Supreme Court of California
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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Supreme Court No. S279670
v.	)	Court of Appeal No. B320352
RAMON PATTON,	)	
Defendant and Appellant.	)	Superior Court No. TA144611

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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Did the trial court engage in impermissible judicial factfinding by relying on the preliminary hearing transcript to deny defendant's Penal Code section 1172.6 petition at the prima facie stage? (See *People v. Lewis* (2021) 11 Cal.5th 952.)

STATEMENT OF THE CASE

On September 11, 2018, appellant, Ramon Patton, pleaded no contest to attempted murder (Pen. Code, §§ 187, subd. (a), 664) and admitted to a gun enhancement allegation (Pen. Code, § 12022.53, subd. (c)). He was sentenced to an aggregate determinate term of 29 years. (C.T. 20-23, 26; R.T. 7-8.)

On January 18, 2022, appellant filed a petition for resentencing pursuant to section 1172.6.[1] (C.T. 27-28.)

[1] Formerly section 1170.95, recodified without substantive change by Stats. 2022, ch. 58, § 10, eff. June 30, 2022. Undesignated statutory references are to the Penal Code.

On May 13, 2022, the superior court summarily denied the petition on the grounds that the evidence presented at the preliminary hearing, in addition to appellant's admission to the gun enhancement allegation, showed that appellant was acting alone and was the actual shooter, rebutting his prima facie showing of eligibility for relief. (C.T. 39; R.T. 302-304.)

The court of appeal (Division Three of the Second Appellate District) affirmed the superior court's order in an unpublished opinion filed on February 22, 2023. The court granted respondent's publication request on March 22, 2023. (See *People v. Patton* (2023) 89 Cal.App.5th 649.) This Court granted review on June 28, 2023.

ARGUMENT

I. THE TRIAL COURT'S ASSESSMENT OF WHETHER A RESENTENCING PETITION PRESENTS A PRIMA FACIE SHOWING OF ELIGIBILITY FOR RELIEF IS A PURELY LEGAL DETERMINATION THAT SHOULD NOT RELY ON PRELIMINARY HEARING EVIDENCE

The issue presented in this case comes down to the question of whether, at a hearing pursuant to section 1172.6, subdivision (c), preliminary hearing evidence can in certain instances establish material facts as a matter of law in relation to whether a resentencing petition has made a prima facie showing of eligibility for relief. In this case, both the trial court and the court of appeal concluded that the preliminary hearing evidence established as a matter of law that appellant was acting alone and was the actual shooter. These facts, in turn, rendered

appellant ineligible for resentencing because they show that his attempted murder conviction could not possibly have been based on the natural and probable consequences doctrine or the imputation of malice.

To the extent that facts such as the identity of the actual perpetrator or the absence of any accomplice could be refuted by supplementation of the preliminary hearing evidence with new or additional evidence that appellant was not acting alone or was not the actual shooter, the court of appeal's opinion requires the petitioner to make an offer of proof at the prima facie showing phase of the proceedings in order to sustain his or her right under the statute to an evidentiary hearing at which such evidence can be considered by the trial court.

Pursuant to this reading of the statute, only some petitioners can rely on a petition containing the basic information required by section 1172.6, subdivision (b)(1). In other cases, including this one, preliminary hearing evidence that the petitioner was the actual perpetrator establishes a rebuttable presumption of ineligibility for resentencing.[2] In such cases, in order to make a prima facie showing of eligibility for relief, the petitioner must make an offer of proof that he or she might prevail at an evidentiary hearing. Otherwise, evidence merely

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[2] If the petitioner could have been prosecuted pursuant to a second-degree felony murder theory, being the actual perpetrator would not necessarily render the petitioner ineligible for relief. That scenario is not implicated here, since appellant pled to attempted murder.

sufficient to demonstrate ineligibility becomes evidence deemed true by operation of law.

Nothing in this Court's decision in *Lewis* supports such an interpretation of the statute, and any attempt to reduce such an approach to a purely legal determination is 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. 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 dispositive finding by operation of law unless challenged by the petitioner with an offer of proof.

Moreover, this reading of the statute is contrary to the broader legislative scheme, pursuant to which the burden of proof at the evidentiary hearing is on the prosecution and the petitioner need only raise a reasonable doubt in order to establish entitlement to resentencing. Under the clear terms of section 1172.6, subdivision (d)(3), the petitioner has no obligation to present *any* evidence and may simply argue that the prosecution has failed to carry its burden of proving beyond a reasonable doubt that the petitioner is guilty of murder under current law. It would make little sense to require the petitioner to present a theory of the case supported by offers of proof merely to sustain his or her right under the statute to an evidentiary hearing at which the petitioner need not present any evidence at all.

As this Court observed in *Lewis*, the prima facie showing determination was intended to be a streamlined part of the proceedings at which the bar has been set very low by the Legislature. The better reading of the statute, consistent with this very low bar, limits review of the petitioner's prima facie showing of eligibility for relief to readily ascertainable facts in the record of conviction. In a plea case like this one, such facts are to be found in the charging document and the explicit terms of the plea agreement, including any admissions. Factfinding based on preliminary hearing evidence, as well as any new or additional evidence presented by the parties, and the resolution of crucial factual issues is reserved for the evidentiary hearing.

A. The Split In Authority

Before and after this Court's decision in *Lewis*, courts have split over whether a trial court can consider evidence presented at a preliminary (or grand jury) hearing in assessing whether a resentencing petition has made a prima facie showing of eligibility for relief.

1. Cases Before *Lewis*

In *People v. Nguyen* (2020) 53 Cal.App.5th 1154, the defendant pleaded guilty to second degree murder and years later filed a section 1172.6 resentencing petition. Division One of the Second Appellate District affirmed the summary denial of the 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.)

Observing that a resentencing petition is properly summarily denied in a case that went to trial if the prosecution did not pursue, and the jury was not instructed on, any of the theories of murder liability abrogated by S.B. 1437, the *Nguyen* court concluded: "Nguyen's murder conviction after a guilty plea should not be accorded less weight and finality than a murder convictions after a jury trial, as the transcripts from the preliminary and plea hearings demonstrate Nguyen was convicted of second degree murder as a direct aider and abettor." (*Id*. at p. 1167.)

"Nguyen's counsel's conjecture and speculation about other theories that could have been pursued at trial do not alter our conclusion, based on the transcripts from the preliminary and

plea hearings, that Nguyen was convicted of second degree murder as a direct aider and abettor. The record of the conviction demonstrates that he pleaded guilty under this theory." (*Id*. at p. 1168.)

In *People v. Rivera* (2021) 62 Cal.App.5th 217, review granted Jun. 9, 2021, S268405, and dism. Jan. 19, 2022, Division One of the First Appellate District disagreed with *Nguyen*: "*Nguyen* involves similar facts to ours, but we decline to follow its holding. Although we agree that a murder conviction after a plea has just as much 'weight and finality' as one after a trial [citing *Nguyen*], this does not mean that the theory underlying each type of conviction can be ascertained with the same degree of certainty." (*Id*. at p. 237.)

"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 pre-plea record of an underlying offense that could support liability for felony murder or murder under the natural and probable consequences doctrine. [Citing *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.)

"[W]e disagree that evidence or arguments presented to a grand jury or at a preliminary hearing definitively establish the

theories under which a petitioner was or could be convicted of murder." (*Id.* at p. 238, fn. 12.)[3]

The *Rivera* court also rejected the argument that Rivera's stipulation to the grand jury transcript as the factual basis for his plea constituted an admission to having acted with actual malice. Noting this Court's observation that "[a] defendant is not required to personally admit the truth of the factual basis of the plea, which may be established by defense counsel's stipulation to a particular document" (*People v. French* (2008) 43 Cal.4th 36, 50-51), the *Rivera* court concluded that, "[f]or our purposes, this means that Rivera did not admit to the truth of any of the evidence presented to the grand jury, and that evidence therefore cannot be used to demonstrate that he admitted to acting with actual malice." (*Rivera, supra,* 62 Cal.App.5th at p. 235; cf. *Davenport, supra,* 71 Cal.App.5th at p. 482 ["The trial court engaged in 'impermissible factfinding' at the prima facie stage by relying on facts taken from the preliminary hearing transcript

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[3] *Rivera* also rejected the argument that Rivera's no-contest plea to second degree murder in response to a charging document that included the language of section 187, subdivision (a), constituted an admission to having acted with actual malice. (*Id.* at p. 234 ["given that the allegation that a murder was committed 'willfully, unlawfully, and with malice aforethought' is a generic charge permitting the prosecution to proceed on *any* theory of murder, we cannot conclude that by admitting to the murder as charged Rivera admitted that he acted with actual malice, not just that the element of malice was satisfied"]; accord, *People v. Pickett* (2023) 93 Cal.App.5th 982, 993, fn. 6; *People v. Flores* (2022) 76 Cal.App.5th 974, 987; *People v. Davenport* (2021) 71 Cal.App.5th 476, 484-485; *People v. Eynon* (2021) 68 Cal.App.5th 967, 978-979.)

that were not stipulated to or admitted"].)

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.)

2. Cases After *Lewis*

In *People v. Lewis*, supra, 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 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.)

Lewis did not end the conflict in the courts of appeal over the issue presented in this case. Subsequent to *Lewis*, in *People v. Davenport, supra,* 71 Cal.App.5th 476, involving a defendant who pled no contest to second degree murder, 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). [Citation.] 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 [footnote omitted].)

Davenport's ruling was limited: "[T]he trial court erred in considering facts from the preliminary hearing transcript here because Davenport did not stipulate to the transcript as a factual basis for his plea." (*Id*. at p. 483.)

Whether a trial court can summarily deny a petition based on documents to which the petitioner *did* stipulate as providing a factual basis for his plea was subsequently addressed in *People v. Flores, supra*, 76 Cal.App.5th 974. In *Flores,* which involved a defendant who pled no contest to second degree murder, the Fifth Appellate District acknowledged the split in authority, and in particular the disagreement between *Nguyen* and *Rivera*, "on the import of the preliminary hearing transcript in determining whether a petitioner has made a prima facie case for

resentencing . . . ." (*Id*. at p. 989.) Noting that *Nguyen* and *Rivera* were decided before this Court's decision in *Lewis*, the *Flores* court concluded that "it is now well-settled that the prima facie determination is a question of law. [Citing *Lewis*.] 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*." (*Id*. at p. 991.)

The *Flores* court went further than *Davenport*. In contrast with Davenport, who did not stipulate that his preliminary hearing transcript provided a factual basis for his plea, Flores *did* stipulate that the police reports and preliminary hearing transcripts provided a factual basis for his plea to second degree murder. (*Id*. at p. 982.) With respect to incriminating testimony presented at Flores' preliminary hearing, the *Flores* court nevertheless concluded: "Petitioner did not admit the truth of this testimony and his stipulation that the transcript provided a factual basis for the plea is not a ' "binding admission for all purposes." ' " (*Id*. at p. 991.)

"Even if it was, this testimony, standing alone, does not conclusively establish as a matter of law that petitioner was the actual killer, acted with intent to kill or actual malice, or was a major participant in an underlying crime who acted with reckless indifference to human life. It does not exclude the possibility that petitioner was, or could have been, convicted under the imputed malice theories eliminated by Senate Bill No. 1437 (2017-2018 Reg. Sess.). To find petitioner ineligible for resentencing on this

record would require judicial factfinding, which is impermissible at the prima facie stage. [Citing *Lewis*.]" (*Id*. at pp. 991-992.)

3. The Court of Appeal's Opinion and a More Recent Case (*Pickett*)

The court of appeal's ruling in this case was based primarily on appellant's failure, both in the trial court and on appeal, to rebut what the court viewed as convincing evidence at appellant's preliminary hearing that he was the sole perpetrator and actual killer and therefore ineligible for relief: "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." (*Patton, supra*, 89 Cal.App.5th at p. 657.)

Notwithstanding this reliance on preliminary hearing evidence as grounds for the summary denial of appellant's petition, the court of appeal's opinion does not discuss or even cite *Nguyen*, *Rivera*, *Davenport*, or *Flores*. Instead, the opinion cites seven cases to support its conclusion that, "As the sole and actual perpetrator of the attempted murder of Jackson, Patton is ineligible for resentencing as a matter of law." (*Id*. at p. 657.) Yet these seven cases have little or no bearing on whether a trial court can rely on the preliminary hearing transcript in summarily denying a petition. Two involved, not summary denials, but rather denials after an evidentiary hearing: *People v. Garcia* (2022) 82 Cal.App.5th 956, 965-966, affirmed the denial

of a petition based on the trial court's finding, after an evidentiary hearing, that petitioner was the actual killer. Garcia was not a plea case, and there was no dispute that Garcia's resentencing petition established a prima facie showing of eligibility for relief. *People v. Myles* (2021) 69 Cal.App.5th 688, 694, was a plea case, but here again the petition was denied only after an evidentiary hearing, and there was no dispute that Myles' petition established a prima facie showing of eligibility for relief.

Two cases cited by the court of appeal's opinion involved jury trials and no-issue briefs filed by appellate counsel. In *People v. Gallo* (2020) 57 Cal.App.5th 594, the dissent (which focused on the proper approach to no-issue briefing) noted that "Gallo's trial involved neither the felony murder rule nor the natural and probable consequences doctrine. His murder conviction accordingly has nothing to do with Penal Code section 1170.95 . . . or Senate Bill No. 1437 (2017–2018 Reg. Sess.)." (*Id.* at p. 600 (dis. opn. of Menetrez, J.).) In *People v. Delgadillo* (2022) 14 Cal.5th 216, 222, "A jury convicted Delgadillo of second degree murder under an actual implied malice theory . . . ." This Court determined, based on its independent review of the record, that Delgadillo was not entitled to any relief under section 1172.6: "Indeed, the record here makes clear that Delgadillo was the actual killer and the only participant in the killing. At trial, defense counsel conceded that the accident occurred while Delgadillo was driving on the wrong side of the road." (*Id.* at p. 233.) In neither *Gallo* nor *Delgadillo* was the ruling based on

preliminary hearing evidence.

Nor do the remaining three cases cited by the court of appeal's opinion provide much support for its ruling in relation to the issue presented for review in this case. In *People v. Daniel* (2020) 57 Cal.App.5th 666, 670, review granted Feb. 24, 2021, S266336, and dism. Dec. 1, 2021, the resentencing petition was summarily denied without appointment of counsel because Daniel's jury was not instructed on either the felony murder rule or the natural and probable consequences doctrine. The *Daniel* court held that the trial court's error in failing to appoint counsel could be shown to be harmless based solely on review of the jury instructions. (*Id*. at p. 677.) *Daniel* rejected the argument that the petitioner should have been given the opportunity to present evidence that he was not the actual killer: "[E]ven if Daniel could conceivably muster some evidence that he did not act alone in killing Tsegay and intentionally participated in only a lesser felony, that evidence would not require an order to show cause in light of the jury's determination that he was directly, not vicariously, liable for her murder." (*Id*. at p. 678.)

In *People v. Harden* (2022) 81 Cal.App.5th 45, the defendant was convicted of felony murder after a jury trial. The *Harden* court affirmed the summary denial of Harden's resentencing petition based solely on the jury instructions and verdicts: "Without weighing conflicting evidence or making credibility determinations, the record of conviction irrefutably establishes as a matter of law that the jury determined Harden was the actual killer. The instructions and verdicts show the

only path to convicting Harden of first degree felony murder with special circumstances and a personal-infliction-of-great-bodily-injury enhancement was based on a finding she actually killed Alfred P." (*Id*. at p. 56.)

Similarly, in *People v. Edwards* (2020) 48 Cal.App.5th 666, overruled in part on another ground by *Lewis, supra*, 11 Cal.5th at pp. 962-963, the defendant was convicted of murder after a jury trial. The *Edwards* court affirmed the summary denial of Edwards' resentencing petition without appointing counsel because there were no jury instructions on either the felony murder rule or the natural and probable consequences doctrine. (*Id*. at p. 674 ["Edwards *could not* meet the statutory prerequisites for even filing a section 1170.95 petition because he was not charged or convicted of second degree felony murder or murder under the natural or probable consequences doctrine directed at accomplice liability. Accordingly, the superior court's summary denial was appropriate on this ground alone"].) Although the *Edwards* court noted that the trial court's secondary ruling that Edwards was ineligible for relief because he was the actual killer "was well supported for the reasons stated by the superior court, namely the record of conviction and our prior opinion in the direct appeal" (*id*. at pp. 674-675), the opinion in *Edwards* included a footnote cautioning that the viability of this secondary ruling was subject to this Court's then-pending decision in *Lewis* (*id*. at p. 675, fn. 4).

The court of appeal's opinion appears to have cited the seven cases discussed above merely for the proposition that

actual killers are ineligible as a matter of law for resentencing. The opinion simply assumes that, in the absence of some sort of rebuttal or contestation, preliminary hearing evidence that the petitioner was the actual killer 'irrefutably establishes as a matter of law' that the petitioner is ineligible for relief: "[W]e 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." (*Patton, supra*, 89 Cal.App.5th at p. 658 [footnote omitted].)

Subsequent to *Patton*, Division One of the Second Appellate District decided *People v. Pickett, supra*, 93 Cal.App.5th 982, review granted, Oct. 11, 2023, S281643. Pickett pled guilty in 1980 to second degree murder. In 2022 he filed a section 1172.6 resentencing petition. The trial court appointed counsel and received opposition papers from the prosecution, which argued that Pickett was ineligible for relief because testimony at Pickett's preliminary hearing showed that he was the actual killer. Defense counsel did not submit a reply and informed the court that she would be submitting on the petition. The trial court denied the petition on the grounds argued by the

prosecution. (*Id*. at pp. 986-987.)

The *Pickett* court noted that the record before it did not include a transcript of Pickett's plea hearing or otherwise indicate whether he had stipulated to a factual basis for his plea. (*Id*. at p. 986, fn. 2.)

The court of appeal affirmed, largely because Pickett failed to provide any rebuttal to the prosecution's assertion that preliminary hearing testimony showed he was the actual killer: "Although Pickett's petition is facially sufficient and thus entitled him to the appointment of counsel, it is devoid of factual allegations concerning the killing of Moore. Pickett does not deny that he was the actual killer, nor does he assert that another person fired the shot that killed Moore or that he acted without the intent to kill. He merely states the legal conclusion that he could not now be convicted of murder because of changes made to the law of murder under Senate Bill No. 1437." (*Id*. at p. 989.)

"Although there is no testimony from anyone who saw Pickett fire the fatal shot, there is nothing to suggest that any other person was involved in the incident. The inference that Pickett acted alone and was the actual killer is uncontradicted and compelling." (*Id*. at p. 990.)

Fatal to Pickett's petition was his failure to contest the incriminating preliminary hearing testimony: "Pickett, with the aid of counsel, had the opportunity to file a reply to the district attorney's response and present argument at a hearing. He asserted no objection to the district attorney's evidence, however, and offered no evidence or argument that might have raised a

factual issue as to his involvement in Moore's death. We can thus assess Pickett's prima facie showing without "engag[ing] in 'factfinding involving the weighing of evidence' " or making any credibility determinations [citing *Lewis*], because Pickett offered no evidence to weigh, and did not dispute the evidence the district attorney submitted." (*Ibid*.)

"Under these circumstances, where the defendant alleges no facts concerning the murder to which he pleaded guilty, the People introduce without objection uncontroverted evidence from the preliminary hearing transcript showing that the defendant acted alone in killing the victim, and the defendant does not put forth, by way of briefing or oral argument, any factual or legal theory in support of his petition, the defendant has failed to make a prima facie showing for relief under section 1172.6." (*Ibid*.)

Distinguishing *Rivera*, the *Pickett* court pointed out that, in that case, the petitioner had offered a theory under which the grand jury evidence was consistent with murder liability pursuant to the natural and probable consequences doctrine, thereby creating a factual dispute. (*Id*. at pp. 991-992.) *Pickett* similarly distinguished *Davenport* on the grounds that Davenport's trial counsel "filed a reply brief—presumably asserting a factual or legal basis in support of the petition—whereas Pickett's counsel did not." (*Id*. at p. 992.) The *Pickett* court also sought to distinguish *Flores*, pointing out that the preliminary hearing evidence in that case left open the possibility that an accomplice, not the defendant, was the actual killer and Flores aided and abetted his accomplice without intending to kill

the victim, whereas there was no allegation or evidence that Pickett had an accomplice. (*Id*. at p. 993.)

Pickett took issue with the view expressed in *Davenport* that, in assessing whether a petition has made a prima facie showing of eligibility for relief, preliminary hearing evidence may be considered only if the petitioner stipulated that the transcript of that hearing provided a factual basis for the plea. According to *Pickett*, the preliminary hearing transcript may be considered by the trial court regardless of any such stipulation. (*Id*. at pp. 992-993.)

B. The Standard of Review

"The proper interpretation of a statute is a question of law we review de novo." (*Lewis, supra,* 11 Cal.5th at p. 961.)

C. Nothing In the Statute Requires a Petitioner To Rebut Preliminary Hearing Evidence at the Prima Facie Showing Stage of the Proceedings

The claim that 'uncontroverted' preliminary hearing evidence rebuts a resentencing petition's prima facie showing of eligibility for relief is not consistent with the legislative scheme enacted by section 1172.6. 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 modest chances of success and that may give away a defendant's trial strategy. (See *Eynon, supra,* 68 Cal.App.5th at pp. 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 shooter, and nothing in his record of conviction establishes as a matter of law that he was the actual shooter.[4] 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 shooter without weighing the preliminary hearing evidence and making an independent finding, which is precisely what this Court in *Lewis* forbade at the prima facie showing phase of the proceedings.

A purely legal determination that the evidence at the preliminary hearing was *sufficient* to sustain a finding that appellant was the actual shooter has no bearing on whether appellant's petition made a prima facie showing of eligibility for relief. (See *Flores, supra*, 76 Cal.App.5th at p. 991 ["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*"].) The statute contemplates an evidentiary hearing to resolve such factual issues at which both parties may

[4] At his plea hearing, appellant's trial counsel stipulated to a factual basis for the plea without reference to any particular document. (R.T. 8.)

present new or additional evidence. (See Pen. Code, § 1172.6, subd. (d)(3).)

The assertion that reliance on uncontroverted preliminary hearing evidence constitutes a strictly legal analysis devoid of any fact finding (see *Patton, supra*, 89 Cal.App.5th at p. 658) appears to be premised on the notion that such evidence sometimes proves a factual proposition as a matter of law –at least for purposes of a resentencing petition– unless it is challenged or supplemented by the petitioner with other evidence that materially changes the picture of what happened. Pursuant to this line of analysis, in any plea case in which the preliminary hearing evidence 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 shooter in dispute. (*Id*. at p. 657.) 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. How else could he satisfy the trial court that the identity of the actual shooter was truly in dispute?

Pursuant to this reading of the statute, only some petitioners can rely on a petition containing the basic information

required by section 1172.6, subdivision (b)(1). 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 include preliminary hearing evidence sufficient to create a rebuttable presumption of ineligibility for resentencing. In such cases, in order to make a prima facie showing of eligibility for relief, the petitioner must make 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 is 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 shooter. 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 dispositive finding by operation of law unless challenged by the petitioner with an offer of proof.

In *Lewis*, this Court stated: "As the People emphasize, the 'prima facie bar was intentionally and correctly set very low.' " (*Lewis, supra,* 11 Cal.5th at p. 972.) Imposing on the petitioner, at the prima facie showing phase of the proceedings, the burden of challenging preliminary hearing evidence that appears to undercut the petitioner's claim of eligibility for relief is inconsistent with a "very low" prima facie bar.

All that is initially required of a valid petition is set forth in section 1172.6, subdivision (b)(1), including a "declaration by the petitioner that the petitioner is eligible for relief under this section . . ." (Pen. Code, § 1172.6, subd. (b)(1)(A).) Following the filing of a valid petition and appointment of counsel, subdivision (c) requires the trial court to hold a hearing to determine whether the petitioner has made a prima facie case. (Pen. Code, § 1172.6, subd. (c).) Nothing in that part of the statute suggests the significantly more complex scheme outlined in *Pickett* and the court of appeal's opinion in this case pursuant to which a petitioner must supplement the petition described in subdivision (b)(1) with offers or proof sufficient to challenge any preliminary hearing evidence that might appear to undercut the petitioner's claim of eligibility for relief. (See *Davenport, supra,* 71 Cal.App.5th at p. 483 [the "subdivision (c) inquiry is a test of the petitioner's pleaded allegations, not an inquiry into the truth of those allegations and the credibility of the evidence on which they may rely"].)

Nor is it clear from these decisions how far such a burden would extend. In some cases, the preliminary hearing transcript

may be entirely devoid of any evidence of an accomplice, giving rise to an inference that the petitioner was acting alone and could not have been convicted based on the imputation of malice. But what if there was evidence of accomplice involvement, but witnesses at the preliminary hearing testified that the petitioner was the actual killer in a case involving a plea to first degree murder or the actual perpetrator in a case involving a plea to attempted murder? What if only one witness so testified? What if no witness so testified, but the evidence gives rise to a reasonable inference that the petitioner was the actual killer or perpetrator? Does the petitioner bear the burden of making an offer of proof sufficient to dispute any such evidence? How does the petitioner or the petitioner's counsel determine the extent of the burden in this respect?

In many cases including this one, pursuant to the interpretation of the statute proposed by *Pickett* and the court of appeal's opinion the petitioner would be obligated to present a theory of the case supported by sufficient offers of proof in order to sustain a prima facie showing of eligibility for relief. The prima facie showing hearing governed by section 1172.6, subdivision (c), would thus become a kind of 'preliminary evidentiary hearing' –a preview of the evidentiary hearing described in subdivision (d)(3) except that it is the petitioner who bears the burden of proof. (See *Davenport, supra,* 71 Cal.App.5th at p. 483 ["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" would "convert the

prima facie inquiry into a factual contest, which is reserved for evidentiary hearings at the section 1170.95, subdivision (d) stage"].)

This reading of the statute is contrary to the broader legislative scheme, pursuant to which the burden of proof at the evidentiary hearing is on the prosecution and the petitioner need only raise a reasonable doubt in order to establish entitlement to resentencing. (See Pen. Code, § 1172.6, subd. (d)(3) ["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"].) Under the clear terms of subdivision (d)(3), the petitioner has no obligation to present *any* evidence and may simply argue that the prosecution has failed to carry its burden of proving beyond a reasonable doubt that the petitioner is guilty of murder under current law. How odd it would be, then, to require the petitioner to present a theory of the case supported by offers of proof merely to sustain his or her right under the statute to an evidentiary hearing at which the petitioner need not present any evidence at all.

Though not stated explicitly, the rationale for this awkward reading of the statute, according to which the burden of proof rests with the petitioner at the prima facie hearing and the prosecution at the evidentiary hearing, appears to be the concern that evidentiary hearings in cases like this one are a waste of time. If it is apparent from the preliminary hearing evidence that the petitioner is probably not entitled to resentencing because it appears he acted alone or was the actual killer or

actual perpetrator –or some other fact showing that he is not eligible for relief, why shouldn't the petitioner bear the burden of demonstrating that there is a material issue in dispute that must be resolved at an evidentiary hearing?

Whatever the merits of this concern, the allocation of burdens of proof and production during the course of resentencing petition proceedings clearly falls within the province of the Legislature and reflects the ordering of priorities, including balancing the conservation of scarce judicial resources against the statute's goal of vacating the homicide convictions of defendants prosecuted pursuant to an invalidated theory of murder liability. Stretching the meaning of 'prima facie case' in section 1172.6, subdivision (c), to require affirmative challenges to incriminating preliminary hearing evidence may serve the goal of reducing the number of evidentiary hearings in California. But a reduction in the number of evidentiary hearings also increases the risk that some petitions will be erroneously denied because the trial court did not have the benefit of an evidentiary hearing in determining whether the petitioner is entitled to relief. This trade off does not reflect the legislative goals of the statute.

Indeed, the Legislature has been quite specific in establishing rules governing the conduct of evidentiary hearings, including relatively precise and detailed guidelines concerning the burden of proof, the standard of proof (and what does not meet it), the applicability of the rules of evidence, and specific exceptions thereto. (Pen. Code, § 1172.6, subd. (d)(3).) These

rules were substantially expanded by the amendments to the statute enacted by Senate Bill No. 775 (2020-2021 Reg. Sess.). Yet, neither in the statute as originally enacted nor in the subsequent amendments has the Legislature included any parallel set of rules or guidelines for the prima facie hearing in section 1172.6, subdivision (c). Had the Legislature intended prima facie hearings to be the complex hearings contemplated by *Pickett* and the court of appeal's opinion in this case, it could easily have included commensurate language in subdivision (c), as it did in subdivision (d)(3). The fact that it did not do so shows that the Legislature contemplated a much simpler and more straightforward prima facie hearing at which the trial court's review is limited to 'readily ascertainable facts' in the record of conviction (*Davenport, supra,* 71 Cal.App.5th at p. 483), such as the charging document and the explicit terms of the plea agreement in a case like this one.

Moreover, whatever efficiencies might be achieved by greatly increasing the burden on petitioners at the prima facie showing phase of the proceedings are likely outweighed by the legal and practical complexities such a scheme adds to what was supposed to be a streamlined part of the process –a "very low" bar (*Lewis, supra,* 11 Cal.5th at p. 972). By comparison, the far simpler approach of simply holding an evidentiary hearing in cases like this one may well also prove to be the most efficient means of adjudicating petitions that appear from the trial court's initial review to have dim prospects of success. On the one hand, an entire round of appellate review is probably avoided in a case

like this one if the trial court's review of a prima facie case is limited to readily ascertainable facts in the record of conviction, such as the charging document and the explicit terms of the plea agreement. By comparison with the time and resources required by an appeal, simply moving forward with an evidentiary hearing is not likely to be so burdensome or time-consuming as to justify the cumbersome reading of the statute proposed by *Pickett* and the court of appeal's opinion.

In any event, the latter approach is consistent with the straightforward language of section 1172.6, subdivision (c). And in view of the broader legislative purpose underlying Senate Bill No. 1437, a preference for the greater accuracy of determinations of entitlement to resentencing made with the benefit of an evidentiary hearing is in keeping with the priorities of the Legislature in enacting section 1172.6.

Lewis's straightforward approach to the statute limits review of the petitioner's prima facie showing of eligibility for relief to readily ascertainable facts in the record of conviction. In a case that went to trial, those may be found in the charging document, jury instructions, verdicts, and findings. In a plea case like this one, those are to be found in the charging document and the explicit terms of the plea agreement, including any admissions. Factfinding based on preliminary hearing evidence, as well as any new or additional evidence presented by the parties, and the resolution of crucial factual issues is reserved for the evidentiary hearing.

Although some resentencing petitions may appear to have

dim prospects of success in view of evidence presented at the preliminary 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. (See *Davenport, supra,* 71 Cal.App.5th at p. 485, fn. 3 ["To the extent the summary denial of section 1170.95 relief in this case reflects the considered view of an experienced trial judge as to what is highly likely to occur at that hearing based on the record as it stands now, we share that view but must apply the statute as written"].)

CONCLUSION

The decision of the court of appeal should be reversed.

Respectfully Submitted,

Dated: November 13, 2023

JONATHAN E. DEMSON
Attorney for Appellant

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Supreme Court
Plaintiff and Respondent,	)	No. S279670
	)	
v.	)	Court of Appeal
	)	No. B320352
RAMON PATTON,	)	
	)	Superior Court
Defendant and Appellant.	)	No. TA144611
	)	

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant certifies that his opening brief on the merits filed in connection with the above-captioned matter consists of approximately 7,793 words, as determined by using the 'word count' feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: November 13, 2023

JONATHAN E. DEMSON
Attorney for Appellant

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/13/2023 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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