

## Death of the Felony Murder Rule? Update (or Is It Only Mostly Dead?)



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## **2018 – Prologue: SB1437 Cometh**



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## CHAPTER 1015

An act to amend Sections 188 and 189 of, and to add Section 1170.95 to, the Penal Code, relating to murder.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

## LEGISLATIVE COUNSEL'S DIGEST

## SB 1437, Skinner. Accomplice liability for felony murder.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, 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, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or 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, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

1437-1957

Ch. 1015

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This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

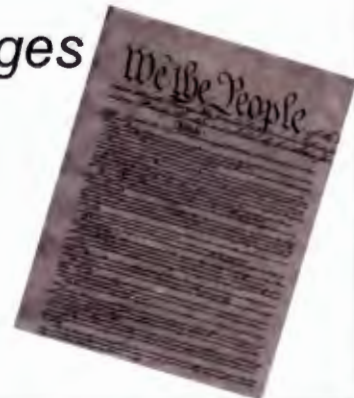
The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

POSTA 30

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## Constitutional Challenges



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## *Constitutional Challenges*

- Proposition 115 (Crime Victims Justice Reform Act – 1990).
  - Made changes to Penal Code section 190.2.
  - Permitted amendment by Legislature with  $\frac{2}{3}$  vote of both houses.
- Proposition 7 (Briggs Initiative – 1978).
  - Set punishments for First Degree Murder and Established Special Circumstances.
  - Unblessed amendment by Legislature not permitted.
- Proposition 9 (Victims' Bill of Rights – 2008) (Marsy's Law).
- Separation of Powers.

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## Proposition 115

- Argument that SB1437 amended statutes effected by Prop. 115 in violation of article II, section 10, subdivision (c) of the California Constitution.
- Proposition 115 amended language of Penal Code section 189.

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## Proposition 115

- *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270 (4/1).
  - Writ petition of San Diego District Attorney after trial court rejected argument.
  - SB1437 did not amend a matter addressed by Prop. 115 because it did not “augment or restrict the predicate felonies.” (*Id.* at p. 287.)
  - Agreement:
    - 2/5 – *People v. Smith* (2020) 49 Cal.App.5th 85.
    - 2/6 – *People v. Bucio* (2020) 48 Cal.App.5th 300.
    - 4/2 – *People v. Johns* (2020) \_\_ Cal.App.5th \_\_ (# E072412).
    - 4/3 – *People v. Solis* (2020) 46 Cal.App.5th 762; *People v. Cruz* (2020) 46 Cal.App.5th 740; *People v. Prado* (2020) \_\_ Cal.App.5th \_\_ (# G058172).

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## Proposition 115

- California Supreme Court denied review of *Gooden* on February 19, 2020.
- Wrinkle: *Prado* concluded that PC189 was not an initiative statute at all, since it did not originate from the electorate. (*Prado* slip opinion at pp. 12 – 13.)

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## Proposition 7

- Argument that the voters relied upon the established definition of murder when creating statutes that punished murder.

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## Proposition 7

- *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270 (4/1).
- Not all legislation concerning the same subject matter as an initiative "is necessarily an amendment to the initiative."  
(*Pearson v. Superior Court* (2010) 48 Cal.4th 464, 571.)
- Since Prop. 7 dealt with punishments, not elements, SB1437 did not conflict with Prop. 7. (*Gooden* at p. 282.)

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## Proposition 9 (Marsy's Law)

- Arguments:
  - SB1437 deprives victims and their families of a “final conclusion” per Cal. Const. art. I, § 28(b)(9).
  - PC1170.95 does not consider the safety of the victim.

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## Proposition 9 (Marsy's Law)

- *People v. Lamoureux* (2019) 42 Cal.App.5th 241.
  - Appeal from defendant after Riverside Superior Court ruled SB1437 unconstitutional.
  - Decided voters could not have meant to “foreclose the creation of any new postjudgment proceedings . . .” (*Id.* at p. 265.)
  - No conflict with considerations of safety for the victim, as there are resentencing proceedings. (*Id.* at p. 266.)
  - Set aside mere “declarations” from art. I, § 28(a). (*Ibid.*)
    - “Because the People’s claim would require us to expand the scope of Marsy’s Law beyond its codified text, we find no merit to the People’s contention.” (*Ibid.*)
  - Agreement: Same cast of characters as *Gooden*.
  - Dissent by Justice O’Rourke.
    - Legislature cannot undo initiative indirectly, citing *Rainey v. Michel* (1936) 6 Cal.2d 259 and *Howard Jarvis Taxpayers Ass’n v. Fresno Metropolitan Projects Authority* (1995) 40 Cal.App.4th 1359.

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## Proposition 9 (Marsy's Law)

- California Supreme Court denied review of *Lamoureux* on February 19, 2020.

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## Separation of Powers

- Argument that the judicial branch is vested with the power to determine finality in cases and the Legislature's actions should not intrude upon that.
- The Legislature "cannot 'readjudicate' or otherwise 'disregard' judgments that are already 'final.'" (*People v. Bunn* (2002) 27 Cal.4th 1, 17, citing *Mandel v. Myers* (1981) 29 Cal.3d 531, 547.)
  - Judgments are final when trial and appeal are completed and the matter is no longer pending in court. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1008.)

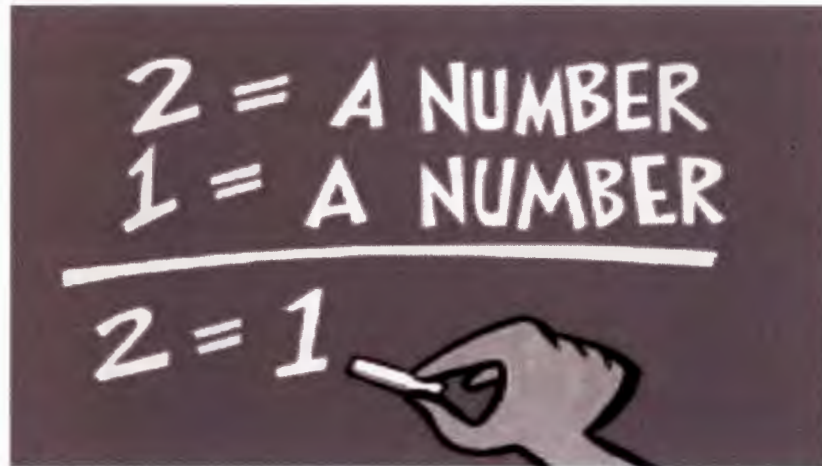
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## Separation of Powers

- *People v. Lamoureux* (2019) 42 Cal.App.5th 241.
  - "[T]he separation of powers has never been applied rigidly." (*Id.* at p. 253, quoting *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 183, 184.)
  - Does not encroach on the Executive's power of clemency. (*Id.* at p. 254.)
    - The effect of clemency is merely "incidental." (*Id.* at pp. 255 - 256, citing *Way v. Superior Court* (1977) 74 Cal.App.3d 165, 176 - 177 and *Younger v. Superior Court* (1978) 21 Cal.3d 102, 117 - 118.)
  - As for judicial finality, *Bunn's* reliance on the federal separation of powers analysis in *Plaut v. Spendthrift Farms, Inc.* (1995) 514 U.S. 211 is inapplicable because "[p]ower is diffused between coequal branches of government . . . to protect the liberty of individuals." (*Lamoureux* at p. 260.) Since PC1170.95 doesn't negatively impact personal liberty, and since it allows for resentencing, that other stuff doesn't apply. (*Id.* at 261 - 263, "stuff" gratuitously offered as unsolicited editorial by your Narrator.)

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## Quod Erat Demonstrandum



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## Currently Unaddressed Constitutional Issues

- PC1170.95(d)(3) permits the People to present new evidence to prove to the court that the defendant is ineligible for relief beyond a reasonable doubt.
  - If this occurs, does this offend *Apprendi v. New Jersey* (2000) 530 U.S. 466, which requires that facts increasing a sentence to be proved to a jury, pursuant to the 6<sup>th</sup> and 14<sup>th</sup> Amendments?
  - Does a defendant waive this right to a jury by using PC1170.95 as a vehicle to undo the conviction?
  - If the procedure does violate *Apprendi*, does this constitutional infirmity undo all of SB1437?
    - No severability clause in bill.
    - Significant factor in determining severability, such as with *Mendoza v. California* (2007) 149 Cal.Ap.4th 1034, 1063 – 1064.

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## Currently Unaddressed Constitutional Issues

- If defendant is successful in vacating conviction, PC1170.95(e) calls for trial court to resentence on uncharged target offense.
  - Would this violate the Ex Post Facto Clause if the statute of limitations has expired?
    - “[A] law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution.” (*Stogner v. California* (2003) 539 U.S. 607, 632 – 633.)
  - If so, does this invalidate the entirety of the bill, based on lack of severability?
  - Does a defendant waive this right by seeking relief?
    - A defendant may waive statute of limitations for his benefit in plea bargaining. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

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## Currently Unaddressed Constitutional Issues

- The 8<sup>th</sup> Amendment requires a narrowing of the class of defendants who may face the death penalty.
  - “[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” (*Zant v. Stephens* (1983) 462 U.S. 862, 877.)
  - Prop. 115 added PC190.2(c) and (d) specifically to narrow the application of special circumstances via felony murder to actual killers, those with the intent to kill, or major participants who acted with reckless indifference to human life. This was done to satisfy the narrowing requirement for felony murders per *Tison v. Arizona* (1987) 481 U.S. 137. (*People v. Banks* (2015) 61 Cal.4th 788, 794.)

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## Currently Unaddressed Constitutional Issues


- The 8<sup>th</sup> Amendment requires a narrowing of the class of defendants who may face the death penalty.
  - Now, SB1437 has introduced identical actual killer, intent to kill, or major participant language into the elemental portion of PC189(e) to that which appears in PC190.2(c) & (d).
  - The required narrowing component included by the electorate has effectively been undone by the bill. Now, all felony murderers are eligible for the death penalty.
  - Given references to PC189(e) in the redrafted PC188(a)(3), if the lack of narrowing renders PC189(e) constitutionally infirm, the lack of severability again becomes an issue.

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## *Application of the Statutes*

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## Voluntary Manslaughter

- Relief under PC1170.95 not available for a defendant convicted of Voluntary Manslaughter.
  - *People v. Cervantes* (2020) 44 Cal.App.5th 884. Review denied April 15, 2020.
  - *People v. Flores* (2020) 44 Cal.App.5th 985. Review denied April 29, 2020.
  - *People v. Turner* (2020) 45 Cal.App.5th 428. Review denied May 13, 2020.
  - *People v. Sanchez* (2020) 48 Cal.App.5th 914. Petition for review filed June 9, 2020, case #S262656 .
- What of plea?
  - *Cervantes, Flores, Turner and Sanchez* were all pleas. No equal protection violation.

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## Attempted Murder – Split of Authority

- Relief under PC1170.95 *not* available for a defendant convicted of Attempted Murder.
  - *People v. Lopez* (2019) 38 Cal.App.5th 1087 (direct appeal after remand, no PC1170.95 petition). Review granted November 13, 2019, case # S258175.
  - *People v. Munoz* (2019) 39 Cal.App.5th 738 (direct appeal, no PC1170.95 petition). Review granted November 26, 2019, case # S258234.
  - *People v. Dennis* (2020) 47 Cal.App.5th 838 (direct appeal, no PC1170.95 petition). Petition for Review filed May 15, 2020, case # S262184.

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## Attempted Murder – Split of Authority

- Relief under PC1170.95 *is* available for a defendant convicted of Attempted Murder.
  - *People v. Larios* (2019) 42 Cal.App.5th 956 (appeal from PC1170.95 petition denial). Review granted February 26, 2020, case # S259983.
  - *People v. Medrano* (2019) 42 Cal.App.5th 1001 (direct appeal on remand from Cal. Sup.). Review granted March 11, 2020, case # S259948.
  - *People v. Sanchez* (2020) 46 Cal.App.5th 637 (direct appeal, no PC1170.95 petition). Review granted June 10, 2020, case # S261768.

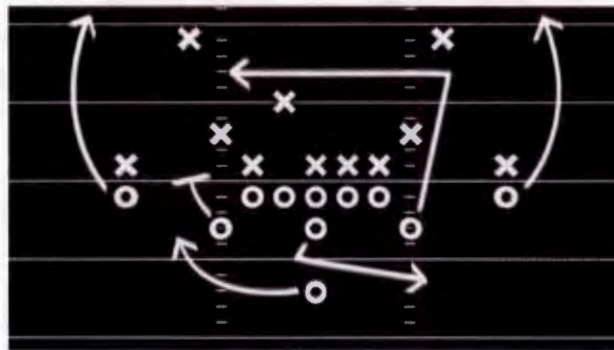
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## Provocative Act Murder

- Relief under PC1170.95 not available for a defendant convicted under theory of Provocative Act Murder.
  - *People v. Lee* (2020) 49 Cal.App.5th 254 (co-participant committed provocative act and was killed). Petition for Review filed June 2, 2020, case # S262459.

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## *Procedure*



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## Prima Facie Case

- *People v. Lewis* (2020) 43 Cal.App.5th 1128.
  - Defendant stated only elements for relief without facts in his petition.
  - Trial Court permitted to look at record of conviction to evaluate prima facie showing. Trial Court reviewed facts from appellate opinion on initial appeal.
  - No counsel appointed.
  - Review granted on March 18, 2020, case # S260598.
- *People v. Verdugo* (2020) 44 Cal.App.5th 320.
  - Trial court could rely on appellate opinion to summarily deny petition based on lack of prima facie case.
  - No counsel appointed.
  - Review granted on March 18, 2020, case # S260493.

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## Prima Facie Case

- *People v. Law* (2020) 48 Cal.App.5th 811 (summary denial, any error in failing to appoint counsel was harmless). Petition for Rehearing denied. Petition for Review filed June 5, 2020, case # S262490.
- *People v. Tarkington* (2020) \_\_ Cal.App.5th \_\_ (# B296331). Petition for Review has not been filed.

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## Prima Facie Case – Major Participant

- *People v. Drayton* (2020) 47 Cal. App.5th 965.
  - Error to summarily deny petition even when defendant armed himself for a home invasion, pistol-whipped victim's wife and held her down while victim was killed. Defendant told co-participant not to rape their daughter when co-participant sexually abused her with firearm.
  - Petition for Review not filed.
- *People v. Smith* (2020) 49 Cal.App.5th 85.
  - Trial predated *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522.
  - Error to summarily conclude defendant was a major participant with reckless indifference to human life without appointment of counsel.
  - Rehearing denied on May 28, 2020. Petition for Review filed on June 18, 2020, case # S262835.

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## Forum

- Relief under PC1170.95 must be first sought in the trial court. Cannot initially be pursued on direct appeal (felony murder theory). (*People v. Garcia* (2020) 46 Cal.App.5th 123. Review denied on May 27, 2020.)
- Same – *People v. Cervantes* (2020) 46 Cal.App.5th 213 (review denied on May 27, 2020); *People v. Anthony* (2019) 32 Cal.App.5th 1102 (review denied on June 19, 2019).

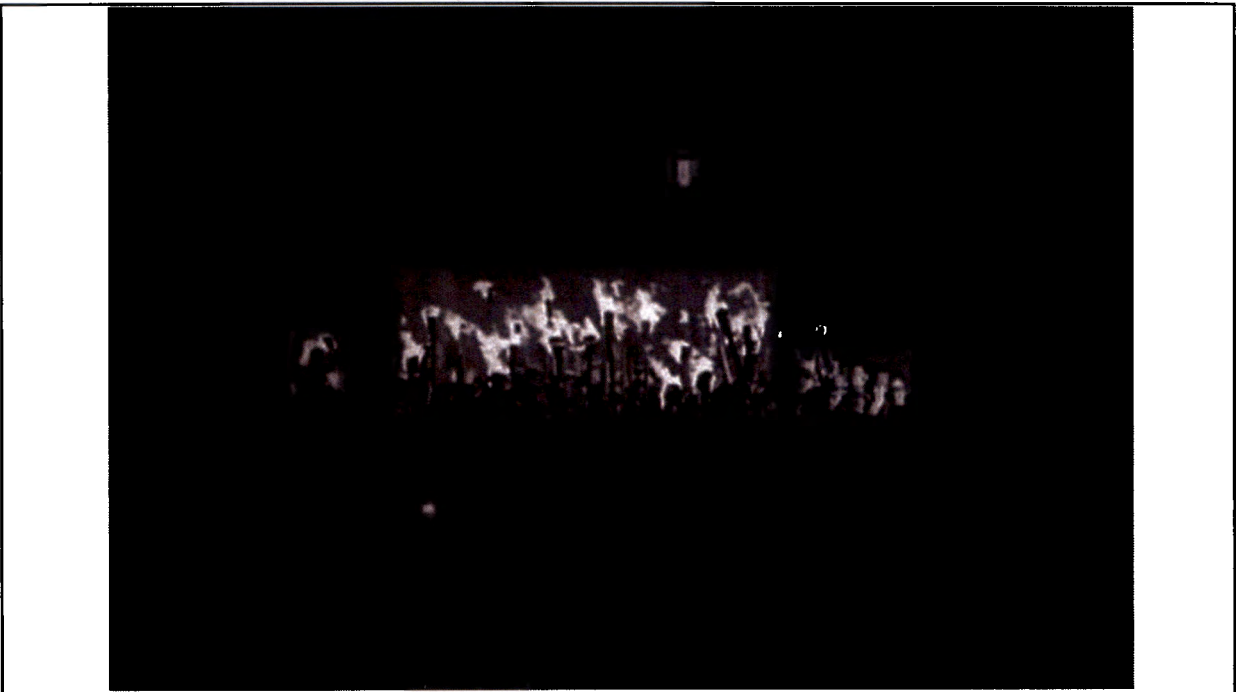
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## Jury Instructions

- CALCRIM 540B and 540C both modified for 2020 to include major participant instructions for felony murder.
  - Draws from *Banks* and *Clark* Special Circumstance language.
  - Beware of Appendix for each that includes pre-SB1437 instructions.
  - Prior approach of having special finding?
- CALCRIM 520 has not been modified and still contains natural and probable consequences language in describing implied malice.

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Credits

Produced and Narrated by Robert P. Brown

*Featuring in Order of Appearance*

Mark Zahner .....Himself

(The Honorable) Morgan Gire .....Himself

The Narrator .....Himself

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*Executive Producer*  
Suzanne Hunter - CDAA

*Technical Director*  
Chris Swayne – CDAA

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*None of the following endorse this presentation:*

42

**Opening Music**

*The Sad Bag of Shaky Jake*

Performed by Humble Pie

Written by Steve Marriott

From *Town and Country*

Copyright 1969 Immediate Records

Distributed by Charly Records LLC

43

## **Mr. District Attorney**

Created by Henry Boltinoff

Published by DC Comics 1948 – 1959

Based on Mr. District Attorney radio show,  
airing on NBC and ABC from 1939 to 1952

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## **Marvin the Martian**

Intellectual Property of Warner Bros.  
Entertainment, Inc.

Created by Chuck Jones

Voiced by Mel Blanc

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**Eeyore**

Created by A.A. Milne

From *Winnie-the-Pooh*

Copyright 1926

Licensing rights currently owned by The Walt  
Disney Company

Thanks for noticing him.

46

**The Inquisitive Mob**

From *Young Frankenstein*

Directed by Mel Brooks

Written by Mel Brooks and Gene Wilder

Based on characters created by Mary Shelley

Copyright 1974 Twentieth Century Fox

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## **Closing Music**

*Banditos*

Performed by The Refreshments

Written by Roger Clyne, Brian Blush,  
Buddy Edwards & P.H. Naffah

From *Fizzy, Fuzzy, Big & Buzzy*

Copyright 1996 PolyGram Records,  
Inc.

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# Fin

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