DEATH PENALTY

No. S173784 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
RAYMOND LEE OYLER,
Defendant and Appellant.

Riverside County Superior Court, Case No. 133032

RESPONDENT'S MOTION FOR JUDICIAL NOTICE

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November 7, 2024

Pursuant to California Rules of Court, rules 8.520(g) and 8.252(a), and Evidence Code sections 452, subdivision (d), and 459, respondent respectfully requests this Court take judicial notice of appellant Raymond Lee Oyler's petition for Penal Code[1] section 1172.6 resentencing relief, filed on July 30, 2024, in case number RIF133032, in the Riverside County Superior Court.

In his recently filed supplemental brief, Oyler raises a claim that he is entitled to relief pursuant to section 1172.6 and further contends that in addition to pursuing relief in this appeal, he can simultaneously seek relief in the superior court pursuant to the petition he filed on July 30, 2024. Consideration or resolution of that contention may depend on the substance of his petition. (Cal. Rules of Court, rule 8.252(a)(2)(A).)

The petition was filed in the superior court, although not before the trial court because it seeks resentencing relief that was unavailable at the time of Oyler's trial. (Cal. Rules of Court, rule 8.252(a)(2)(B) and (a)(2)(D).)

The petition is subject to judicial notice because it is a court record. (Cal. Rules of Court, rule 8.252(a)(2)(C).) Read together, Evidence Code sections 452, subdivision (d), and 459, subdivision (a), permit a reviewing court to take judicial notice of any records of a court of this state that are relevant to the issues before it. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *People v. Woodell* (1998) 17 Cal.4th 448, 454-457.) The Rules of Court are in accord. (See Cal. Rules of Court, rule 8.252(a).)

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

Because the record at issue may be relevant to this Court's resolution of the matters raised on appeal, respondent respectfully requests this Court take judicial notice of the petition Oyler filed in the Riverside County Superior Court (case no. RIF 133032) seeking resentencing relief pursuant to section 1172.6.

The petition is attached to this motion. (Cal. Rules of Court, rule 8.252(a)(3).)

Respectfully submitted,

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November 7, 2024

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ATTACHMENT

Olyer's Petition for Penal Code section 1172.6 Resentencing Relief
Filed July 30, 2024; Riverside County Case No. RIF133032

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR RIVERSIDE COUNTY

RAYMOND LEE OYLER, Petitioner, On Request for Resentencing	Case No. RIF 133032 (Related to California Supreme Court Case No. 173784.) PETITION FOR RESENTENCING (PENAL CODE § 1172.6); MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF COUNSEL. **CAPITAL CASE**

PETITION FOR RESENTENCING

Pursuant to Penal Code § 1172.6[1], Petitioner Raymond Oyler hereby files this Petition for Resentencing. (See Pen. Code § 1172.6 (a-b); *People v. Strong* (2022) 13 Cal. 5th 698; *People v. Lewis* (2021) 11 Cal. 5th 952; *People*

[1]Section 1170.95 was enacted by SB 1437 effective January 1, 2019, amended by SB 775 effective January 1, 2022, and renumbered as section 1172.6 effective June 30, 2022. (Stats. 2022, ch. 58, § 10 A.B. 200.) To minimize confusion throughout this brief Petitioner generally refers to section 1170.95 as section 1172.6.

v. Gentile (2020) 10 Cal. 5th 830.)

Mr. Oyler's direct appeal is currently pending in the California Supreme Court. (People v. Oyler, Case No. S173784.) Following *Gentile,* 10 Cal. 5th at 858-860, Mr. Oyler has filed a motion in the Supreme Court to stay his direct appeal proceedings and to remand his case to this Court for the limited purpose of deciding his resentencing petition pursuant to Penal Code section 1172.6.

Mr. Oyler, therefore, requests this Court receive and hold this petition pending action by the Supreme Court on his motion for a stay of his direct appeal and remand.

Dated: July 29, 2024

Respectfully Submitted,
s/Michael Clough
MICHAEL CLOUGH
Attorney for Defendant/ Appellant/Petitioner
RAYMOND LEE OYLER

DECLARATION OF PETITIONER OYLER

In support of this petition, I, Raymond Lee Oyler, hereby aver and allege:

On April 9, 2007, in case number RIF 133032, an Information was filed that allowed the Riverside District Attorney to proceed under a theory of felony murder. (3CT:556-559; 24RT:3689-3691; 24RT:3730-3731.)

On March 6, 2009, I was convicted of felony murder following a trial. (16CT:4367-4371; 25RT:3921-3933.)

I could not presently be convicted of murder because of changes to Section 188 or 189 made effective January 1, 2019 because:

a. I was **not** the actual killer and did **not** personally kill Mark Loutzenhiser, Daniel Hover-Najera, Jess McLean, Jason McKay, or Pablo Cerda.

b. I did **not**, with intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist an actual killer.

c. I was **not** a major participant in the underlying felony who acted with reckless indifference to human life.

d. The victims were **not** peace officers acting in the performance of their duties.

Based on these averments and for the reasons stated below, I have plainly made a prima facie showing that I am eligible for relief pursuant to Penal Code section 1172.6, subdivisions (a) - (c). (Pen. Code §1172.6, subs. (a)-(c); *Lewis,* 11 Cal.5th at 971.) Therefore, this Court must issue an order to show cause and hold an evidentiary hearing to determine whether to vacate my murder convictions and resentence me. (Pen. Code, § 1172.6 (c-d); (*People v. Curiel* (2023) 15 Cal.5th 433, 463 ("At the prima facie stage, a court must accept as true a petitioner's allegation that he or she could not currently be

convicted of a homicide offense because of changes to section 188 or 189 made effective January 1, 2019, unless the allegation is refuted by the record. [Citation.] And this allegation is not refuted by the record unless the record conclusively establishes every element of the offense.").)

DATED: 5/31/24

RAYMOND LEE OYLER

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR RESENTENCING PURSUANT TO PENAL CODE SECTION 1172.6

I. SENATE BILL 1437 SUBSTANTIALLY CHANGED CALIFORNIA'S FELONY MURDER LAWS AND CREATED NEW PROVISIONS FOR DEFENDANTS CONVICTED UNDER THE OLD FELONY MURDER LAWS TO OBTAIN AMELIORATIVE RELIEF.

On September 30, 2018, Senate Bill 1437 (SB 1437) was signed into law. (2018 Cal Stats. ch. 1015.) SB 1437 amended Penal Code sections 188 and 189 to bar the use of the "natural and probable consequences" doctrine and limit the felony murder rule. Specifically, SB 1437 added section 189, subdivision (e), which provides that:

> A participant in the perpetration or attempted perpetration of [qualifying felonies] in which a death occurs is liable for murder only if one of the following is proven:
>
> (1) The person was the actual killer.
>
> (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
>
> (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(*Gentile*, 10 Cal. 5th at 842; § 189 subd. (e).)

SB 1437 also added section 188, subdivision (a)(3):

> Except [for felony-murder liability] 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."

(Id.; § 188, subd. (a)(3).)

SB 1437 enacted section 1170.95, which was rechaptered without amendment as section 1172.6 effective July 1, 2022, to provide a procedure

for persons convicted of felony murder or murder under the natural and probable consequences doctrine to seek ameliorative relief based on the amendments to sections 188 and 189, which went into effect on January 1, 2019. (Id., at 842-843.)

The California legislature's plainly stated purposes were "to more equitably sentence offenders in accordance with their involvement in homicides," to promote the "bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability," "to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual," and to ensure that "murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (2018 Cal Stats. ch. 1015.)

In *Gentile,* the California Supreme Court characterized SB 1437 as "ameliorative legislation" that "set out a specific mechanism [procedure]" "for those convicted of felony murder or murder under the natural and probable consequences doctrine to seek relief under the two ameliorative provisions" enacted by the California legislature and signed into law in October 2018. (*Gentile,* 10 Cal.5th at 838-839, 843, 847, 851-854.) Based on *In re Estrada* (1965) 63 Cal.2d 740, *Gentile* held that the ameliorative provisions enacted by SB 1437 were **not** retroactive on appeal and, therefore, defendants already serving sentences for murder could **not** file a petition for relief in the trial court if their direct appeals were pending. (*Gentile,* 10 Cal.5th at 851-859.) But *Gentile* noted, "nothing prevents defendants from seeking to stay their

direct appeals in order to pursue relief under Senate Bill 1437." (Id., at 858.)

On October 5, 2021, the Governor signed Senate Bill (SB) 775. (2021 Cal Stats. ch. 551.) SB 775 amended then-section 1170.95 to "expand the authorization to [file a resentencing petition] to allow a person who was convicted of murder under any 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 who was convicted of manslaughter when the prosecution was allowed to proceed on a theory of felony murder or murder under the natural and probable consequences doctrine, to apply to have their sentence vacated and be resentenced." (Id..)

SB 775 also "codifie[d] the holdings of *Lewis*, 11 Cal.5th at 961-970 regarding petitioners' right to counsel and the standard for determining the existence of a prima facie case"; reaffirm[ed] that the proper burden of proof at a resentencing hearing under section 1170.95 (d) is proof beyond a reasonable doubt"; and clarified "what evidence a court may consider at a resentencing hearing." (Id.) As amended by section SB 775, section 1172.6 requires that, after the filing of a petition that satisfies the requirements in section 1172.6 subdivisions (b) (1) – (2), "if the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." (§ 1172.6, subd. (b)(3).) It establishes deadlines for the prosecutor to file a response to the petition and for petitioner to file a reply, which "shall be extended for good cause"; and requires, "[a]fter the parties have had an opportunity to submit briefings," the court must "hold a hearing to determine whether the petitioner has made a prima facie case for relief"; and "[i]f 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)(3).)

Section 1172.6 subdivision (d) requires a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and recall and resentence the petitioner. (§ 1172.6, subd. (d)(1).) It also provides the rules to be followed "[a]t the hearing to determine whether the petitioner is entitled to relief," including that the prosecutor must "prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019." (§ 1172.6, subd. (d)(3).)

As amended by SB 775, section 1172.6 "made explicit" that an appellate court finding substantial evidence supports a homicide conviction "is **not** a basis for denying resentencing after an evidentiary hearing." *Strong,* 13 Cal.5th at 720 (citing former § 1170.95 (d)(3), as amended by Stats. 2021, ch. 551, § 2) ("A finding that there is substantial evidence to support a conviction for murder … is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing"). "Nor, then, is it a basis for denying a petitioner the opportunity to have an evidentiary hearing in the first place." (Id.)

Section 1172.6 further provides that the Evidence Code governs the admission of evidence in the hearing, "except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed." The prosecutor and the petitioner both "may also offer new or additional evidence." (§ 1172.6, subd. (d)(3).)

In response to *Gentile,* SB 775 added subdivision (g) to section 1172.6, which provides, "[a] person convicted of murder, attempted murder, or manslaughter whose conviction is not final *may* challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and

189 by Senate Bill 1437." (§ 1172.6 subd. (g) (emphasis added).)

After passage of SB 775, defendants eligible for relief under section 1172. 6 ***whose appeals are not final*** have two options: They may, as recommended by *Gentile,* stay their direct appeal and file a petition in the trial court. (*Gentile,* 10 Cal.5th at 851, citing *People v. Martinez* (2019) 31 Cal.App.5th 719, 729; *People v. Cervantes* (2020) 46 Cal.App.5th 213, 226; *People v. Awad* (2015) 238 Cal.App.4th 215, 220.) Alternatively, pursuant to section 1172. 6, subdivision (g), they may challenge their murder conviction in their direct appeal based on the changes enacted by SB 1437/ SB 775. (See *People v. Wilson* (2023) 14 Cal.5th 839, 869-871.) Mr. Oyler has chosen to stay his pending appeal in the California Supreme Court and file this petition in this court -- the original trial court.

After the enactment of SB 775, the California Supreme Court held that petitioners, like appellant Oyler, who are serving sentences based on special circumstance findings before the Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522 were eligible for relief. "[U]nless a defendant was tried after *Banks* was decided, a major participant finding will not defeat an otherwise valid prima facie case. And unless a defendant was tried after *Clark* was decided, a reckless indifference to human life finding will not defeat an otherwise valid prima facie case." (*Strong*, 13 Cal.5th at 720.) Because Mr. Oyler was tried and convicted in 2009 (before *Banks* and *Clark* were decided), after *Strong,* the jury's special circumstance findings in his case do **not** make him ineligible for relief pursuant to section 1172.6. (Id. at 710 ("Findings issued by a jury before *Banks* and *Clark* do not preclude a defendant from making out a prima facie case for relief under Senate Bill 1437. This is true even if the trial evidence would have been sufficient to support the findings under *Banks* and *Clark*");

see also *Curiel*, 15 Cal.5th at 440–441 (defendant entitled to an evidentiary hearing despite jury's true finding as to a gang special circumstance).)

II. TO DENY A PETITION FILED PURSUANT TO SECTION 1172.6 AT THE PRIMA FACIE STAGE, A COURT MUST FIND THE "RECORD OF CONVICTION" "CONCLUSIVELY" ESTABLISHES "AS A MATTER OF LAW" THAT THE PETITIONER IS INELIGIBLE FOR RELIEF.

As stated above, at the prima facie stage, a court must accept as true a petitioner's allegation that he or she could not currently be convicted of a homicide offense because of changes to section 188 or 189 made effective January 1, 2019, unless the allegation is refuted by the record." (*Curiel,* 15 Cal.5th at 463, citing *Lewis*, 11 Cal.5th at 971.) "[T]his allegation is not refuted by the record unless the record conclusively establishes *every* element of the offense." (*Curiel,* 15 Cal.5th at 463 emphasis added).) If it is "possible" the jury convicted the defendant in a manner that does not preclude relief under Senate Bill 1437 as a matter of law, then an order to show cause *must* issue." (*People v. Harden* (2022) 81 Cal.App.5th 45, 54 (emphasis added).) "[A] court should not reject the petitioner's factual allegations on credibility grounds without first conducting an evidentiary hearing." (Id., citing *People v. Drayton* (2020) 47 Cal.App. 5th 965, 978, fn. omitted, citing *In re Serrano* (1995) 10 Cal.4th 447, 456.)

"In general, whether a prior finding will be given conclusive effect in a later proceeding is governed by the doctrine of issue preclusion, also known as collateral estoppel." (*Curiel,* 15 Cal.5th at 451, quoting *Strong*, 13 Cal.5th at 715.) " [I]ssue preclusion bars relitigation of issues earlier decided 'only if several threshold requirements are fulfilled.'" (Id.) Those requirements are:

* "[T]he issue sought to be precluded from relitigation must be identical to that decided in a former proceeding."
* "[T]his issue must have been actually litigated in the former

proceeding."

* "[I]t must have been necessarily decided in the former proceeding."
* "[T]he decision in the former proceeding must be final and on the merits."
* "[T]he party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding."

(*Curiel,* 15 Cal.5th at 451, quoting *Strong*, 13 Cal.5th at 716.)

" 'The party asserting collateral estoppel bears the burden of establishing these requirements.'" (*Curiel,* 15 Cal.5th at 452, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) " 'In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts.'" (Id., quoting *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.)

A "presumption of correctness applies" to jury findings "while direct review is ongoing." (*Samara v. Matar* (2018) 5 Cal.5th 322, 335 (citing *Denham* [*v. Superior Court*] (1970) 2 Cal. 3d 557, 564).) "[U]nder California law," however, a "trial court judgment has no preclusive effect until the appellate process is complete." (Id. citing e.g., *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954; *Brown v. Campbell* (1893) 100 Cal. 635, 646–647). "[A] judgment becomes final ' "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari ha[s] elapsed."'" (*Wilson*, 14 Cal.5th at 870, quoting *People v. Padilla* (2022) 13 Cal.5th 152, 162, and citing *People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.)

When a defendant still has an opportunity to contest the sufficiency of the evidence presented at trial to support a jury finding or challenge the finding as legally erroneous, it would be unwarranted and unfair to treat a jury finding as preclusive without reviewing the evidence supporting that

finding. (See *People v. Barboza* (2021) 68 Cal.App.5th 955, 965.) It would be analogous to treating a decision on appeal as preclusive with regard to a ground that was omitted from the appellate court's final decision. (See *Samara*, 5 Cal.5th at 335 ("Affording preclusive effect to a trial court determination that evades appellate review might speed up the resolution of controversies, but it would do so at the expense of fairness, accuracy, and the integrity of the judicial system").)

For these reasons, "in determining whether a **nonfinal** jury verdict *conclusively* refutes a petitioner's claim they could not be convicted of murder under sections 188 and 189 as amended by SB 1437," a court "may", if not must, "look to 'the entire cause, including the evidence.'" (See *Curiel*, 15 Cal.5th at 465, fn. 6 (quoting *In re Lopez* (2023) 14 Cal. 5th 562, 588-589, quoting *People v. Aledama*t (2019) 8 Cal. 5th 1, 13.)

Based on the record of conviction in Petitioner's case, including the instructions the jury was given at trial in 2009 and, as alleged in the attached proffer, the lack of any evidence Mr. Oyler actually started the Esperanza fire and personally killed the five firefighters who tragically died after a sudden area ignition swept over their position on the morning of October 26, 2006, and the plain language of amended section 189 subdivision (e), the jury's nonfinal verdicts as to the five murder counts and felony-arson murder special circumstances in this case do not *conclusively* refute Petitioner Oyler's claim he could not be convicted of murder under sections 188 and 189 as amended by SB 1437 effective January 1, 2019.

III. THE RECORD OF CONVICTION IN MR. OYLER'S CASE DOES NOT CONCLUSIVELY ESTABLISH HE COULD BE CONVICTED ON A THEORY OF MURDER THAT REMAINS VALID AFTER THE CHANGES IN PENAL CODE SECTION 188 AND PENAL CODE SECTION 189 BECAME EFFECTIVE ON JANUARY 1, 2019.

A. BECAUSE OF THE CHANGES IN PENAL CODE SECTION 188 AND

PENAL CODE SECTION 189 THAT BECAME EFFECTIVE ON JANUARY 1, 2019, MR. OYLER COULD NOT BE CONVICTED ON A THEORY OF FELONY MURDER THAT REMAINS VALID.

In *Curiel*, the California Supreme Court reaffirmed and explained:

> At the prima facie stage, a court must accept as true a petitioner's allegation that he or she could not currently be convicted of a homicide offense because of changes to section 188 or 189 made effective January 1, 2019, unless the allegation is refuted by the record. (*Lewis*, 11 Cal.5th at 971.) *And this allegation is not refuted by the record unless the record conclusively establishes every element of the offense.* If only one element of the offense is established by the record, the petitioner could still be correct that he or she could not currently be convicted of the relevant offense based on the absence of other elements.

(*Curiel,* 15 Cal.5th at 463 (emphasis added).)

Section 189 subdivision (e) defines the elements that a prosecutor must now prove beyond a reasonable doubt to convict a defendant of felony murder -- and that a reviewing court must consider in deciding whether a petitioner has made a prima facie showing that they are eligible for relief under section 1172.6. As amended, section 189 provides:

> A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
>
> (1) The person was the actual killer.
>
> (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
>
> (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(§ 189 subd. (e).)

With regard to the murder charges, in Mr. Oyler's 2009 trial, jurors were instructed only that:

> The defendant is charged in counts 1 through 5 with murder, under a theory of felony murder.
>
> To prove that the defendant is guilty of first degree murder under this theory, the people must prove that:
>
> 1. The defendant committed arson;
>
> 2. The defendant intended to commit arson;
>
> 3. While committing an arson, the defendant did an act that caused the death of another person.
>
> A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

(16CT 4194; 24RT 3730.)

Jurors were **not** asked to determine whether Mr. Oyler was the actual killer. They were **not** asked to determine whether, with intent to kill, Mr. Oyler aided, abetted, counseled, commanded, induced, solicited, requested, or assisted an actual killer in the commission of murder in the first degree. And they were **not** asked to determine whether Mr. Oyler was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2. Because jurors in Mr. Oyler's 2009 trial were not instructed to find any of these elements true, even if the jury's verdict were final on appeal, it could not be used to establish that all of the elements of felony murder as amended effective January 1, 2019 are true beyond a reasonable doubt under current law.

Neither the jury's verdict nor any other parts of the record of conviction in his case refute Mr. Oyler's allegations that he was not the actual killer, he did not personally kill or cause the deaths of the five fire fighters, he did not aid and abet an actual killer with the intent to kill, and, with regard to the Esperanza fire, he was not a major participant in a felony who acted with

reckless disregard for human life. Because the record of conviction does not conclusively establish as a matter of law all of the elements necessary for a court to find that Mr. Oyler could be convicted of murder under California's felony murder law effective January 1, 2019, he is entitled to an evidentiary hearing pursuant to section 1172.6 subdivision (d) subsection (3). (See *Curiel*, 15 Cal.5th at 463.)

B. TO PROVE THE ACTUAL KILLER ELEMENT AS REQUIRED BY CURRENT LAW, THE PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS AN ACTUAL KILLER" AND "PERSONALLY KILLED" THE VICTIM[S].

Since passage of SB 1437, the meaning of the term "actual killer" has been examined by three courts of appeal in cases addressing very different factual circumstances. In *People v. Garcia* (2020) 46 Cal.App.5th 123, 143-144 [review denied by *People v. Garcia*, 2020 Cal. LEXIS 3623 (Cal., May 27, 2020)], the appellate court examined the meaning of "actual killer" in Penal Code section 190.2. At trial, the prosecutor, citing CALCRIM No. 730, told the jury the defendant could be found guilty of the charged special circumstance as the actual killer because he did an act – handing over duct tape to a person who placed the tape on the victim's mouth – that caused the death of the victim. (Id. at 149.) On appeal, the defendant argued that handing the tape over was legally insufficient to qualify him as an actual killer because he did not personally kill the victim. (Id. at 150.) The appellate court found that only the person who actually applied the tape to the victim's mouth was the actual killer. (Id.) In reaching that conclusion, *Garcia* held that "the meaning of actual killer is 'particular and restricted' (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012), and its application must be literal." "The actual killer is the person who personally kills the victim, whether by shooting, stabbing, or . . . asphyxiation." (Id. at 152, 155.)

Because "[p]roximately causing and personally inflicting harm are two different things" (*Garcia,* 46 Cal.App.5th at 151 (quoting *People v. Bland* (2002) 28 Cal.4th 313, 336), the court of appeal held that a "jury should have been instructed that it could find true the special circumstance under section 190.2(a)(17)(A) and (b) only if the prosecution proved beyond a reasonable doubt that [the defendant] 'personally killed' [the victim]." (Id.at 155 (emphasis added).)

In *People v. Lopez* (2022) 78 Cal.App.5th 1, the appellate court also concluded that "the term 'actual killer' as used in the revised felony-murder rule of section 189, subdivision (e)(1) refers to someone who personally killed the victim and is not necessarily the same as a person who 'caused' the victim's death." (*Lopez*, 78 Cal.App.5th at 4-5.) In *Lopez*, the prosecutor proceeded on the theory that Lopez was the actual killer. (Id., at 15-16.) Lopez "testified that although he went with [a co-defendant] to the victim's apartment, he did not kill the victim or participate in the robbery or even enter the bedroom in which the victim was later found." (Id., at 16.) Except for Lopez's DNA on a drinking glass in the bathroom, there was no direct evidence that Lopez bludgeoned the victim. (Id., at 19.) Because it was possible "the jury convicted [Lopez] of felony murder and found to be true the robbery-murder special-circumstance allegation without finding him to have been the actual killer," the appellate court held that the superior court erred in denying Lopez's petition without issuing an order to show cause. (Id., at 20.)

In *People v. Vang* (2022) 82 Cal.App.5th 64, [review denied by *People v. Vang*, 2022 Cal. LEXIS 6425] (Cal., Oct. 19, 2022), the court was presented with a different factual scenario. In *Vang,* the defendant got into an argument with his wife and followed her after she fled in a car. Vang forced

her to stop and coerced her into his vehicle through force or fear. As he was driving away, she opened the door and jumped out of the vehicle. (*Vang,* 82 Cal.App.5th at 73-74.) The fall from the vehicle resulted in her death.

In response to *Vang's* petition for relief pursuant to section 1172.6, the Attorney General argued for a "broad interpretation" of the term "actual killer" that would include "any person whose conduct during the commission of a qualifying felony caused the victim's death, regardless of whether the death was intentional or accidental." (Id., at 84.) After examining the history of SB 1437, the court of appeal rejected this interpretation:

> If the Legislature's intent had been to limit its changes to accomplice liability, the text of Senate Bill 1437 presumably would have said so. Here, the word "accomplice" is never used in the text and there is nothing in the language of section 189, subdivision (e) which limits its application to cases involving accomplices.

(Id. at 87.)

Vang also noted that "the Legislature's stated intent in amending the felony-murder rule was to more equitably sentence 'offenders' -- not just accomplices -- in accordance with their involvement in homicides." (Id.)

Vang found and held,

> … the term "actual killer" was intended to limit liability for felony murder—in cases where section 189, subdivision (e)(2) or (e)(3) do not apply—to the actual perpetrator of the killing, i.e., the person (or persons) who personally committed the homicidal act. In other words, the intent was to conform California law to the "agency theory" of felony murder liability, under which criminal culpability is restricted to deaths directly caused by the defendant or an accomplice, as distinguished from the "proximate cause" theory of felony murder, under which a defendant is responsible for any death that proximately results from the unlawful activity. (citations omitted.)

(Id. at 88.)

Vang's holding that "actual killer" refers to "the actual perpetrator of the killing, i.e., the person (or persons) who personally committed the homicidal act," is also consistent "with precedent discussing what it means to be an 'actual killer' for purposes of section 190.2," and with the California Supreme Court's repeated characterization of *Tison v. Arizona* (1987) 481 U.S. 137 "as articulating the constitutional limits on executing felony murderers 'who did not personally kill,' equating the term 'actual killer' with someone who 'personally killed' the victim." (Id. at 88-89 (citations omitted).)

In *People v. Bodely* (2023) 95 Cal.App.5th 1193 ["review denied by *People v. Bodely*, 2023 Cal. LEXIS 6878 (Cal., Dec. 13, 2023]), the appellate court denied a petition filed pursuant to section 1172.6 at the prima facie stage after finding that the record of conviction established the defendant was the actual killer and was, therefore, not eligible for resentencing as a matter of law. (Id. at 1198.) In *Bodely*, a person in a supermarket parking lot attempted to stop a robber as he drove off by reaching into the driver's window of the robber's car. The driver hit the person with his car, causing him to hit his head on the pavement, and the person died. (Id. at 1196.) The court of appeal denied the petition for resentencing because the robber "directly" hit the person with his car resulting in his death. (Id. at 1202.) In an earlier case, *People v. Garcia* (2022) 82 Cal.App.5th 956, review denied by *People v. Garcia*, 2022 Cal. LEXIS 7193 (Cal., Nov. 22, 2022), an appellate court found a defendant who assaulted an 82- year-old man and stole money from him was the actual killer because the man, who had cardiovascular disease, died about an hour later from a lethal cardiac arrhythmia brought on either by the stress of being robbed or the physical altercation. (Id. at 959, 961-962.) *Bodely* and *Garcia* are sharply distinguished from Mr. Oyler's case by the fact that the defendants personally and directly took physical action

against their victims that directly resulted in their deaths.

Based on the record of conviction in his case including the facts that jurors were not required to determine that Petitioner Oyler was "an actual killer" who "personally killed" the five fire fighters, and were not fully and properly instructed on causation, the jury's nonfinal verdicts do not conclusively establish as a matter of law that Petitioner Oyler is ineligible for resentencing under section 1172.6.

C. AT MR. OYLER'S 2009 TRIAL, JURORS WERE NOT REQUIRED TO FIND THAT MR. OYLER WAS AN ACTUAL KILLER" AND "PERSONALLY KILLED" THE VICTIMS.

On February 25, 2009, Judge Morgan held a hearing to finalize his instructions to the jury. At the hearing, prosecutor Hestrin confirmed he was "**not** going [to proceed] on a theory of premeditated and deliberate murder." (24RT3688 (emphasis added).) Judge Morgan proposed to give CALCRIM 540A. When the court brought up CALCRIM 520 and 521, prosecutor Michael Hestrin commented, "Second Degree Felony Murder" "does exist," but agreed with Judge Morgan that "it doesn't apply." (24RT3690.) Based on prosecutor Hestrin's statements, Judge Morgan did not give CALCRIM 520 or CALCRIM 521.

After the court said it had a problem with CALCRIM 732 (the standard felony arson murder special circumstance instruction), prosecutor Hestrin said he did not "think we should be using 732 at all." (24RT3694). Instead of giving CALCRIM 732, at prosecutor Hestrin's urging, Judge Morgan modified CALCRIM 732 to change the intent element from "The defendant (intended to commit) arson that burned an inhabited structure," to "The defendant intended to commit arson." (See 24RT3694-3697.) Judge Morgan also left out two elements -- that "[t]he commission [or attempted commission] of the arson was a substantial factor in causing the death of another person"; and

that "[t]here was a logical connection between the act causing the death and the arson [or attempted arson]. The connection between the fatal act and the arson must involve more than just their occurrence at the same time and place." (See CALCRIM 732, CALCRIM 2006-2007.)

In addition, Judge Morgan ignored the bench notes in both CALCRIM 540A and CALCRIM 732 directing that "If causation is at issue, the court has a *sua sponte* duty to instruct on proximate cause." (CALCRIM 540A and CALCRIM 732, CALCRIM 2006-2007.) With regard to murder, Judge Morgan instructed jurors only that:

> The defendant is charged in counts 1 through 5 with murder, under a theory of felony murder.
>
> To prove that the defendant is guilty of first degree murder under this theory, the people must prove that:
>
> 1. The defendant committed arson;
>
> 2. The defendant intended to commit arson;
>
> 3. While committing an arson, the defendant did an act that caused the death of another person.
>
> A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

(16CT 4194; 24RT 3730.)

With regard to "whether the defendant committed arson," the court instructed jurors to apply the prior instruction when they "decide[ed] whether the people have proved first degree murder under a theory of felony murder." (16CT 4194; 24RT 3730.) They were further instructed:

> The defendant must have intended to commit the arson before or at the time of the act causing the death.
>
> It is not required that the person die immediately, as long as the act causing the death and the felony are part of one continuous transaction.

It is not required that the person killed be an intended victim of the felony.

(16CT 4195; 24RT 3730-3731.)

With regard to arson, the jurors were instructed:

The defendant is charged in counts 6 through 28 with arson, in violation of penal Code Section 451, subdivision (b).

To prove that the defendant is guilty of this crime, the people must prove that:

1. The defendant set fire or burned a forest land; and

2. He acted willfully and maliciously.

To set fire to or burn means to damage or destroy with fire either all or part of something, no matter how small the part.

Someone commits an act willfully when he does it willingly or on purpose.

Someone acts maliciously when he intentionally does a wrongful act or when he acts with an unlawful intent to defraud, annoy, or to injure someone else.

Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.

(16CT 4201-4202; 24RT 3732-3733.)

With regard to the arson-murder special circumstance, Penal Code Section 190.2(a)(17), the jurors were instructed:

To prove this special circumstance is true, the people must prove that:

1. The defendant set fire to or burned forest land;

   A. He acted willfully and maliciously; AND

   B. The fire burned an inhabited structure.

2. The defendant intended to commit an arson;

3. The defendant did an act that caused the death of another person; AND

4. The act causing the death and the arson of the inhabited structure were part of one continuous transaction.

> A structure is inhabited if someone lives there and is either present or has left but intends to return.

(16CT 4199; 24RT3732.)

The verdict forms the jurors signed stated only:

> "We, the jury in the above-entitled action, find the defendant, Raymond Lee Oyler, guilty of a violation of Section 187, subdivision (a), of the Penal Code, murder of [each firefighter] on October 26, 2006, as charged under Count 1 of the Information, and fix the degree as murder in the first degree."

(16CT 4367-4371.)

D. AT MR. OYLER'S 2009 TRIAL, JURORS WERE ALSO NOT REQUIRED TO FIND THAT MR. OYLER HAD THE INTENT TO KILL, OR THAT HE WAS A MAJOR PARTICIPANT IN THE UNDERLYING FELONY AND ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE.

As Petitioner believes the District Attorney will not dispute, jurors at his 2009 trial were also not required to find that Mr. Oyler had the intent to kill, or that he was a major participant in the underlying felony and acted with reckless indifference to human life.

E. BECAUSE JURORS AT MR. OYLER'S 2009 TRIAL WERE NOT REQUIRED TO FIND BEYOND A REASONABLE DOUBT ANY OF THE ELEMENTS OF FELONY MURDER UNDER PENAL CODE SECTION 189, SUBDIVISION (E) EFFECTIVE JANUARY 1, 2019, THERE IS NO LEGAL BASIS FOR THIS COURT TO FIND THAT MR. OYLER'S ALLEGATIONS IN SUPPORT OF HIS PETITION ARE CONCLUSIVELY REFUTED BY THE RECORD OF CONVICTION.

As the California Supreme Court reaffirmed and explained in *Curiel*, "[a]t the prima facie stage, a court must accept as true a petitioner's allegation that he or she could not currently be convicted of a homicide offense because of changes to section 188 or 189 made effective January 1, 2019, unless the allegation is refuted by the record. (*Lewis*, 11 Cal.5th at 971.) And this allegation is not refuted by the record unless the record conclusively establishes every element of the offense. If only one element of the offense is established by the record, the petitioner could still be correct that he or she

could not currently be convicted of the relevant offense based on the absence of other elements." (15 Cal.5th at 463.)

In Petitioner's case, which is **not** final on appeal, the record does **not** "conclusively establish[] *any* of the elements of the offense. As he alleges, he was not the actual killer and did not personally kill Mark Loutzenhiser, Daniel Hover-Najera, Jess McLean, Jason McKay, or Pablo Cerda; he did not, with intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist an actual killer; and he was not a major participant in the underlying felony who acted with reckless indifference to human life."

For these reasons, Petitioner Oyler has satisfied his burden to make "a prima facie showing that [he] is entitled to relief," and this Court *must* issue an order to show cause, and *must* hold a hearing under section 1172.6 subdivision (d) to determine whether to vacate Petitioner's five felony murder convictions (Counts 1-5) and recall his sentence and resentence him on the remaining counts. (Pen. Code, § 1172.6 subdivisions (c)-(d).)

IV. CONCLUSION

For the reasons stated above and based on the allegations in Petitioner Oyler's Petition, this Court must issue an order to show cause and hold a hearing as required and provided for by section 1172.6 subdivision (d).

Dated: July 29, 2024

Respectfully Submitted,
s/Michael Clough
MICHAEL CLOUGH
Attorney for Defendant/
Petitioner/Appellant

RAYMOND LEE OYLER

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DECLARATION OF MICHAEL W. CLOUGH

I, Michael W. Clough, declare as follows:

1. I am an attorney licensed to practice law in the State of California.

2. On July 24, 2013, I was appointed by the California Supreme Court to represent Raymond Lee Oyler on direct appeal.

3. On April 27, 2016, I was also appointed to represent appellant Oyler for habeas corpus/executive clemency proceedings related to the automatic appeal.

4. On June 28, 2016, appellant Oyler's Opening Brief on Appeal (AOB) was filed in the California Supreme Court.

5. Respondent's Brief (RB) was filed on June 30, 2017.

6. On November 13, 2018, appellant Oyler's Reply Brief (Reply) was filed.

7. On May 14, 2019, appellant's Oyler's Petition for a Writ of Habeas Corpus was filed in this Court. (OYLER (Raymond Lee) On Habeas Corpus, Case No. S255804.)

8. On January 2, 2020, this Court transferred appellant-petitioner's Petition to the Superior Court of California, County of Riverside. This Court retained "jurisdiction over all matters concerning the appointment of counsel for petitioner and the payment of appointed counsel's fees and expenses only with respect to proceedings in the superior court pursuant to this order."

9. On April 16, 2020, Mr. Oyler filed an initial motion for post-conviction discovery in the Riverside Superior Court (Case No. RIC200080.) The post-conviction discovery proceedings are still ongoing.

10. On December 6, 2023, this Court issued an order that "if appellant contends any changes in the law (including any ameliorative statute) since the filing of the reply brief are relevant to this appeal, appellant shall serve and file a supplemental opening brief not to exceed 50 pages on or before January 8, 2024."

11. The changes in California's felony murder law which were enacted by Senate Bill 1437 effective January 1, 2019 (after appellants reply brief was filed) are unquestionably relevant to appellant Oyler's appeal.

12. On April 9, 2007, appellant was arraigned on a 45-count Information that

included five first degree murder charges and felony arson murder special circumstance allegations -- Counts 1 through 5. (CT, Volume 3, pp. 556-568.)

13. Before closing argument, with respect to the murder charges, the trial court instructed jurors only on a theory of felony arson murder. (RT, Volume 6, p. 3730-3731.)

14. Among other issues affected by the changes in law that were enacted on January 1, 2019, the trial court did **not** instruct the jury that they were required to find beyond a reasonable doubt that defendant Oyler was "an actual killer" and "personally killed" the victims of the Esperanza fire and it did **not** instruct the jury they were required to find beyond a reasonable doubt that defendant Oyler "acted with reckless indifference to human life."

15. On March 6, 2009, the jury found defendant Oyler guilty on the five felony arson murder charges.

16. On January 1, 2019, after appellant's reply brief was filed, Penal Code section 1170.95 (amended effective January 1, 2022 and rechaptered as Penal Code section 1172.6) became effective.

17. Section 1172.6 provides ameliorative relief to persons convicted "under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime." (Pen. Code § 1172.6.)

18. Because he was convicted under a theory of felony murder, counsel for appellant Oyler believes that the changes of law effected by section 1172. 6 are relevant to his appeal and that he is entitled to file a petition in the Riverside Superior Court for resentencing on the murder charges based on the procedures detailed in section 1172.6.

19. In support of his petition, appellant Oyler avers and alleges the following:

20. On April 9, 2007, the Riverside County District Attorney filed an Information in the Riverside County Superior Court in case no. RIF 133032 charging Mr. Oyler with 5 first degree murders (Pen. Code § 187) each with a special circumstance (Pen. Code. § 190.2 subdivision (a), subsection (17) (h)) based on allegations he

committed five felony arson murders on October 26, 2006. (CT, Volume 3, pp. 556-568.)

21. On March 6, 2009, following a jury trial, Mr. Oyler was convicted of first degree murder in Riverside County Superior Court Case No. RIF 133032 based on a felony arson murder theory. (RT, Volume 24, 3922, 3924-3925, 3927, 3929, 3931.)

22. Because of changes made to Penal Code sections 188 and 189, effective and retroactive, as of January 1, 2019, appellant/petitioner appellant Oyler could not now be convicted of first or second degree murder. Specifically, appellant Oyler will aver and allege:

a. He was not the actual killer and did not personally kill Mark Loutzenhiser, Daniel Hover-Najera, Jess McLean, Jason McKay, or Pablo Cerda.

b. He did not, with intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist an actual killer.

c. He was not a major participant in the underlying felony of arson as charged with regard to the Esperanza fire started on October 26, 2006 and he did not act with reckless indifference to human life.

d. The victims were not peace officers acting in the performance of their duties.

23. By this filing, Appellant Oyler's petition for resentencing pursuant to section 1172.6 is hereby lodged in the Riverside Superior Court pending action by the California Supreme Court on his application/motion for a stay.

24. As this Court recognized in *People v. Gentile* (2020) 10 Cal.5th 830, 858-59 (see also *People v. Awad* (2015) 238 Cal.App.4th 215, 222), when as in this case, an appellant's appeal is **not** final, a temporary and limited stay of the appeal is required so that the superior court can hear and decide a petition filed pursuant to section 1172.6.

25. A temporary and limited remand to permit this Court to consider and rule on appellant Oyler's resentencing petition under section 1172.6 is the most expeditious means "consistent with the fair and principled administration of justice" (*see* § 1509

subd. (f); *Briggs*, 3 Cal. 5th at 860) to address and decide the issues created in this case by the changes in California's felony murder law that went into effect on January 1, 2019. It will also serve the mutual interests of the parties and the Court in ensuring a reliable determination of those issues.

26. Petitioner Oyler hereby reserves his right to amend his petition for resentencing prior to the filing of a response by the District Attorney

27. Petitioner Oyler further reserves his right to submit a proffer of allegations and facts in support of his petition to include a proffer of evidence he intends to present in admissible form, consistent with the rules of evidence and section 1172. 6 subd. (d).

28. For these reasons, counsel respectfully requests that this court accept this petition pending action by the California Supreme Court.

29. I, Michael Clough, hereby declare under penalty of perjury that the foregoing is true and correct on this 29th day of July , 2024 at Piedmont, California,

s/Michael Clough

_____

Michael W. Clough
Attorney for appellant Raymond Oyler

PROOF OF SERVICE

I, MICHAEL CLOUGH, declare:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within action; my business address is 6114 LaSalle Ave. #833, Oakland, California 94611.
On July 29, 2024, I served the foregoing documents described as:

Appellant's petition for resentencing pursuant to Penal Code section 1172.6; Declaration of Petitioner Oyler; Memorandun of Points and authorities; and declaration of Michael Clough

By electronic service:	By U.S. Postal Mail:
Meredith White, Office of the Attorney General P. O. Box 85266, San Diego, CA 92186 meredith.white@doj.ca.gov sdag@doj.ca.gov Michael Hestrin District Attorney Emily Hanks Managing Deputy District Attorney District Attorney's Office 3960 Orange St. Riverside, CA 92501 emilyhanks@rivcoda.org Laura Murry California Appellate Project 101 Second St. Suite 101 San Francisco CA 94105 lmurry@capsf.org	Raymond Lee Oyler G62187 California Institution for Men PO Box 500 Chino CA 91708 Clerk Superior Court of Riverside Riverside Hall of Justice 4100 Main Street Riverside CA 92501 Clerk California Supreme Court by efiling

I declare under penalty of perjury that the foregoing is true and correct on this 29nd day of July, 2024 at Piedmont, California,

s/Michael Clough

_____

MICHAEL CLOUGH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. OYLER (RAYMOND LEE)**
Case Number: **S173784**
Lower Court Case Number:

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: **meredith.white@doj.ca.gov**

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

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST	Request for Judicial Notice

Service Recipients:

Person Served	Email Address	Type	Date / Time
Michael Clough law offices of michael clough 235410	cloughlawoffices@gmail.com	e-Serve	11/7/2024 1:00:04 PM
Michael Clough Attorney at Law	mwclough@gmail.com	e-Serve	11/7/2024 1:00:04 PM
Attorney Attorney General - San Diego Office Holly D. Wilkens, Supervising Deputy Attorney General 88835	Holly.Wilkens@doj.ca.gov	e-Serve	11/7/2024 1:00:04 PM
Meredith White Department of Justice, Office of the Attorney General-San Diego 255840	meredith.white@doj.ca.gov	e-Serve	11/7/2024 1:00:04 PM
California Appellate Project	filing@capsf.org	e-Serve	11/7/2024 1:00:04 PM
Riverside County District Attorney 265891	appellate-unit@rivcoda.org	e-Serve	11/7/2024 1:00:04 PM
Riverside County Superior Court	appealsteam@riverside.courts.ca.gov	e-Serve	11/7/2024 1:00:04 PM

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

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

11/7/2024

Date

/s/Tammy Larson

Signature

White, Meredith (255840)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm