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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SEKOU KWANE THOMPSON,

Defendant and Appellant.

B296039

(Los Angeles County  
Super. Ct. No. A648471)

APPEAL from an order of the Superior Court of Los Angeles County, Allen J. Webster Jr., Judge. Reversed.

Robert H. Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Amanda V. Lopez and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Sekou Kwane Thompson comes before this court for the fourth time, now appealing the denial of his petition for resentencing pursuant to Penal Code section 1170.95. Thompson argues, Respondent concedes, and we agree that he made a prima facie showing entitling him to consideration of his petition by the trial court. We reverse.

### **FACTUAL AND PROCEDURAL SUMMARY**

Thompson was convicted of first degree murder (Pen. Code, §§ 187, 189)<sup>1</sup>, and related crimes in 1990. In 2014, following the decision of the California Supreme Court in *People v. Chiu* (2014) 59 Cal.4th 155, Thompson petitioned this Court for a writ of habeas corpus as to his conviction for first degree murder, on the ground that the jury had been instructed that it could convict Thompson of first degree murder either as an aider and abettor or as a co-conspirator under the natural and probable consequences doctrine. Because this Court found that the record did not establish that the jury based its verdict on a legally valid theory of first degree murder, we granted the writ and ordered the trial court, if the People did not elect to retry Thompson, to modify the judgment to reflect a conviction for second degree murder and to resentence him.<sup>2</sup>

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

<sup>2</sup> *In re Thompson* (2017) B270387. Thompson's conviction had been the subject of two prior appeals, *People v. Thompson* (1992) 7 Cal.App.4th 1966, and *People v. Thompson* (1994) 24 Cal.App.4th 299. Because each of the opinions contains a detailed narrative of the facts of the case, we do not repeat them here.

In 2018, the Legislature enacted Senate Bill 1437, which amended the definitions of malice and first and second degree murder and added section 1170.95 to the Penal Code, establishing a procedure for persons “convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have petitioner’s murder conviction vacated and to be resentenced.” (§ 1170.95, subd. (a).)

In January 2019, Thompson petitioned for resentencing and requested the appointment of counsel under section 1170.95. The trial court considered the petition without the parties present, and denied it, without stating any reasons. Thompson appealed.

## **DISCUSSION**

Section 1170.95 permits a petitioner, like Thompson, who had been convicted of first or second degree murder under a theory of felony murder or the natural and probable consequences doctrine, but who could not now be convicted because of the changes made to sections 188 and 189, to petition for resentencing. The statute provides that any such petition shall include:

“(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner’s conviction.

(C) Whether the petitioner requests the appointment of counsel.” (§ 1170.95, subd. (b)(1).)

After the petition is filed, the trial court must review the petition to determine whether the petitioner has made a prima facie showing that he or she falls within the statutory provisions and, if so and the petitioner has requested the appointment of counsel, shall appoint counsel.

The prosecution has 60 days to file and serve a response, to which the petitioner may reply within 30 days. (§ 1170.95, subd. (c).) Thereafter, if there is a prima facie showing that the petitioner is entitled to relief, the trial court must then issue an order to show cause and “hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner”; the burden of proof at that hearing is on the prosecution, which must prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. (§ 1170.95, subds. (d)(1), (d)(3).) Alternatively, the parties may stipulate that the petitioner is entitled to have his petition vacated and to be resentenced. (§1170.95, subd. (d)(2).)

Thompson asserts, the respondent concedes, and we agree that the petition satisfies the statutory requirements and establishes a prima facie case. Respondent has not stipulated to waive the hearing, however, and asserts that this court should only order appointment of counsel and briefing. As that is the relief Thompson requested, we reverse and remand for the appointment of counsel and briefing.<sup>3</sup>

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<sup>3</sup> Respondent does not concede that Thompson is entitled to resentencing, and argues that it can make a showing in its briefing that Thompson is ineligible. Thompson disagrees. Given the limited relief requested in the appeal, we decline to reach an issue not properly before this Court.

### **DISPOSITION**

The order denying the petition is reversed, and the matter remanded to the trial court. The trial court shall appoint counsel for Thompson, and thereafter, unless the parties waive hearing and stipulate to eligibility, proceed with briefing and further proceedings compliant with the statute.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.