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Superior Court of California
County of Los Angeles

AUG 15 2019

Sherri R. Carter, Executive Officer/Clerk
By M. Ramirez Deputy
Melody Ramirez

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent

vs.

Defendant/Petitioner.

Case No.

PETITIONER'S REPLY IN SUPPORT OF HIS PETITION TO VACATE MURDER CONVICTION AND BE RESENTENCED ON REMAINING COUNTS; MEMORANDUM OF POINTS AND AUTHORITIES

PLEASE TAKE NOTICE THAT that Petitioner, , hereby submits his Reply in Support of His Petition to Vacate his Murder Conviction and To Be Resentenced on the Remaining Counts.

The Reply is based on this notice, the attached memorandum of points and authorities, any evidence introduced at the hearing on the Petition, and the entire record and proceedings on file in this action.

Dated: 8/15/19

Aaron Spolin
Attorney for Defendant

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I. INTRODUCTION

In the People's Response to Defendant's Petition for Resentencing (the "Response"), Respondent fails to address, let alone refute, *any* of the arguments raised in the Petition. Instead, Respondent aims its entire Response at the California Legislature, challenging the constitutionality of SB 1437 and §1170.95. This effort, however, is unavailing as each of Respondent's supporting arguments is flawed as a matter of law. First, Respondent's argument that SB 1437 unconstitutionally "amends" Propositions 7 and 115 fails as a threshold matter, given that SB 1437 does not even address the same subject matter as those Propositions so as to "amend" them. Second, Respondent lacks standing to challenge the constitutionality of §1170.95 pursuant to the rights Marsy's Law affords to crime victims, and even if it had standing to do so, the California Legislature did nothing to violate those rights in the first place. Third, Respondent's purported basis for challenging SB 1437's retroactive effect – i.e., that it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" – is a principle that only applies to the judiciary, not the legislature. And even if it did apply to the legislature, it only invalidates retroactive changes that *expand* criminal culpability, not those that *reduce* them, as is the case here. Finally, long ago, the Supreme Court of California addressed *and rejected* the very arguments Respondent advances in support of its contention that §1170.95 violates the separation of powers doctrine. Accordingly, Petitioner [redacted] submits that SB 1437 and §1170.95 are constitutional and that therefore this Court should grant his otherwise unchallenged Petition.

II. STANDARD OF REVIEW

Under well-established California law, the burden of establishing the unconstitutionality of a statute rests on [the party] who assails it. (*Metro. Cas. Ins. Co. v. Brownell* (1935) 294 U.S. 580, 584; *In re York* (1995) 9 Cal. 4th 1133 at p. 1152). This burden is a heavy one since "the courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity. (*People v. Falsetta* (1999) 21 Cal. 4th, 912-913 (internal citations omitted); s*ee also Lockyer v City and County of San Francisco* (2004) 33 Cal. 4th 1055, 1086 ("one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, is presumed to be constitutional.")). This constitutional presumption does not just mean that the courts must view a statute as constitutional until proven otherwise; rather it also means that any doubt as to the

1 Legislature's authority to act in a given area must be resolved in favor of the legislative action
2 and the enactment must not be construed to embrace matters not covered by the language of such
3 enactment. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal. 3d 329, 35-351, citing *City*
4 *and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103)).
5 Accordingly, "courts should exercise judicial restraint in passing upon the acts of coordinate
6 branches of government; and the invalidity of the legislation must be clear before it can be
7 declared unconstitutional." (*Dittus v. Cranston* (1959), 53 Cal. 2d 284, 286)).

III. SENATE BILL 1437 AND §1170.95 ARE CONSTITUTIONAL

8 In the Petition, Petitioner [redacted] established that his murder conviction warranted
9 vacatur and that he be resentenced due to a retroactive change in the laws governing defendants
10 murder/attempted murder charges, i.e., the enactment of Senate Bill 1437 and §1170.95. More
11 specifically, Petitioner advanced no less than four arguments demonstrating that his conduct does
12 not meet the new requirements under Senate Bill 1437 for being charged with murder under a
13 felony murder theory/natural and probable consequences theory, and because those laws are
14 retroactive under §1170.95, vacating his conviction and resentencing him is now warranted.
15 Respondent has challenged *none* of these arguments.

16 Respondent has instead chosen to devote the entirety of its Response to challenging the
17 constitutionality of SB 1437 and §1170.95. Respondent advances four flawed arguments in
18 support of this cause: (1) SB 1437 is unconstitutional because it "amends" Propositions 7 and
19 115 without meeting the requirements of Cal Const., Art. II § 10(c) for amending initiative
20 statutes; (2) §1170.95 is unconstitutional because it violates a crime victim's right to finality
21 under Marsy's Law; (3) SB 1437 violates due process because the retroactive change in the law
22 was "unexpected and indefensible by reference to the law which had been expressed prior to the
23 conduct in issue;" and (4) SB 1437 violates the separation of contract doctrine by "commanding"
24 courts to reopen final convictions for murder and decide them anew and by "usurping the
Governor's exclusive power to issue pardons and commute sentences."

25 As will be established immediately below, each of these arguments fails as a matter of
26 well-settled law.

A. Senate Bill 1437 Does Not "Amend" Proposition 7 or Proposition 115.

27 According to Respondent, Propositions 7 and 115 were "amended" by SB 1437 because
28 the "voters' intent" behind the Propositions was "to increase the punishment for murder," while

SB 1437 somehow "changes the punishment and sentencing for murder." (*See* Response at pp.15-16). Strikingly, Respondent in the same breath acknowledges the simple distinction that "Propositions 7 and 115 concern *sentencing* for murder and SB 1437 concerns the *definition* of murder," but dismisses it, baldly insisting that "the concepts are inseparable." *Id.* at 15. In any event, Respondent's argument is fundamentally flawed. As Respondent concedes, to "resolve the question" of whether an initiative statute has been "amended" by a legislative statute under Cal Const., Art. II § 10(c), the Court is "required to decide what the voters contemplated. The voters should get what they enacted, not more and not less." (*People v. Superior Court (Pearson)* (2010), 48 Cal. 4th 564, 571; *see also* Response p. 12). Respondent misapplies *Pearson*, however, by deriving the "voters' intent" behind Propositions 7 and 115 from secondary materials such as ballot summaries. (*See* Response, pp. 12-14). California law is clear that where, as here, the language of the subject initiative statute(s) is unambiguous, the Court may *not* consider extrinsic materials, such as ballot summaries, to determine the intent of the voters. (*See Browne v. Cty. of Tehama* (2013), 213 Cal. App. 4th 704, 720) ("Courts consider ballot summaries and arguments to determine the voters' intent only where the language of the initiative is ambiguous."); *Knight v. Superior Court* (2005), 128 Cal. App. 4th 14, 23 ("if the language is not ambiguous, not even the most reliable document of legislative history ... may have the force of law.") (internal quotation marks and citations omitted); *see also Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1177 ("Ballot arguments often embody the sound-bite rhetoric of competing political interests vying for popular support. However useful they may be in identifying the general evils sought to be remedied by an initiative measure, they are principally designed to win votes, not to present a thoughtful or precise explication of legal tests or standards.")).

Instead, the court must presume that the voters intended the "meaning apparent from the language." (*People v. Superior Court (Pearson)* (2010), 48 Cal. 4th 564, 571 ("When we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from the language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. . . If the language is *ambiguous*, courts may consider *ballot summaries*. . .") (emphasis added)). Consequently, as the *Pearson* court

itself declared, when deciding whether a particular statutory provision "amends" an initiative statute, courts "simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Pearson*, 48 Cal. 4th at 571). In other words, the "Legislature remains free to address *a related but distinct area* or a matter that an initiative measure does not specifically authorize or prohibit." (*Id.* (internal citations and quotation marks omitted) (emphasis added)).

Under *this* test, SB 1437 clearly did *not* "amend" Proposition 7 or 115. Indeed, Petitioner is unable to locate, and Respondent has failed to identify, a single instance where SB 1437 "prohibits" what Proposition 7 or 115 "authorizes," or "authorizes" what Proposition 7 or 115 "prohibits." Moreover, identifying such an instance would be *impossible*, as the subject matter addressed by SB 1437 is entirely "distinct" from that addressed by the Propositions. Specifically, as Respondent acknowledges, SB 1437 operates to *redefine* certain murder crimes but does not address, let alone "*amend,*" the *penalties* prescribed for any crime. (*People v. Martinez*, 31 Cal. App. 5th 719, 723 (Ct. App. 2019), as modified on denial of reh'g (Feb. 13, 2019), review denied (May 1, 2019) ("Substantively, Senate Bill 1437 accomplishes this by amending section 188, which *defines* malice, and section 189, which *defines* the degrees of murder, and as now amended, addresses felony murder liability.) (emphasis added); *People v. Martinez*, 31 Cal.App.5th 719, 722 (2019) ("Senate Bill 1437 made statutory changes *altering the definitions* of malice and first and second degree murder.") (emphasis added)).[1]

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[1] Penal Code Sections 188 and 189 currently provide in pertinent part as follows, with SB 1437's amendments italicized:

Penal Code section 188.

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) *Except 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.*

By stark contrast, and as Respondent further acknowledges, Proposition 7 amended Section 190 of the Penal Code so as to substantially increase the *penalties* for first and second degree murder, and Proposition 115 amended the *penalties* set forth in Section 190.2 of the Penal Code to provide a death sentence or life without the possibility of parole for two situations where the defendant is not the actual killer. (*See People v. Cooper* (2002) 27 Cal.4th 38 ("The purpose of the Briggs Initiative [Proposition 7] was to substantially increase the punishment for persons convicted of first and second degree murder.");[2] Cal. Penal Code § 190.2, subds. (c)-(d)).[3] And

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Penal Code section 189.

e) 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.*

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

[2] Section 190, with Proposition 7's amendments italicized, provides as follows:

(a) Every person guilty of murder in the first degree shall be punished by *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.* The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.
Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of *15 years to life.*

[3] Penal Code Sections 190.2, with relevant amendments of Proposition 115 italicized, provides in pertinent part as follows:

Section § 190.2 Death penalty or life imprisonment without parole; special circumstances

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in

although Respondent insists that the "concepts" of defining crimes and fixing penalties are "inseparable," the Supreme Court of California has clearly expressly (and logic clearly dictates) to the contrary. (*See, e.g., People v. Banks* (2015), 61 Cal.4th 788, 801, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 602 ("the definition of crimes generally has not been thought automatically to dictate what should be the proper punishment.")).

Additionally, while Proposition 115 also amended Section 189 of the Penal Code to add various offenses to the list of felonies supporting a first-degree murder charge, those amendments are wholly unaffected by and unrelated to SB 1437's amendments.[4]

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which one or more of the following special circumstances has been found under Section 190.4, to be true . . .

***

(c) *Every person, not the actual killer who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been found to be true under Section 190.4.*

(d) *Notwithstanding subdivision (c), every person not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for life without the possibility of parole, in any case in which a special circumstance enumerated in paragraph (17) of subdivision (a) of this section has been found to be true under Section 190.4.*

[4] Penal Code Sections 189, with relevant amendments of Proposition 115 italicized, provides in pertinent part as follows:

§ 189. Murder; degrees
(a) All murder that is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, *kidnapping, train wrecking*, or any act punishable under *Section 286, 288, 288a, or 289*,is murder of the first degree . . .

In sum, the *Pearson* test, properly applied, leads to the inescapable conclusion that SB 1437 did not "amend" Proposition 7 or 115 under Cal Const., Art. II § 10(c) or otherwise.

B. § 1170.95 Does not Violate Marsy's Law.

According to Respondent, § 1170.95 is unconstitutional because it permits "vacating . . . murder convictions long final on appeal" while Cal. Const., Art. I §§ 28(a)(6) and 28(b)(9) entitle victims of crimes to "finality in their criminal cases." (*See* Resp. pp. 17-19; Cal. Const., Art. I § 28(a)(6); Cal. Const., Art. I § 28(b)(9)). Respondent's argument misconstrues and misapplies §§ 28(a)(6) and 28(b)(9) and should therefore be rejected.

As a threshold matter, "the same principles governing statutory construction" generally govern the interpretation of voter initiatives such as Marsy's Law, including Cal. Const., Art. I §§ 28(a)(6) and 28(b)(9). (*Santos v. Brown* (2015), 238 Cal. App. 4th 398, 409 (referring to Marsy's Law)). Accordingly, a court will "first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." Crucially, the court will "adopt a construction that will effectuate the voters' intent, giv[ing] meaning to each word and phrase, and ***avoid absurd results***." *Id.* Also of importance here, "as the Courts of Appeal have repeatedly held, a statement of legislative intent" such as those presented in the 'Legislative Findings and Declarations' portion of a statute – "may *not* give rise to a mandatory duty." (*Shamsian v. Dep't of Conservation* (2006), 136 Cal. App. 4th 621, 633–34) (emphasis added)).

Applying the foregoing principles here makes clear that § 1170.95 is not violative of Cal. Const., Art. I §§ 28(a)(6) or 28(b)(9) so as to render it unconstitutional. Preliminarily, § 28(a)(6), appearing in the "Findings and Declarations," creates no "mandatory duty," and is thus not enforceable altogether. (*See Shamsian*, 136 Cal. App. 4th at 633–34 ("The statement of legislative intent in section 14501 (entitled "Legislative Findings and Declarations"), subdivision (g), does not impose a mandatory duty the breach of which gives rise to a private right of action."). Indeed, Cal. Const. art. I, § 28 could not be more clear that the only enforceable rights it confers are the "17 specific and expansive rights set forth in Section 28, ***subdivision b***." (*People v. Hannon* (Ct. App. 2016), 5 Cal. App. 5th 94, 100 (emphasis added); *see also* Cal. Const. art. I, § 28 (b) ("In order to preserve and protect a victim's rights to justice and due

process, a victim shall be entitled to the following rights . . .); Cal. Const., art. I, § 28, subd. (c)(1).("A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights *enumerated in subdivision (b)* in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.") (emphasis added)).

Second, and relatedly, both the *un*enforceable rights enumerated in subdivision (a) as well as the enforceable rights enumerated in subdivision (b) of Section 28 were afforded to the crime "victims," *not* the People of California. (*See* Cal. Const. art. I, § 28(a)(6) ("Victims of crime are entitled to finality in their criminal cases. . .."); Cal. Const. art. I, § 28(c)(1) ("A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) . . . ."); Cal. Const. art. I, § 28(f) ("In addition to the enumerated rights provided in subdivision (b) that *are personally enforceable by victims* as provided in subdivision (c), victims of crime have additional rights that are shared with all of the People of the State of California.") (emphasis added)). Accordingly, Respondent lacks standing to assert the rights of third-party victims. (*See Alford v. Superior Court* (2003), 29 Cal.4th 1033 (holding that the People of California had no standing in a criminal proceeding to be heard in related third-party discovery proceedings)).

Third, and most fundamentally, the "finality" afforded under Marsy's law cannot possibly have been intended to have the effect of rendering § 1170.95 unconstitutional. For if so, it would lead to the absurd (and chaotic) result of likewise rendering unconstitutional any judicial process (such Writ of Habeus Corpus, Writ of Error Coram Nobis, etc. . .) whereby a party obtains a reduced sentence after a "conviction long final on appeal." That cannot possibly be the case. Instead, the "finality" afforded by Marsy's Law is readily understood in light of its own unambiguous statements:

> Victims of crime are entitled to *finality* in their criminal cases. *Lengthy* appeals and other post judgment proceedings that challenge criminal convictions, *frequent and difficult* parole hearings that threaten to release criminal offenders, and the *ongoing threat* that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This *prolonged suffering* of crime victims and their families must come to an end.

(Cal. Const., art. I, § 28(a)(6) (emphasis added)). Clearly, Marsy's Law was not targeting the *enactment* of post-judgment proceedings, but instead, was seeking to minimize the "prolonged"

effects that may attend post-judgment proceedings that are "lengthy," "frequent and difficult," or pose an "ongoing threat that sentences will be reduced."[5] As there is simply nothing in the language or application of § 1170.95 that requires proceedings thereunder to be lengthier, more frequent and difficult, or more likely to create the ongoing possibility of a reduced sentence, than any other "post-judgment proceeding" referenced by Section 28, there is no basis for finding § 1170.95 violative of Marsy's law.

C. Senate Bill 1437 Does not Violate The Due Process Clause.

By way of carefully selected quotations, Respondent asserts that SB 1437 violates due process because it effects a retroactive change that was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." (Response, p. 20 (quoting *Rogers v. Tennessee* (2001) 532 U.S. 451, 461)). But, as *Rogers* itself makes clear, this "principle of fair warning" under due process applies to ***the judiciary***, not the legislature:

> we conclude that ***a judicial alteration*** of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

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[5] That this was the goal of Marsy's Law is not at all surprising given what precipitated the Law in the first place. As the Supreme Court of California observed based on the Law's legislative history:

> Marsy's Law was named after a young woman who was murdered in 1983. . . Following the arrest of Marsy's murderer, Marsy's mother was shocked to meet him at a local supermarket after he was released on bail without Marcy's family's receiving notice or opportunity to express opposition to his release. Several years after his conviction and sentence to 'life in prison,' the parole hearings for his release began. In the first parole hearing, Marsy's mother suffered a heart attack fighting against his release. Since then Marsy's family has endured *the trauma of frequent parole hearings and constant anxiety that Marsy's killer would be released*. . .
>
> The measure's findings express a number of grievances, including . . .*the early release of inmates after serving as little as 10 percent of the sentences imposed* . . . the pain caused victims' families by *frequent parole hearings*, . . .*failure to impose actual and just punishment* upon their wrongdoers, and *failure to extend to them some measure of finality* to the trauma inflicted upon them by their wrongdoers.

(*In re Vicks* (2013), 56 Cal. 4th 274, 281–82 (internal quotation marks and citations omitted) (emphasis added)).

(*Rogers*, 532 U.S. at 462 (emphasis added); *see also Bouie v. City of Columbia* (1984) 378 U.S. 347, 354 (finding that when the "*judicial construction* of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," the "due process right of fair warning is violated if the judicial construction is retroactively applied.") (emphasis added)).[6] As applied to the *legislature*, due process works to "str[i]ke down a criminal statute" where "it was not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." (*Bouie*, 378 U.S. at 351). More specifically, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* Here, Respondent does not challenge – nor could it genuinely challenge – SB 1437 as failing to be "sufficiently explicit" regarding its meaning or application.

Furthermore, even if the "principal of fair warning" applicable to the judiciary were applicable to the legislature, it *still* would not render SB 1437 unconstitutional for want of due process. That principle applies only where the retroactive change seeks to *enlarge* criminal activity, i.e., criminalize an act that was lawful when taken or, was at least a lesser offense when committed. (*Robertson v. Runnals* (9th Cir. 2009), 310 F. App'x 957, 958 ("An unforeseeable judicial *enlargement* of a criminal statute, applied retroactively, violates the [Fourteenth Amendment] right to fair warning of what constitutes criminal conduct.") (emphasis added)). As Respondent itself acknowledges, however, SB 1437 is a "more *lenient* law" than what had existed previously, *reducing* criminal conduct that was once punishable as murder to one that is punished as a lesser offense. (*See United States v. Newman*, 203 F.3d 700, 702–03 (9th Cir. 2000), as amended on reh'g (Mar. 9, 2000) ("The judicial decision at issue here, *does not enlarge* the scope of criminal liability. Rather, it interprets a federal statute concerning the calculation of the length of a term of imprisonment without reference to the issue of the defendant's criminal

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[6] Indeed, given that the legislature is the very governmental body entrusted with determining the law, its enactment of a statute announcing the law – even if retroactively so – cannot be considered "unexpected" or "indefensible by reference to the law which had been expressed prior to the conduct in issue."

liability. Thus, the due process concerns raised by *Bouie* are inapplicable to this case."); *see also* Response, p.22)). Accordingly, SB 1437 does not violate the due process.[7]

D. §1170.95 Does Not Violate the Separation of Powers Doctrine.

Respondent contends that §1170.95 violates the separation of powers doctrine because it "commands courts to reopen final convictions" and "usurps the Governor's exclusive power to issue pardons and commute sentences." Resp., pp. 24-25. To support this argument, Respondent relies on *People v. Bunn* (2002) 27 Cal.4th 1, where the Court struck down a California statute as violative of the separation of powers doctrine because it extended the applicable statute of limitations to revive cases that had previously been time-barred. Respondent's argument is flawed, and its reliance on *Bunn* and its progeny is wholly misplaced.

As a threshold matter, and contrary to Respondent's contention, "the Legislature does *not* necessarily violate the separation of powers doctrine *even by legislating with regard to inherent judicial power[s] or function[s]*." (*McMahon v. Superior Court* (2003), 106 Cal. App. 4th 112, 117) ("California decisions long have recognized that, in reality, the separation of powers doctrine does *not* mean that the three departments of our government are not in many respects mutually dependent." (emphasis supplied)). "Indeed, upon brief reflection, the substantial interrelatedness of the three branches' actions is apparent and commonplace: the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative process through the veto power." (*Le Francois v. Goel*, 35 Cal. 4th 1094, 1102 (2005), as modified (June 10, 2005)).

Rather, "the standard for evaluating the separation of powers clause is whether, from a realistic and practical perspective, the action of one branch *defeats* or *materially impairs* the core

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[7] Had Respondent argued that SB 1437 violates the Ex Post Facto Clause, the result would be the same. As the *Bouie* Court observed, the Ex Post Facto Clause prohibits the enactment of a statute "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed." (*Bouie*, 378 U.S. at 353 (internal citations and quotation marks omitted)). Here, as discussed, SB 1437 does *not* criminalize an act that was innocent when done or make it greater than it was when committed. To the contrary, it makes an action done before the passing of the law" a *lesser* crime than it was when committed.

zone of constitutional authority of another branch." ("*Citizens for a Better Way v. Brown* (Cal. Ct. App. Oct. 13, 2016), No. C075018, 2016 WL 5940923, at *3 (citing *Marine Forests Society v. California Coastal Com.*, (2005) 36 Cal.4th 1, 45)). "No branch of government can exercise the *complete* power constitutionally vested in another." (*Bunn*, 27 Cal. 4th at 16) (emphasis in original). Under this standard, the Legislature may not amend a statute that would "readjudicat[e]" or otherwise "disregard" judgments that are already "final." (*Id.*).

Likewise, the separation of power doctrine "is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental effect* of duplicating a function or procedure delegated to another branch." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662). Crucially, the power to "define crimes and fix penalties" lies well within the sphere of the legislative branch. (*See, e.g., People v. Juarez* (1984), 158 Cal. App. 3d 412, 415 ("it is the function of the Legislature to define crimes and fix punishments"); *see also Gananian v. Wagstaffe*, 199 Cal. App. 4th 1532, 1542 (2011) ("the legislative branch bears the sole responsibility and power to define criminal charges and to prescribe punishment...."); *People v. Hames* (Ct. App. 1985), 172 Cal. App. 3d 1238, 1242 ("It is settled that the Legislature, not the courts, has the exclusive power to define crimes and fix penalties.")). Under this standard, "[a]s long as . . . [legislative] enactments do not defeat or materially impair the constitutional functions of the courts, a 'reasonable' degree of regulation is allowed" (*McMahon*, 106 Cal. App. 4th at 117 (internal quotation marks omitted)).

Applying the foregoing principles here, it is clear the that §1170.95 does not violate the separation of powers doctrine. Preliminarily, §1170.95 does not "defeat" or "materially impair" the constitutional functions of the court or the Governor. Unlike the Governor who has the power to commute a sentence *in its entirety*, and unlike the statute at issue in *Bunn*, which "disregarded" the prior judgment to the point that the parties may "readjudicate" the very claims that had been dismissed, §1170.95 merely permits the *modification* of the sentence imposed by an otherwise final judgment.

Second, and more fundamentally, §1170.95 does not violate the separation of power doctrine because it is was enacted "incidental" to a "properly taken" legislative action to "define crime and fix penlaties", i.e., the enactment of SB 1437. (*See, e.g, People v. Martinez* (Ct. App. 2019), 31 Cal. App. 5th 719, 723, as modified on denial of reh'g (Feb. 13, 2019), review denied (May 1, 2019) ("Senate Bill 1437 was enacted to amend the felony murder rule and the natural

and probable consequences doctrine, as it relates to murder . . . Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill 1437 *also adds* the aforementioned section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory ... [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts ....") (emphasis added)).[8]

In fact, the Court in *Way v. Superior Court* (1977), 74 Cal.App.3d 165, used this very distinction to reject the same arguments Respondent makes here. The *Way* case centered around the California Legislature's then-recent decision to repeal the Indeterminate Sentence Law (ISL) and replace it with the Uniform Determinate Sentencing Act of 1976 (UDSA), § 1170 *et seq.* (*See generally id.*) Amongst other things, the UDSA had the effect of reducing certain prison sentences. (*See id.*, 168-70). One of the provisions of the UDSA is Penal Code section 1170.2, which (akin to 1179.95), provides for retroactive application of the UDSA and thus resulted in a reduction in the terms of some prisoners convicted under the ISL. (*Id.* at 169.). In discussing the constitutionality of § 1170.2, the Court addressed and rejected the arguments that §1170.2 violates the separation of powers doctrine by infringing upon the Governor's constitutional power of commutation or the judiciary's constitutional power, as embodied in the finality of judgment rule:

> We note that the motivation behind section 1170.2 is not consistent with commutation. The Legislature's objective, admittedly one within its power, is to restructure punishments for criminal conduct and to make them uniform to the extent reasonably possible. Having accomplished this as to future offenders, it then sought to avoid a condition which it deemed both undesirable and inconsistent with the concept of uniformity, that felons concurrently serving sentences for identical offenses be subject to disparate terms solely because of the time when they committed their crimes. It undertook no act of mercy, grace, or forgiveness toward past offenders, such as characterizes true commutations.

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[8] Indeed, the stated purpose of § 1170.95, like the other provisions of § 1170 *et. seq.*, is simply to ensure that the terms of incarceration are "proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." § 1170(a)(1).

> Thus *the shortening of existing prison terms by section 1170.2 is purely incidental to the main legislative purpose*, and comes within the rule enunciated in *Laisne v. Cal. St. Bd. of Optometry* (1942) 19 Cal.2d 831, 835, 123 P.2d 457, 460, which states: "It is true that there can be no complete separation of powers of government in an ever changing social order. It is equally true that each department for its own existence must in some degree exercise some of the functions of the others.
>
> Nor do we see any inconsistency between our holding and the finality of judgment rule, which states that once a judgment in a criminal case becomes final, it may not be reduced by subsequent legislative action. . . .
>
> *The distinction is that in this case final judgments will be reduced only as an incident of a major and comprehensive reform of an entire penal system. In view of the legislative objective, the final judgment rule must yield.*

(*Way*, 74 Cal. App. 3d at 179–80 (emphasis added)). The reduced sentences effectuated by §1170.95, like those effectuated by §1170.2, are "purely incidental to the Legislative objective to reform the penal code." Accordingly, like §1170.2, §1170.95 does not fun afoul of the separation of powers doctrine. (*See In re Chavez* (2004) 114 Cal. App. 4th 989, 1000 (applying *Way* to find that "the lessening of petitioners' sentences here is incidental to the legitimate motivation of correcting an anomaly in the law and likewise cannot be considered an infringement of the executive power.")).

IV. CONCLUSION

For the foregoing reasons, neither SB 1437 nor §1170.95 is unconstitutional, and for the unrefuted reasons set forth in the Petition, Petitioner [redacted] has satisfied the statutory requirements necessary to have his murder conviction vacated, and for him to be resentenced on his remaining counts. Accordingly, he requests that this Court grant his Petition and afford him the relief prayed therein.

Dated: August 15, 2019

Spolin Law

[redacted signature]

Aaron Spolin
Attorney for Defendant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Blvd., Ste 900, Los Angeles, CA 90017. On August 15, 2019 I served **PETITIONER'S REPLY IN SUPPORT OF HIS PETITION TO VACATE MURDER CONVICTION AND BE RESENTENCED ON REMAINING COUNTS; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

DISTRICT ATTORNEY'S OFFICE
210 West Temple Street
Los Angeles, CA 90012

> **(BY MAIL)** I am readily familiar with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 15, 2019, at Los Angeles, California.

Fernando Mercado
PRINT NAME

SIGNATURE