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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY LEAVON CURTIS,

Defendant and Appellant.

B297665

(Los Angeles County  
Super. Ct. No. YA035642)

APPEAL from an order of the Superior Court of  
Los Angeles County. Edmund Willcox Clarke, Jr., Judge.  
Reversed and remanded for further proceedings.

Mark D. Lenenberg, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Thomas S. Patterson,  
Assistant Attorney General, Tamar Pachter and Nelson R.  
Richards, Deputy Attorneys General, for Plaintiff and  
Respondent.

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## INTRODUCTION

On September 30, 2018, the Governor signed Senate Bill No. 1437 (2018 Reg. Sess.) (S.B. 1437) in order to “amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) In addition to amending Penal Code sections 188 and 189,<sup>1</sup> S.B. 1437 also added section 1170.95, which created a procedure whereby a person whose felony murder conviction was final, but who could not have been convicted under the amended statutes, could petition to have the conviction vacated. (§ 1170.95, subd. (a).)

S.B. 1437 went into effect on January 1, 2019. (See Stats. 2018, ch. 1015, § 4.)

Following defendant and appellant Tony Leavon Curtis’s conviction for first degree murder and attempted second degree robbery, defendant filed a petition for resentencing pursuant to section 1170.95. The trial court denied his petition on the grounds that section 1170.95 is unconstitutional.

Defendant appeals, arguing that the trial court erred in finding section 1170.95 unconstitutional. The People agree that the trial court erred when it found S.B. 1437 unconstitutional. We agree with the parties. Accordingly, we reverse the judgment and remand the matter for further proceedings.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## PROCEDURAL BACKGROUND

Following a jury trial, on February 1, 1999, defendant was convicted of first degree murder under a felony murder theory and attempted second degree robbery. The jury found the felony murder special circumstance allegation to be not true. Defendant was sentenced to 25 years to life imprisonment.

Defendant timely appealed the judgment, and on December 12, 2000, we affirmed. (*People v. Curtis* (Dec. 12, 2000, B131733) [nonpub. opn.].)

On January 4, 2019, defendant filed a petition for resentencing pursuant to section 1170.95. He argued that because he was convicted of first degree murder pursuant to the felony murder rule and could not now be convicted of either first or second degree murder due to the changes made to sections 188 and 189 effective January 1, 2019, he was entitled to be resentenced pursuant to section 1170.95, subdivision (d)(2).

The prosecution opposed the petition, arguing that section 1170.95 is unconstitutional on the ground that it violates the separation of powers set forth in the California Constitution. The People did not dispute that defendant had made a prima facie showing of entitlement to relief.

Defendant filed a reply, pointing out that the People had failed to rebut defendant's prima facie showing that he was factually entitled to relief.

The People then filed a second opposition to defendant's petition, again on constitutional grounds. Specifically, the prosecution contended that (1) S.B. 1437 impermissibly amended two California initiatives (Propositions 7 & 115); (2) section 1170.95 violated article I, section 28, subdivision (a)(6), and article 29 of the California Constitution because it denied finality to victims of crimes and due process to the prosecution; and (3) section 1170.95 violated the separation of powers doctrine.

On April 17, 2019, the trial court issued an order to show cause. The prosecutor conceded that defendant “was convicted under a straight felony murder theory, and we have no evidence to contend he was the actual shooter or a substantial participant. So we would be conceding on those grounds, but object on the constitutionality of the amendment.”

After entertaining oral argument, the trial court found section 1170.95 unconstitutional and denied defendant’s petition on that ground. Specifically, the trial court found that section 1170.95 was “directly in conflict with Marsy’s Law” because the new statute violated victims’ right to finality.

This timely appeal ensued.

### **DISCUSSION**

Defendant argues that the trial court erred in finding S.B. 1437 unconstitutional. The People agree. In fact, “the Attorney General is providing a uniform defense of the law throughout the State.”

We agree that S.B. 1437 is constitutional and that Marsy’s Law does not provide a basis for invalidating section 1170.95.<sup>2</sup>

On November 4, 2008, California voters passed Proposition 9, the Victims’ Bill of Rights Act of 2008 (Marsy’s Law), amending article I, section 28 of the California Constitution to expand and protect victims’ rights. Article I, section 28, subdivision (a)(6), provides: “Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions . . . and the ongoing threat that the sentences of

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<sup>2</sup> In urging us to reverse, the parties offer several arguments in support of the constitutionality of section 1170.95. Because the trial court only relied upon Marsy’s Law in its ruling, we only address that theory here.

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.” (See also Cal. Const., art. I, § 28, subd. (a)(8) [providing that the laws relating to our criminal justice process be amended to protect victim rights].) Article I, section 28, subdivision (b), continues: “In order to preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to” certain rights, including, for example, the right to notice and opportunity to be heard at “parole or other post-conviction release proceedings” before prisoners obtain early release from prison. (Cal. Const., art. I, § 28, subd. (b)(7).)

Section 1170.95 does not violate Marsy’s Law. The enumerated victims’ rights set forth in the California Constitution entitle victims to notice of, and the ability to attend, certain hearings. (Cal. Const., art. I, § 28, subds. (b)(7)-(8).) They also entitle victims to “speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.” (*Id.* at subd. (b)(9).) But these provisions do not restrict legislative authority to create new postconviction procedures, such as the one set forth in section 1170.95. (See *Santos v. Brown* (2015) 238 Cal.App.4th 398, 404 [despite Marsy’s Law’s expansive protection of victims’ rights, it does not restrict the executive’s clemency powers].)

Admittedly, hearings pursuant to section 1170.95 may cause some suffering by adding a postconviction proceeding. But this is a lamentable, and inescapable, side-effect of postconviction relief generally. Nothing in Marsy’s Law absolutely guarantees that a murder conviction will never be revisited.

Having determined that section 1170.95 is constitutional, we turn to the merits of defendant’s petition. It appears that defendant successfully made a *prima facie* showing of entitlement

to relief. (§ 1170.95, subds. (a) & (b).) And, by conceding that there was no evidence that defendant was the actual shooter or a substantial participant in the underlying felony, it appears that the People stipulated to eligibility. (§ 1170.95, subd. (d)(2).) Thus, upon remand, the trial court shall vacate defendant's murder conviction and resentence defendant. (*Ibid.*; see also *People v. Ramirez* (2019) 41 Cal.App.5th 923, 933.)

### **DISPOSITION**

The order denying defendant's petition to vacate his murder conviction and for resentencing is reversed. The matter is remanded to the trial court with directions to grant the petition, vacate defendant's murder conviction, and resentence him on the remaining count.

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\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
HOFFSTADT