

GENERAL OFFICE MEMORANDUM 18-172

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOSEPH P. ESPOSITO 
Chief Deputy District Attorney

SUBJECT: MURDER RESENTENCING UNDER SB 1437
(PC 1170.95)

DATE: DECEMBER 27, 2018

This memorandum is the second in a series of General Office Memoranda (GOM) regarding Senate Bill (SB) 1437's changes to accomplice liability for murder. This GOM will inform deputies of the new resentencing provision, Penal Code¹ section 1170.95, which retroactively applies the new murder accomplice liability rules to all prior murder convictions.

The superior court has decided that the original sentencing courts will handle all resentencing petitions, subject to reassignment based on the judge's availability and workload (see attached court order). Based on the superior court's decision, a subsequent GOM will further explain office policies and procedures for handling the petitions. The instant GOM will explain the statutory resentencing procedure.

Application of section 1170.95

A. Eligibility

A defendant is eligible for resentencing if he or she was convicted of first or second-degree murder, by trial or plea, under a theory of accomplice liability that is now invalid after the changes to sections 188 and 189 under SB 1437. This includes convictions under the felony-murder rule for participants other than the actual killer and major participants, or convictions under the natural and probable consequences doctrine.

Subdivision (a) of section 1170.95 applies *only* to defendants convicted of first or second-degree murder. Barring case law to the contrary, deputies should take the position that defendants convicted of other related charges—including attempted murder or manslaughter—are not eligible for resentencing, even if the Information originally charged a murder count.

Section 1170.95 is not limited to defendants still serving a sentence for their conviction.

¹ All statutory references are to the Penal Code.

B. Petition filing and appointment of counsel

The defendant must file the resentencing petition in the original sentencing court with an affidavit declaring that he or she was convicted under a now-invalid theory of murder. It must include the case number and year of conviction. The defendant may request appointment of counsel. If the sentencing judge is not available, the presiding judge may designate another judge to rule on the petition. The defendant must also serve a copy on the district attorney, as well as trial counsel or the public defender.

The superior court will screen the petitions for a “prima facie showing.” The court has stated this will merely be for facial compliance with the statute. Noncomplying petitions will be returned to the filer by the court for correction.

The Court must appoint counsel for defendants who so request. The superior court has stated that it will not do so until after it decides that the petition is correct in form. Unless the Court appoints counsel, or counsel has properly filed a petition on the defendant’s behalf, the defendant should be treated as proceeding in propria persona.

C. Response, reply, and order to show cause

The People may file a response within 60 days, and the petitioner may file a reply within 30 days. Deadlines may be extended for good cause. Due to the age of many of these cases, most cases will require several continuances to obtain appropriate records.

If the filings make a prima facie showing that the defendant may be entitled to resentencing, the Court shall issue an order to show cause.

D. Hearing

The Court must hold a hearing on the petition within 60 days of the order to show cause. This may be extended for good cause. The parties may alternatively waive a hearing and stipulate that the defendant is eligible for resentencing.

At the hearing, the People have the burden of proving, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. Under the terms of the statute, the People may rely on the “record of conviction,” or offer new evidence. Deputies should assume that any new evidence introduced beyond the record of conviction must comply with the rules of evidence.

E. Resentencing

If the defendant is found eligible, the Court must resentence him or her on any remaining counts. If the target crime or underlying felony giving rise to murder liability was not separately charged, the Court will redesignate the murder conviction to the target or underlying crime. The statute of limitations shall not bar the redesignation.

The defendant shall be given credit for any time served, and the judge may order up to three years of parole supervision.

Some defendants may raise constitutional objections to having their murder conviction deemed a lesser offense that was not originally charged. Deputies should argue that the resentencing procedures impliedly contemplate a waiver of any constitutional objections to take advantage of the Legislature's resentencing procedure.

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Attachment

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2
3 SUPERIOR COURT OF THE STATE OF CALIFORNIA
4 FOR THE COUNTY OF LOS ANGELES
5

6 ORDER REGARDING THE TRANSFER) LOS ANGELES COUNTY COURT
7 OF PETITIONS FILED UNDER PENAL) RULES RULE 8.2
8 CODE SECTION 1170.95)
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12)

13 The following three orders are made under the supervisory power vested in the
14 Supervising Judge of the Criminal Division pursuant to Los Angeles County
15 Court Rules, Rule 8.2.

16 **IT IS HEREBY ORDERED,**

17 (1) SENTENCING JUDGE MOVED TO A DIFFERENT ASSIGNMENT UNDER A
18 DIFFERENT SUPERVISING JUDGE – Whenever a judge who sentenced the
19 petitioner has moved to a different assignment under a new Supervising
20 Judge, the two Supervising Judges shall confer to determine whether the
21 petition should be heard by the judge who sentenced the petitioner. The
22 court where the petition is ultimately to be heard is left to the discretion
23 of the two Supervising Judges.

24 (2) SENTENCING JUDGE RETIRED – Whenever a judge who sentenced the
25 petitioner has retired, the Supervising Judge of the district where the

1 petitioner was sentenced is authorized to assign the petition to any judge
2 within the district.

3 (3) ORDERLY DISTRIBUTION OF WORKLOAD – Every Supervising Judge of
4 the district where any petition is filed shall be authorized to transfer any
5 petition from any court within the district to promote orderly distribution
6 of the court’s workload. This includes the authority to transfer cases
7 from a sentencing judge to a new judge.

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10 Dated: _____.

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13 SAM OHTA
14 Supervising Judge
15 Criminal Division
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