

GENERAL OFFICE MEMORANDUM 18-174

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOSEPH P. ESPOSITO 
Chief Deputy District Attorney

SUBJECT: CONSTITUTIONAL CHALLENGE TO MURDER RESENTENCING,
APPEALS, AND REFILEING (PC 1170.95)

DATE: DECEMBER 27, 2018

This is the fourth memorandum in a series of General Office Memoranda (GOM) regarding Senate Bill (SB) 1437's changes to accomplice liability for murder. This GOM will address a constitutional challenge to the resentencing portion of the law, appellate review, and whether deputies may seek to retry vacated murder convictions.

I. Constitutional challenge to Penal Code section 1170.95

If the underlying conviction was final on appeal prior to January 1, 2019,¹ the Office will challenge the constitutionality of Penal Code² section 1170.95 because it violates the separation of powers. The statute violates the separation of powers by impermissibly reopening final judgments of conviction and by infringing on the Governor's exclusive power to issue pardons and commutations. This challenge will not affect the prospective application of section 1170.95 to current and future murder trials.

Deputies handling resentencing petitions under section 1170.95 shall object and file the motion entitled "Opposition to Penal Code section 1170.95," which will be available in PIMS. A constitutional challenge does not depend on the facts of the individual case. However, if the facts of a case show that resentencing would be particularly unjust e.g., the passage of time prevents us from challenging a petition with admissible evidence—then deputies should inform the court of those facts.

For questions or assistance on the constitutional challenge, contact Matt Brown in the Appellate Division at mbrown@da.lacounty.gov.

¹ "A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired." (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.)

² Statutory references are to the Penal Code.

II. Appellate review

Section 1170.95 does not expressly state if a resentencing decision is appealable, but it likely would be as an order after judgment affecting the substantial rights of the People. (§ 1238, subd. (a)(5).) We can therefore appeal a resentencing if the judge abused his or her discretion or committed legal error. Deputies may request an appeal by memorandum through their chain of command to the Appellate Division.

Further, deputies should contact the Appellate Division if the court denies the Office's constitutional challenge to section 1170.95. The office may seek writ review in an appropriate case.

III. Dismissed counts cannot be refiled

Dismissed counts shall not be refiled. Section 1170.95 makes no provision for refiling or retrial of a case following resentencing. The statute expressly provides the opportunity to present new evidence, so it provides a full and fair opportunity to present any evidence that could be presented at a new trial. Thus, the Legislature likely meant for a section 1170.95 decision to be final.

Deputies shall fully litigate a resentencing petition under section 1170.95 on the merits. Deputies shall not refile charges in a new case following an adverse ruling.

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