *People v. Scott* (1997) 15 Cal.4th 1188, 1200 [illness after gunshot]; *People v. McGee* (1947) 31 Cal.2d 229, 241 [substandard medical care]; *People v. Watter* (1996) 51 Cal.App.4th 948, 953 [though victim had pre-existing condition].) It is also an issue when there are "concurrent causes" of death; for example, when multiple defendants shoot a victim and it is unclear which was the fatal shot. (See, e.g, *People v. Sanchez* (2001) 26 Cal.4th 834, 847; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 61; *People v. Pock* (1993) 19 Cal.App.4th 1263, 1275.)

The Supreme Court has granted review on the following questions: (1) Does the "substantial concurrent causation" theory of liability of *Sanchez, supra,* 26 Cal.4th 834 permit a conviction for first degree murder if the defendant did not fire the shot that killed the victim? (2) What impact, if any, do *People v. Chiu* (2014) 59 Cal.4th 155 and Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 1, subd. (f)) have on the rule of *Sanchez*? (3) the significance, if any, of Senate Bill No. 775 (Stats. 2021, ch. 551) to the issues presented in this case? (*People v. Carney* [nonpub. opn.], review granted Mar. 25, 2020, S260063.)

5. Provocative act murder

Courts have held the defendant is not eligible for relief under S.B. 1437 if he or she was convicted under the provocative act doctrine. (*People v. Mancilla* (2021) 67 Cal.App.5th 854, 867-868; *People v. Swanson* (2020) 57 Cal.App.5th 604, 612-617, disapproved on other grounds in *Lewis, supra,* 11 Cal.5th 952; *People v. Johnson* (2020) 57 Cal.App.5th 257, 265.)

The provocative act murder doctrine was first invoked in 1965 when a robbery victim killed an accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 779.) The defendant was not liable for the murder of his accomplice under the felony murder doctrine because the death was not committed in furtherance of the felony. (*Id*. at p. 781.) Instead, it was sufficient that the defendant's actions provoked someone to act in killing the decedent. (*Id*. at p. 782.) A provocative act must be more than mere participation in a felony. (*In re Jose R.* (1980) 27 Cal.3d 496, 503-504.) It typically occurs in three different scenarios: (1) a victim or witness shoots a gun because of defendant's actions, (2) the police shoot a gun because of the defendant's actions, or (3) someone consciously reacts to defendant's actions. (See *People v. Cervantes* (2001) 26 Cal.4th 860, 868, 873.) The degree normally depends on the mens rea of the defendant in committing the provocative act, not on the nature of the underlying felony. (*Id*. at pp. 872-873, fn. 15.)

A provocative act murder is not a felony murder theory. (*Washington, supra,* 62 Cal.2d at p. 781.) Instead, there is a line of cases that hold accomplices vicariously liable for participating in the crime during which the provocative act occurred. A provocative act is when the defendant commits an act in furtherance of an underlying crime which was life-threatening and beyond those acts necessary to accomplish the underlying crime (and thus the proximate cause of death). (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654-655 [defendant brought two people to attack the victim, gave one of them a gun which the victim took and killed the confederate].)

The rationale is not very fleshed out, but some cases say malice is imputed just for participating in the crime. (*People v. Johnson* (2013) 221 Cal.App.4th 623, 630-631 [prior cases "imputed malice and first degree murder liability to the 'wheelman' of a

robbery/homicide even though he was 'just' a getaway driver"].) This would run counter to the statutory language in S.B. 1437 that malice can "not be imputed to a person based solely on his or her participation in a crime." (Pen. Code, § 188, subd. (a)(3).) However, the Supreme Court has also said the provocative act demonstrates the defendant has malice: "A murder conviction under the provocative act doctrine thus requires proof that the defendant personally harbored the mental state of malice, and either the defendant or an accomplice intentionally committed a provocative act that proximately caused an unlawful killing." (*Gonzalez, supra,* 54 Cal.4th at p. 655.)

6. Manslaughter

S.B. 775 expanded the statute to apply to "manslaughter." Most people assume this refers to voluntary manslaughter under a natural and probable consequence theory, but it could in theory be applied to involuntary manslaughter or vehicular manslaughter where the defendant is not the actual killer. There has not been any case law on this yet.

D. Subdivision (d)(3) hearings

1. Subdivision (d)(2)

If there is a prima facie case, immediate relief is required when the defendant is convicted as an aider and abettor in a felony murder and there has been a prior finding the defendant was not a major participant who acted with conscious disregard. (Pen. Code, § 1172.6, subd. (d)(2); *Ramirez, supra,* 41 Cal.App.5th at p. 930; *People v. Harrison* (2021) 73 Cal.App.5th 429, 438-440; *People v. Clayton* (2021) 66 Cal.App.5th 145, 155 [jury finding felony murder special circumstance not true automatically entitled the defendant to relief].) However, this provision does not automatically require relief when the defendant had not been held to answer on the felony murder special circumstance. (*People v. Nieber* (2022) 82 Cal.App.5th 458, 474.)

Courts have not been willing to grant immediate relief if there are other valid theories for convicting the defendant for murder. (*People v. Guillory* (2022) 82 Cal.App.5th 326, 333.) One theory a couple of courts have invoked is that the defendant could still be denied relief if it is possible the victim was a peace officer that was killed during the commission of the enumerated felony. (*People v. Sifuentes* (2022) 83 Cal.App.5th 217, 242-246; see also *People v. Flint* (2022) 75 Cal.App.5th 607, 616-618.) Note, this provision applies whenever the defendant "had reason to believe" the victim was a peace officer; actual knowledge is not required. (*Ibid.*; *People v. Hernandez* (2021) 60 Cal.App.5th 94, 105-109.)

2. Issue preclusion, law of the case, successive petitions

The prosecution frequently argues that certain issues are precluded from litigation in the S.B. 1437 proceeding. This is often a question of issue preclusion or law of the case. Strictly speaking, res judicata (claim preclusion) seldom applies because this bars a party from relitigating the same cause of action in two different proceedings. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.) This is not what is happening in an S.B. 1437 proceeding. However, the term res judicata is sometimes used to mean direct or collateral estoppel. (See *DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824,)

Direct or collateral estoppel refers to issue preclusion. (*Samara v. Matar* (2018) 5 Cal.5th 322, 326; *Mycogen Corp., supra*, 28 Cal.4th at pp. 896-897.) The Supreme Court recently discussed issue preclusion in the context of an S.B. 1437 proceeding in *People v. Strong* (2022) 13 Cal.5th 698. Issue preclusion "bars relitigation of issues earlier decided 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.] And while these threshold requirements are necessary, they are not always sufficient: 'Even if the[ ] threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles' of promoting efficiency while ensuring fairness to the parties." (*Id*. at p. 716.) "It is the burden of the party seeking to prevent relitigation based on prior findings to raise the defense and establish its elements." (*Ibid*.) When the trial court's decision could have rested on more than one ground, and there is an appeal, issue preclusion rests only on the issues actually decided by the appellate court. (*Samara*, at pp. 334-336.) Further, "the estoppel effect of a judgment extends only to the facts in issue as they existed at the time the prior judgment was rendered." (*People v. Carmony* (2002) 99 Cal.App.4th 317, 322.) Issue preclusion does not apply when there has been a change in the law. (*Strong,* at pp. 717-718.) Thus, the Supreme Court concluded in *Strong* the existence of a felony murder special circumstance before 2015 did not automatically preclude relief because the law had changed. (*Ibid*.)

Law of the case is a related but separate doctrine. "The doctrine of the law of the case is this: That where, upon an appeal, the . . . court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1161, internal quotation marks omitted.) "Application of the rule is now subject to the qualifications that

the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision." (*Ibid*., internal quotation marks omitted.) "The doctrine is one of procedure, not jurisdiction, and it will not be applied where its application will result in an unjust decision, e.g., where there has been a manifest misapplication of existing principles resulting in substantial injustice" (*People v. Sons* (2008) 164 Cal.App.4th 90, 99, internal quotation marks omitted.) For example, the court might have instructed on what is now an invalid theory, but an issue on appeal was that the instruction on the invalid theory was flawed. If the appellate court decided any error was harmless because the jury necessarily convicted the defendant on what is currently a valid theory for conviction, then this can be fatal to obtaining relief under S.B. 1437.

In other words, "a section 1170.95 petition is not a means by which a defendant can relitigate issues already decided." (*People v. Coley* (2022) 77 Cal.App.5th 539, 549.) This also applies to the prosecution. For example if the court had dismissed an allegation due to insufficient evidence under Penal Code section 1385, this amounts to an acquittal for purposes of S.B. 1437. (*People v. Hampton* (2022) 74 Cal.App.5th 1092, 1106.) Further, the court cannot make a finding that is inconsistent with the verdict when no additional evidence is presented. (*Cooper, supra,* 77 Cal.App.5th at pp. 412-418 [court could not find defendant fired a gun when the jury found the personal gun enhancement not true].) The defendant admitting personal use of a firearm made the defendant guilty as a matter of law when the facts showed a gun was not just displayed. (*Garrison, supra,* 73 Cal.App.5th at p. 743.) Nonetheless, one must carefully analyze what was the actual ruling in the old appeal and what must be found in the current petition. Often, the two do not correspond neatly, and there is room for arguing that the prior litigation does not preclude relief.

Some clients have been filing several petitions, especially in light of the passage of S.B. 775. The Attorney General has been arguing the appellate courts lack jurisdiction to consider an appeal from a successive petition. One court said there is nothing in the statute that prohibits successive petitions, at least when a change in the law affects the petitioner's claim. (*People v. Fanfan* (2021) 71 Cal.App.5th 942, 946-947.)

3. Standard of review

Generally, findings of fact are reviewed for substantial evidence. When the trial court relies solely on the transcripts of the trial, however, there is an argument that the standard of review on appeal should be independent review. This is because when "the facts derive entirely from written declarations and other documents, . . . '[t]he trial court and this court are in the same position in interpreting written declarations' when reviewing a cold record . . . ." (*People v. Vivar* (2021) 11 Cal.5th 510, 528; see also *Reid v. Google, Inc.*

(2010) 50 Cal.4th 512, 527; *In re Cudjo* (1999) 20 Cal.4th 673, 687-688.) Nonetheless, courts have been sticking with a substantial evidence test in reviewing the trial court's subdivision (d)(3) findings based solely on the cold record. (*Sifuentes, supra,* 83 Cal.App.5th 217, 232-233; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 591; *People v. Clements* (2022) 75 Cal.App.5th 276, 302.)

4. Parole hearing transcripts

The defendant is in a difficult situation in facing a parole eligibility hearing. The board assumes the defendant killed the victim and insists he or she take responsibility for these actions. Suddenly, the transcripts of the parole hearings are being used against defendants at S.B. 1437 proceedings as admissions of personally killing the victim or being a major participant acting with reckless disregard. There have been efforts to obtain judicial immunity for the defendant's testimony at parole hearings, but this has not been successful. (See, e.g., *Mitchell, supra,* 81 Cal.App.5th at pp. 586-590; *People v. Anderson* (2022) 78 Cal.App.5th 81, 93; *People v. Myles* (2021) 69 Cal.App.5th 688, 705-706.)

5. It's a sentencing hearing, not a new trial

An S.B. 1437 proceeding is not a new trial. Instead, it is a proceeding to determine if the defendant should be resentenced. Consequently, courts have concluded double jeopardy is not an issue. (*Flint* (2022) 75 Cal.App.5th 607, 618; *People v. Hernandez* (2021) 60 Cal.App.5th 94, 111.) The court can consider the defendant's statements after the plea, including statements to the probation officer. (*Myles, supra,* 69 Cal.App.5th at pp. 703-704.) And *Apprendi v. New Jersey* (2000) 530 U.S. 466 does not provide for a right to a new jury trial. (*People v. Silva* (2021) 72 Cal.App.5th 505, 520; *People v. James* (2021) 63 Cal.App.5th 604, 609; *People v. Howard* (2020) 50 Cal.App.5th 727, 740.)

6. Compelling the defendant to testify

Based on the principle that it is a sentencing hearing, not a new trial, some enterprising district attorneys are calling the defendant to testify. This has not been addressed in a published decision yet. By analogy, in habeas proceedings, a court can compel the defendant to testify, but it cannot make negative inferences from his invocation of his Fifth Amendment right not to answer certain questions. (*In re Crew* (2011) 52 Cal.4th 126, 145; *In re Scott* (2003) 29 Cal.4th 783, 815.) The analogy is not an exact fit. A habeas petition is a special proceeding. (*Scott,* at p. 815.) It is not clear if an S.B. 1437 proceeding is a special proceeding. Unlike a habeas petition, it is not a collateral attack on the judgment.

7. Evidence at the hearing

Penal Code section 1172.6, subdivision (d)(3) provides the rules for the evidentiary hearing. It states:

> [1] 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 guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019. [2] The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. [3] The court may also consider the procedural history of the case recited in any prior appellate opinion. [4] However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. [5] The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens. [6] A finding that there is 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. [7] 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.

(Pen. Code, § 1172.6, subd. (d)(3).)

The first and sixth sentences make clear that the issue is whether the judge is convinced beyond a reasonable doubt that the defendant is guilty under current law, not whether the jury relied on a valid theory beyond a reasonable doubt or that there was substantial evidence the defendant could have been convicted of murder under current law. (*People v. Basler* (2022) 80 Cal.App.5th 46, 61.)

The second sentence makes transcripts of prior hearings admissible. Some defense counsel are arguing this is merely a restatement of the prior testimony hearsay exception found in Evidence Code section 1291. Even if the transcripts are admissible without showing the declarant is unavailable under section 1291, can prior inconsistent statements be admitted for the truth of the matter asserted? Evidence Code section 1202 state inconsistent statements

are admissible to impeach a declarant but not for the truth of the matter asserted. Finally, should the court be able to consider the transcript of the preliminary hearing when there is a transcript of the jury trial?

The second sentence requires evidence to be admissible "under current law." Watch for testimonial hearsay that is now inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36. Also watch out for the admission of gang evidence through the gang expert that is hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665. Some of the predicate offenses would no longer be admissible under A.B. 333 or under *People v. Prunty* (2015) 62 Cal.4th 59.

The fifth sentence permits the parties to present new evidence. "New evidence" includes evidence available after the plea, regardless of whether it existed or did not exist at the time of the plea. (*Myles, supra,* 69 Cal.App.5th at p. 698.)

8. Major participant and reckless disregard

In a felony murder case, the issue is whether an aider and abettor is a major participant in the underlying felony who acted with reckless indifference to human life.

Under *People v. Banks* (2015) 61 Cal.4th 788, 794, "[t]he ultimate question pertaining to being a major participant is 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered 'major' [citations].' (*Id*. at p. 803.) Among the relevant factors in determining this question, we set forth the following: '[1] What role did the defendant have in planning the criminal enterprise that led to one or more deaths? [2] What role did the defendant have in supplying or using lethal weapons? [3] What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? [4] Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? [5] What did the defendant do after lethal force was used?' (*Ibid*., fn. omitted.)" (*People v. Clark* (2016) 63 Cal.4th 522, 611.)

As for reckless indifference to human life, " '[t]hese requirements significantly overlap both in this case and in general, for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.' (*Tison, supra*, 481 U.S. at p. 153.)" (*Clark, supra*, Cal.4th at p. 615.) *Clark* identified five relevant, but nonexclusive, factors for evaluating this subjective requirement: (1) the "defendant's awareness that a gun [or other deadly weapon] will be used," whether the defendant personally used a lethal weapon, and the number of lethal weapons used; (2) the defendant's

"[p]roximity to the murder and the events leading up to it" and opportunity to either restrain the crime or aid the victim; (3) whether the murder took place "at the end of a prolonged period of restraint of the victim[] by the defendant"; (4) the "defendant's knowledge of . . . a cohort's likelihood of killing"; and (5) whether the defendant made an "effort[] to minimize the risks of violence in the commission of a felony . . . ." (*Id*. at pp. 618-622.) Again, no single factor is necessary, nor is any one necessarily sufficient. (*Id*. at p. 618.)

"Reckless indifference to human life has a subjective and an objective element. (*Clark, supra*, 63 Cal.4th at p. 617.) As to the subjective element, '[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed,' and he or she must consciously disregard 'the significant risk of death his or her actions create.' (*Banks, supra*, 61 Cal.4th at p. 801; see *Clark*, at p. 617.) As to the objective element, ' "[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." ' (*Clark*, at p. 617, quoting Model Pen. Code, § 2.02, subd. (2)(c).) 'Awareness of no more than the foreseeable risk of death inherent in any [violent felony] is insufficient' to establish reckless indifference to human life; 'only knowingly creating a "grave risk of death" ' satisfies the statutory requirement. (*Banks*, at p. 808.) Notably, 'the fact a participant [or planner of] an armed robbery could anticipate lethal force might be used' is not sufficient to establish reckless indifference to human life. (*Ibid*.; see *Clark*, at p. 623.)" (*In re Scoggins* (2020) 9 Cal.5th 667, 677.)

The youthfulness of the defendant at the time of the offense is a relevant factor. A youthful offender is less culpable because he or she is less able to appreciate the riskiness of the actions, more willing to join in others' conduct out of peer pressure, and less able to influence the behavior of older participants. (*People v. Ramirez* (2021) 71 Cal.App.5th 970, 987; *In re Moore* (2021) 68 Cal.App.5th 434, 454;*People v. Harris* (2021) 60 Cal.App.5th 939, review granted Apr. 28, 2021, S267802; but see *In re Harper* (2022) 76 Cal.App.5th 450, 466-472.)

9. Victim impact statements

Under Marsy's law, the family of the victim may come and speak. However, " the safety of the victim and the public are not pertinent to whether a court may vacate the petitioner's murder conviction and resentence the petitioner." (*People v. Lamoureaux I* (2019) 42 Cal.App.5th 241, 265.) The impact of the crime on the victim's family is relevant if the court vacates the conviction and must now resentence the defendant in determining whether the defendant " presents 'a serious danger to society' and '[a]ny other factors [that] reasonably relate to the defendant or the circumstances under which the crime was

committed.' (Cal. Rules of Court, rule 4.421(b)(1), (c).)" (*Id*. at p. 266.) "At minimum, the trial court's ability to consider these factors during resentencing ensures the safety of the victim, the victim's family, and the general public are 'considered,' as required by Marsy's Law. (Cal. Const., art. I, § 28, subd. (b)(16).)" (*Ibid*.)

E. When the Court Grants Relief

1. Target offense

At least when the defendant was convicted of felony murder, the court can redesignate the conviction to be the target offense. "The petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes if the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose." (Pen. Code, § 1172.6, subd. (e).)

The court has been permitted to find the defendant guilty of first degree burglary, though it was never charged, find enhancements true, and make a finding that an occupant was present. (*People v. Howard* (2020) 50 Cal.App.5th 727, 738, 741-742.) The court can even find the defendant guilty of more than one target offense, and this does not violate *Apprendi, supra*, 530 U.S. 466. (*Silva, supra,* 72 Cal.App.5th at pp. 520, 530-532; see also *People v. Watson* (2020) 64 Cal.App.5th 474, 485-492.) The defendant is entitled to notice. (*Id*. at pp. 521-525 [it was sufficient that the prosecutor put it in its supplemental sentencing memorandum].) However, the court cannot impose a conviction for the target offense if there is insufficient evidence. (*In re I.A.* (2020) 48 Cal.App.5th 767, 774-776.)

One court held it did not violate the ex post facto or due process clause to add an enhancement under Penal Code section 186.22, subdivision (d), though the statute did not exist at the time of the offense. (*People v. Gonzales* (2021) 65 Cal.App.5th 1167, 1173-1174.) This was based on the theory that an ex post facto clause prohibits applying a criminal statute retroactively that disadvantages the defendant. Since the overall sentence was being reduced, it did not disadvantage the defendant. There is an argument this is wrong. There is also an argument the court acts in excess of jurisdiction when it adds enhancements that were never charged, assuming S.B. 1437 is a special proceeding. " 'Special proceedings are creatures of statute and the court's jurisdiction in such proceedings is limited by statutory authority' " (*People v. Quiroz* (2016) 244 Cal.App.4th 1371, 1379.) Since Penal Code section 1172.6 does not state the court can add enhancements, it would lack the authority to do so.

2. Credits and period of parole

The court cannot impose a "greater" sentence. (Pen. Code, § 1172.6, subd. (d).) Increasing the fine, even when the time in custody is reduced, is considered to be an increase in the sentence. (*People v. Hanson* (2000) 23 Cal.4th 355, 367.)

"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 two years following the completion of the sentence." (Pen. Code, § 1172.6, subd. (h).) For most murder convictions, the defendant was not entitled to conduct credits. If the conviction is vacated, the court must determine the amount of conduct credits the defendant would have accrued at the time of the first sentencing hearing. Generally, a defendant shall be awarded presentence conduct credits according to the law that applied at the time he or she was in custody. (*People v. Brown* (2012) 54 Cal.4th 314, 328–330.) The court calculates the actual time in custody after sentencing. (Pen. Code, § 2900.1; see *People v. Donan* (2004) 117 Cal.App.4th 784, 792.) The court does not calculate the amount of conduct credits after the sentencing hearing; this is determined by the Department of Corrections and Rehabilitation. (*People v. Buckhalter* (2001) 26 Cal.4th 30, 33-34.)

The court need not apply excess time in custody to reduce parole. (*People v. Lamoureaux II* (2020) 57 Cal.App.5th 136, 145; *People v. Wilson* (2020) 53 Cal.App.5th 42, 48-54.) If the defendant has accumulated excess time in custody, the excess time shall be credited to any outstanding fines and penalty assessments. (Pen. Code, § 2900.5; *Lamoureaux II,* at p. 152; *People v. McGarry* (2002) 96 Cal.App.4th 644, 64.) The Legislature increased the amount in 2016 to at least $125 per day, and this applies even if the conviction occurred before the statute was amended. (See *People v. Carranza* (2016) 6 Cal.App.5th Supp. 17, 33-37.) Effective July 2013, the excess time in custody cannot be credited to restitution fines, but the ex post facto clause requires that excess time be applied to restitution fines if the conviction occurred before July 2013. (*People v. Morris* (2015) 242 Cal.App.4th 94, 101-103.)

The length of parole for the underlying felony is now generally limited to two years under Penal Code section 3000.01 or three years if the defendant served an indeterminate term. It can be longer if it is a sex offense, and it can be shorter if another statute applies. (*People v. Tan* (2021) 68 Cal.App.5th 1, 5-6.) This applies to S.B. 1437 cases. (*Id*. at pp. 6-7.)

In many cases, the defendant should no longer be liable for victim restitution for the murder. This is a question of whether there is a nexus between the loss and the defendant's conduct. (See generally *Luis M. v. Superior Court* (2014) 59 Cal.3d 300, 309-310; *People*

v. Trout-Lacy (2019) 43 Cal.App.5th 369, 372.)

3. Sentencing reform

If the court vacates the homicide conviction and the defendant was under the age of 18 when the offense was committed, he or she is entitled to have the case return to the juvenile court and can be returned to adult court only after a new transfer hearing. (*Ramirez, supra,* 71 Cal.App.5th at pp. 996-1000; *People v. Keel* (2022) 84 Cal.App.5th 546, 563-565.)

The defendant is entitled to be sentenced under current sentencing law. (See generally *People v. Rodriguez and Barajas* (2018) 4 Cal.5th 1123, 1132; *People v. Sandoval* (2007) 41 Cal.4th 825, 846.) There are some exceptions. A provision enacted after the crime was committed that increases punishment cannot be applied because this would violate the constitutional right against ex post facto laws in criminal cases. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Because fines are punishment, the law concerning fines in effect when the defendant commits the crime is used. (*Hanson, supra,* 23 Cal.4th at p. 362.) The court operation fee (Pen. Code, § 1465.8; Stats. 2003, ch. 159, § 25, eff. Aug. 17, 2003) and the court facility fee (Gov. Code, § 70373, subd. (a)(1); Stats 2008, ch. 311, § 6.5, eff. Jan. 1, 2009) are not considered to be punishment. (*People v. Alford* (2008) 42 Cal.4th 749, 754-755.) However, they apply only if the "conviction" occurred after the laws were enacted, which is the day of the verdict or plea. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.) A defendant is not entitled to a new sentencing hearing if the petition to vacate the homicide conviction is denied. (*Vizcarra, supra,* 84 Cal.App.5th at p. 393.)