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SUPREME COURT NO. _____

**IN THE SUPREME COURT OF CALIFORNIA**

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| **THE PEOPLE OF THE STATE OF CALIFORNIA**, | ) | |
| Plaintiff and Respondent, | ) | Court of Appeal No. B320352 |
| v. | ) | |
| **RAMON PATTON**, | ) | Superior Court No. TA144611 |
| Defendant and Appellant. | ) | |

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY
Honorable Hector E. Gutierrez, Judge

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# PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, AFFIRMING THE DENIAL OF APPELLANT'S PETITION FOR RESENTENCING (Pen. Code, § 1172.6)

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**TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:**

Appellant respectfully petitions for review pursuant to California Rules of Court, rule 8.500(a)(1). The Court of Appeal, Second Appellate District, Division Three, filed an unpublished opinion on February 22, 2023, affirming the Los Angeles County Superior Court's denial of appellant's petition for resentencing pursuant to Penal Code section 1172.6. By order dated March 22, 2023, the court granted respondent's request for publication of

the opinion. A copy of the opinion is attached. For the Court's convenience, a copy of respondent's letter requesting publication is also attached.

## ISSUE PRESENTED FOR REVIEW

In assessing whether a defendant has made a *prima facie* showing of eligibility for resentencing under Penal Code section 1172.6, can the trial court rely on the evidence presented at the defendant's preliminary hearing?

## NECESSITY FOR REVIEW

Pursuant to rule 8.500(b)(1) of the California Rules of Court, this issue merits review in order to secure uniformity of decision and to settle an important question of law.

Appellant pled no contest in 2018 to attempted murder and admitted to a gun enhancement allegation. At his plea hearing, appellant stipulated to a factual basis for his plea, but did not stipulate to any specific document, such as the preliminary hearing transcript. (R.T. 8.) In 2022 appellant filed a petition for resentencing pursuant to Penal Code section 1172.6. The superior court summarily denied the petition on the grounds that the evidence presented at appellant's preliminary hearing, in addition to appellant's admission to the gun enhancement allegation, showed that appellant was the actual killer, rebutting his *prima facie* showing of eligibility for relief.

In affirming the superior court's ruling, the court of appeal's opinion concludes that the preliminary hearing evidence shows that appellant was the actual killer: "Police officers

testified at the preliminary hearing that they had watched the surveillance video and they knew and recognized Patton as the sole perpetrator, who approached Jackson as he stood at the motel clerk's desk and fired several rounds at him. Those officers were personally involved in the investigation of the shooting of Jackson, and they were subject to cross-examination at the preliminary hearing." (Slip opn. at p. 10.)

The opinion also points out that appellant never made any proffer of evidence in support of his petition to contest the claim that he was the actual killer: "In the trial court, Patton never offered any theory to support his implicit contention now that he was an accomplice and not the person who actually shot Jackson. Nor, on appeal, has Patton even suggested what facts he has to demonstrate that someone else shot Jackson and he was merely an accomplice." (Slip opn. at p. 10.)

The opinion characterizes the evidence that appellant was the actual killer as 'uncontroverted,' and therefore rejects any claim that the determination that appellant was the actual killer involved factfinding: "Finally, we reject Patton's contention that the trial court ' "engage[d] in factfinding, weigh[ed] the evidence, or reject[ed] the petition's allegations on the basis of adverse credibility determinations." ' The sworn testimony of police officers, based on surveillance video of the crime, that Patton committed the shooting was and is uncontroverted. '[N]o factfinding, weighing of evidence, or credibility determinations' were or are necessary here. '[T]he record of conviction irrefutably establishes as a matter of law that' Patton was convicted as the

actual perpetrator of the attempted murder." (Slip opn. at p. 11 [footnote omitted].)

The opinion is bereft of any discussion or even acknowledgment of any cases either arguably in support of, or in conflict with, its premise that preliminary hearing evidence may be considered in determining whether a defendant has made a *prima facie* showing of eligibility for relief –in this case, specific to the factual issue of whether appellant was the actual killer. Regardless, the opinion falls on one side of a split of authority on this issue.

In *People v. Nguyen* (2020) 53 Cal.App.5th 1154, Division One of the First Appellate District affirmed the summary denial of a resentencing petition based largely on the evidence presented at Nguyen's preliminary hearing: "Based on the transcripts from the preliminary and plea hearings—which Nguyen and the Attorney General agree courts may consider in determining whether a petitioner made a prima facie showing he or she is entitled to relief—we conclude Nguyen is not entitled to relief as a matter of law, and the trial court did not err in denying the petition without issuing an order to show cause and holding an evidentiary hearing. The transcripts from the preliminary and plea hearings demonstrate Nguyen was convicted of second degree murder as a direct aider and abettor. This was the only theory put forth by the prosecutor, not only at the June 15, 2006 preliminary hearing, but also on October 25, 2006, the date trial was set to commence, when the prosecutor sought to introduce at trial statements that both Nguyen and Barry told others that

Nguyen instructed Barry to kill Kim, and Nguyen paid Barry for doing so." (*Id*. at pp. 1166-1167.)

In *People v. Rivera* (2021) 62 Cal.App.5th 217, Division One of the First Appellate District disagreed with *Nguyen*: "In our view, when a petitioner disputes that the evidence presented at a pre-plea 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." ' [Citations.]" (*Id*. at p. 238.)[1]

In *People v. Lewis* (2021) 11 Cal.5th 952, which was decided after *Nguyen* and *Rivera*, this Court held that the trial court can rely on the record of conviction to determine whether the petitioner has made a *prima facie* showing of eligibility for relief

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[1] The *Rivera* court noted that its ruling was limited to the specific circumstances presented: "We need not decide whether under other circumstances a trial court could rely on a grand jury transcript to deny a section 1170.95 petition for failure to make the required prima facie showing. In *People v. Cooper* (2020) 54 Cal.App.5th 106, 268 Cal.Rptr.3d 417, review granted Nov. 10, 2020, S264684, we left open the possibility that if a petitioner filed a facially sufficient petition but thereafter failed to submit briefing, a court could rely on a preliminary hearing transcript to deny the petition. [Citations.] Likewise, we leave open the possibility that if a petitioner who entered a plea to murder after being indicted submits a form petition making the required declarations but does not in any way contest the evidence presented to the grand jury, a trial court can rely on the grand jury transcript to deny the petition before holding an evidentiary hearing." (*Id*. at p. 238.)

under the new law. (*Id.* at p. 971.) But "the prima facie inquiry under subdivision (c) is limited." (*Ibid.*) "In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion.' " (*Id.* at p. 972.)

Subsequent to *Lewis*, in *People v. Davenport* (2021) 71 Cal.App.5th 476, Division Four of the First Appellate District reversed the summary denial of a resentencing petition based on the trial court's reliance on preliminary hearing evidence that Davenport was the actual killer: "The exception, for 'readily ascertainable facts' in the record of conviction that ' " 'refut[e] the allegations made in the petition' " ' [citing *Lewis*], bars a petitioner from pleading things that the record of conviction necessarily establishes are untrue (such as an allegation that he is entitled to resentencing relief for an offense that is not listed in the statute). . . . If the exception were to be read more broadly, allowing inquiry into the historical facts that may appear in the court's files but that were never admitted by the petitioner as the factual basis for a plea, the exception would swallow the rule and convert the prima facie inquiry into a factual contest, which is reserved for evidentiary hearings at the section 1170.95, subdivision (d) stage." (*Id.* at p. 483.)

*Davenport* was also critical of the assertion in *People v. Perez* (2020) 54 Cal.App.5th 896, review granted Dec. 9, 2020, opinion vacated and cause transferred for reconsideration in light of *Lewis* Oct. 26, 2022, S265254, that a petitioner's failure to proffer evidence to rebut preliminary hearing evidence is grounds

for summary denial of a resentencing petition: "Because Davenport did not stipulate that the preliminary hearing transcript provided the factual basis for his no contest plea, the transcript does not *conclusively* 'refute' his allegations. In our view, by focusing on what appellant Perez *could* have proffered at the prima facie stage to counter the evidence set forth in the preliminary hearing transcript, the *Perez* court's analysis allocates to petitioners an evidentiary burden that should be on the state (§ 1170.95, subd. (d)(3)), and effectively raises ' "the prima facie bar [that] was intentionally and correctly set very low" ' [citing *Lewis*]. We thus conclude that the trial court erred by relying on facts from the preliminary hearing transcript at the prima facie stage of the proceedings." (*Davenport, supra,* 71 Cal.App.5th at pp. 483-484.)

*Davenport*'s reliance on *Lewis* and the court of appeal's citation to *Lewis* in this case (slip opn. at p. 9) show that courts have read *Lewis* as supporting both sides of the disagreement over whether a trial court may rely on preliminary hearing evidence to summarily deny a resentencing petition.

Although the court of appeal's opinion does not distinguish or even mention *Davenport* (or any of the other court of appeal decisions discussed above), there is no way to reconcile the two opinions. Indeed, in the Attorney General's letter requesting publication, respondent acknowledges that the court of appeal's opinion "addresses a conflict in the current case law regarding whether a trial court reviewing a section 1172.6 petition filed by a petitioner convicted by guilty or no contest plea may rely on

uncontroverted evidence in a preliminary hearing to deny relief at the prima facie stage." (Respondent's Request for Publication, at p. 1.) Acknowledging that the court of appeal's opinion is in conflict with *Davenport* and *Rivera*, respondent observes that "the opinion confirms that under *People v. Lewis* (2021) 11 Cal.5th 952, the trial court may rely on uncontroverted evidence in a preliminary hearing transcript to deny relief at the prima facie stage without engaging in factfinding. (See Opn. 9-11.) Because *Nguyen* was decided before *Lewis*, this opinion, if published, would be the first to hold that relying on a preliminary hearing transcript under these circumstances is consistent with *Lewis*." (Respondent's Request for Publication, at p. 2.)

The claim that 'uncontroverted' preliminary hearing evidence rebuts a resentencing petition's *prima facie* showing of eligibility for relief seems problematic. Given the minimal burden on the prosecution at a preliminary hearing, defendants have little reason to challenge the evidence at that early phase of a criminal prosecution, a challenge typically with minimal chances of success and that may give away a defendant's trial strategy. (See *People v. Eynon* (2021) 68 Cal.App.5th 967, 975-976 ["Being held to answer on an allegation does not constitute a factual finding that the allegation is true (and the allegation itself does not establish its own truth). Being held to answer does not even constitute a determination that the allegation is supported by substantial evidence"].)

Appellant never admitted to being the actual killer, and nothing in appellant's record of conviction establishes as a matter

of law that he was the actual killer. Appellant's petition was thus denied based on a finding not made or admitted or required at his plea hearing. There is no way to arrive at the conclusion that appellant was the actual killer without weighing the evidence and making an independent finding, which is precisely what *Lewis* explicitly forbade at the *prima facie* showing phase of resentencing petition proceedings.

A purely legal determination that the evidence at the preliminary hearing was *sufficient* to sustain the finding that appellant was the actual killer has no bearing on whether appellant's petition made a *prima facie* showing of eligibility for relief. The statute contemplates an evidentiary hearing to resolve such factual issues, at which both parties may present new or additional evidence. (See Pen. Code, § 1172.6, subd. (d).)

The assertion that reliance on uncontroverted preliminary hearing evidence constitutes a strictly legal analysis devoid of any fact finding (slip opn. at p. 11) appears to be premised on the notion that evidence at such a hearing sometimes proves a factual proposition as a matter of law –at least for purposes of a resentencing petition– unless it is impeached or supplemented with other evidence that changes the picture. Pursuant to this line of analysis, in any plea case in which the evidence at the preliminary hearing appears on its face to refute a petitioner's claim of eligibility for resentencing, it becomes the petitioner's burden to make an offer of proof sufficient to show that his or her eligibility for relief is indeed a disputable and disputed factual issue.

Along these lines, the court of appeal's opinion faults appellant for failing to make an offer of proof sufficient to place the issue of whether he was the actual killer in dispute. (Slip opn. at p. 10.) In order to sustain his *prima facie* showing of eligibility for relief, appellant was apparently required to locate witnesses and/or evidence and provide the trial court with sworn declarations and/or other documentation commensurate with a substantial offer of proof.

Pursuant to this reading of the statute, only some petitioners can rely on a petition containing the information required by Penal Code section 1172.6, subdivision (a). Others, including appellant, must supplement their petitions with offers of proof sufficient to demonstrate that their eligibility for relief is a disputable and disputed factual issue. In other words, some records of conviction contain evidence sufficient to create a rebuttable presumption of ineligibility for relief; in such cases, in order to make a *prima facie* showing of eligibility for relief, the petitioner must demonstrate by way of an offer of proof that he or she *might* prevail at an evidentiary hearing. Otherwise, evidence merely *sufficient* to demonstrate ineligibility becomes evidence deemed true (at least for purposes of assessing a resentencing petition) by operation of law.

Nothing in *Lewis* supports such an interpretation of the statute, and any attempt to reduce such an approach to a purely legal determination seems untenable. Regardless of whether evidence at the preliminary hearing is sufficient to sustain a particular finding, the claim that such evidence therefore creates

a rebuttable presumption that the finding is true is necessarily based on the crediting of that evidence. Substantial evidence review tests the legal sufficiency of the evidence supporting a particular finding or verdict, but here there was no previous finding by a court or jury that appellant was the actual killer. There is no basis anywhere in the statute for the notion that substantial evidence at the preliminary hearing creates a rebuttable presumption regarding eligibility for relief that becomes a finding by operation of law unless challenged by an offer of proof.

*Lewis*'s straightforward approach to the statute limits review of the petitioner's *prima facie* showing of eligibility for relief to basic elements in the record of conviction, such as jury instructions, verdicts, findings, or admissions, and reserves the resolution of factual disputes for the evidentiary hearing. Although some resentencing petitions may appear to be foredoomed by evidence previously presented at a hearing, the proper approach to such petitions consistent with *Lewis* is to issue an order to show cause and allow the parties to present new or additional evidence and argue the merits of the petition at an evidentiary hearing.

Review should therefore be granted to resolve the split in authority concerning this issue.

## FACTUAL AND PROCEDURAL BACKGROUND

For the purpose of this petition for review, appellant adopts the factual and procedural history set forth in the opinion of the court of appeal. (Slip opn. at pp. 2-6.)

To briefly summarize the legal basis for appellant's resentencing petition: Senate Bill No. 1437 (Stats. 2018, ch. 1015) eliminated natural and probable consequences liability for murder and limited the scope of the felony murder rule. (See Pen. Code, §§ 188, subd. (a)(3), 189, subd. (e), as amended by Senate Bill 1437.) It also added Penal Code section 1172.6 (as currently numbered), which established a procedure for defendants convicted of murder who could not be convicted under the law as amended to seek relief retroactively. (See *Lewis, supra,* 11 Cal.5th at p. 957.) The purpose of S.B. 1437 was to "ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); see *Lewis, supra,* 11 Cal.5th at pp. 959; *Gentile, supra,* 10 Cal.5th at p. 842.)

Penal Code section 1172.6 allows such defendants to file a petition to have their murder conviction vacated and to be resentenced on any remaining counts. (Pen. Code, § 1172.6, subd. (a).) The petition must include a declaration by the petitioner stating that he or she meets three basic requirements: (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, and (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, § 1172.6, subds. (a), (c); see *Lewis, supra,* 11 Cal.5th at pp. 959-960; *Gentile, supra,* 10 Cal.5th at p. 847.)

Upon the filing of a facially sufficient petition, the superior court may consider the record of conviction to determine whether the petitioner has made a prima facie case for relief. (Pen. Code, § 1172.6, subd. (c); *Lewis, supra,* 11 Cal.5th at pp. 970-971.) If the petitioner has made such a showing, the trial court "shall issue an order to show cause." (Pen. Code, § 1172.6, subd. (c).)

The court must then hold a hearing "to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner on any remaining counts . . ." (Pen. Code, § 1172.6, subd. (d)(1); see *Gentile, supra,* 10 Cal.5th at p. 847.) At that hearing, the prosecutor and the petitioner may rely on the record of conviction or "offer new or additional evidence to meet their respective burdens." (Pen. Code, § 1172.6, subd. (d)(3).) "[T]he 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 current law. (*Ibid*.)

"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." (*Ibid*; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 724.)

## CONCLUSION

Review should be granted.

Respectfully Submitted,

Dated: April 26, 2023

JONATHAN E. DEMSON
Attorney for Appellant

**IN THE SUPREME COURT OF CALIFORNIA**

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| **THE PEOPLE OF THE STATE OF CALIFORNIA**, | ) | |
| | ) | Court of Appeal |
| Plaintiff and Respondent, | ) | No. B320352 |
| | ) | |
| v. | ) | |
| | ) | Superior Court |
| **RAMON PATTON**, | ) | No. TA144611 |
| | ) | |
| Defendant and Appellant. | ) | |
| | ) | |

## CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant certifies that the Petition for Review filed in connection with the above-captioned matter consists of approximately 3,591 words, as determined by using the 'word count' feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: April 26, 2023

JONATHAN E. DEMSON
Attorney for Appellant

Filed 2/22/23; Certified for Publication 3/22/23 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAMON PATTON,<br><br>Defendant and Appellant. | B320352<br><br>Los Angeles County<br>Super. Ct. No. TA144611 |

APPEAL from an order of the Superior Court of Los Angeles County, Hector E. Gutierrez, Judge. Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Charles S. Lee and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

In September 2018, defendant and appellant Ramon Patton entered into a plea agreement with the People. Patton pleaded no contest to attempted murder and admitted he had personally used and discharged a firearm in the commission of the crime. In January 2022 Patton filed a petition for resentencing under Penal Code section 1172.6.[1] The trial court denied Patton's petition, stating, "Patton was the only perpetrator and the only shooter," and therefore ineligible for relief. We affirm because the record of conviction establishes Patton is ineligible for resentencing as a matter of law.

## FACTS AND PROCEDURAL BACKGROUND

### 1. *The shooting of David Jackson*[2]

At about 7:40 p.m. on May 27, 2017, Los Angeles Police Department Detective Anthony Balderama was called to the Casa Motel on South San Pedro Street in Los Angeles about a shooting. The motel manager had surveillance footage of the shooting and Balderama watched it. At the preliminary hearing, Balderama testified to what he'd seen in the footage: A man later identified as David Jackson drove a car into the

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[1] References to statutes are to the Penal Code. Effective June 30, 2022, former section 1170.95 was renumbered section 1172.6, with no change in text. (Stats. 2022, ch. 58, § 10.)

[2] We take our facts from the testimony given at Patton's preliminary hearing on January 9, 2018. We previously granted the Attorney General's request for judicial notice of the transcript of that hearing. We consider only the witness testimony "that is admissible under current law," disregarding any testimony that was admitted at the preliminary hearing under Proposition 115, codified as subdivision (b) of Section 872. (See § 1172.6, subd. (d)(3).)

parking lot of the motel. He got out of the car and walked up to the front counter.

A man later identified as Patton walked up to the driveway of the motel. He pulled a handgun from his front sweatshirt pocket and fired three rounds at Jackson. Jackson fell to the ground but then got up and went back to his car. Patton "fle[d] in a northeasterly direction."

Detective Christian Mrakich was assigned to the case on June 22, 2017. He watched the surveillance video. Mrakich knew Patton; Mrakich had met him and spoken with him in the past. Mrakich got a photograph of Patton from his Facebook page and then had a search warrant served "for the official records" of Patton's Facebook account.

In the Facebook photo, Patton was wearing what the detective described as "stone washed or bleached type blue jeans." The jeans Patton was wearing in the photo—with "distinct patterns" and "stains" with "shape[s]"—appeared to be the same jeans the shooter was wearing in the surveillance footage. The court at the preliminary hearing, after examining the Facebook photo as well as still photos from the surveillance footage, stated, "[T]hey're very similar."

Officer Otoniel Ceballos also testified at the preliminary hearing. Ceballos was assigned to a gang enforcement detail. Ceballos had had "numerous contacts" with Patton and had seen him 20 times. Ceballos had spoken with Patton and had "been able to watch the way he walks." Ceballos had watched the surveillance footage of the May 27 shooting and he recognized Patton as the shooter. Ceballos listed "his mannerisms, the way he walks, his stature, the way he runs away." Ceballos continued, "I've seen him run away from us. I've seen him walk. I've seen his stature up close and personal. In my opinion, that's him."

**2. *The charges and plea agreement***

The People charged Patton with the attempted willful, deliberate, and premeditated murder of Jackson. The People alleged Patton committed the crime for the benefit of a criminal street gang and personally inflicted great bodily injury on Jackson. The People further alleged that a principal personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm that caused great bodily injury under section 12022.53, subdivisions (b), (c), (d), and (e)(1). The People also charged Patton with carrying a loaded firearm while being an active participant in a street gang and with possession of a firearm by a felon.

On the date set for trial, Patton entered into a plea agreement with the prosecution. After an offer by the People (32 years) and a counteroffer by the defense (25 years), the prosecution offered Patton—who was facing two indeterminate life terms—a determinate term of 29 years. Patton accepted. The prosecution agreed to strike the allegation that the attempted murder was willful, deliberate, and premeditated. In response to the prosecutor's questions, Patton confirmed he understood his rights and the consequences of his plea, and he was pleading freely and voluntarily. Patton then pleaded no contest to attempted murder. The prosecutor asked, "As to the allegation under Penal Code section 12022.53(c) that you personally used and discharged a firearm in the course of the crime do you admit or deny that allegation?" Patton replied, "Admit."

In accordance with the parties' agreement, the court sentenced Patton to 29 years in the state prison, calculated as the high term of nine years for the attempted murder plus

20 years for the firearm enhancement. The court dismissed the remaining counts and allegations on the People's motion.

**3. *Patton's petition for resentencing***

On January 18, 2022, Patton, representing himself, filed a form petition for resentencing under section 1172.6. Patton checked boxes on the form stating (1) the information filed in his case "allowed the prosecution to proceed under a theory of felony murder, 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, or attempted murder under the natural and probable consequences doctrine," (2) he was "convicted of murder, attempted murder, or manslaughter following a trial or [he] accepted a plea offer in lieu of a trial at which [he] could have been convicted of murder or attempted murder," and (3) "[he] could not presently be convicted of murder or attempted murder because of changes made to Penal Code §§ 188 and 189, effective January 1, 2019." Patton also checked a fourth box that stated, "Having presented a facially sufficient petition, I request that this Court appoint counsel to represent me."

The court appointed the Alternate Public Defender to represent Patton. On April 11, 2022, the prosecution filed a response to Patton's petition. The prosecution asserted Patton was not entitled to relief because "as the direct perpetrator [he] could not have been convicted of attempted murder based upon the natural and probable consequences doctrine." Patton did not file a reply to the People's response.

On May 13, 2022, counsel appeared by Webex for a hearing on Patton's petition. Patton also was present by Webex. The court stated it had read the transcripts of the preliminary hearing and of the change of plea. The court then asked counsel, "Does either side wish to be heard further or augment the record

in any way?" Patton's counsel replied, "No, I don't need to submit anything more." The prosecutor also said he had nothing further to present and the court responded, "Well, thank you again to both sides."

The court stated, "I read through the entirety of the preliminary hearing transcript. The defendant was identified by way of social media, some distinctive jeans that he was wearing as the shooter, and there was only one shooter. [¶] Furthermore, I read the plea transcript in which the defendant admitted to personally discharging a firearm."

The court said, "So in this particular case, reading the People's response and the preliminary hearing, the court finds that, number one, there's more than substantial evidence that Ramon Patton was the only perpetrator and the only shooter as charged with attempted murder." After summarizing the terms of the plea agreement, the court concluded, "Therefore, the court is satisfied beyond a reasonable doubt and based on the information that I have in front of me that Mr. Patton was acting alone, he was the shooter, and that substantial evidence supports the charge of attempted murder and his plea of no contest to that charge. [¶] For those reasons, the court finds that he has failed to make a prima facie claim for relief, and the court respectfully denies the motion." The court asked both counsel if there was "anything else," and both replied, "No."

## DISCUSSION

### 1. *Section 1172.6*

Senate Bill No. 1437 (Senate Bill 1437) took effect on January 1, 2019. (See Stats. 2018, ch. 1015, § 4.) The bill amended existing law on accomplice liability for murder " 'to ensure that murder liability is not imposed on a person who is not the actual killer . . . .' " (*People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417, quoting Stats. 2018, ch. 1015, § 1,

subd. (f); § 189, subd. (e)(1).) To accomplish this goal, Senate Bill 1437 limited accomplice liability under the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder, to ensure a person's sentence is commensurate with his individual criminal culpability. (*People v. Gentile* (2020) 10 Cal.5th 830, 842-843 (*Gentile*); *People v. Lewis* (2021) 11 Cal.5th 952, 957, 971 (*Lewis*).)

Senate Bill 1437 also authorized, through new section 1172.6, an individual convicted of felony murder or murder based on the natural and probable consequences doctrine to petition the sentencing court to vacate the conviction and be resentenced on any remaining counts if he could not have been convicted of murder because of Senate Bill 1437's changes to the definition of the crime. (See *Lewis*, *supra*, 11 Cal.5th at pp. 959-960; *Gentile*, *supra*, 10 Cal.5th at p. 843.)

If the petition contains all the required information, including a declaration by the petitioner that he was convicted of murder and is eligible for relief (§ 1172.6, subd. (b)(1)(A)), section 1172.6, subdivision (c) requires the court to direct the prosecutor to file a response to the petition and permit the petitioner to file a reply,[3] and to determine if the petitioner has made a prima facie showing that he is entitled to relief. (See *Lewis*, *supra*, 11 Cal.5th at pp. 959-960.)

In determining whether the petitioner has carried the burden of making the requisite prima facie showing he falls within the provisions of section 1172.6 and is entitled to relief, the superior court properly examines the record of conviction, "allowing the court to distinguish petitions with potential merit

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[3] Section 1172.6, subd. (b)(3) also requires the court to appoint counsel to represent the petitioner, if requested. Here, the trial court did appoint counsel for Patton.

from those that are clearly meritless." (*Lewis*, *supra*, 11 Cal.5th at p. 971.) However, "the prima facie inquiry under [section 1172.6,] subdivision (c) is limited. Like the analogous prima facie inquiry in habeas corpus proceedings, ' "the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." '[4] . . . 'However, if the record, including the court's own documents, "contain[s] facts refuting the allegations made in the petition," then "the court is justified in making a credibility determination adverse to the petitioner." ' " (*Ibid.*; see *People v. Daniel* (2020) 57 Cal.App.5th 666, 675.)

Senate Bill No. 775 (2021-2022 Reg. Sess.) (Senate Bill 775), effective as of January 1, 2022, amended section 1172.6 in various respects. The bill clarified that "persons who were convicted of attempted murder . . . under . . . the natural [and] probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theor[y]." (Stats. 2021, ch. 551, § 1, subd. (a).) Senate Bill 775 also clarified that the burden of proof at a section 1172.6 hearing is beyond a reasonable doubt and a trial court's finding that there is substantial evidence to support a conviction is insufficient to meet this burden. (§ 1172.6, subd. (d)(3).) In addition, the bill clarified the standards for the admissibility of evidence at the evidentiary hearing. Section 1172.6, subdivision (d)(3) now provides, "The admission of evidence

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4 The court then holds an evidentiary hearing at which the prosecution has the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1172.6, subd. (d)(3).)

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. . . . The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens." (§ 1172.6, subd. (d)(3).)

We independently review a trial court's determination of whether a petitioner has made a prima facie showing. (*People v. Harden* (2022) 81 Cal.App.5th 45, 52 (*Harden*).)

**2. *The trial court was not required to issue an order to show cause or conduct an evidentiary hearing because—as the sole perpetrator of the attempted murder—Patton is ineligible for resentencing as a matter of law***

Patton contends that—because he checked a box on a form that stated he "could not presently be convicted" of attempted murder "because of changes made to Penal Code §§ 188 and 189" —the trial court was required to issue an order to show cause and conduct an evidentiary hearing under section 1172.6, subdivision (d)(3). Patton does not acknowledge Justice Groban's statement for a unanimous court in *Lewis* that, "The record of conviction will necessarily inform the trial court's prima facie inquiry under section 117[2.6], allowing the court to distinguish petitions with potential merit from those that are clearly meritless. This is consistent with the statute's overall purpose: to ensure that murder culpability is commensurate with a person's actions, while also ensuring that clearly meritless petitions can be efficiently addressed as part of a single-step prima facie review process." (*Lewis*, *supra*, 11 Cal.5th at p. 971.)

At the hearing on Patton's petition, the court stated it had read the preliminary hearing transcript as well as the

transcript of Patton's change of plea in his negotiated agreement with the prosecution. Police officers testified at the preliminary hearing that they had watched the surveillance video and they knew and recognized Patton as the sole perpetrator, who approached Jackson as he stood at the motel clerk's desk and fired several rounds at him. Those officers were personally involved in the investigation of the shooting of Jackson, and they were subject to cross-examination at the preliminary hearing. In the trial court, Patton never offered any theory to support his implicit contention now that he was an accomplice and not the person who actually shot Jackson. Nor, on appeal, has Patton even suggested what facts he has to demonstrate that someone else shot Jackson and he was merely an accomplice.

As the sole and actual perpetrator of the attempted murder of Jackson, Patton is ineligible for resentencing as a matter of law. (*People v. Garcia* (2022) 82 Cal.App.5th 956, 969-971 [affirming denial of resentencing because record of conviction "unequivocally establishes" defendant was the sole perpetrator and actual killer]; *Harden*, *supra*, 81 Cal.App.5th at pp. 47-48, 56 [same]; *People v. Myles* (2021) 69 Cal.App.5th 688, 692-694 [affirming denial of resentencing because defendant admitted at parole suitability hearing that she was actual killer; defendant therefore was " 'directly liable,' " " 'not vicariously liable' "]; *People v. Gallo* (2020) 57 Cal.App.5th 594, 599-600 [defendant was actual killer]; *People v. Edwards* (2020) 48 Cal.App.5th 666, 669, 671, 674 [affirming summary denial of resentencing petition where record of conviction showed petitioner was actual killer]; see also *People v. Delgadillo* (2022) 14 Cal.5th 216, 233 [defendant "not entitled to any relief under section 1172.6" because he "was the actual killer and the only participant in the killing"]; cf. *People v. Daniel*, *supra*, 57 Cal.App.5th at p. 678 [failure to appoint counsel was harmless because defendant was

actual killer who was "directly, not vicariously, liable for [victim's] murder"].)

Finally, we reject Patton's contention that the trial court " 'engage[d] in factfinding, weigh[ed] the evidence, or reject[ed] the petition's allegations[5] on the basis of adverse credibility determinations.' " The sworn testimony of police officers, based on surveillance video of the crime, that Patton committed the shooting was and is uncontroverted. "[N]o factfinding, weighing of evidence, or credibility determinations" were or are necessary here. "[T]he record of conviction irrefutably establishes as a matter of law that" Patton was convicted as the actual perpetrator of the attempted murder. (*Harden*, *supra*, 81 Cal.App.5th at pp. 47, 56.) In short, Patton was convicted, by his plea, under a valid theory of attempted murder that survives the changes to sections 188 and 189.

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5 Nowhere in Patton's petition did he assert he was not the sole and actual perpetrator. Apparently he contends his checking of a box that he "could not presently be convicted" of attempted murder encompasses such an implicit assertion.

## DISPOSITION

We affirm the trial court's order denying Ramon Patton's petition for resentencing.

EGERTON, J.

We concur:

EDMON, P. J.

RICHARDSON (ANNE K.), J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 3/22/23

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAMON PATTON,<br><br>Defendant and Appellant. | B320352<br><br>Los Angeles County<br>Super. Ct. No. TA144611<br><br>ORDER CERTIFYING<br>FOR PUBLICATION<br>[NO CHANGE IN JUDGMENT] |

THE COURT:

The opinion in the above-entitled matter, filed on February 22, 2023, was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be published in the Official Reports.

There is no change in the judgment.

EGERTON, J. EDMON, P. J. RICHARDSON (ANNE K.), J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

***ROB BONTA***
***Attorney General***

***State of California***
***DEPARTMENT OF JUSTICE***

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March 13, 2023

The Honorable Lee Smalley Edmon, Presiding Justice
and Honorable Associate Justices
Court of Appeal of the State of California
Second Appellate District, Division Three
300 S. Spring Street, Second Floor, North Tower
Los Angeles, California 90013

RE: Request for Publication, Cal. Rules of Court, 8.1120
*People v. Ramon Patton*
Second Appellate District, Division Three, Case No. B320352
Los Angeles Superior Court, Case No. TA144611

Dear Presiding Justice Edmon and Honorable Associate Justices:

On February 22, 2023, in the above-entitled case, this Court affirmed the trial court's order denying appellant's Penal Code Section 1172.6 petition at the prima facie stage. This Court held that the transcript of the preliminary hearing established that appellant was the sole perpetrator of the offense and therefore ineligible for relief as a matter of law. (Opn. 9-11.) The opinion was not certified for publication. Pursuant to California Rules of Court, rule 8.1120, respondent respectfully requests that this Court certify the opinion for publication in the Official Reports.

This Court's opinion addresses a conflict in the current case law regarding whether a trial court reviewing a section 1172.6 petition filed by a petitioner convicted by guilty or no contest plea may rely on uncontroverted evidence in a preliminary hearing to deny relief at the prima facie stage. *People v. Nguyen* (2020) 53 Cal.App.5th 1154 held that such a petitioner is ineligible for relief as a matter of law when the preliminary hearing transcript contains no reference to an underlying felony or a target crime for applying the natural and probable consequences doctrine. (*Id*. at pp. 1166-1168.) *People v. Rivera* (2021) 62 Cal.App.5th 217 disagreed with *Nguyen* and held that the denial of a petition at the prima facie stage based on the absence of evidence that the prosecution relied on an invalid theory before the grand jury involves improper factfinding. (*Id*. at pp. 237-238; see

*People v. Drayton* (2020) 47 Cal.App.5th 965, 980.) *People v. Davenport* (2021) 71 Cal.App.5th 476 sided with *Rivera*. (*Id.* at pp. 480-483.)

This Court's opinion implicitly agrees with *Nguyen*. More importantly, the opinion confirms that under *People v. Lewis* (2021) 11 Cal.5th 952, the trial court may rely on uncontroverted evidence in a preliminary hearing transcript to deny relief at the prima facie stage without engaging in factfinding. (See Opn. 9-11.) Because *Nguyen* was decided before *Lewis*, this opinion, if published, would be the first to hold that relying on a preliminary hearing transcript under these circumstances is consistent with *Lewis*. As a result, this opinion would provide much needed guidance to trial courts and attorneys in section 1172.6 cases involving petitioners convicted by plea.

In light of the foregoing, the opinion meets the following standards for publication: it "[a]dvances a new interpretation . . . of a . . . statute" (Rule 8.1105(c)(4)); [a]ddresses . . . an apparent conflict in the law (Rule 8.1105(c)(5)); and "[i]nvolves a legal issue of continuing public interest" (Rule 8.1105(c)(6)). Accordingly respondent respectfully requests that the opinion be certified for publication.

Sincerely,

/s/ Susan Sullivan Pithey

SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
State Bar No. 180166

For ROB BONTA
Attorney General

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

Case Name: ***People v. Ramon Patton***
Case No.: **B320352**

I declare:

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

On March 13, 2023, I electronically served the attached **LETTER REQUEST FOR PUBLICATION** by transmitting a true copy via this Court's TrueFiling system and email:

Jonathan E. Demson
Attorney for Appellant
(Service via TrueFiling)

California Appellate Project (LA)
CapDocs@lacap.com
(Service via TrueFiling)

Alexander Hogue
Deputy District Attorney
(Service via Email)

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 13, 2023, at Los Angeles, California.

| A. D. Kartikarini | /s/ A. D. Kartikarini |
|---|---|
| Declarant for eFiling | Signature |

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 13, 2023, a true copy thereof enclosed in a sealed envelope has been placed in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

The Honorable Hector Gutierrez
Judge
Los Angeles County Superior Court
Compton Courthouse
200 West Compton Blvd.
Department 9
Compton, CA 90220

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 13, 2023, at Los Angeles, California.

| I. Rangel | /s/ I. Rangel |
|---|---|
| Declarant for U.S. Mail | Signature |

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**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

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Supreme Court of California

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

4/26/2023

Date

/s/Jonathan Demson

Signature

Demson, Jonathan (167758)

Last Name, First Name (PNum)

Jonathan E. Demson, Attorney at Law

Law Firm