No. S279670

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RAMON PATTON,
Defendant and Appellant.

Second Appellate District, Division Three, Case No. B320352
Los Angeles County Superior Court, Case No. TA144611
The Honorable Hector Gutierrez, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

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.)

INTRODUCTION

A petition seeking resentencing under Penal Code section 1172.6 is subject to initial screening to determine whether the petitioner has established a prima facie case for relief. (Pen. Code, § 1172.6, subd. (c); *People v. Lewis* (2021) 11 Cal.5th 952, 960.)[1] Dismissal of the petition at this stage is appropriate if the underlying record of conviction conclusively shows that the petitioner is ineligible for relief. (*People v. Strong* (2022) 13 Cal.5th 698, 708.) One way this may be apparent is if the facts adduced at the petitioner's trial did not permit any theory of liability other than one in which the petitioner personally committed the crime. (*People v. Delgadillo* (2022) 14 Cal.5th 216, 233.) This is because, except for a narrow exception not relevant here, section 1172.6 relief is unavailable for those who personally killed or attempted to kill. (See §§ 188, 189, 1172.6, subd. (a), (a)(3).)

In cases like this one, where the petitioner pleaded guilty or no contest, a preliminary hearing transcript may serve the same purpose. This Court has acknowledged in a different context that

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[1] All further undesignated statutory references are to the Penal Code.

a preliminary hearing transcript is part of the record of conviction where a case was resolved by guilty plea and that the transcript reliably reflects the facts of the offense for which the defendant was convicted. (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Like consideration of a trial transcript, consideration of a preliminary hearing transcript as part of the prima facie inquiry under section 1172.6, subdivision (c), does not require any factfinding, which is prohibited at that stage of the petition proceedings. (See *Lewis*, *supra*, 11 Cal.5th at p. 971.) Rather, a court may properly consult the facts in the record of conviction, without resolving any evidentiary conflicts or credibility questions, to determine whether any legal theory that could support section 1172.6 relief was a possible basis for the conviction. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233.)

As the Court of Appeal below correctly recognized, the facts elicited at Patton's preliminary hearing excluded the possibility of any theory but that he personally committed the attempted murder. When the prosecution identified this in the superior court as a basis for dismissing Patton's petition, Patton offered no theory in response that would have satisfied his burden of establishing a prima facie case for relief. His petition was therefore properly denied.

LEGAL BACKGROUND

In 2019, the Legislature amended sections 188 and 189 in an effort "'to more equitably sentence offenders in accordance with their involvement in homicides.'" (*People v. Gentile* (2020) 10 Cal.5th 830, 838-839, superseded on other grounds by § 1172.6, subd. (g); Stats. 2018, ch. 1015 (Senate Bill No. 1437); see also Stats. 2021, ch. 551 (Senate Bill No. 775).)[2] Section 188 now provides in relevant part, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Section 189 now provides that, except in certain circumstances not relevant here, felony murder liability may be imposed only on the actual killer, an aider and abettor who acted with the intent to kill, or a major participant in the underlying felony who acted with reckless indifference to life. (§ 189, subd. (e).) In effect, these amendments eliminated the natural and probable consequences theory of aiding and abetting as to murder and limited the scope of the felony murder rule. (*Delgadillo*, *supra*, 14 Cal.5th at p. 223, *Gentile*, at pp. 842-851.)[3]

Section 1172.6 sets out a procedure under which certain persons may take advantage of this change in law. (See Sen. Bill

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[2] Effective January 1, 2022, the Legislature amended the statute "to expand the population of eligible offenders, codify certain aspects of [the] decision in *Lewis*, and clarify the procedure and burden of proof at the evidentiary hearing stage of proceedings." (*People v. Curiel* (2023) 15 Cal.5th 433, 449; Senate Bill No. 775, Stats. 2021, ch. 551, § 1.) Patton's petition was filed and adjudicated after that amendment.

[3] Under the natural and probable consequences doctrine, a defendant "need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator," but is held liable for the offense "committed by the confederate" if it was a natural and probable consequence of the defendant's intended crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.)

No. 775 (2020-2021 Reg. Sess.) at § 2.)[4] The statute provides that those previously "convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, attempted murder under the natural and probable consequences doctrine, or manslaughter" may petition for relief if they "could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective" by Senate Bill No. 1437. (§ 1172.6, subds. (a), (a)(3).)

The petition process proceeds in distinct stages. To initiate the process, a petitioner must file a resentencing petition in the original sentencing court alleging that he or she: was charged with murder in a way that permitted liability under a natural and probable consequences, felony murder, or other theory under which malice is imputed, or was charged with attempted murder under the natural and probable consequences doctrine; was convicted of murder, attempted murder, or manslaughter after a trial or pleaded guilty in the face of a murder or attempted murder charge; and could not presently be convicted of murder or attempted murder because of the amendments to sections 188 and 189. (§ 1172.6, subds. (a), (b)(1), (b)(1)(A).) The petition

[4] The procedure was originally codified at section 1170.95. After the adjudication of Patton's petition, it was renumbered as section 1172.6 without substantive change. (*Curiel*, *supra*, 15 Cal.5th at p. 449; Stats. 2022, ch. 58, § 10.) This brief refers to the current statutory designation.

must also contain certain information specified in the statute. (§ 1172.6, subd. (b)(1).)

If the petition on its face meets these requirements, then the court must appoint counsel (if requested), accept briefing from the prosecution and the petitioner, and "hold a hearing to determine whether the petitioner has made a prima facie case for relief." (§ 1172.6, subds. (b)(3), (c); see also § 1172.6, subd. (b)(2); *Lewis*, *supra*, 11 Cal.5th at pp. 961-963.) If the court determines at that hearing that no prima facie case for relief has been established, then it must make a statement "fully setting forth its reasons" for denying the petition; otherwise, it must issue an order to show cause. (§ 1172.6, subd. (c).)

After the issuance of an order to show cause, the court must "hold a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner." (§ 1172.6, subd. (d)(1).) At the hearing, the burden is on the prosecution to prove beyond a reasonable doubt that the petitioner is guilty of murder or attempted murder under current law, and the parties may submit new evidence on that question. (§ 1172.6, subd. (d)(3).)

Finally, if the court makes a finding that the petitioner is entitled to relief, then the court must vacate the challenged conviction and resentence the petitioner. (§ 1172.6, subds. (d)(1), (d)(3), (e).)

This case involves aspects of the second stage, at which the petitioner must make a prima facie showing of entitlement to relief, which will be addressed in more detail below.

STATEMENT OF THE CASE

A. Patton's preliminary hearing and no contest plea

In 2017, Patton was charged with willful, deliberate, and premeditated attempted murder (§§ 187, subd. (a), 664), carrying a loaded firearm by an active participant in a street gang (§ 25850, subds. (a), (c)(3)), and possession of a firearm by a felon (§ 29800, subd. (a)(1)). (CT 1-4.) As to the attempted murder charge, the prosecution alleged that Patton personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). (CT 2.) The prosecution further alleged as to that charge that a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)), personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)), and personally and intentionally discharged a firearm proximately causing great bodily injury to the victim (§ 12022.53, subds. (d), (e)(1)). (CT 2-3.) The prosecution also alleged that all the charged offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)), and that Patton had served a prior prison term (§ 667.5, subd. (b)). (CT 2, 4.)

The following evidence was elicited at a preliminary hearing on those charges. Around 7:40 p.m. on May 27, 2017, David Jackson drove to the Casa Motel at 9615 South San Pedro Street in Los Angeles. (Preliminary Hearing Transcript (PHT) 3-4, 6.)[5] His brother Jalen Powell and Powell's girlfriend, Futima Luna, were in the car with Jackson. (PHT 5-7.) Jackson went inside

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[5] The Court of Appeal below granted the People's motion for judicial notice of the preliminary hearing transcript.

the motel office to rent a room for the night while Powell and Luna remained in the car. (PHT 6.) Jackson was standing at the counter in the motel office when Powell observed a person, who was wearing a gray hooded sweatshirt, fire four rounds at Jackson with a silver handgun. (PHT 6-7.) Luna heard four or five gunshots. (PHT 8.) Jackson fell to the ground, stood up, and ran to the car. (PHT 7.) He had a gunshot wound to his left thigh. (PHT 8, 30.) The shooter ran northbound on San Pedro Street. (PHT 7.)

Los Angeles Police Department (LAPD) Detective Anthony Balderama watched surveillance video of the shooting. (PHT 3, 8.)[6] According to Detective Balderama, the video showed Jackson's car pulling into the motel parking lot, and Jackson getting out of the car and walking to the front counter. (PHT 8, 10.) Another camera angle showed a person walking up the driveway of the motel. (PHT 8.) The person pulled a handgun out of his sweatshirt pocket and fired at Jackson, who fell to the ground. (PHT 8-9.) The shooter fled in a northeasterly direction, while Jackson got up and went back to his car. (PHT 9.)

LAPD Officer Otoniel Ceballos of the Southeast Division Gang Enforcement Detail had interacted with Patton about 25 times previously and had arrested him for another crime the year before the preliminary hearing. (PHT 43, 46-47.) Officer Ceballos was familiar with the way Patton walked and had seen him run before. (PHT 48, 58.) Officer Ceballos identified the

[6] The recording was not admitted into evidence.

shooter in the surveillance video as Patton. (PHT 49-50.) He believed it was Patton based on "his mannerisms, the way he walks, his stature, the way he runs away. . . . I've seen him run away from us. I've seen him walk. I've seen his stature up close and personal." (PHT 51.)

LAPD Detective Christian Mrakich also watched the surveillance video and described it as showing an SUV slow down and travel across the screen before the shooting. (PHT 34-35.) Detective Mrakich's theory as he investigated the crime was that, based on this portion of the video as well as a witness statement, the SUV had been following Jackson, and Patton may have been a passenger in that vehicle before the shooting. (PHT 34-35.)[7]

Detective Mrakich identified Patton in a photograph obtained from his Facebook account. (PHT 14, 18 [referencing Peo. Exh. 5].) The name on the Facebook account was "Ramon Tah RicRoc Patton." (PHT 23.) Patton often referred to himself as "Ric Roc" in his instant messages and postings on Facebook, and the name was listed as Patton's moniker on his rap sheet. (PHT 23.) The photograph was posted online on February 27, 2017 (PHT 19-20), and showed Patton wearing stone-washed or

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[7] According to Detective Balderama, the surveillance video of the shooting itself depicted one shooter on foot walking up to Jackson and firing at him (PHT 8-9), and Officer Ceballos identified Patton as that shooter (PHR 50-51). Detective Mrakich's theory that a driver may have taken Patton to the scene was based on a witness statement, but the detective did not provide any details regarding the statement. (See PHT 34-35.)

bleached blue jeans (PHT 18-19). Detective Mrakich had a specialist in the LAPD Technical Investigation Division compare Patton's jeans in the Facebook photograph with the shooter's jeans in still photographs from the surveillance video of the shooting. (PHT 24-25.) The specialist placed red lines on the photographs to indicate distinct patterns on the jeans. (PHT 25; Peo. Exh. 5.) Detective Mrakich also spent "a lot" of time comparing the jeans in the Facebook photograph to the surveillance video. (PHT 25-26.) He looked at the specific shapes of the stains, the design and location of a "patch" on the jeans, the structure of the jeans, and their fit. (PHT 26.) He concluded that the same jeans were depicted in the two images. (PHT 25-26.)[8]

On February 21, 2017, a few months before the shooting, Patton had exchanged instant messages on Facebook with someone who offered to sell him a nine-millimeter pistol. (PHT 28.) The exchange included a picture of the handgun. (PHT 29.) The casings later recovered from the scene of the shooting were nine millimeter. (PHT 29.) Detective Mrakich testified that, based on a photograph obtained from the surveillance video, it appeared the shooter was carrying a "Sig"

[8] Detective Mrakich's testimony regarding the jeans was admitted as lay opinion. (PHT 26.) After reviewing the photographs, the court stated that the jeans "are very similar even to my mind," and that this supported admission of the opinion testimony. (PHT 27.)

nine-millimeter gun. (PHT 38.) The gun was similar to the one that was the subject of the Facebook exchange. (PHT 39.)[9]

Peter Collins, Jackson's half-brother, told Detective Mrakich that a few days prior to the shooting, he and Jackson were confronted by a stocky Black man in his early twenties with short, twisted braids around 108th Street and Avalon. (PHT 20-21.) Jackson and Collins were sitting in Jackson's car. (PHT 21.) The man asked, "What's the Front Street life like?" (PHT 20.) Jackson was a member of the Back Street Crips. (PHT 22; see also PHT 22-23.) The Front Street Crips were a rival of Jackson's gang. (PHT 45; see PHT 22.)

Detective Mrakich listened to phone calls made from jail by Davion Smith, a member of the Back Street Crips gang. (PHT 30.) Smith called Jackson, and Jackson said that he had been shot at a motel. (PHT 31.) In another call during August or September 2017 (PHT 33), Jackson told Smith that Ric Roc was in custody with Smith (PHT 32). Smith told Jackson that he would look out for Ric Roc. (PHT 32.)

In Officer Ceballos's opinion, Patton was a member of the Front Street Crips. (PHT 47.) It was also Officer Ceballos's opinion that a hypothetical shooting like the one in this case

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[9] Ammunition was later recovered in a search of Patton's home, but Detective Mrakich did not know the caliber of the ammunition at the time of his preliminary hearing testimony. (PHT 39-40.)

would have been committed for the benefit of, in association with, and at the direction of a gang. (PHT 53-55.)

Patton did not present any evidence or raise any affirmative defenses at the preliminary hearing, but he did move to strike the premeditation and gang allegations. (See PHT 61.) Patton argued that there was no evidence that the gang member who confronted the victim two days before the shooting was the same person who committed the attempted murder, nor was there evidence corroborating the theory that the gang member involved in the earlier confrontation told Patton "to go commit a crime for the benefit of the gang." (PHT 61.) The court denied the motion and held that, although there was insufficient evidence to show that the person from the prior confrontation was Patton, there was sufficient evidence to support the gang allegation. (PHT 63-64.) The court also found that there was sufficient evidence to establish that Patton was the shooter based on evidence of Patton's "very, very similar clothing" to the shooter's, the victim's statement implying that Patton was the shooter, and the officer's opinion that Patton was the shooter in the video. (PHT 64.)

Patton was held to answer. (PHT 65.) The prosecutor calculated Patton's sentence exposure as 63 years to life, which included two indeterminate life terms. (RT 1.)

Patton subsequently entered into a plea agreement. (CT 20-21.) At a hearing, after confirming that he understood his rights and the consequences of his plea (RT 5-7), Patton pleaded no contest to one count of attempted murder (RT 7). The prosecutor then asked Patton, "[a]s 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?" (RT 8.)[10] Patton responded, "Admit." (RT 8.) Defense counsel stipulated to a factual basis for the plea but did not identify the factual basis or reference the preliminary hearing testimony. (RT 8.)

In accordance with the plea agreement, the remaining counts and the allegation that the attempted murder was willful, deliberate, and premeditated were dismissed. (RT 5; CT 23.) The trial court sentenced Patton to 29 years in state prison. (RT 8; CT 21, 26.) He did not appeal.

B. Patton's petition under section 1172.6

In 2022, Patton filed a section 1172.6 petition claiming that he had been charged with attempted murder in a way that permitted liability under the natural and probable consequences doctrine, had accepted a plea offer in lieu of a trial in which he could have been convicted of attempted murder, and could not presently be convicted of attempted murder because of the changes made to sections 188 and 189 effective January 1, 2019. (CT 27.) The court appointed counsel. (See CT 29.)

The prosecution filed a brief in opposition to the resentencing petition (CT 31-37), arguing that Patton could not

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[10] Patton was originally charged with an enhancement for committing a gang-related crime in which a principal was armed with a firearm. (CT 2-3.) But he ultimately admitted that he personally discharged a firearm under section 12022.53, subdivision (c). (RT 8.)

establish a prima facie case for relief because his plea encompassed the admission that he had the specific intent to kill and was the person who actually used the gun (CT 31, 35-36), and because he "has always been the only person charged in this case, and there is no evidence of him aiding and abetting another perpetrator who committed the attempted murder in the commission of another crime that the attempted murder was the natural and probable consequence of." (CT 36.) Patton did not file a reply brief. (See RT 302.)

The superior court held a hearing under section 1172.6, subdivision (c), to determine whether Patton had made a prima facie case for relief. (RT 301-302.) The court stated that it had read the prosecution's opposition, "the entirety of the preliminary hearing transcript," and the "entirety of the plea transcript." (RT 302.) The court asked, "Does either side wish to be heard further or augment the record in any way?" (RT 302.) Defense counsel said, "No, I don't need to submit anything more." (RT 302.) The prosecutor also declined to argue further. (RT 302.)

The superior court denied Patton's resentencing petition. (RT 304; see also CT 39.) Relying on *People v. Garrison* (2021) 73 Cal.App.5th 735, it held Patton's admission at the plea hearing that he personally discharged a firearm, coupled with the prosecution's opposition brief and the preliminary hearing evidence, meant that there was "more than substantial evidence" that Patton was "the only perpetrator and the only shooter as charged with attempted murder." (RT 302-303.) It reasoned that

Patton "was identified by way of social media, some distinctive jeans that he was wearing as the shooter, and there was only one shooter." (RT 303.) The court also noted that Patton admitted to personally discharging a firearm. (RT 303.) The court was thus "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." (RT 304.) It concluded, "For those reasons, the court finds that he has failed to make a prima facie claim for relief . . . ." (RT 304.)

C. The Court of Appeal's decision

The Court of Appeal affirmed the judgment. (Opn. 1-2, 12.) It relied on this Court's observation that "'[t]he record of conviction will necessarily inform the trial court's prima facie inquiry under section [1172.6], allowing the court to distinguish petitions with potential merit from those that are clearly meritless.'" (Opn. 9, quoting *Lewis*, *supra*, 11 Cal.5th at p. 971.) And it disagreed with Patton's argument that he was entitled to an order to show cause and evidentiary hearing under section 1172.6, subdivision (d)(3), merely "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 . . . .'" (Opn. 9.)

The court observed that police officers who were personally involved in the investigation testified at the preliminary hearing that "they knew and recognized Patton as the sole perpetrator" in the surveillance video. (Opn. 10.) And in the face of that record, Patton had "never offered any theory to support his implicit contention now that he was an accomplice and not the person who actually shot Jackson." (*Ibid.*) The court noted that Patton had not "even suggested what facts he has to demonstrate that someone else shot Jackson and he was merely an accomplice." (*Ibid.*) It concluded, therefore, that the record of conviction established that Patton was ineligible for relief because he was convicted as the actual and sole perpetrator of the attempted murder. (Opn. 10-11.)

The Court of Appeal rejected Patton's argument that the superior court engaged in impermissible factfinding by relying on the preliminary hearing transcript in assessing his prima facie showing. (Opn. 11.) It reasoned that the preliminary hearing testimony showing that Patton was the sole perpetrator was uncontroverted. (*Ibid.*) The record of conviction therefore "irrefutably establishe[d] as a matter of law" that Patton was convicted on a theory that remains valid after the amendments to sections 188 and 189. (*Ibid.*)

ARGUMENT

THE SUPERIOR COURT DID NOT ENGAGE IN IMPERMISSIBLE JUDICIAL FACTFINDING BY RELYING ON THE PRELIMINARY HEARING TRANSCRIPT TO DENY PATTON'S SECTION 1172.6 PETITION AT THE PRIMA FACIE STAGE

Dismissal of a section 1172.6 petition at the prima facie stage is appropriate if the court determines, without resolving any factual conflicts or credibility questions, that the record of conviction conclusively shows that relief is unavailable. The preliminary hearing evidence is part of the record of conviction and, where the petitioner pleaded guilty or no contest, it reliably reflects the facts of the offense. A court may therefore properly consult the preliminary hearing transcript—just as it may properly consult trial facts—in making the section 1172.6 prima facie inquiry to determine whether it is possible that the petitioner's conviction rested on any now-invalid legal theory.

Here, the evidence presented at Patton's preliminary hearing excluded the possibility of any theory other than that Patton was the actual shooter and sole assailant. Because the record of conviction conclusively refutes Patton's claim that he is eligible for relief under section 1172.6, his petition was properly denied at the prima facie stage.

A. A section 1172.6 petitioner must make a prima facie showing of eligibility for relief that is not refuted by the record of conviction

A section 1172.6 petitioner bears the burden to make a prima facie showing that he or she "could not currently be convicted" of the challenged offense "because of changes to Section 188 or 189." (See § 1172.6, subds. (a)(3), (b)(1)(A); *Curiel*, *supra*, 15 Cal.5th at p. 461 ["The Attorney General is correct that the allegation under section 1172.6, subdivision (a)(3) is part of the prima facie showing a petitioner must make in order to proceed to an evidentiary hearing"]; see also § 1172.6, subd. (c) ["the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief"].) Dismissal of a section 1172.6 petition at the prima facie stage is appropriate "[i]f the petition and record in the case establish conclusively that the defendant is ineligible for relief." (*Strong*, *supra*, 13 Cal.5th at

p. 708; accord *Curiel*, at p. 450.) As this Court has explained: "The record of conviction will necessarily inform the trial court's prima facie inquiry under section [1172.6], allowing the court to distinguish petitions with potential merit from those that are clearly meritless." (*Lewis*, *supra*, 11 Cal.5th at p. 971.) "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." (*Ibid*.)

At the same time, this Court has cautioned that the inquiry is "limited" at the prima facie stage: "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.'" (*Lewis*, *supra*, 11 Cal.5th at p. 971, quoting *People v. Drayton* (2020) 47 Cal.App.5th 965, 978 abrogated on other grounds by *Lewis*, internal quotation marks omitted.) The superior court at this stage "'should not reject the petitioner's factual allegations on credibility grounds.'" (*Lewis*, at p. 971, quoting *Drayton*, at p. 978.) "'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.'" (*Lewis*, at p. 971, quoting *Drayton*, at p. 979, internal quotation marks and alteration omitted.)

This Court has further observed that findings made by a petitioner's jury are ordinarily a dispositive part of the record in section 1172.6 proceedings and will be given preclusive effect in determining whether the challenged conviction rests on a theory that remains valid after the amendments to sections 188 and 189. (*Curiel*, *supra*, 15 Cal.5th at pp. 463-471; *Strong*, *supra*, 13 Cal.5th at p. 715.) Thus, when a section 1172.6 petition challenges a conviction that was obtained after a jury trial, courts have looked to the jury instructions to ascertain the theory or theories supporting the conviction. (See *Curiel*, at pp. 465-466; see, e.g., *People v. Harden* (2022) 81 Cal.App.5th 45, 55; *People v. Estrada* (2022) 77 Cal.App.5th 941, 945-949; *People v. Medrano* (2021) 68 Cal.App.5th 177, 182-183; *People v. Farfan* (2021) 71 Cal.App.5th 942, 956.) In addition, the evidence and arguments of counsel at a trial may demonstrate the theory or theories upon which a conviction rested. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233 [in light of trial evidence and arguments, "the record here makes clear that Delgadillo was the actual killer and the only participant in the killing"]; *People v. Bodely* (2023) 95 Cal.App.5th 1193, 1202 [jury instructions, evidence at trial, and closing arguments conclusively established that section 1172.6 relief was foreclosed].)

The same legal standard governs the prima facie inquiry where a section 1172.6 petition challenges a conviction obtained after a guilty or no contest plea—that is, whether the record of conviction conclusively shows that relief is unavailable. (See § 1172.6, subd. (a)(2); *Strong*, *supra*, 13 Cal.5th at p. 708; *People *v. Nguyen* (2020) 53 Cal.App.5th 1154, 1167 [a "murder conviction after a guilty plea should not be accorded less weight and finality than a murder conviction after a jury trial"].) The record of conviction in a plea case, however, may be more limited than the record in a case arising from a jury trial. Courts in this situation have thus looked, for example, to whether the petitioner's express admissions in entering the plea demonstrate the legal theory or theories upon which the conviction was based. (See *People v. Saavedra* (2023) 96 Cal.App.5th 444, 506; *People v. Fisher* (2023) 95 Cal.App.5th 1022, 1028-1029; *People v. Romero* (2022) 80 Cal.App.5th 145, 152-153.) As will be explained—and as the Court of Appeal below correctly held (Opn. 10-11)—a preliminary hearing transcript is also a part of the record of conviction that can properly be considered in determining the legal theory or theories upon which a guilty plea was based.

B. A preliminary hearing transcript is part of the record of conviction that may be consulted to determine whether a guilty plea could have been based on an invalid legal theory

This Court has previously acknowledged that a preliminary hearing in a case that was resolved by guilty plea is considered part of the record of conviction. (*Reed*, *supra*, 13 Cal.4th at p. 223.) In *Reed*, the Court held that a preliminary hearing transcript may be considered in determining whether a prior conviction constitutes a "serious felony" for purposes of the Three Strikes law. (*Ibid*.) The record of conviction encompasses the preliminary hearing transcript because that transcript "reliably reflect[s] the facts of the offense for which the defendant was convicted." (*Ibid*; see also *People v. Trujillo*, 40 Cal.4th 165, 177;

id. at p. 180 ["The transcript of a preliminary hearing contains evidence that was admitted against the defendant and was available to the prosecution prior to the conviction. The transcript of a preliminary hearing, therefore, sheds light on the basis for the conviction"].) This is because the right to confront and cross-examine witnesses, the requirement that witnesses testify under oath, and the accuracy afforded by the court reporter's verbatim reporting of the proceedings "tend to ensure the reliability of such evidence." (*Reed*, at p. 223.)[11]

For purposes of the prima facie inquiry under section 1172.6, a preliminary hearing transcript may therefore inform the court's analysis as to whether the petition is clearly meritless. (See *Lewis*, *supra*, 11 Cal.5th at pp. 965-966, 971.) It may show, for example, that no currently invalid theory of liability was possible

[11] This Court has more recently held that the Sixth Amendment precludes a trial court from relying on a preliminary hearing transcript to "make findings about the conduct that 'realistically' gave rise to a defendant's prior conviction" for purposes of the Three Strikes law. (*People v. Gallardo* (2017) 4 Cal.5th 120, 134.) *Gallardo* did not disavow the general proposition that a preliminary hearing transcript is part of the record of a prior conviction for the reasons stated in *Reed*. Instead, *Gallardo*'s analysis focused on the scope of the rule that, under the Sixth Amendment, all punishment-increasing facts must be proved to a jury beyond a reasonable doubt. (See *Gallardo*, at pp. 132-137.) That issue is different from the one presented in this case about section 1172.6's prima facie inquiry, to which the constitutional authority addressed in *Gallardo* does not apply. (See *People v. Njoku* (2023) 95 Cal.App.5th 27, 44-45 [section 1172.6, as act of lenity, does not implicate Sixth Amendment right to jury trial]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 588-589 [same]; see also fn. 13, *post*.)

on the facts presented. (Cf. *Delgadillo*, *supra*, 14 Cal.5th at p. 233.) In such a case, the transcript would refute the petitioner's averment that he could not be convicted of murder or attempted murder under current law without requiring the court to conduct any factfinding. (§ 1172.6, subd. (a)(3).)

Preliminary hearing evidence is comparable to trial evidence for this purpose. For example, in *Delgadillo*, this Court looked to the evidence presented at the petitioner's trial and concluded that it "makes clear that Delgadillo was the actual killer and the only participant in the killing" and therefore "Delgadillo is not entitled to any relief under section 1172.6." (*Delgadillo*, *supra*, 14 Cal.5th at p. 233.) Similarly, in *Bodely*, the Court of Appeal concluded that the jury instructions, in combination with the trial evidence and arguments, showed that the prosecution's sole theory was that the defendant was the actual killer in a first degree felony murder. There was no dispute that the petitioner was the driver and sole occupant of the car that struck the victim during an escape from a burglary, which precluded section 1172.6 relief. (*Bodely*, *supra*, 95 Cal.App.5th at p. 1201 ["The evidence at trial revealed no indication of any accomplice. Defense counsel did not argue or even insinuate that any other person was responsible for [the victim's] death"].) In both of these cases, the reviewing courts looked to the factual record in making the prima facie determination that no now-invalid legal theory could have supported the conviction.

Patton argues that a preliminary hearing transcript should not be relied upon in this way because defendants do not have incentive to contest evidence at the preliminary hearing due to "modest chances of success" and a desire not to give away trial strategy. (OBM 24.) The argument is inconsistent with *Reed*, however, which Patton does not acknowledge. And it is also inaccurate in the context of the prima facie inquiry under section 1172.6, which focuses not on the strength of the evidence but only on what legal theories were possible based on the evidence in the case. Regardless of whether the defense contested the prosecution's evidence, the prosecution had the incentive to present all evidence that would support the most expansive theories of liability then available, including, prior to Senate Bill No. 1437, the natural and probable consequences theory of liability, which was "'easier to prove'" than direct aiding and abetting. (See *People v. Reyes* (2023) 14 Cal.5th 981, 991.) Where the preliminary hearing evidence focuses solely on the presence of a sole assailant, there is no basis in the record to speculate that the prosecution could have been based on a natural and probable consequences theory.[12]

The weight of lower court authority is in accord. In *People v. Pickett* (2023) 93 Cal.App.5th 982, review granted Oct. 11, 2023,

[12] As a practical matter, it is likely that the majority of cases in which the preliminary hearing evidence shows that a petitioner is ineligible for section 1172.6 relief will be those involving a sole assailant. Where there are multiple assailants, it is unlikely that the preliminary hearing transcript will conclusively establish a defendant's mental state or role within the group, as the presence of an additional assailant would in most cases make an imputed malice theory of liability at least possible, even if unlikely.

S281643, the Court of Appeal held that, for purposes of section 1172.6, the record of conviction includes the preliminary hearing transcript, which in that case conclusively showed that relief was unavailable. (*Id*. at pp. 988-989, citing *Lewis*, *supra,* 11 Cal.5th at p. 971 and *Reed*, *supra*, 13 Cal.4th at p. 223.) The court observed that, while factfinding is prohibited in making the prima facie inquiry, a petition may be denied at that stage when "'the record . . . makes clear that [the petitioner] was the actual killer and the only participant in the killing.'" (*Pickett*, at p. 989, quoting *Delgadillo*, *supra*, 14 Cal.5th at p. 233.)

Other courts have suggested that there is no barrier to proper consideration of pre-plea evidence at the prima facie stage, even while concluding that the particular evidence in the record of conviction did not conclusively demonstrate ineligibility. (See *People v. Rivera* (2021) 62 Cal.App.5th 217, 238 [grand jury evidence was consistent with a now-invalid theory and therefore did not conclusively preclude relief, but "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"]; see also *People v. Flores* (2022) 76 Cal.App.5th 974, 991-992 [following *Rivera* and concluding, "the portion of the preliminary hearing transcript relied on by the People does not establish petitioner's ineligibility for resentencing as a matter of law"].) One court has held that although a preliminary hearing transcript is part of the record of conviction for purposes of section 1172.6, subdivision (c), it should only be considered at the prima facie stage if the defendant stipulated to it as part of the factual basis for the plea. (*People v. Davenport* (2021) 71 Cal.App.5th 476, 481, 483.) *Davenport* was incorrectly decided on this point for the reasons explained above and in *Pickett*. (See *Pickett*, *supra*, 93 Cal.App.5th at pp. 992-993.) But even *Davenport* refused to adopt the argument Patton advances here, which is that the preliminary hearing transcript must be disregarded altogether. (*Davenport*, at p. 481 ["We reject Davenport's argument that the preliminary hearing transcript is never part of the record of conviction"].)

C. A court may consider a preliminary hearing transcript under section 1172.6, subdivision (c), without engaging in any factfinding

Patton makes a number of additional arguments as to why a preliminary hearing transcript should not be considered as part of the prima facie inquiry under section 1172.6, subdivision (c), all of which stem from the misapprehension that looking to the transcript will necessarily require a court to engage in factfinding, which is reserved for a subdivision (d) evidentiary hearing. (See, e.g., OBM 25 ["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"].) This Court has indeed held that the prima facie inquiry should not be resolved by making new factual findings, but in doing so it acknowledged that a court may make findings adverse to the claims in the petition when the existing record refutes those claims. (*Lewis*, *supra*, 11 Cal.5th at p. 971; see also *ibid*. ["'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"'"].)

As the *Delgadillo* decision demonstrates, a court may consult the evidence in the record of conviction to make the prima facie determination without engaging in impermissible factfinding. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233.) In other words, a court may, without resolving any factual conflicts or credibility questions, assess what legal theories were possible based on the evidence in the case. If that inquiry shows that no currently invalid theory was even available under the facts that were adduced in the proceedings leading to the conviction, then the record has refuted the allegation that the petitioner could not now be convicted of the same offense.[13]

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[13] For this reason, *Gallardo*'s analysis regarding the use of a preliminary hearing transcript for Three Strikes purposes is inapposite here. In *Gallardo*, the Court held that the use of a preliminary hearing transcript to determine "the nature or basis" of a prior conviction—in that case, that the prior offense had been committed with the use of a knife because a witness so testified—necessarily involved factfinding that the Sixth Amendment prohibits. (*Gallardo*, *supra*, 4 Cal.5th at p. 137.) A similar factual determination, based on the credibility of a witness, would also be prohibited at the prima facie stage of section 1172.6 proceedings. But examination of the record to determine whether any impermissible legal theory was possible under the facts does

(continued…)

Patton's misapprehension on this point is evident in the hypothetical situations he posits. For example, he asks whether the prima facie burden would be met if the preliminary hearing showed "there was evidence of accomplice involvement," but the only witness testified that the petitioner was the actual killer or would-be killer. Or, he asks, "what if no witness so testified, but the evidence gives rise to a reasonable inference that the petitioner was the actual killer or perpetrator?" (See OBM 28-29.) The answer is that in such cases, prima facie eligibility would likely be established if it were possible, given the evidence, that the accomplice was a co-assailant. Even if it were highly implausible that the witness confused the petitioner for one of the other assailants, it would still be legally possible for the prosecution to proceed at trial on an imputed malice theory in the event the prosecution was concerned about the witness's credibility. To be sure, some determinations in this regard — unlike the one in Patton's case—might not be straightforward. But that is not a reason to reject reliance on preliminary hearing transcripts at the prima facie stage altogether.

Along the same lines, Patton argues that consideration of the preliminary hearing transcript in cases like this one would lead to "complex" prima facie proceedings that he likens to a "preliminary evidentiary hearing." (OBM 29, 32.) And he claims

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(…continued)

not entail any factfinding that is prohibited under section 1172.6, subdivision (c).

that it would be "far simpler" to disregard a preliminary hearing transcript and simply proceed to an evidentiary hearing if the record of conviction does not otherwise prelude relief. (OBM 32.) Consideration of a preliminary hearing transcript, however, does not make the prima facie inquiry in a plea case any more complex than it would be in cases arising from trials. Because consideration of the transcript at the prima facie stage does not entail factfinding, no "preliminary evidentiary hearing" would be required or permitted. Again, this Court and other courts have encountered no particular trouble in looking to the factual record to determine whether any invalid legal theory was a possible basis for the conviction. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233; *Pickett*, *supra*, 93 Cal.App.5th at pp. 989-990, 993-994; *Flores*, *supra*, 76 Cal.App.5th at pp. 991-992; *Rivera*, *supra*, 62 Cal.App.5th at p. 237; *Bodely*, *supra*, 95 Cal.App.5th at p. 1201.) The inquiry is no more complex than other questions that can arise regarding the prima facie showing, including in cases involving an underlying trial with jury instructions. (See, e.g., *Curiel*, *supra*, 15 Cal.5th at pp. 463-471; *Strong*, *supra*, 13 Cal.5th at pp. 709-710.)

Nor is any offer of proof required at the prima facie stage. (See OBM 26-27 [arguing it would be incongruous to require petitioners in Patton's position to "make an offer of proof that he or she might prevail at an evidentiary hearing," while those whose preliminary hearing transcripts do not refute their claims need not do so].) An offer of proof generally means an identification of "actual evidence to be produced and not merely the facts or issues to be addressed and argued," and would encompass evidence that is extraneous to the record. (*People v. Carlin* (2007) 150 Cal.App.4th 322, 334.) A petitioner is not required—and indeed is not permitted—to make an offer of proof because the prima facie inquiry is limited to the record of conviction. (*Lewis*, *supra*, 11 Cal.5th at p. 971; see also *People v. Daniel* (2020) 57 Cal.App.5th 666, 678.) Instead, what the statute requires according to *Lewis*—in cases stemming from both trials and guilty pleas—is simply that the petitioner identify a faulty legal theory that could be supported by the facts in the record of conviction.[14]

Because of the important role that the parties' briefing can play at this stage in framing the relevant legal question, courts have correctly recognized that a petitioner risks failing to carry the burden of making a prima facie case by declining to engage with an argument by the prosecution that the record of conviction precludes relief. (See *Pickett*, *supra*, 93 Cal.App.5th at p. 990; *Rivera*, *supra*, 62 Cal.App.5th at p. 238.) As this Court observed in *Lewis*, the prima facie inquiry in section 1172.6 proceedings

[14] Patton argues that the Court of Appeal faulted him for failing to make an offer of proof that would have required him to "locate witnesses and/or evidence and provide the trial court with sworn declarations and/or other documentation" to satisfy the prima facie stage. (OBM 26.) Though the Court of Appeal referred to the factual record, it indicated that "Patton never offered any *theory* to support his implicit contention now that he was an accomplice and not the person who actually shot Jackson." (Opn. 10, italics added.) In any event, for the reasons explained, no factual proffer is required at the prima facie stage.

may in some respects be analogized to the similar prima facie inquiry in habeas corpus. (*Lewis*, *supra*, 11 Cal.5th at p. 971.) The parties' briefing on the prima facie question under section 1172.6 can be likened to an informal response to a habeas petition and an informal reply. (See *Drayton*, *supra*, 47 Cal.App.5th at p. 979.) These briefs assist the court in determining whether, in light of the petition and the record in the case, the petitioner has stated a prima facie claim of entitlement to relief. (See *Lewis*, at p. 971; *Maas v. Superior Court* (2016) 1 Cal.5th 962, 974.) All that may be required of a petitioner at this stage is a basic explanation of how it would be possible for the record of conviction to support a now-faulty theory of liability.

Both trial and plea cases present a range of possibilities as to how the prima facie question might be argued. In some cases, the inquiry might be straightforward, even to the point of prompting a concession by the People that a prima facie case has been made. (See, e.g., *People v. Porter* (2022) 73 Cal.App.5th 644, 652.) In that type of case, no briefing by the petitioner would be necessary because the parties will agree that the record does not conclusively refute the claim for relief. But in other cases, the parties might reasonably dispute the question whether the record of conviction conclusively shows that section 1172.6 relief is foreclosed. (See, e.g., *Curiel*, *supra*, 15 Cal.5th at pp. 463-471.) And in still other cases, the prosecution might demonstrate in an opposition brief that the record precludes relief, and the petitioner might be unable to make any colorable argument to the contrary, such as when the crime of conviction is not enumerated in the statute. (See, e.g., *People v. Whitson* (2022) 79 Cal.App.5th 22, 34-36.) In some situations, a petitioner's arguments might be critical to assisting the court in making the prima facie inquiry; but no situation requires any factual proffer by a petitioner or improper finding of fact by a court at the prima facie stage.

D. Patton's interpretation would effectively exempt most guilty-plea cases from prima facie screening, contrary to legislative intent

Under Patton's view, a court may never consider a preliminary hearing transcript in making the section 1172.6 prima facie determination; rather, the court may consider only "readily ascertainable facts" from "the charging document and the explicit terms of the plea agreement, including any admissions." (OBM 9; see also OBM 28, 31-32.) But California law does not require any specific subsidiary admissions of fact as part of a plea. (See *People v. Holmes* (2004) 32 Cal.4th 432, 440-443, citing *People v. Watts* (1977) 67 Cal.App.3d 173, 182 and *People v. West* (1970) 3 Cal.3d 595, 608.) It is therefore unlikely that a plea record would contain any admissions shedding light on a theory of culpability, including an admission that the defendant acted alone. The only valid basis for denying a petition in a plea case at the prima facie stage under Patton's view would thus play a very limited screening role. In his framework, a petition could be denied, for example, if it turns out the petitioner actually pleaded to a non-qualifying offense (see, e.g., *Whitson*, *supra*, 79 Cal.App.5th at pp. 34-36); made admissions that were not required as part of the plea (see, e.g., *Saavedra*, *supra*, 96 Cal.App.5th at p. 506); or described the facts of the crime in a plea colloquy showing he was the actual and sole killer (see, e.g., *Fisher*, *supra*, 95 Cal.App.5th at pp. 1028-1029). But absent circumstances like those, an evidentiary hearing would be required even in cases in which the preliminary hearing evidence conclusively shows that the parties understood and never disputed that the petitioner was exclusively prosecuted as the sole perpetrator and therefore no invalid theory of murder liability was possible.[15]

Patton's view undermines the Legislature's conception of the prima facie inquiry under section 1172.6, subdivision (c), as a device for identifying and dismissing clearly meritless petitions without the additional judicial burden that an evidentiary hearing would entail. The purpose of the prima facie inquiry under section 1172.6, subdivision (c) is to screen out petitions that clearly "lack substantive merit" because the petitioner must have been convicted on a theory that did not include imputed malice. (*Lewis*, *supra*, 11 Cal.5th at pp. 968, 971.) The Legislature expressly limited the petition process to non-killers who had the malice of an accomplice imputed to them. (See

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[15] It is unclear whether, in Patton's framework, any admitted enhancement would establish ineligibility as a matter of law for a petitioner who pleaded no contest to attempted murder. For example, even if a sole-assailant petitioner admitted that he personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)), and there is no evidence of any accomplice, the inability to consider a preliminary hearing transcript would leave the petitioner free to speculate that the injury was not necessarily tied to the attempted killing, and the actual attempted killer may have been someone else.

Stats. 2018, ch. 1015, § 1, subd. (f); § 1172.6, subd. (a).) And this gatekeeping function applies regardless of whether a petitioner was convicted by trial or plea. (*Id*. at p. 971.)

When Senate Bills No. 1437 and No. 775 were enacted, the Legislature would have been aware that express factual admissions as to the nature of the crime are not required as part of a plea. (See *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500-1501 [the Legislature is presumed to know the existing law when it enacts a statute].) It also would have been aware that, under *Reed*, a preliminary hearing transcript reliably reflects the circumstances of a crime. The Legislature would thus have understood that the prima facie screening under section 1172.6, subdivision (c), even in plea cases, would be more robust in practice than the extraordinarily narrow conception advanced by Patton.

The Legislature's amendments to the pre-enactment drafts of Senate Bill No. 775 further suggest that it envisioned a broader prima facie screening function than the one Patton urges. The initial draft of the bill sought to modify the statutory language regarding the prima facie requirement to state that "a court shall find a prima facie showing has been made unless the declaration fails to comply with the requirements of subdivision (a)." (See Sen. Bill No. 775 (2021-2022 Reg. Sess.) § 1, as introduced February 19, 2021 [proposed 1172.6, subd. (c)].) This language, if adopted, would have effectively nullified the prima facie inquiry by requiring an evidentiary hearing for every properly pleaded petition, including those filed by petitioners who were convicted as lone actors. It was deleted by the second draft of the bill, however, and the prior (and current) requirement of a functional prima facie stage remained intact. (See Sen. Bill No. 775 (2021-2022 Reg. Sess.) § 1, as amended May 20, 2021 [former § 1170.95, subd. (c)]; see Sen. Bill No. 775 (2021-2022 Reg. Sess.) § 2, as chaptered October 5, 2021 [former § 1170.95, subd. (c)].)[16]

Although unpassed versions of a bill are generally of little assistance in determining legislative intent (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1261-1262), they may "provide some guidance" (*Doe v. Becerra* (2018) 20 Cal.App.5th 330, 342), particularly when there is an indication of the Legislature's reasoning in rejecting the unpassed provision (see *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 177). Here, the deleted language is directly contrary to the final language in the bill. Further, the final bill's findings and declarations implicitly recognized the import of the deletion by stating that the purpose of Senate Bill No. 775 was to "[c]odif[y]

[16] The original language of Senate Bill No. 1437 stated that "[t]he 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 makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (Stats. 2018, ch. 1015, § 4.) The current language, as amended by Senate Bill No. 775, similarly states that "[a]fter the parties have had an opportunity to submit briefings, the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause." (§ 1172.6, subd. (c).)

the holdings of [*Lewis*], regarding . . . the standard for determining the existence of a prima facie case." (Stats. 2021, ch. 551, § 1, subd. (b).) The deleted language, had it passed, would instead have superseded *Lewis*.

In addition, the Legislature stated that its intention for Senate Bill No. 775 was to "address[] what evidence a court may consider at a resentencing hearing (clarifying the discussion in *People v. Lewis*, *supra*, at pp. 970-972)." (See Stats. 2021, ch. 551, § 1, subd. (d).) The cited pages, 970 to 972, include the Court's holding that a court may make a credibility determination at the prima facie stage adverse to a petitioner if the record of conviction includes facts refuting the petition. (*Lewis*, at p. 971.) These pages also include the Court's holding that a clearly meritless petition may be dismissed at the prima facie stage. (*Ibid.*) And this section of *Lewis* noted that there is "no categorical bar" to consulting the record of conviction at the prima facie stage, absent improper factfinding. (*Id.* at p. 972 & 972, fn. 6.) The Legislature's reliance on these specific pages of *Lewis* further supports the inference that the gatekeeping function of the prima facie standard was meant to be a meaningful one, and that it includes review of the entire record of conviction, subject to a bar on novel factfinding.

The Legislature in enacting Senate Bill No. 775 thus made a choice not to eliminate the prima facie inquiry as a screening device. It instead ratified *Lewis*'s interpretation that the inquiry should operate to exclude those petitions that, although properly pleaded, are clearly without merit in light of the record of conviction. (*Lewis*, *supra*, 11 Cal.5th at pp. 968, 971.) Patton's view, which as a practical matter would exempt nearly all plea cases from prima facie screening, including those involving sole assailants, is in considerable tension with this legislative choice.

E. The record of conviction in this case conclusively shows that Patton is not entitled to relief

Patton is ineligible for section 1172.6 relief as a matter of law, a question that this Court reviews de novo. (*People v. Williams* (2022) 86 Cal.App.5th 1244, 1251.) Patton filed a form petition averring that he was eligible for relief but omitting any discussion of the record of conviction in this case. (CT 27-28.) The prosecution filed an opposition arguing that the averment in Patton's petition that he could not now be convicted of attempted murder was refuted by the record of conviction because he was prosecuted as the sole assailant. (CT 31, 35-36.) Patton did not respond. The record of conviction conclusively shows that Patton was convicted as the sole and direct perpetrator and is therefore ineligible for relief.

Section 1172.6 states that relief may be available for a person convicted of "attempted murder under the natural and probable consequences doctrine . . . ." (§ 1172.6, subd. (a).) That is the only theory on which an attempted murder conviction may be vacated under section 1172.6. (*People v. Coley* (2022) 77 Cal.App.5th 539, 548.) The natural and probable consequences doctrine makes the defendant liable for an offense "committed by the confederate" if it was a natural and probable consequence of the defendant's intended crime. (*Prettyman*, *supra*, 14 Cal.4th at p. 262.) By definition, therefore, the actual perpetrator who directly commits the crime cannot be convicted under the natural and probable consequences doctrine. This means that the actual killer in a murder, and the would-be killer in an attempted murder, are ineligible for section 1172.6 relief as a matter of law. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233 [petitioner "not entitled to any relief under section 1172.6" because evidentiary record showed he "was the actual killer and the only participant in the killing"]; see also *People v. Hurtado* (2023) 89 Cal.App.5th 887, 893; *People v. Garcia* (2022) 82 Cal.App.5th 956, 969-971; *Harden*, *supra*, 81 Cal.App.5th at pp. 47-48; *Garrison*, *supra*, 73 Cal.App.5th at p. 745.)[17]

When the prosecution argued that the record showed Patton was convicted as the actual perpetrator, it put in issue the provision in section 1172.6, subdivision (c), that requires the court to "to determine whether the petitioner has made a prima facie case for relief." The prosecution's opposition was based in part on the preliminary hearing evidence, which showed that the

[17] There is one narrow exception to the rule that an actual killer may not obtain relief under section 1172.6: The law of first degree felony murder, as amended by Senate Bill No. 1437, continues to apply to actual killers. (§189, subd. (e)(1).) But an actual killer who was convicted under a theory of second degree felony murder—where the felony is inherently dangerous to human life but not enumerated in section 189 (see *People v. Chun* (2009) 45 Cal.4th 1172, 1182)—is potentially eligible for section 1172.6 relief because Senate Bill No. 1437 eliminated that theory. (*In re White* (2019) 34 Cal.App.5th 933, 937, fn. 2.) This case does not implicate that issue because Patton pleaded no contest to attempted murder, not murder.

only question in the case was identity, not whether the shooter acted as an accomplice. (See CT 32, 34.)

The evidence included testimony by an officer who was familiar with Patton and recognized him as the shooter in the video (PHT 49-50), and there was evidence that the shooter's pants were unique and matched pants worn by Patton in a photograph posted on his Facebook account (PHT 24-26). The officer testified that surveillance video showed a lone shooter firing at the victim. (PHT 8-9.) There was also testimony about jail phone calls in which the victim implied that one person, Patton, was his attacker. (PHT 23, 30-33.) No other person was charged together with Patton. (See CT 1-4.) In short, the prosecution's evidence was that Patton alone was the shooter, and nothing in the record supported a contrary theory. While the defense moved to dismiss based on insufficiency of the evidence (PHT 61), it did not suggest that the prosecution's theory was anything other than that Patton personally committed the shooting. (See PHT 61 [characterizing prosecution's theory as "some guy from Front Street bangs on some guy from Back Street," in response to which a person later committed the shooting, "and that's Mr. Patton. It's a nice theory"].)[18]

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[18] Some testimony at the preliminary hearing conveyed law enforcement hearsay testimony permitted under section 872, subdivision (b). (See, e.g., PHT 20-21.) Such testimony would not be admissible at a section 1172.6 *evidentiary hearing*. (§ 1172.6, subd. (d)(3).) The court's task at the evidentiary hearing, however, is to weigh evidence and act as an independent trier of fact. (See *People v. Cody* (2023) 92 Cal.App.5th 87, 110.) In (continued…)

As the Court of Appeal correctly observed, the evidence at the preliminary hearing permitted exclusively a "sole perpetrator" theory of the shooting. (See Opn. 10; PHT 61-63.) Further, as part of his plea, Patton admitted that he personally used and discharged a gun during the attempted murder. (RT 8; § 12022.53, subd. (c).) In the context of the preliminary hearing evidence indicating a lone shooter, this was an acknowledgement that the plea was based on the theory that he was that shooter. Given this record, as highlighted by the prosecution's opposition, Patton had the prima facie burden to present a legal argument, also based on the record, demonstrating that the evidence could have supported a natural and probable consequences theory of liability. The Court of Appeal correctly observed that Patton's petition did not offer any record-based argument at all, much less one that could support the contention that he was prosecuted or convicted as an accomplice. (Opn. 10; see CT 27-28.) And, as noted, Patton did not file a reply brief or present any oral argument during his prima facie hearing. (RT 302.) Nor does he now offer any explanation of how the facts in the record of conviction could have supported an invalid theory.

(…continued)

contrast, a court does not weigh evidence or find facts at the prima facie stage; it may consult the preliminary hearing evidence only to determine whether any now-impermissible theory of liability was possible in light of the record of conviction. In any event, the testimony pertaining to the video showing a single assailant, and the officer's ability to identify Patton in the video based on his personal knowledge, was not hearsay.

Patton insists that he "never admitted to being the actual shooter. . . ." (OBM 25.) It is true that such an admission would preclude relief under section 1172.6, as Patton appears to suggest. But relief may also be precluded, as it is here, where the preliminary hearing transcript shows that the evidence could only have permitted a sole perpetrator theory, meaning his plea was based on that theory. (*Pickett*, *supra*, 93 Cal.App.5th at p. 990.) Patton's petition is clearly meritless because the record of conviction conclusively refutes his contention that he could not be convicted of attempted murder under current law. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233; *Strong*, *supra*, 13 Cal.5th at p. 708; *Lewis*, *supra*, 11 Cal.5th at p. 971.)[19]

[19] To the extent the superior court or the Court of Appeal referred to an incorrect substantial evidence standard in assessing Patton's claim (see CT 39; OBM 27), any error in that regard is immaterial. As noted, this Court reviews de novo the legal question whether Patton has established a prima facie claim for relief. (*Williams*, *supra*, 86 Cal.App.5th at p. 1251.)

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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February 12, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains **10,493** words.

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/s/ Amanda V. Lopez
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February 12, 2024

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

Case Name: *People v. Patton* No.: S279670

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 February 12, 2024, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system. 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 February 12, 2024, I placed a true copy thereof enclosed in a sealed envelope 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:

David Slayton, Clerk of the Court
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attn: Hon. Hector Gutierrez
(Served via U.S. Mail)

On February 12, 2024, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via the Court's TrueFiling system and electronic mail to:

Jonathan E. Demson
Counsel for Appellant
(served via TrueFiling)

Alexander Hogue
Deputy District Attorney
(e-served via e-mail)

California Appellate Project
Los Angeles County (CAP – LA)
(e-served via TrueFiling
capdocs@lacap.com)
Jessie Peterson
Deputy Public Defender
(served via TrueFiling)

I also caused the attached document to be electronically served to the California Court of Appeal by transmitting a true copy via the Court's TrueFiling system.

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 February 12, 2024, at Los Angeles, California.

J. Wu	/J. Wu/
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. PATTON**
Case Number: **S279670**
Lower Court Case Number: **B320352**

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: **amanda.lopez@doj.ca.gov**

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

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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.

2/12/2024
Date

/s/Judy Wu
Signature

Lopez, Amanda (273602)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm