

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

March 19, 2019

The Honorable Jorge E. Navarrete  
Clerk, California Supreme Court  
Supreme Court of California  
455 Golden Gate Ave., Ground Floor  
San Francisco, CA 94102

Please respond to:  
JOHN T. PHILIPSBORN  
Law Offices of J.T. Philipsborn  
507 Polk Street, #350  
San Francisco, CA 94102

Re: *People v. Martinez*, S254288 (31 Cal.App.5th 719; Court of Appeal, Second Appellate District, Div. 5, Case No. B287255; Los Angeles Superior Court Case No. NA095527) – **Petition for Review, in the Alternative Request for De-Publication of Decision of the Court of Appeal**

Dear Mr. Navarrete:

The Amicus Committee of the California Attorneys for Criminal Justice (CACJ) urges the California Supreme Court to grant review or to de-publish the above captioned Court of Appeal opinion. The Court of Appeal's conclusion that a defendant with a pending appeal of a murder conviction must pursue relief under SB 1437 in the Superior Court via Penal Code section 1170.95 violates the defendant's Sixth Amendment right to a jury trial as to proof, and or the existence, of malice aforethought, now a necessary element of virtually all murder convictions un Penal Code sections 188 and 189 as amended by SB 1437.

## **Identification of CACJ**

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the

RECEIVED

MAR 19 2019

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

improvement of “the quality of the administration of criminal law.” (Article IV, CACJ By Laws). CACJ’s membership consists of approximately 1700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions.<sup>1</sup>

## Interest of CACJ in Seeking Review of De-Publication

The Amicus Committee of the California Attorneys for Criminal Justice (CACJ) urges the California Supreme Court to grant review or to de-publish the above captioned Court of Appeal opinion. The Court of Appeal’s conclusion that a defendant with a pending appeal of a murder conviction must pursue relief under SB 1437 in the Superior Court via Penal Code section 1170.95 violates the defendant’s Sixth Amendment right to a jury trial as to proof, and or the existence, of malice aforethought, now a necessary element of virtually all murder convictions un Penal Code section 188 and 189 as amended by SB 1437.

CACJ is one of California's two largest professional organizations of criminal defense lawyers. CACJ has often appeared before this Court on matters of importance to the fair and orderly administration of justice in our criminal courts. CACJ has a particular interest in the issue presented here because it was among the organizations that had recommended review and revision of the doctrines and rulings that permitted convictions of murder without any finding of malice aforethought. SB 1437 was intended to preclude further convictions without a finding of malice (with certain limited exceptions) and to provide retroactive relief for those previously convicted of murder without a finding of malice.

As a result of its involvement in the efforts that brought about SB 1437, as well as because its members will be among those who will be litigating cases

---

<sup>1</sup> The undersigned Chair and Vice Chair of the CACJ *Amicus Curiae* Committee certify that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

under the provisions of the law, CACJ respectfully submits that it has an interest in ensuring the orderly development of procedures and legal doctrines related to the implementation of SB 1437.

## ARGUMENTS

The purpose of SB 1437 was to redefine the elements of murder to ensure that convictions, and associated sentencing, would be based on a degree of culpability commensurate with the seriousness of the crime. The Legislature found that “[i]t is necessary 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.” To implement this change in policy, the Legislature made two significant changes to the statutes defining the elements of murder.

First, the Legislature added a new subdivision (3) to the definition of malice set forth in Penal Code section 188. That new subdivision provides that except as set forth in new Penal Code section 189, subdivision (e) “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.”

Next, the Legislature added section 189, subdivision (e), which required proof as to the aider and abettor of a designated felony that the defendant either harbored the intent to kill, or 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.”

In short, after Senate Bill 1437, in order to obtain a conviction of murder for a defendant who did not kill, the state must prove either (1) the defendant aided the killer with an intent to kill or (2) there was a death during a felony enumerated in section 189 and the defendant was a major participant in the felony who acted with a reckless indifference to human life. Of course, since these are elements the

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

state must prove in order to convict a non-killer of murder, these elements must be proven beyond a reasonable doubt to a jury. *In re Winship* (1970) 397 U.S. 358.

The above captioned *People v. Martinez* properly recognized that because Senate Bill 1437 amended the elements of murder, the defendant was entitled to the benefit of that provision. However, *Martinez* erroneously concluded that appellant's sole remedy was to pursue in the trial court the same Penal Code section 1170.95 procedure that Senate Bill 1437 provided for defendants whose convictions were final. According to *Martinez*, where the appellate record fails to establish that the jury failed to find beyond a reasonable doubt the elements now required for conviction, the remedy is not an appellate reversal, but rather a remand where a single superior court judge is responsible for determining whether the prosecution can prove this requisite elements beyond a reasonable doubt.

The conclusion of the Court of Appeal in *Martinez* is not only inconsistent with the language of Senate Bill 1437, but it also violates the appealing defendant's Sixth Amendment right to a jury finding on each element of the offense. The vice of the *Martinez* mandatory remand procedure is that tasks that wrong entity – a superior court judge rather than a jury – to determine the defendant's defendant guilt. *Rose v. Clark* (1986) 478 U.S. 570, 578.

The fundamental flaw in *Martinez* is its untenable reliance on *People v. Conley* (2016) 63 Cal.4th 646, 661-62, which construed a distinctly different type of legislation – a punishment amelioration provision that did not purport to alter the elements of the underlying convictions. The Proposition 36 scheme under consideration entailed only a reduction of punishment, not the redefinition of the elements of the underlying offense – “There can be no doubt that the Reform Act was motivated in large measure by a determination that sentences under the prior version of the Three Strikes law were excessive.” 63 Cal.4th at 658.

The right of the legislature to structure remedial procedures for purely sentencing modifications does not have constitutional restrictions, apart from Eighth Amendment limitations. In contrast, a criminal defendant does have a

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

federal constitutional right to a jury trial as to every element of the offense.

*Martinez's* relegation of improperly convicted defendants with pending appeals to the Penal Code section 1170.95 Superior Court procedure violates that defendant's Sixth Amendment right to a jury trial.

*Martinez* obliquely referred to this issue but without addressing the federal constitutional basis of the right to jury trial.:

Defendant additionally argues his right to seek reversal of his conviction on direct appeal is supported by other cases in which the defendants were allowed to argue a conviction must be reversed on direct appeal due to a legislative change in the elements of a criminal offense. Both cases defendants cite in support of this argument involved changes to the substantive elements of the defendants' crimes before their sentences were final (*People v. Ramos* (2016) 244 Cal.App.4th 99 [197 Cal. Rptr. 3d 738]; *People v. Collins* (1978) 21 Cal.3d 208 [145 Cal. Rptr. 686, 577 P.2d 1026]), but neither involved a new or amended law that "modif[ied], limit[ed], or entirely forb[ade] the retroactive application of ameliorative criminal law amendments." (*Conley, supra*, 63 Cal.4th, at 656.) They are thus inapposite here. 31 Cal.App.5th, at 728.

Contrary to the flawed view of *Martinez*, *People v. Ramos* (2016) 244 Cal.App.4th 99, carefully complied with the Sixth Amendment when it addressed on direct appeal the retroactive effect of a legislative amendment to the elements of the conviction offense, and reversed the conviction and remanded in deference to the appellant's federal constitutional right to a jury trial:

After defendant was convicted, section 11352 was amended by adding subdivision (c), which now provides, "For purposes of this section, 'transports' means to transport for sale." Accordingly, transportation of heroin for personal use no longer constitutes a violation of section 11352. The practical effect of this amendment is that transportation of heroin for sale as opposed to personal use is now an element of the offense that must be decided by a jury by proof beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 510 [132 L.Ed.2d

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

444, 115 S.Ct. 2310]; *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869].)

Defendant contends, the People concede, and we agree, the amendment is retroactive and it applies to defendant. 244 Cal.App.4th, at 103.

Finally, *Martinez* incorrectly reduces to meaninglessness the express language of Penal Code section 1170.95(f) -- "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner". *Martinez* dismisses that plain language with a cursory reference to *Conley*, 63 Cal.4th at 661, see *Martinez*, 31 Cal.App.5th, 728-29. However, the appellant in *Conley* was attempting to claim an "automatic right to re-sentencing," not a settled constitutional right. The right to appellate review of the validity of a criminal conviction is a recognized constitutional right.

*Conley* addressed the Proposition 36 counterpart of Penal Code section 1170.95(f), found at Penal Code section 1170.126(k) -- "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant."

That being the case, section 1170.126, subdivision (k) cannot help defendant's argument. Subdivision (k) contains no indication that automatic re-sentencing--as opposed to, for example, habeas corpus relief--ranks among the "rights" the electorate sought to preserve. A careful reading of the statute points to the opposite conclusion: The voters authorized defendant and others similarly situated to seek re-sentencing under the recall provisions of section 1170.126, but they did not intend to confer a right to automatic re-sentencing under the amended penalty provisions of the Reform Act. 63 Cal.4th, at 662-63.

*Conley* itself cited habeas corpus as an example of an alternative remedy that was preserved by section 1170.126(k). Certainly the right to appeal under Penal Code section 1237 stands on equal statutory and constitutional footing to the right to petition for habeas corpus relief under Penal Code section 1473.

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

Appellate review of the constitutionality of the procedure by which the elements of the offense were determined is essential to ensure the Sixth Amendment right to a jury trial on each element of the offense.

*Martinez* has erroneously eradicated the right to appellate review by unfounded reliance on inapplicable precedent from this Court. This flawed opinion, and its progeny, e.g., *People v. Anthony* (2019) \_\_ Cal.App.5th \_\_, A139352 (March 8, 2019), should be eliminated as precedent.

## CONCLUSION

For all of the reasons stated here, CACJ respectfully urges this Court to find that review should be granted to address the issues framed by Petitioner and framed by CACJ here. In the alternative, the *Martinez* ruling and the *Anthony* ruling should be ordered de-published.

Respectfully submitted,  
STEPHEN K. DUNKLE, Chair  
JOHN T. PHILIPSBORN, Vice Chair



---

JOHN T. PHILIPSBORN  
State Bar No. 83944  
As Counsel for CACJ

Please respond to:

JOHN T. PHILIPSBORN  
Law Offices of J.T. Philipsborn  
507 Polk Street, #350  
San Francisco, CA 94102

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

## PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within documents entitled:

**LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR  
CRIMINAL JUSTICE IN SUPPORT OF PETITION REVIEW,  
IN THE ALTERNATIVE REQUEST FOR DE-PUBLICATION  
OF DECISION OF THE COURT OF APPEAL**

- (X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
- ( ) By electronically transmitting a true copy thereof;

Steven Schorr  
Law Office of Steven Schorr  
P.O. Box 1931  
Discovery Bay, CA 94505  
**Counsel for Petitioner Jose Angel  
Martinez**

Los Angeles County Superior Court  
Governor George Deukmejian  
Courthouse  
275 Magnolia  
Long Beach, CA 90802  
**Trial Court**

Thomas Chi-Fu Hsieh  
Office of the Attorney General  
300 South Spring Street  
Los Angeles, CA 90013  
**Counsel for the People: Plaintiff and  
Respondent**

California Court of Appeal  
Second District, Division 5  
Ronald Reagan State Building  
300 S. Spring Street  
2nd Floor, North Tower  
Los Angeles, CA 90013

# CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

---

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

Executed this 19<sup>th</sup> day of March, 2019, at San Francisco, California.

Signed:   
Melissa Stern