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 TO BRIEF OF AMICUS CURIAE

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INTRODUCTION

The Office of the State Public Defender (OSPD), as amicus curiae, contends that a preliminary hearing transcript may not be considered as part of the prima facie inquiry under Penal Code section 1172.6.[1] Much of OSPD's argument is driven by the misapprehension that doing so would necessarily involve impermissible factfinding because it would mean crediting or rejecting the evidence in the record. OSPD is mistaken. As this Court's decision in *People v. Delgadillo* (2022) 14 Cal.5th 216 shows, the facts reflected in the record of conviction—in that case, the trial record—may be considered in making the purely legal determination that no now-invalid legal theory could have supported the conviction. (*Id*. at p. 233.) That purely legal determination does not require any factfinding and is appropriate at the prima facie stage of section 1172.6 proceedings.

OSPD attempts to distinguish *Delgadillo*, arguing that, unlike a trial transcript, a preliminary hearing transcript cannot reliably shed light on the nature of a guilty or no contest plea. But while a trial is obviously different from a preliminary hearing, the latter is sufficiently reliable to inform the limited prima facie inquiry under section 1172.6. This Court has previously held that, in general, a preliminary hearing transcript reliably reflects the facts supporting a guilty plea. Moreover, the prosecution had an incentive under the former law of murder to present any imputed malice theories at the preliminary hearing,

[1] All statutory references are to the Penal Code unless otherwise indicated.

as those theories were typically easier to prove. A preliminary hearing transcript may therefore be relied upon in making the legal determination whether the evidence could have supported any now-invalid theory of liability, without considering its weight or persuasiveness. OSPD's contrary interpretation would require courts to speculate or assume that there may be such evidence outside the record, no matter the circumstances of the case, meaning that virtually all murder convictions obtained by guilty plea would proceed to an evidentiary hearing. But that would contradict the Legislature's purpose in creating a prima facie screening stage applicable to both trial and plea cases alike.

ARGUMENT

I. CONSIDERATION OF A PRELIMINARY HEARING TRANSCRIPT FOR PURPOSES OF THE SECTION 1172.6 PRIMA FACIE INQUIRY DOES NOT REQUIRE FACTFINDING

A central premise of OSPD's argument is that consideration of a preliminary hearing transcript for purposes of the prima facie inquiry necessarily entails factfinding, which is prohibited at that stage of section 1172.6 proceedings. (See OSPD Br. 10-11; *People v. Lewis* (2021) 11 Cal.5th 952, 971-972.) But that view is irreconcilable with *Delgadillo*, *supra*, 14 Cal.5th 216, in which this Court looked to a trial record in determining that the section 1172.6 petitioner there could not make a prima facie claim for relief. The Court in *Delgadillo* held that the record precluded any possibility that the petitioner was prosecuted on a now-invalid implied malice theory because it made clear that he was "the actual killer and the only participant in the killing." (*Id.* at p. 233; see also ABM 31-33.) Lower courts have similarly

considered the trial record for purposes of the prima facie inquiry. (See *People v. Morales* (2024) 102 Cal.App.5th 1120, 1131-1132 [trial evidence in combination with jury findings could only support a still-valid theory]; *People v. Bodely* (2023) 95 Cal.App.5th 1193, 1201 [trial evidence could only support a still-valid theory].)

At bottom, OSPD misapprehends respondent's position as to the proper role of a preliminary hearing (or trial) transcript at the prima facie stage. At the section 1172.6 prima facie stage, the question is whether a petitioner was convicted of murder, attempted murder, or manslaughter, but could not presently be convicted of murder or attempted murder because of the changes Senate Bill No. 1437 made to sections 188 and 189. (See § 1172.6, subd. (a).) To proceed to an evidentiary hearing, the petitioner must make a showing, not refuted by the record of conviction, that he or she was prosecuted "under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, or attempted murder under the natural and probable consequences doctrine." (§ 1172.6, subd. (a)(1).)

As explained in the answer brief, a court may, without resolving any factual conflicts or credibility questions, assess what legal theories were possible in a guilty or no contest plea case based on the evidence in the case. (ABM 32.) 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. (*Ibid.*; cf. *People v. Mares* (2024) 99 Cal.App.5th 1158, 1167-1168, review granted May 1, 2024, S284232 [preliminary hearing transcript supported "no theory other than those where Mares was the actual killer, acting with no accomplice," which foreclosed petitioner's ability to establish that "he cannot be convicted of murder today 'because of' the Senate Bill 1437 changes"].)

In other words, the court may consider the entirety of the evidence in the record of conviction to address the relevant *question of law*: whether that evidence could support any legal theory invalidated by Senate Bill No. 1437 (Stats. 2018, ch. 1015) so that that the conviction might have been based on such a theory. In answering that question, the court may neither credit nor discount evidence from the preliminary hearing, but it may make a determination that the petition's allegations are refuted by the record of conviction (which includes the preliminary hearing). (See *Lewis*, *supra*, 11 Cal.5th at p. 971 [record of conviction will necessarily inform prima facie inquiry, allowing court to identify "clearly meritless" petitions]; see also *Delgadillo*, *supra*, 14 Cal.5th at p. 233 ["the record here makes clear that Delgadillo was the actual killer and the only participant in the killing"]; *People v. Strong* (2022) 13 Cal.5th 698, 708 ["If the petition and record in the case establish conclusively that the

defendant is ineligible for relief, the trial court may dismiss the petition"].)[2]

Moreover, the absence of evidence that could support a now-invalid theory cannot be used to show that such evidence theoretically could have supported the conviction. (Evid. Code, § 140 ["'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact"]; see also *People v. Flores* (1992) 3 Cal.App.4th 200, 210 ["absence of evidence as to what occurred . . . is *not* evidence," leaving only speculation]; cf. *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655 ["If an absence of evidence could satisfy the burden of proof, the concept of burden of proof would have no meaning"].) If section 1172.6 petitioners were entitled to rely on an absence of evidence in making the prima facie showing, by pointing to the hypothetical possibility of an invalid theory that the prosecution

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[2] This Court has described the applicable standard at the prima facie stage in slightly different ways. For example, in *Lewis*, the Court suggested that a court may dismiss a petition as "clearly meritless" if the record of conviction "refutes" the petitioner's allegations (*Lewis*, *supra*, 11 Cal.5th at p. 971); in *Strong*, the Court stated that prima facie dismissal is appropriate if the record of conviction "conclusively" establishes ineligibility (*Strong*, *supra*, 13 Cal.5th at p. 708); and in *Delgadillo*, the Court held that dismissal at the prima facie stage was appropriate because the trial record "ma[de] clear" that the petitioner was convicted on the basis of a still-valid theory (*Delgadillo*, *supra*, 14 Cal.5th at p. 233). Whatever language is used, *Delgadillo* illustrates that the standard is met when the facts in the record of conviction could not support an invalid imputed malice theory, such as when they show exclusively that the petitioner acted alone. (*Ibid.*)

never presented, then the averments in the petition would be incontrovertible and the gatekeeping function of the prima facie stage in such cases would be eliminated as a practical matter. Indeed, under such a theory, this Court in *Delgadillo* could not have reached the holding it did because the petitioner there could simply have asserted that some un-presented evidence might have supported a now-invalid alternative theory.

As applied here, this means that the superior court was not called upon to decide the credibility or persuasiveness of Officer Ceballos's identification of Patton as the shooter in the video. (PHT 49-50.) Instead, what matters is that this was the sole theory of criminal liability supported by the evidence in the record of conviction. The evidence in Patton's case could *only* support a sole assailant, direct perpetrator theory of liability for the attempted murder because the prosecution's only explanation for how victim David Jackson was shot relied on the video showing a lone shooter firing at him. The no contest plea therefore could not have been premised on any now-impermissible theory of liability. (PHT 8-9.)[3]

OSPD misplaces reliance on *People v. Gallardo* (2017) 4 Cal.5th 120 in arguing that the use of a preliminary hearing transcript for purposes of the section 1172.6 prima facie inquiry necessarily requires factfinding. (See OSPD Br. 8, 14.) In

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[3] Contrary to OSPD's apparent contention, respondent has not stated that the identification of appellant as the person in the video was based on hearsay evidence. (See OSPD Br. 19, citing ABM 44, fn. 18.) As noted in the answer brief, the identification was based on the officer's personal knowledge. (ABM 14-15, 44, fn. 18.)

Gallardo, the defendant was convicted of robbery and transportation of a controlled substance. (*Gallardo*, at pp. 123.) The trial court thereafter found true a prior strike and serious felony allegation based on a conviction by guilty plea for assault with a deadly weapon or with force likely to produce great bodily injury. (*Ibid*.) In making that finding, the trial court was called upon to determine the nature of the prior conviction because "[a]n assault conviction qualifies as a serious felony if the assault was committed with a deadly weapon (§ 1192.7, subd. (c)(31)), but not otherwise." (*Ibid*.) After reviewing the preliminary hearing transcript, "the trial court determined that defendant did, in fact, commit the assault with a deadly weapon," which qualified the assault as a serious felony for purposes of enhanced sentencing. (*Ibid*.) The question in *Gallardo* was whether that judicial factfinding violated the Sixth Amendment, which requires any fact necessary to support increased punishment to be submitted to a jury for proof beyond a reasonable doubt. (*Id*. at p. 126.) This Court held that, "[b]ecause the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea, they could not serve as the basis for defendant's increased sentence here." (*Id*. at p. 137.)

Gallardo is inapposite because, as noted in the answer brief, it involved reliance on a preliminary hearing transcript for a purpose that is different from how such a transcript is used in the prima facie inquiry under section 1172.6. (See ABM 32, fn. 13.) When a court properly relies on a preliminary hearing transcript to deny a section 1172.6 petition at the prima facie stage, it need

not and does not find any particular fact to be true. (*Mares*, *supra*, 99 Cal.App.5th at p. 1174 ["no factfinding is needed to reject the petition, as a court need not find any individual fact in the preliminary hearing was true, only that the claim that Senate Bill 1437 could matter is unsupported by the record"].) The court is not determining whether witness testimony or other evidence was credible. The court is instead making the legal assessment of whether a now-invalid theory could have supported the conviction based on the evidence in the record. (*People v. Pickett* (2023) 93 Cal.App.5th 982, 993, review granted Oct. 11, 2023, S281643.) In contrast, in *Gallardo*, the trial court engaged in factfinding when it reviewed the evidence to determine that the defendant "*in fact*, commit[ted] the assault with a deadly weapon." (*Gallardo*, *supra*, 4 Cal.5th at p. 123, italics added.) The court's task in these two scenarios is inherently different.

To be sure, *Gallardo* addressed a situation—the prior serious felony determination—in which judicial factfinding is prohibited, as it is at the prima facie stage of section 1172.6 proceedings. (See *People v. Williams* (2024) 103 Cal.App.5th 375, 322 Cal.Rptr.3d 728, 751 [comparing Sixth amendment bar at issue in Gallardo to *Lewis*'s bar on factfinding at the prima facie stage of section 1172.6].)[4] The difference is in how the

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[4] In section 1172.6 proceedings, however, the source of the factfinding prohibition is only statutory. The Sixth Amendment requirement of jury factfinding does not apply to section 1172.6 given that there is no possibility of added punishment. (ABM 27, fn. 27, citing *People v. Njoku* (2023) 95 Cal.App.5th 27, 44-45 and *People v. Mitchell* (2022) 81 Cal.App.5th 575, 588-589; see *Williams*, *supra*, 322 Cal.Rptr.3d at p. 751.)

preliminary hearing transcript is used in each proceeding. Under the section 1172.6 prima facie standard, no factfinding is required to conclude that there is an absence of evidence in the record that could support a now-faulty theory. Regardless of how the record might be characterized in that situation (see *Williams*, at pp. 751-752 [purporting to distinguish between "compelling, uncontroverted, and uncontradicted" evidence and "conclusive" evidence of the petitioner's guilt under a particular theory]), the complete absence of such evidence refutes the petitioner's prima facie allegation that his conviction could have been based on an impermissible theory, as this court's *Delgadillo* decision illustrates.

This Court's decision in *People v. Curiel* (2023) 15 Cal.5th 433, does not support a contrary interpretation. (See *Williams*, *supra*, 322 Cal.Rptr.3d at pp. 745-747 [relying on *Curiel* in reasoning that preliminary hearing transcript cannot establish every element of offense because it may not be used for factfinding].) *Curiel*'s holding that a petition may not be denied at the prima facie stage "unless the record conclusively establishes every element of the offense" does not abrogate the prima facie standard described in *Lewis*, which permits courts to draw necessary logical inferences from both trial evidence and preliminary hearing evidence to ascertain the basis for the conviction. (See *Curiel*, at p. 463; *Lewis*, *supra*, 11 Cal.5th at p. 971.)

In making the prima facie determination, a court may consider the facts in the record of conviction to conclude that the

only possible basis for a murder or attempted murder charge was that the defendant was the sole assailant, even when the jury was instructed on the now-faulty natural and probable consequences doctrine. (*Morales*, *supra*, 102 Cal.App.5th at pp. 1131-1132.) In the trial context, logical inferences based on the evidence can necessarily rule out the possibility that the jury relied on the faulty theory, meaning "the jury necessarily made all the factual findings required to establish [the petitioner] is guilty of attempted murder under the still-valid theory . . . ." (*Id.* at p. 1132.) And similarly in the plea context, if "the record contains any indication [the petitioner] had an accomplice who may have been the killer, a prima facie case ordinarily would be readily established, even by conclusory assertions in a form petition." (*Mares*, *supra*, 99 Cal.App.5th at p. 1173.) Conversely, if "[n]o record evidence shows [the petitioner] was an accomplice, and uncontradicted record evidence shows he was the killer" or would-be killer, then the only logical inference as a matter of law is that the subsequent plea admitted all elements of the offense under a still-valid theory. (*Ibid.*, citing *Curiel*, *supra*, 15 Cal.5th at p. 465.)

In *Curiel* itself, the jury was instructed with a now-faulty theory of liability and presented with evidence that could have supported it. "Because the jury was instructed on the natural and probable consequences doctrine, the jury was required to find only that Curiel knew that Hernandez intended to commit one of the underlying target offenses and that Curiel intended to aid him in *that* offense, not murder." (*Curiel*, *supra*, 15 Cal.5th at

p. 468, italics original.) Although the jury separately found that Curiel intended to kill, it did not necessarily find that he knew the direct perpetrator intended to commit the murder or life-endangering act, and the evidence did not necessarily require such a finding because Curiel "could act with intent to kill but at the same time believe the actual perpetrator could never risk harm to another human being . . . ." (*Id.* at p. 470.)

But in Patton's case, the only theory of liability that the evidence in the record of conviction could support was that of a "sole perpetrator, who approached [the victim] as he stood at the motel clerk's desk and fired several rounds at him." (Opn. 10; see also *Mares*, *supra*, 99 Cal.App.5th at p. 1173 ["The evidence does not allow for the existence of some other killer, and no facts suggest that Mares could have aided someone else in some other crime that resulted in the killing"].) When a defendant in such a situation pleads guilty or no contest, there is no risk, as there was in *Curiel*, that the conviction was obtained in the absence of some element of murder or attempted murder as those crimes are currently defined. Direct perpetrators of attempted murder are ineligible for relief as a matter of law because that is a complete, still-valid theory of liability that incorporates all the elements of the crime. (See ABM 43; *Delgadillo*, *supra*, 14 Cal.5th at p. 233.)[5]

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[5] Contrary to OSPD's assertion, respondent does not contend that "whether the defendant is the actual killer is a special type of fact that escapes the realm of factfinding." (OSPD Br. 14, citing ABM at 32, fn. 13.) Again, no factfinding is permitted at the prima facie stage—but considering the facts in the record of conviction under the applicable prima facie standard

(continued…)

A contrary interpretation would "effectively render[] the prima facie review meaningless in plea cases." (*Williams*, *supra*, 322 Cal.Rptr.3d at p. 756, dis. opn. of Meehan, J.) Such an outcome "is not warranted by the statute's language or purpose, or by California Supreme Court precedent." (*Id.* at p. 755, dis. opn. of Meehan, J.; see also ABM 37-42.)

II. A PRELIMINARY HEARING TRANSCRIPT IS SUFFICIENTLY RELIABLE TO INFORM THE SECTION 1172.6 PRIMA FACIE INQUIRY

OSPD's other central contention is that, in contrast to a trial record like the one considered in *Delgadillo*, a preliminary hearing transcript is insufficiently reliable to inform the prima facie analysis. (OSPD Br. 18-19.) But while a preliminary hearing is obviously different from a trial, a preliminary hearing transcript is sufficiently reliable for purposes of the limited prima facie inquiry under *Lewis*.

OSPD observes, for example, that the burden of proof at a preliminary hearing is lower than at a trial and that the rules of evidence are different. (OSPD Br. 18-19; see also *Williams*, *supra*, 322 Cal.Rptr.3d at pp. 746-747.) It is true that the procedural protections applicable at a trial differ from those

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does not require factfinding. Respondent has acknowledged that, given the prohibition on credibility determinations and factfinding at the prima facie stage, the preliminary hearing will most often establish that a theory of imputed malice was not legally possible when the record shows only that the petitioner was the sole assailant. (See ABM 29, fn. 12 & 32, fn. 13.) Other scenarios precluding section 1172.6 relief as a matter of law are simply less likely to lend themselves to determination by reference to a factual record without improper factfinding.

applicable at a preliminary hearing. But this Court has nonetheless observed as a general matter that evidence adduced at a preliminary hearing is part of the record of conviction in a guilty plea case because the procedural protections afforded the defendant during a preliminary hearing tend to ensure the reliability of such evidence in reflecting the facts of the offense for which the defendant was convicted. (*People v. Reed* (1996) 13 Cal.4th 217, 223.)

The additional procedural protections applicable at a trial are not crucial to the reliability of a preliminary hearing transcript for purposes of making the prima facie determination under section 1172.6. As explained, that prima facie inquiry involves no factfinding and asks only whether, in light of the record of conviction, a murder conviction could have been based on a now-invalid theory. (See Arg. I, *ante*.) A preliminary hearing transcript may simply establish whether there was any evidence—credited or not—that could have supported certain theories of liability as a matter of law. And a court may make purely legal logical deductions in that regard, narrowing the basis of the conviction as circumscribed by the outer limits of the evidence presented. (*Morales*, *supra*, 102 Cal.App.5th at pp. 1131-1132.) For that purpose, the preliminary hearing transcript is not materially distinguishable from a trial transcript. (See *Delgadillo*, *supra*, 14 Cal.5th at p. 233 ["the record here makes clear that Delgadillo was the actual killer and the only participant in the killing" and is therefore ineligible for relief at the prima facie stage].) Indeed, even a trial transcript does not

typically reveal which particular facts a jury credited in reaching its verdict (see OSPD Br. 8-9 [arguing that facts found by a jury after trial are distinguishable from probable cause finding at preliminary hearing])—but again, that is not the point of the prima facie inquiry.[6]

OSPD also attacks the reliability of preliminary hearing transcripts for purposes of the prima facie inquiry on the ground that defendants generally lack a strong incentive to contest evidence at a preliminary hearing. (OSPD Br. 18, 20-21; see also *Williams*, *supra*, 322 Cal.Rptr.3d at p. 747.) But as discussed in the answer brief (see ABM 28-29), a defendant's incentive to contest the evidence, or lack thereof, is irrelevant to the prima facie standard. The key question at that stage is not the reliability of the evidence but the existence of it. In that respect, it is the *prosecution*'s incentive to present evidence at the preliminary hearing that is more relevant to consideration of that proceeding at the section 1172.6 prima facie stage.

Before Senate Bill No. 1437, prosecutors had an incentive to present any evidence that might have supported an imputed malice theory, which was easier to prove than other theories of liability. (See ABM 29, citing *People v. Reyes* (2023) 14 Cal.5th 981, 991 [a natural and probable consequences theory of liability

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[6] Subsequent cases have superseded *Reed*'s holding as to the use that may be made of a preliminary hearing transcript for purposes of the prior serious felony determination. (See *Williams*, *supra*, 322 Cal.Rptr.3d at pp. 749-751.) But as explained, that part of *Reed* is not relevant to the issue in this case.

was "'easier to prove'" than direct aiding and abetting liability].) Prosecutors were also aware that defendants have a due process right to notice of the theory of a case and that a defendant may not be affirmatively misled or "ambushed" in preparing and presenting a defense. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70-71; see also *People v. Scully* (2021) 11 Cal.5th 542, 599 [a defendant will generally receive notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing]; *People v. Diaz* (1992) 3 Cal.4th 495, 557 [although "an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely . . . the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing"]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 905 [the preliminary hearing transcript notifies the defendant of "all the particulars of the crime," and when "the particulars are *not* shown by the preliminary hearing transcript, the defendant is *not* on notice in such a way that he has the opportunity to prepare a meaningful defense"].) In light of those incentives, a preliminary hearing transcript is sufficiently reliable to indicate what possible legal theories a conviction by guilty plea could have been based upon. (Cf. *Reed*, *supra*, 13 Cal.4th at p. 223.)

Nor does the fact that defendants do not necessarily admit the truth of any particular evidence admitted in a preliminary hearing undermine reliance on that proceeding for purposes of the prima facie inquiry. (See OSPD Br. at 9-10, 19-24.) While a

stipulation to specific evidence as a factual basis for a plea may be an additional consideration in the prima facie inquiry, it is not crucial. (See ABM 46.) Whether the defendant stipulated in this manner does not affect the underlying evidence on which the conviction *could have been* based. (*Pickett*, *supra*, 93 Cal.App.5th at p. 993 ["Nothing in *Lewis* supports the proposition that the preliminary hearing transcript may 'inform the trial court's prima facie inquiry' only when the defendant has stipulated to the transcript as the factual basis for his plea"].) In other words, if it is possible in light of the record—with or without any stipulation—that the conviction might have been based on an invalid theory, then a prima facie case has been made.

Nothing in this Court's *Reed* decision is to the contrary. (See *Williams*, *supra*, 322 Cal.Rptr.3d at p. 748 [concluding that *Reed* is "contrary to the People's argument"].) *Reed* addressed the admissibility of preliminary hearing evidence to determine whether a prior conviction was a serious felony under section 667, subdivision (a), on the basis that it involved weapon use. (*Reed*, *supra*, 13 Cal.4th at pp. 221-222.) The crime to which the defendant pleaded in *Reed*—assault with a deadly weapon *or* by means of force likely to produce great bodily injury—did not necessarily require weapon use and the defendant did not admit that particular fact in entering the plea. (*Id.* at pp. 220-222.) The preliminary hearing contained evidence that the defendant had likely used a weapon, but it also did not foreclose the possibility that he committed assault without a weapon. (*Id.* at p. 221.) This Court held that the preliminary hearing evidence

constituted admissible hearsay and could be considered to show the nature of the defendant's conduct underlying the prior assault conviction. (*Id.* at pp. 223, 229.) But it rejected the People's argument that it was admissible for the non-hearsay purpose of showing that the defendant's subsequent guilty plea admitted the relevant fact that he used a weapon. (*Id.* at p. 224.) The Court concluded that relying on the preliminary hearing transcript for the non-hearsay purpose of determining that the defendant had admitted use of a weapon would require weighing the evidence beyond the scope of the plea. (*Ibid.*)

Reed is consistent with the Court of Appeal's decision below and with respondent's position. Reliance on a preliminary hearing transcript in the section 1172.6 context is subject to the same limitations that *Reed* applied when discussing non-hearsay. Petitioners are not considered to have admitted the truth of any particular fact from the preliminary hearing (ABM 46), nor may courts weigh the strength of the evidence at the preliminary hearing to deny a section 1172.6 petition (ABM 33). Only where there is no possibility that a now-faulty theory supported the guilty plea, based on the evidence in the record of conviction, may the petition be denied. In *Reed*, the prior testimony did not necessarily rule out the possibility that the defendant was unarmed. When *Reed* stated that the preliminary hearing testimony did not demonstrate that the meaning or content of the plea included an admission to weapon use, it was correctly observing that the defendant had not admitted that the witness

testimony about his weapon use was actually true. (*Reed*, *supra*, 13 Cal.4th at p. 224.)

As applied here, for example, if the preliminary hearing had included evidence of multiple potential shooters at the scene, and Patton averred that he was not the actual shooter, then he would be entitled to an evidentiary hearing *even if there was uncontradicted testimony that Patton was indeed the actual shooter*. Under those circumstances, denying the petition at the prima facie stage would require either crediting the truth of the testimony, or wrongly assuming that Patton had admitted its truth by virtue of his plea, neither of which is permitted. (See *Lewis*, *supra*, 11 Cal.5th at pp. 971-972.) But there was no such confounding evidence in this case because the preliminary hearing evidence exclusively indicated that the shooting was committed by a sole assailant. The only logical inference from the record of conviction is that Patton's plea of no contest could not have been based on any now-invalid theory.

III. OSPD'S ADDITIONAL ARGUMENTS ARE UNPERSUASIVE

OSPD raises several additional objections to the use of preliminary hearing testimony at the section 1172.6 prima facie stage. (OSPD Br. 14-18. 24-29.) These arguments are unpersuasive.

OSPD asserts that consideration of preliminary hearing transcripts at the prima facie stage would call upon courts to resolve unduly complex factual questions. (OSPD Br. 26-27.) But OSPD again misapprehends the nature of the inquiry. As explained, a court at the prima facie stage makes no factual

findings but simply determines whether the record discloses any evidence that might have supported an invalid basis for the conviction. (See Arg. I, *ante*.) The most likely scenario to implicate that standard in a guilty plea case is a crime involving a sole assailant (see fn. 5, *ante*), which does not pose any obviously complex question. And courts heretofore have encountered no particular trouble in resolving the prima facie inquiry when taking into consideration pre-plea evidence. (See, e.g., *Mares*, *supra*, 99 Cal.App.5th at p. 1174; *Pickett*, *supra*, 93 Cal.App.5th at pp. 992-993; *People v. Flores* (2022) 76 Cal.App.5th 974, 991-992; *People v. Rivera* (2021) 62 Cal.App.5th 217, 235-236, 238, 239.) More broadly, section 1172.6 has presented the courts with a number of complex issues that are not unique to guilty plea cases. (See ABM 33-34; see, e.g., *Strong*, *supra*, 13 Cal.5th at pp. 709-710; *Curiel*, *supra*, 15 Cal.5th at pp. 461-462.) Any potential complexity is inherent in the process of attempting to retroactively apply a change in the law; it does not distinguish consideration of preliminary hearing transcripts from other potential issues in a way that meaningfully informs construction of section 1172.6's prima facie inquiry.

OSPD points to *People v. Estrada* (2024) 101 Cal.App.5th 328, in support of its argument that consideration of a preliminary hearing transcript at the prima facie stage is unworkable. (OSPD Br. 14-18.) But *Estrada* demonstrates precisely the opposite: that courts are well equipped to identify whether a case meets the prima facie standard in light of a

particular record. In holding that the petitioner had established a prima facie showing, the *Estrada* court distinguished the Court of Appeal's decision below, as well as *Pickett* and *Mares*. It observed that in those cases "the evidence contained in the preliminary hearing transcript conclusively foreclosed the possibility that the petitioner was convicted under an invalid theory of liability" and thus did not require any factfinding to resolve the prima facie inquiry adversely to the petitioners. (*Id.* at p. 340.) In contrast, the preliminary hearing evidence in Estrada's case did not conclusively establish his ineligibility as a matter of law, as it indicated that multiple perpetrators were involved in the attempted murder and murder. (*Ibid.* [noting evidence of two other people with bloody clothes and one of the individuals carried a box cutter].) The outcome in *Estrada* is therefore consistent with the Court of Appeal's decision below.

OSPD insists that, if a preliminary hearing transcript can refute a prima facie showing, petitioners in Patton's position would be "simply out of luck" if they have evidence from outside the record showing that they could have been prosecuted under an imputed malice theory. (OSPD Br. 27-28.) But the same is true in cases stemming from convictions after a trial. At the prima facie stage, only the record of conviction—not extra-record materials—may be considered in determining a petitioner's eligibility for relief. (See *Lewis*, *supra*, 11 Cal.5th at pp. 970-971.) That principle makes logical sense: the basis of a conviction must necessarily be limited to the record because evidence *not* presented could not have supported the conviction. Just as a

petitioner who was convicted at trial may not proffer evidence from outside the record suggesting a juror relied on an invalid theory which she was never instructed upon, a petitioner convicted by guilty plea may not point to extra-record evidence of a second assailant that was never presented at the preliminary hearing. Again, the gatekeeping function of the prima facie stage, to screen out clearly meritless petitions, would be meaningless if speculative claims such as Patton's were permitted. (*Lewis*, *supra*, 11 Cal.5th at p. 971; see also *Williams*, *supra*, 322 Cal.Rptr.3d at pp. 769-770, dis. opn. of Meehan, J. ["Courts must take care not to demand too much of the petitioner at the prima facie stage, but they must also not demand so little that the prima facie review is rendered meaningless and direct perpetrator cases with uncontroverted records of conviction move to the next stage based on nothing more than a form petition with the requisite boxes checked"].)

OSPD further argues that reliance on preliminary hearing transcripts would potentially make a petitioner's entitlement to an evidentiary hearing turn on "minor" and arbitrary variations in the evidentiary showing, such as where the prosecution presented evidence pointing to a single perpetrator and a law enforcement witness "simply failed to mention" alternate suspects. (OSPD Br. 17-18.) But again, this does not distinguish a preliminary hearing from a trial. Just as in OSPD's hypothetical, a trial witness might have simply neglected to mention the presence of another assailant, leaving the jury with

the choice to either convict the defendant as the direct perpetrator or to acquit.

More fundamentally, OSPD's concern is misplaced in light of the purpose of the section 1172.6 petition process. The legislative history for Senate Bill No. 1437 emphasizes that relief is intended for individuals who had only "peripheral involvement" in a murder. (See Cal. Bill Analysis, Assem. Floor, Sen. Bill No. 1437 (2017-2018 Reg. Sess.) Aug. 20, 2018, p. 5 [felony murder statute has caused disproportionately long sentences for those "who did not commit murder, and who in some cases had, at best, very peripheral involvement in the crime that resulted in a death" and that "youth who were peripheral to a homicide are often held as responsible as the actual killer"]; see also Sen. Com. on Pub. Saf. on Sen. Bill No. 1437 (2017-2018 Reg. Sess.) Apr. 23, 2018, p. 6 [murder liability should not exist where "someone is standing watch while his friend breaks into a locked vehicle" and is discovered by a security guard who dies while pursuing the burglars]; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, pp. 3-4 [same].)

In scenarios of peripheral involvement, it is difficult to imagine that all the evidence at the preliminary hearing would go to proving the defendant's direct liability, while nothing would be presented that could suggest any other assailant was present. Indeed, Patton himself has never claimed in his petition or on appeal that he is in the highly improbable situation that OSPD describes in that that there exists evidence of another assailant

who was never referenced at his preliminary hearing or seen on the video of the shooting.

Finally, OSPD argues that simply proceeding to an evidentiary hearing in cases like Patton's "will have little impact other than changing the nomenclature of the proceeding at which a judge denies relief" and therefore will not subvert section 1172.6's aim to efficiently screen out clearly meritless petitions at the prima facie stage. (OSPD Br. 24-25, 26-27.) The argument tacitly acknowledges that, under OSPD's view, prima facie screening would be eliminated as a practical matter for guilty plea cases. (See OSPD Br. 25; OBM 32-34.) Even if preliminary hearing transcripts would shed light on only a subset of guilty plea cases for purposes of prima facie screening (see p. 15, fn. 5, *ante*), that would still serve important efficiency interests in dispensing with cases like Patton's at the threshold.

At the evidentiary hearing stage, the burden of proof is shifted to the prosecution, the court must weigh the evidence as an independent factfinder, and the petitioner has a right to personal presence and to offer additional evidence outside the record of conviction. (§ 1172.6, subd. (d)(3); *People v. Vargas* (2022) 84 Cal.App.5th 943, 952 [discussing standard of proof]; *People v. Quan* (2023) 96 Cal.App.5th 524, 534 [personal presence].) Evidentiary hearings thus entail substantial costs relating to the transportation of inmates to and from court, the additional preparation and possible investigation undertaken by counsel, and the potential appearance by witnesses and presentation of other evidence. (§ 1172.6, subd. (d)(3) [excluding

law enforcement hearsay from admissible prior hearing evidence].) Under OSPD's framework, these costs would be unnecessarily incurred even in cases where the parties understood at all times that the only theory of liability was that the defendant was the actual killer or would-be killer. (*Williams*, *supra*, 322 Cal.Rptr.3d at p. 770, dis. opn. of Meehan, J. ["already swamped trial courts will be needlessly burdened by conducting evidentiary hearings on meritless petitions"].) There is nothing to indicate that the Legislature intended to carve out a large class of section 1172.6 petitioners who may avoid prima facie screening in the way OSPD asserts.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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September 3, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO BRIEF OF AMICUS CURIAE** uses a 13 point Century Schoolbook font and contains **5,752** words.

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September 3, 2024

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

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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 September 3, 2024, at Los Angeles, California.

J. Wu	/s/
Declarant for eFiling	Signature

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S. Feigin	/s/
Declarant for U.S. Mail	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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