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7 Attorney for Petitioner

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF LOS ANGELES**

10 THE PEOPLE OF THE STATE OF  
11 CALIFORNIA,


12 Plaintiff/Respondent,

13 vs.

14 ,  
15 Defendant/Petitioner.

16 Superior Court Case No.: PA013483

17 PETITION TO VACATE MURDER  
18 CONVICTION AND BE RESENTENCED ON  
19 REMAINING COUNTS; MEMORANDUM OF  
20 POINTS AND AUTHORITIES; AND  
21 DECLARATION

22 **PLEASE TAKE NOTICE THAT** that Defendant/Petitioner  hereby  
23 moves to vacate his murder conviction pursuant to Senate Bill 1437 (Penal Code section  
24 1170.95) and to be resentenced on any remaining counts.

25 Dated: October 7, 2021

26 Respectfully submitted,

27 SPOLIN LAW P.C.

28 By: 

Aaron Spolin  
Attorney for the Petitioner

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

2 **STATEMENT OF THE CASE**

3 The District Attorney of Los Angeles County charged [REDACTED] ("Petitioner") with  
4 one count of first-degree murder, in violation of California Penal Code section 187(a) (Count  
5 One), and two counts of second-degree robbery, in violation of Penal Code sections 211 (Counts  
6 Two and Three). It was further alleged as to Count One that the murder was committed during  
7 the commission of a robbery, in violation of Penal Code section 190.2(a)(17). It was alleged as to  
8 all counts that a principal used a firearm pursuant to Penal Code section 12022(a)(1). Petitioner's  
9 co-defendant [REDACTED] was also charged as the getaway driver in the robbery heist.  
10 (Trial Case No. PA013483). Co-conspirator [REDACTED] case was separate from Petitioner's  
11 and [REDACTED]. (Trial Case No. PA016118).

12 After the preliminary hearing, Petitioner pleaded nolo contendere to the charges.  
13 Petitioner was sentenced to a term of 26 years to life.

14 Petitioner pursued a direct appeal of his conviction in the Second Appellate District,  
15 Division Seven. (Appellate Case No. B081500). On January 31, 1994, the Court of Appeal  
16 summarily denied his petition. The California Supreme Court denied Petitioner's petition for  
17 review on March 31, 1994. (Supreme Court Case No. S038132).

18 Petitioner is now filing a Petition for Resentencing pursuant to SB 1437 asserting that he  
19 could not now be convicted of first degree murder because: i) he was not the actual killer; ii) he  
20 did not with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the  
21 actual killer in the commission of murder in the first degree; iii) he was not a major participant in  
22 the felony; and iv) he did not act with reckless indifference to human life. Notably, **Petitioner's  
23 co-defendant and getaway driver, [REDACTED], has already received relief under SB  
24 1437 and has been released from prison.**

25 **STATEMENT OF FACTS**

26 For the purposes of this petition, Petitioner summarizes the evidence as presented in the  
27 Preliminary Transcript from Case. No. PA013483 to the extent that they do not conflict with the  
28 argument below:

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[REDACTED]

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[REDACTED]

**ARGUMENT**

**I. SB 1437 REQUIRES THAT PETITIONER’S FIRST-DEGREE MURDER CONVICTIONS BE VACATED**

On September 30, 2018, the governor signed Senate Bill 1437 into law. The new law recognized, “It is a bedrock principle of the law and equity that a person should be punished for his or her actions according to his or her own level of individual culpability.” Senate Bill 1437 amended Penal Code sections 188 and 189 to change the definitions of malice and murder. The bill also created Penal Code section 1170.95, which created a process for certain defendants convicted of felony murder or murder under a natural and probable consequences theory to petition to have their murder convictions vacated. The amendments require that a person’s

1 liability for murder must be premised upon that person's individual actions and subjective mens  
2 rea. (*People v. Medrano* (2019) 42 Cal.App.5th 1001, 1010.)

3 "The effect of a successful petition under section 1170.95 'is to vacate the judgment ... as  
4 if no judgment had ever been rendered.'" (*People v. Superior Court (Gooden)* (2019) 42  
5 Cal.App.5th 270, 286 [citations omitted].)

6 The legislature stated that the purpose of the amendments to the felony murder and  
7 natural and probable consequences rules was a need to "more equitably sentence offenders in  
8 accordance with their involvement in homicides." (See Senate Bill 1437.) The legislature  
9 recognized the lengthy sentences were not commensurate with individual culpability, and  
10 concluded:

11 It is necessary to amend the felony murder rule and the natural and probable  
12 consequences doctrine, as it relates to murder, to ensure that murder liability is  
13 not imposed on a person who is not the actual killer, did not act with the intent  
14 to kill, or was not a major participant in the underlying felony who acted with  
15 reckless indifference to human life.

16 (*Id.*)

17 Senate Bill 1437 was the result of Senate Concurrent Resolution 48, passed on September  
18 22, 2017, which stated that a conviction under a felony murder theory is "inconsistent with  
19 principles of law and equity." The Legislature found that it was inequitable for a defendant to be  
20 convicted of murder based solely on his participation in a felony, when he did not commit the  
21 fatal act and, therefore, be punished for the "unforeseen results of another felon's actions,  
22 especially where the conduct was not agreed upon." (Senate Concurrent Resolution No. 48,  
23 Resolution Chapter 175, 2017-18 Regular Session.) The resolution further stated that the United  
24 States was one of the few countries in the world that allows prosecutions under the felony  
25 murder theory and that the felony murder rule circumvented a defendant's Fifth and Fourteenth  
26 Amendment rights by allowing a conviction for murder without malice aforethought. (*Id.*)

27 Amended Penal Code section 188 now holds that for a person to be convicted of murder,  
28 he or she must act with malice aforethought, and "malice shall not be imputed to a person based  
solely on his or her participation in a crime." Section 189 was also amended to include  
subsection (e) which holds that a person is liable for murder only where one of the following is  
proven:

1 (1) The person was the actual killer.

2 (2) The person was not the actual killer, but with the intent to kill, aided, abetted,  
3 counseled, commanded, induced, solicited, requested or assisted the actual killer in  
4 the commission of murder in the first degree.

5 (3) The person was a major participant in the underlying felony and acted with  
6 reckless indifference to human life, as described in subdivision (d) of section 190.2.

7 Senate Bill 1437 also created a mechanism for a defendant convicted of felony murder or  
8 murder under a theory of natural and probable consequences to petition to have his conviction  
9 vacated, by creating Penal Code section 1170.95. Section 1170.95 applies to a defendant who  
10 meets each of the following conditions:

11 (1) A complaint, information, or indictment was filed against the petitioner that  
12 allowed the prosecution to proceed under a theory of felony murder or murder under  
13 the natural and probable consequences doctrine.

14 (2) The petitioner was convicted of first degree murder or second degree murder  
15 following a trial or accepted a plea offer in lieu of a trial at which the petitioner  
16 could be convicted of first degree or second degree murder.

17 (3) The petitioner could not be convicted of first degree murder because of changes  
18 to Section 188 or 189 made effective January 1, 2018.

19 (Penal Code section 1170.95(a)(1-3).)

## 20 **II. STANDARD OF REVIEW**

21 Section 1170.95 creates an “initial review stage” where the court must determine the  
22 factual sufficiency of the defendant’s claim and whether the defendant has made a prima facie  
23 showing that he was entitled to relief. A prima facie showing of eligibility “triggers the trial  
24 court’s obligation to issue an order to show cause.” (*People v. Ramirez* (2019) 41 Cal.App.5th  
25 923, 929.) In *Ramirez*, the court of appeal found that the defendant had made a prima facie  
26 showing where he satisfied all three requirements of 1170.95(b)(1). (*Id.* at p. 929-930.)

27 In *People v. Drayton* (2020) 47 Cal.App.5th 965, 980, the Court of Appeal held that  
28 “when assessing the prima facie showing, the trial court should assume all facts stated in the  
section 1170.95 petition are true.”

The *Drayton* court also set forth the procedure once a defendant makes a prima facie  
showing:

1 If, accepting the facts asserted in the petition as true, the petitioner would be entitled  
2 to relief because he or she has met the requirements of section 1170.95(a), then the  
3 trial court should issue an order to show cause. (§ 1170.95(c).) Once the trial court  
4 issues the order to show cause under section 1170.95(c), it must then conduct a  
5 hearing pursuant to the procedures and burden of proof set out in section 1170.95,  
6 subd. (d) unless the parties waive the hearing or the petitioner's entitlement to relief  
is established as a matter of law by the record. (§ 1170.95, subd. (d)(2).) Notably,  
following the issuance of an order to show cause, the burden of proof will shift to  
the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible  
for resentencing.

7 (*Id.* at p. 980-981.)

8 According to section 1170.95(d)(3), a superior court is not permitted to consider the  
9 record on conviction until after the court has issued an order to show cause. However, there is  
10 presently a split of authority as to whether the court may consider the record of conviction at the  
11 prima facie hearing stage. (See *People v. Law* (2020) 262 Cal.Rptr.3d 268; *People v. Perez*  
12 (2020) 54 Cal.App.5th 896 [all holding that it is permissible for the court to consider the record  
13 of conviction before the order to show cause is issued]; see contra *People v. Drayton, supra*, 47  
14 Cal.App.5th 965 [holding that it was error for the trial court to engage in factfinding at prima  
15 facie showing stage].) This question is presently pending in the California Supreme Court.  
(*People v. Lewis*, S260598, rev. granted March 18, 2020.)

16 Once the court determines that the defendant has made a prima facie showing that he is  
17 entitled to relief, the burden shifts to the prosecution to prove beyond a reasonable doubt that the  
18 petitioner is ineligible for resentencing. (Penal Code section 1170.95(d)(3); *People v. Rodriguez*  
19 (2020) 58 Cal.App.5th 227.)

20 **III. PETITIONER MAKES A PRIMA FACIE SHOWING THAT HE IS ENTITLED TO**  
21 **RELIEF AND THIS COURT SHOULD ISSUE AN ORDER TO SHOW CAUSE.**

22 This Petition fully complies with the dictates of the statute and makes a prima facie  
23 showing that Petitioner is entitled to have his conviction vacated. Petitioner is filing a petition to  
24 vacate his sentence which includes the required declaration stating that he is eligible for relief  
25 based on all of the requirements set out in section 1170.95(a). Petitioner also includes the  
26 superior court case number and year of conviction, and notes that Petitioner is not requesting the  
27 appointment of counsel.  
28

1 It must also be noted that based on the evidence presented at the preliminary hearing, it is  
2 clear that the prosecution proceeded against Petitioner under a felony murder theory and that he  
3 was convicted of first-degree murder. In this case, the record shows that Petitioner was involved  
4 in the robbery of Ameci Pizza, and that during the robbery, ██████████ was killed. It was never  
5 determined that Petitioner was the actual killer. In fact, the evidence pointed to ██████████ as  
6 the actual killer. **Ms. ██████████ a firsthand eyewitness who was working the pizza parlor the**  
7 **night of the incident, identified ██████████ as ██████████'s shooter.** (3 Prelim. Trans.  
8 19). Ms. ██████████ even picked out Petitioner as the other individual who was present during the  
9 robbery, but **indicated Petitioner was not the shooter.** (1 Prelim. Trans. 80-81).

10 Indeed, Petitioner allegedly told Detective ██████████ in his initial police interview that  
11 ██████████ had the .22 automatic and a backpack. (1 Prelim. Trans. 92). This corroborated Ms.  
12 ██████████ and co-defendant ██████████ allegations that ██████████, **not Petitioner, was carrying the**  
13 **sole gun** in some sort of bag. (1 Prelim. Trans. 79; 2 Prelim. Trans. 7). Co-defendant ██████████  
14 also told Detective ██████████ in his initial police interview that once ██████████ and Petitioner returned  
15 to the car after the robbery, ██████████ allegedly told ██████████ that he "had shot the pizza man  
16 because he did not move fast enough," and Petitioner "agreed that [██████████] had shot the pizza  
17 man." (2 Prelim. Trans. 8). ██████████ shared this information with ██████████ immediately after  
18 getting into the car, when the incident was still fresh. Detective ██████████ described it as, "**██████████**  
19 **and Petitioner] copped out right away ... they admit that ██████████] shot the pizza man."** (3  
20 Prelim. Trans. 15).

21 As a result of the facts above, it is clear Petitioner was not the actual shooter. The  
22 testimony and police statements provided by the witnesses, Petitioner, and co-defendant  
23 ██████████ concretely outlined the role of each player in this case: ██████████ was the getaway  
24 driver. Petitioner took part in the robbery and was unarmed. ██████████ was the armed robber killer.  
25 Even reading the facts in a light favorable to the prosecution, it is unquestionable that Petitioner  
26 did not shoot ██████████ Simply, Petitioner's involvement in the matter and the evidence that  
27 the shooting occurred during the commission of a robbery allowed the prosecution to instruct the  
28 jury that Petitioner could be found guilty under a theory of felony murder.

Accordingly, Petitioner makes a prima facie showing that the prosecution against  
Petitioner proceeded under a theory of felony murder where ██████████ was killed during the



1 commission of a robbery. Petitioner satisfies the requirements of Penal Code section  
2 1170.95(a)(1-2). The question then turns to whether Petitioner could be convicted of murder  
3 under the changes to Penal Code sections 188 and 189.

4 **a. Petitioner makes a prima facie showing that he was not the actual killer, and did**  
5 **not aid or abet with an intent to kill.**

6 Pursuant to Senate Bill 1437, liability for first degree murder is now limited. As  
7 discussed, to show that a defendant is liable for first-degree murder, the prosecution must prove  
8 either that the person was the actual killer, that he directly aided and abetted in the killing with  
9 the intent to kill the victim, or that he was a participant in an underlying felony and acted with  
10 reckless indifference to human life. Petitioner makes a prima facie showing that none of these  
11 criteria apply to his case.

12 First, there was no evidence that Petitioner was the actual killer or intended to kill  
13 anyone. The evidence only showed, beyond a reasonable doubt, Petitioner's intent to rob Ameci  
14 Pizza. ██████ asked Petitioner and co-defendant ██████ if they wanted to participate in a  
15 robbery. (1 Prelim. Trans. 91). Once Petitioner and ██████ entered Ameci Pizza, they waited for  
16 other customers to leave before initiating the robbery. (1 Prelim. Trans. 91-92). ██████ and  
17 ██████ both spoke during the commission of the robbery, and told ██████ to hurry up. (1  
18 Prelim. Trans. 79). When ██████ asked if they wanted checks, the individual with the gun  
19 [██████] told ██████ that he did not, and ██████ then shot ██████ in the chest. (1  
20 Prelim. Trans. 79). Clearly, both men intended to leave the scene of the robbery as quickly as  
21 possible. Petitioner did not expect or intend that the robbery would include potentially killing  
22 anyone. The total absence of evidence as to Petitioner's motivation for ██████ murder, and  
23 the fact that Petitioner was unarmed, precludes a finding that either Petitioner was the actual  
24 killer or that Petitioner intended for ██████ to kill ██████.

25 Based on the evidence presented at the preliminary hearing, it would have been  
26 impossible for the prosecution to prove beyond a reasonable doubt that Petitioner was the actual  
27 killer or that he directly aided and abetted ██████, with the intent that ██████ kill ██████.  
28 At this stage of the proceedings, this Court must accept Petitioner's factual allegations as true  
without engaging in fact-finding. Therefore, this Court should find that Petitioner has made a  
prima facie showing that he is entitled to resentencing.

1                   **b. Petitioner makes a prima facie showing that he was not a major participant**  
2                   **acting with reckless indifference to human life.**

3                   Petitioner was convicted in 1993, before *People v. Banks* (2015) 61 Cal.4th 788 and  
4 *People v. Clark* (2016) 63 Cal.4th 522 were decided. Petitioner also pleaded nolo contendere to  
5 the charges after the preliminary hearing. Therefore, there was no finding at a trial that Petitioner  
6 was a major participant acting with reckless indifference to human life.

7                   Pursuant to *Banks*, a defendant in a felony murder case is only eligible for a sentence of  
8 life imprisonment without parole if the evidence shows that the defendant demonstrated reckless  
9 indifference to human life and was “subjectively aware that his or her participation in the felony  
10 involved a grave risk of death.” The California Supreme Court ruled that prior to imposing a  
11 sentence of life imprisonment without the possibility of parole, “a sentencing body must examine  
12 the defendant’s personal role in the crimes leading to the victim’s death and weigh the  
13 defendant’s individual responsibility for the loss of life, not just his or her vicarious  
14 responsibility for the underlying crime.”

15                   In *Banks*, the Court ruled that a getaway driver was not a major participant and did not  
16 act with reckless indifference to human life and reversed the jury’s true special circumstances  
17 finding. In so holding, the *Banks* Court set forth a five-part test to determine whether a defendant  
18 is a “major participant” within the meaning of *Tison v. Arizona* (1984) 481 U.S. 137:

19                   What role did the defendant have in planning the criminal enterprise that led to one  
20 or more deaths? What role did the defendant have in supplying or using lethal  
21 weapons? What awareness did the defendant have of particular dangers posed by  
22 the nature of the crime, weapons used, or past experience or conduct of the other  
23 participants? Was the defendant present at the scene of the killing, in a position to  
24 facilitate or prevent the actual murder, and did his or her own actions or inaction  
25 play a particular role in the death? What did the defendant do after lethal force was  
26 used?

27                   Subsequently, in *People v. Clark, supra*, 63 Cal.4th 522, the California Supreme Court  
28 elaborated on the *Banks* decision. The Court held that even if a defendant is a major participant  
in a felony, the defendant cannot be sentenced to life imprisonment without parole unless the  
defendant exhibited a reckless indifference to human life. To determine whether a defendant  
exhibited a reckless indifference to human life, a court should look at a number of factors,  
including:

- 1 (1) The defendant's knowledge of weapons;
- 2 (2) The use and number of weapons;
- 3 (3) The defendant's proximity to the crime and opportunity to stop the killing or  
aid the victim;
- 4 (4) The duration of the offense conduct and "whether a murder came at the end  
5 of a prolonged period of restraint of the victims by defendant";
- 6 (5) The defendant's awareness that his confederate was likely to kill; and
- 7 (6) The defendant's efforts to minimize the possibility of violence during the  
8 crime.

9 In determining whether a defendant was a major participant acting with reckless  
10 indifference in a 1170.95 review, a court "cannot simply defer to the jury's pre-*Banks* and *Clark*  
11 factual findings that [the defendant] was a major participant who acted with reckless indifference  
12 to human life as those terms were interpreted at the time." (*People v. Torres* (2020) 46  
13 Cal.App.5th 1168, 1179, Accord. *People v. Tarkington* (2020) 49 Cal.App.5th 892; *People v.*  
14 *Smith* (2020) 49 Cal.App.5th 85.) This is because in *Clark* and *Banks*, the California Supreme  
15 Court construed the meanings of major participant and reckless indifference to human life "in a  
16 significantly different, and narrower manner than courts had previously." (*Torres, supra*, 46  
17 Cal.App.5th at p. 1179.) Therefore, the factual issues involved in the jury's pre-*Banks* and pre-*Clark*  
18 case "are not the same factual issues our Supreme Court has identified as controlling," and  
19 it would be "inappropriate" to treat the previous findings "as if they had resolved key disputed  
20 facts" when the jury did not have the same questions before them. (*Smith, supra*, 29 Cal.App.5th  
21 at p. 1179, citing *Torres, supra*, 46 Cal.App.5th at p. 1179.)

22 In this case, Petitioner pleaded nolo contendere to the charges after the preliminary  
23 hearing. Thus, a jury did not decide whether he was a major participant acting with reckless  
24 indifference as those concepts have been defined by the present law. Petitioner is not a major  
25 participant, and he did not act with reckless indifference to human life. Simply stated, the  
26 evidence did not point to Petitioner as the actual killer, and there was no evidence of any plan to  
27 kill [REDACTED]. There was no evidence that Petitioner was aware that [REDACTED] may have  
28 intended to kill [REDACTED]. There was no prolonged restraint of [REDACTED], and it appears from  
the record that the shooting likely happened in the heat of passion. Petitioner was unarmed, and  
[REDACTED] possessed the sole firearm. There was no evidence of Petitioner's efforts to minimize the

1 possibility of violence. Therefore, addressing the *Clark* factors, Petitioner makes a prima facie  
2 showing that he was *not* a major participant acting with reckless indifference to human life. It is  
3 also worth noting, and as mentioned above, that **Petitioner's co-defendant and getaway driver,**  
4 **[REDACTED], has already received relief under SB 1437 and been released from**  
5 **prison.**

6 Therefore, under *Drayton*, this Court must accept Petitioner's factual assertion that he  
7 was not. Accordingly, based on Penal Code section 1170.95, Petitioner makes a prima facie  
8 showing that he is entitled to relief. This Court must issue an order to show cause.

9 **CONCLUSION**

10 For all the reasons stated above, this court should issue an order to show cause, grant the  
11 Penal Code section 1170.95 petition to vacate petitioner's murder conviction.

12  
13 Dated: October 7, 2021

Respectfully submitted,

14 SPOLIN LAW P.C.

15  
16 By: [REDACTED]

Aaron Spolin  
Attorney for the Petitioner

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7 Attorney for Petitioner

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF LOS ANGELES**

10 THE PEOPLE OF THE STATE OF  
11 CALIFORNIA,

Superior Court Case No.; PA013483

12 Plaintiff/Respondent,

13 vs.

14 [REDACTED]  
15 Defendant/Petitioner.

16 **Declaration of** [REDACTED]

17 I, [REDACTED], declare as follows:

- 18 1. A complaint, information, or indictment was filed against me that allowed the  
19 prosecution to proceed under a theory of felony murder.
- 20 2. After my preliminary hearing, I pleaded nolo contendere to first-degree murder.
- 21 3. I could not now be convicted of first-degree murder because of changes made to  
22 Penal Code sections 188 and 189, effective January 1, 2019.
  - 23 a. I was not the actual killer.
  - 24 b. I did not, with the intent to kill, aid, abet, counsel, command, induce,  
25 solicit, request, or assist the actual killer in the commission of murder in  
26 the first degree.

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c. I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony.

d. The victim of the murder was not a peace officer in the performance of his or her duties.

4. I have retained counsel and am not requesting that this court appoint counsel for me during this re-sentencing process.

Dated: October 18, 2021



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**PROOF OF SERVICE**  
**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 11500 W. Olympic Blvd., Suite 400, Los Angeles, CA 90064.

On December 3, 2021, I served a true and correct copy of the within Petition to Vacate Murder Conviction and be Resentenced on Remaining Counts: Memorandum of Points and Authorities; and Declaration on the interested parties listed below in this action by transmitting to all interested parties a true copy thereof as follows:

Los Angeles County  
District Attorney's Office  
San Fernando Courthouse  
900 3rd Street  
San Fernando, CA 91340  
**Via USPS**

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings, and notices for mailing with the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 3, 2021, at Los Angeles, California.

  
\_\_\_\_\_  
Michael Alfi