No. S260598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

VINCE E. LEWIS,
Defendant and Appellant.

Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties in Support of Vince E. Lewis

From a Decision of the Court of Appeal,
Second Appellate District, Division 1

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APPLICATION

Pursuant to Rule 8.520(f) of the California Rules of Court, the American Civil Liberties Union ("ACLU") of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties (collectively "*Amici*") respectfully apply for permission to file the *Amici Curiae* brief contained herein.[1]

The proposed *Amici Curiae* brief will address the constitutional dimension of the Court's second question for review: "When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?"

Amici are the three California affiliates of the national ACLU, a nationwide nonprofit, nonpartisan organization with more than 1.75 million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. The ACLU of California entities, which together have an approximate membership of 300,000, have a longstanding interest in preserving the constitutional rights of persons involved in the criminal justice system and have often submitted amicus briefs to this Court in such cases. The ACLU of California affiliates have a strong interest in and

[1] This Court previously granted leave to file this application and proposed *Amicus* brief by November 16, 2020.

familiarity with constitutional criminal procedure issues under the state and federal Constitutions.

No party, or counsel for any party, in this matter has authored any part of the accompanying proposed *Amici Curiae* brief, nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

Dated: November 16, 2020

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

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INTRODUCTION

Amici submit this brief to address the Court's second question: "When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?" The right to appointed counsel arises upon the filing of a facially sufficient petition and prior to the trial court's consideration of the record of conviction.

The structure of § 1170.95(c) clearly requires appointment of counsel on a petitioner's request and before the disposition of the petition. *See People v. Cooper* (2020) 54 Cal.App.5th 106, 123 (holding that "a petitioner is entitled to counsel upon the filing of a facially sufficient petition for relief that requests counsel be appointed"). But if § 1170.95(c) were ambiguous as to when counsel should be appointed, the canon of constitutional avoidance would be one way to resolve it. *See People v. Davis* (1981) 29 Cal.3d 814, 829 ("[W]e must, in applying the provision, adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality.") (quotations omitted).

Given the petitioner's weighty interests in full and fair § 1170.95 proceedings and the complexity of legal questions involved, both the state and federal Constitutions require appointment of counsel upon the filing of a facially sufficient petition. Given the unique status and structure of the S.B. 1437 scheme, cases limiting appointment of counsel in other types of

collateral challenges are materially distinguishable. Accordingly, any ambiguity in § 1170.95(c) should be construed in favor of appointment before the trial court reviews the record (and any additional evidence the petitioner may submit) and makes the threshold determination of whether the petition makes out a prima facie case.

STATEMENT OF THE CASE

In addition to redefining the crime of murder, Senate Bill 1437 establishes procedures for vacating murder convictions based on natural and probable consequences or felony murder theories. Set out in § 1170.95, those procedures require a petitioner to file a declaration "that he or she is eligible for relief under this section," based on the following 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.
>
> (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

Pen. Code § 1170.95(a)-(b). The petition must also indicate "[w]hether the petitioner requests the appointment of counsel." Pen. Code § 1170.95(b).

This case concerns § 1170.95's provisions governing the trial court's review of the petition:

> The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

Pen. Code § 1170.95(c).

While § 1170.95(c) expressly requires appointment of counsel if requested, any ambiguity in the statute as to *when* counsel "shall" be appointed emerges from an interpretation—including the Second District Court of Appeal's interpretation in Mr. Lewis' case—that § 1170.95(c) involves *two distinct* prima facie determinations. Under that reading of the statute, the petitioner must first "ma[ke] a prima facie showing that the petitioner falls within the provisions of this section." Only *after* this first prima facie determination is counsel appointed. The petitioner must then make a second prima facie showing for the trial court to issue an OSC. *See People v. Verdugo* (2020) 44 Cal.App.5th 320, 328 (interpreting § 1170.95(c) to "prescribe[ ] two additional court reviews before an [OSC] may issue, one made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section

1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief"); *see also People v. Edwards* (2020) 48 Cal.App.5th 666, 673–674 (adopting *Verdugo*'s reading of the statute), review granted July 8, 2020, S262481; *People v. Drayton* (2020) 47 Cal.App.5th 965, 975–976 (same); *People v. Torres* (2020) 46 Cal.App.5th 1168, 1177–1178 (same), review granted Jun. 24, 2020, S262011; *contra Cooper*, 54 Cal.App.5th at 118 ("declin[ing] to adopt the view that section 1170.95(c) requires two prima facie reviews").

In 2012, Mr. Lewis was convicted of murder after a jury trial. In 2019, after the passage of S.B. 1437, he filed a *pro se* petition to vacate his conviction and for resentencing under § 1170.95. Mr. Lewis' petition stated that he had been "convicted of [first or second] degree murder pursuant to ... the natural and probable consequences doctrine" and that because of the amended definition of murder he "could not now be convicted" because he "was not the actual killer" and "did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree." *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134. Mr. Lewis also requested the appointment of counsel. *Id*.

The trial court denied Mr. Lewis' petition without appointing counsel or holding a hearing, concluding – after reviewing the record of conviction – that he could still be convicted of murder as a direct aider and abettor, a theory of murder that survives S.B. 1437. On appeal, Mr. Lewis argued that the summary denial of his petition was improper given that § 1170.95(d)(3) allows a petitioner to "offer new or additional evidence." The Court of Appeal affirmed. *See Lewis*, 43 Cal.App.5th at 1139. The Court of Appeal rejected this argument, finding that Mr. Lewis "did not include or refer to such evidence in his petition." *Id*. at 1139. The Court of Appeal also found no error in the trial court's denial of appointed counsel, finding that the right to such counsel only arises "after the court determines that the petitioner has made a prima facie showing that petitioner 'falls within the provisions' of the statute[.]" *Id*. at 1140.

ARGUMENT

I. Appointed Counsel Has Historically Played a Critical Role in Assisting Indigent Defendants Like Mr. Lewis Fully and Fairly Access Complex Proceedings

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). Thus, the right to appointed counsel is at the bedrock of the American criminal justice system. This right is "of such character that it cannot be denied without violating . . . fundamental principles of liberty

and justice which lie at the base of all our civil and political institutions." *Powell v. State of Ala.* (1932) 287 U.S. 45, 67. *Gideon*'s universalization of this right—through the incorporation of the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment—is accordingly celebrated as a watershed moment in constitutional history. *See Gideon v. Wainright*, 372 U.S. 355 (1963). In California, "[t]he right to counsel is a fundamental constitutional right, which has been carefully guarded by the courts of this state." *Ex parte James* (1952) 38 Cal.2d 302, 310.

In addition to evening the playing field against a well-equipped adversary, appointed counsel helps indigent defendants navigate the endlessly complicated legal system. As the *Powell* court recognized, the right to be heard has little meaning if does not include the right to counsel, because "even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. at 68. As "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty" the right to counsel "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done." *Gideon*, 372 U.S. at 343 (quotations omitted).

For indigent defendants like Mr. Lewis, "lawyers in criminal courts are necessities, not luxuries[.]" *Gideon*, 372 U.S. at 344. Without provision of appointed counsel for the most meaningful of criminal proceedings, the justice system could make little claim to protect fairness and equality under

the law. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois* (1956) 351 U.S. 12, 19. While a state may not be *obligated* to allow courts to vacate a serious conviction when the crimes of conviction has been redefined, "that is not to say that a State that does grant" such a process "can do so in a way that discriminates against some convicted defendants on account of their poverty." *Id*. at 18. Courts should thus maintain "resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration." *People v. Ortiz* (1990) 51 Cal. 3d 975, 982-83.

II. POST-CONVICTION PROCEEDINGS WHERE THERE IS NO CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL ARE MATERIALLY DISTINGUISHABLE

Cases where courts have circumscribed the right to appointed counsel in post-conviction proceedings are distinguishable because none involved a statutory amendment to the substantive definition of a crime and an associated process to petition for vacatur and resentencing. In California, due process typically requires the appointment of counsel in habeas proceedings only after a sufficient showing is made to justify the issuance of an order to show cause ("OSC"). *See In re Clark* (1993) 5 Cal. 4th 750, 779-80 ("[I]f a petition attacking the validity of a judgment states a prima facie case … the appointment of counsel is demanded by due process concerns.") (citing *People v. Shipman* (1965) 62 Cal. 2d 226, 231-32); *see*

also Rules of Court 4.551(c)(2), 8.385(f). Until an OSC issues, non-capital habeas petitioners have no right to appointed counsel because "the ordinary processes of trial and appeal are presumed to result in valid adjudications." *Shipman*, 62 Cal.2d at 232; *see Clark*, 5 Cal. 4th at 779-80. But after a prisoner has pleaded facts showing that he may be entitled to relief, "his claim can no longer be treated as frivolous and he is entitled to have counsel appointed to represent him." *Shipman*, 62 Cal. 2d at 232. Similarly, the U.S. Supreme Court has stated that the constitutional requirement of appointed counsel extends only to the "first appeal of right," but not to further collateral attacks on a conviction. *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555.

But as far as *amici* are aware, neither the *Shipman* nor the *Finley* line of cases have addressed the right to appointed counsel in a proceeding—like this one—where a state legislature has fundamentally altered the definition of a particular crime. S.B. 1437 aims to "fairly address[] the culpability of the individual" by redefining murder under state law and applying the redefined crime to past convictions. Proceedings under § 1170.95 thus serve as an outgrowth of the original criminal proceeding, as opposed to a new civil matter collaterally attacking the conviction. *Cf. Finley*, 481 U.S. at 556-57 ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in

nature."). Unlike habeas and its focus on prejudicial constitutional error, the focus of S.B. 1437 is the proper classification of the defendant's actions under the state's applicable criminal law. The law sought "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). The structure and articulated purpose of S.B. 1437 thus makes it *sui generis* among post-conviction remedies.

III. The Filing of a Facially Sufficient Petition Under Penal Code § 1170.95(c) Invokes a Critical Stage of the Criminal Process Requiring Appointment of Counsel

As explained in *Cooper*, a plain reading of § 1170.95(c) requires appointment of counsel after the filing of a facially sufficient petition. *Cooper*, 54 Cal.App.5th at 123. But if § 1170.95(c) were ambiguous on this point, Article I, § 15 and the Sixth Amendment would require the statute to be construed to require the appointment of counsel at that phase of the proceedings to avoid a serious constitutional problem. Section 1170.95(c)'s threshold prima facie inquiry is a "critical stage" in the criminal proceeding because counsel is necessary to preserve substantial rights that otherwise would be irretrievably lost.

A. Critical Stages are those Where Counsel is Necessary to Preserve a Defendant's Substantial Rights

"Under article I, section 15 of the California Constitution, a defendant's right to the assistance of counsel is not limited to trial, but instead extends to other, 'critical stages' of the criminal process." *Gardner v. Appellate Division* (2019) 6 Cal.5th 998, 1004-1005. The Sixth Amendment's right to counsel similarly applies to all "critical stages" of the criminal process. *See Lafler v. Cooper* (2012) 566 U.S. 156, 165.

Though the U.S. Supreme Court has never expressed "a comprehensive and final one-line definition of 'critical stage,'" *Van v. Jones* (6th Cir. 2007) 475 F.3d 292, 312, it has variously described its qualities: "a step of a criminal proceeding … that h[olds] significant consequences for the accused," *Bell v. Cone* (2002) 535 U.S. 685, 696, where "[a]vailable defenses may be [ ] irretrievably lost," *Hamilton v. State of Ala*. (1961) 368 U.S. 52, 53, "where rights are preserved or lost," *White v. State of Md*. (1963) 373 U.S. 59, 60, and where counsel is "necessary to mount a meaningful defence," *United States v. Wade* (1967) 388 U.S. 218, 225. *See also Mempa v. Rhay* (1967) 389 U.S. 128, 134 (stating that a critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected").

While courts at times speak of "critical stages" in terms of the "confrontation" between prosecutor and defendant, *see Coleman v. Alabama* (1970) 399 U.S. 1, 9, the doctrine largely turns on the significance of the defendant's interests in the particular proceeding and the need for counsel to assist in navigating that proceeding. *See Gardner*, 6 Cal.5th at 1004 ("[W]e have described a critical stage as one in which the substantial rights of a defendant are at stake, and the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial.") (quotations omitted). As this Court has noted, "[t]his rule … recognizes that the right to the assistance of counsel is fashioned *according to the need for such assistance*, and this need may very well be greater during certain pre- and posttrial events than during the trial itself." *Id*. at 1004 (emphasis added).[2]

[2] In other formulations, the presence of any of the following factors may make a proceeding a critical stage: whether "(1) failure to pursue strategies or remedies results in a loss of significant rights, (2) skilled counsel would be useful in helping the accused understand the legal confrontation, and (3) the proceeding tests the merits of the accused's case." *United States v. Benford* (9th Cir. 2009) 574 F.3d 1228, 1232.

B. Section 1170.95's Procedure for Determining Whether a Petitioner Has Established a Prima Facie Case Is a Critical Stage of Trial Court Proceedings

The procedure after the filing of a petition under § 1170.95 bears the hallmarks of a critical stage.[3] It is "is governed by intricate rules that to a layperson would be hopelessly forbidding." *Gardner*, 6 Cal.5th at 1006 (quotations omitted). A petitioner must file a "declaration" effectively stating that petitioner satisfies "all the requirements" of § 1170.95(a). *See* Pen. Code § 1170.95(b). Two of these requirements are relatively straightforward, such as stating that the prosecution was "allowed" to "proceed under a theory of felony murder or murder under the natural and probable consequences doctrine" and stating an actual "convict[ion] of first degree or second degree murder[.]" Pen. Code § 1170.95(a)(1)-(2). But the

[3] As far as *amici* know, neither this Court nor the U.S. Supreme Court has reached the question of whether the constitutional right to appointed counsel applies to proceedings where a statute offers the opportunity to seek vacatur and resentencing based on amendment of the crime of conviction. Other cases have dealt with distinct Sixth Amendment questions in post-conviction resentencing cases that do not implicate the "critical stage" doctrine. *See People v. Perez* (2018) 4 Cal.5th 1055, 1063-64 (holding that Sixth Amendment jury trial rights do not prohibit trial court from finding facts for resentencing purposes – in that case, under Proposition 36's three-strikes reform – that were not found by the jury); People v. Anthony (2019) 32 Cal.App.5th 1102, 1156 (rejecting argument that S.B. 1437 violates Sixth Amendment jury trial rights by allowing sentencing court to make "new factual determinations about their liability … because the retroactive relief they are afforded by Senate Bill 1437 is not subject to Sixth Amendment analysis.").

third requirement is more complex: a statement that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189[.]" Pen. Code § 1170.95(a)(3). The trial court must then determine whether – based on the petition – the petitioner has made "a prima facie showing that he or she is entitled to relief." Pen. Code § 1170.95(c). The petitioner bears the burden at this stage. *See Drayton*, 47 Cal.App.5th at 980.

The petitioner's ability to open the door to further review of their claim to vacatur and resentencing thus turns on showing that they could not be convicted of murder under the amendments ushered in by S.B. 1437. Yet the law of murder is notoriously complex. *See People v. Osband* (1996) 13 Cal.4th 622, 689 (discussing "complicated murder instructions, which contain numerous terms of art"); *People v. Chiu* (2014) 59 Cal.4th 155, 171 (Kenard, J., concurring and dissenting) (comparing direct aiding and abetting liability and "[i]ndirect liability of the aider and abettor, under the natural and probable consequences rule" which is "more complex, requiring a five-step process").[4] Digesting murder doctrine as modified by S.B. 1437

[4] At least one Court of Appeal has found that "the preliminary determination that a petitioner is ineligible" for relief under S.B. 1437 "will generally be straightforward and uncomplicated." *People v. Tarkington* (2020) 49 Cal.App.5th 892, 909. *Amici* respectfully disagree and note that without counsel, a petitioner may be unable to identify for the trial court the record and extra-record facts that bear on the prima facie inquiry.

and applying it to what might be a sprawling record (not to mention accounting for any extra-record evidence that would now be relevant) is the essence of "critical" proceeding because it involves "rules" that are "forbidding for any layperson, but all the more so for criminal defendants who may come to court with a wide range of educational backgrounds and linguistic and other abilities." *Gardner*, 6 Cal.5th at 1006.[5]

The gatekeeping proceedings under § 1170.95 are also "critical" because of how directly they implicate a defendant's substantive rights. S.B. 1437 aims to "fairly address[] the culpability of the individual" by redefining murder under state law and applying the redefined crime to past convictions. Stats. 2018, ch. 1015, § 1, subd. (e). The stakes could hardly be higher in these proceedings. Their outcome bears not only on the petitioner's personal liberty but also whether the legal system—and the world—will brand them as a murderer.

Analogous right to counsel cases further illustrate why the filing of a facially sufficient petition constitutes a critical stage. In *Mempa v. Rhay* (1967) 389 U.S. 128, counsel had not been appointed for petitioners on their resentencing following a probation violation. The state of Washington argued that appointed counsel was not required because "petitioners were

[5] An incarcerated person like Mr. Lewis may also have difficulty obtaining the record of conviction from prison.

sentenced at the time they were originally placed on probation and [] the imposition of sentence following probation revocation is, in effect, a mere formality constituting part of the probation revocation proceeding." 389 U.S. at 135. The Supreme Court disagreed, identifying the ways in which appointed counsel was necessary.

While "sentencing in Washington offers fewer opportunities for the exercise of judicial discretion than in many other jurisdictions," the sentencing judge was required to make recommendations and furnish information to a probation board as part of the sentencing process. *Id*. In this context, despite the existence of a sentencing record, "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent." *Id*. But "[e]ven more important" than the practical need for counsel to assist with these functions "is the fact that certain legal rights may be lost if not exercised at this stage." *Id*. Similarly, here, even though the role of the trial court is relatively circumscribed at the prima facie stage, appointed counsel is necessary to "marshal[] the facts" and generally "aid[] and assist[] the defendant to present his case" that his murder conviction should be vacated and he should be resentenced.

The reasoning of *People v. Rodriguez* (1998) 17 Cal.4th 253, also compels the conclusion that the prima facie determination under § 1170.95(c) is a critical stage. *Rodriguez* involved the question whether a defendant and counsel must be present for a trial court's determination on remand whether to strike a prior felony conviction finding. The Court of Appeal had agreed with the State's argument that presence and counsel rights were contingent on a trial court determination on remand: "if the trial court on remand determines not to strike a prior felony conviction finding, no sentencing occurs, judgment is not pronounced, and defendant's right to be present is not implicated." *Id*. at 257. This Court rejected the idea that presence and counsel rights attach only after a threshold determination is made about entitlement to resentencing.

While the Court's holding relied on Penal Code § 1260's provision that remand involve "such further proceedings as may be just under the circumstances," its reasoning illustrates why there is a constitutional right to counsel for consequential threshold determinations like the one at issue in this case. The People's position in *Rodriguez* was that "the trial court can make an informed decision regarding its exercise of discretion" without the input of counsel by "rely[ing] on the record," including "the probation officer's report as well as the nature of the current offenses from the trial transcript." *Rodriguez*, 17 Cal.4th at 258. As the People argued, any statements by the parties "prior to the trial court making an initial decision

relating to its inclination to strik[e] the prior convictions" would be "superfluous." *Id*. This Court disagreed, finding that the "evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." *Id*. The Court thus determined it was "just under the circumstances" to require the defendant's presence and counsel "at the first occasion on which the trial judge will consider whether to exercise his sentencing discretion in defendant's favor[.]" *Id*.

Just like *Rodriguez*'s threshold determination on remand, under § 1170.95 the defendant has "never enjoyed a full and fair opportunity to marshal and present the case" that he cannot be deemed liable for murder as now defined. In § 1170.95 proceedings too, "evidence and arguments [] might be presented" by counsel to demonstrate eligibility for relief. Where it was "just under the circumstances" to enforce the rights of presence and counsel in *Rodriguez*, for similar reasons the threshold determination under § 1170.95 constitutes a "critical stage" for constitutional purposes.

IV. Due Process Independently Requires Appointment of Counsel After the Filing of a Facially Sufficient § 1170.95 Petition

The Due Process Clause of the California and U.S. Constitutions independently requires appointed counsel after the filing of a facially sufficient petition under § 1170.95. This is true both under the long line of

due process cases requiring that criminal defendants be equipped to fully participate in criminal proceedings and under the *Mathews v. Eldridge* (1976) 424 U.S. 319, balancing test.

Even before *Gideon*, the Supreme Court had long recognized circumstances in which the due process clause of the Fourteenth Amendment required appointment of counsel in criminal proceedings. For example, *Townsend v. Burke* (1948) 334 U.S. 736, found that the absence of counsel during sentencing after a guilty plea, coupled with "assumptions concerning" the defendant's "criminal record which were materially untrue" deprived the defendant of due process. Sentencing counsel "might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." *Id*. at 741.

In *Hamilton v. State of Alabama* (1961) 368 U.S. 52, the Supreme Court held that failure to appoint counsel at arraignment violated due process, despite the fact that the defendant simply pleaded not guilty. Under Alabama law at the time, certain defenses had to be raised then or be abandoned and it was the prospect of losing the opportunity to pursue those defenses that resulted in the constitutional problem. These due process cases – like their Sixth Amendment progeny – recognize that "[t]he right to

counsel is not a right confined to representation during the trial on the merits." *Moore v. State of Michigan* (1957) 355 U.S. 155, 160.

Similar to Sixth Amendment doctrine, the due process doctrine of appointed counsel turns in large part on the need for counsel to assist an indigent defendant navigate a complex legal system. *See Gardner*, 6 Cal.5th at 1006 ("[I]n part for these very reasons, the high court has held that a criminal defendant has a Fourteenth Amendment right to appointed counsel in his or her first appeal as of right.") (citing *Douglas v. California* (1963) 372 U.S. 353); *see also Halbert v. Michigan* (2005) 545 U.S. 605, 610 (holding that due process and equal protection required the appointment of counsel for indigent defendants seeking leave to appeal their guilty pleas because the state appellate court, in ruling on an application for leave to appeal, reviewed the merits of the appellant's claims, and indigent defendants were generally ill-equipped to navigate this process). As discussed above, *supra* part III.B, the proceedings at issue here involve legal complexity beyond the grasp of many indigent defendants, warranting appointment of counsel.

Another strand of due process doctrine also supports appointed counsel once a petitioner has filed a facially sufficient petition. Under *Mathews*, courts balance three factors to determine what procedural protections are necessary: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest

through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

In § 1170.95 proceedings, the private interest of possible relief from a murder conviction is immense. Such relief would remove the stain of such a serious conviction. *See People v. Brown* (1996) 42 Cal.App.4th 461, 478 ("murder has always been recognized as the most serious of crimes") (quotations omitted). It could also significantly shorten the sentence of imprisonment.

The risk of erroneous deprivation without counsel is also significant, particularly where heavily burdened trial courts must review the record of conviction without guidance and without the ability to know if extra-record evidence may also be relevant to the prima facie determination. Counsel for the petitioner would be uniquely positioned to provide the information and argument necessary for this determination.

Finally, even though there would be some costs associated with appointing counsel for all petitioners who submit a facially sufficient S.B. 1437 petition, those would be one-time costs and involve a relatively small group of potential petitioners. *See Weinberg v. Whatcom County* (9th Cir. 2001) 241 F.3d 746, 754 (requiring additional safeguards where "providing … an informal hearing prior to the deprivation would have entailed only minor administrative costs and burdens for the County"). Moreover, California already has a well-developed network of public defenders and panel attorneys who have been accepting appointments in S.B. 1437 cases—the state need not establish a new system to administer appointments at the threshold phase of the § 1170.95 process.

CONCLUSION

An indigent petitioner seeking to vacate their conviction under S.B. 1437 cannot be expected to fully present a prima facie case without the assistance of counsel. The stakes are immense, bearing not only on the petitioner's personal liberty but also whether the legal system—and the world—will brand them as a murderer. For a proceeding of such complexity and importance, the state and U.S. Constitutions require

appointment of counsel before the trial court determines whether to summarily dismiss the petition. Any ambiguity in § 1170.95(c) should accordingly be construed in favor of appointed counsel after the filing of a facially sufficient petition.

Dated: November 16, 2020

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: Sean Riordan

Attorneys for *Amici Curiae* ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rule of Court 8.204 that this Brief of *Amici Curiae* contains 4,970 words, including footnotes, but excluding the cover, application, tables, signature blocks, and this certification, as calculated by the word count feature of Microsoft Word.

Dated: November 16, 2020 By: 

Sean Riordan
Counsel for *Amici Curiae*

PROOF OF SERVICE

I, Lisa Marquez, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the American Civil Liberties Union Foundation of Northern California, and my business address is 39 Drumm Street, California 94111.

On November 16, 2020, I served the following document(s):

Application for Leave to File Amici Brief and Proposed Brief of Amici Curiae ACLU of Northern California, ACLU of Southern California and ACLU of San Diego and Imperial Counties in Support of Vince E. Lewis

In the Following Case:
People v. Lewis

No. S260598 on the parties stated below by the following means of service:

Office of the Attorney General 300 S. Spring St. #1700 Los Angeles, CA 90013 docketingLAawt@doj.ca.gov	Robert D. Bacon Attorney At Law 484 Lake Park Avenue, PMB 110 Oakland, CA 94610 bacon2254@aol.com

X BY E-MAIL causing the above-referenced document(s) to be transmitted via electronic transmission to the interested parties at the email addresses referenced in the attached service list.

X__ By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the aforementioned addressees. I am readily familiar with the business practices of the ACLU Foundation of Northern California for collection and processing of correspondence for mailing with the United States Postal Service and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 16, 2020 at Escondido, California.

__/s/ Lisa Marquez

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **sriordan@aclunc.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	ACLU Amicus Lewis with Bookmarks

Service Recipients:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/18/2020

Date

/s/Sean Riordan

Signature

Riordan, Sean (255752)

Last Name, First Name (PNum)

ACLU Foundation of Northern California

Law Firm