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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES RAMIREZ PROBUS,

Defendant and Appellant.

E072780

(Super.Ct.No. SWF003257)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Reversed with directions.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Lance E. Winters and Charles C. Ragland, Chief Assistant Attorney General, Julie L. Garland and Donald W. Ostertag,

Assistant Attorney General, Meredith S. White and Robin Urbanski, Deputy Attorneys General, for Plaintiff and Respondent.

In 2004, a jury convicted defendant of first degree murder (§ 187) and found as a special circumstance that the murder was committed while defendant was engaged in the crime of attempted robbery (§§ 190.2, subd. (a)(17)(A), 664, 211). In January 2019, defendant filed a petition pursuant to section 1172.6 of the Penal Code seeking vacation of his murder conviction and resentencing.<sup>1</sup> The trial court denied the petition and defendant appealed.

We affirmed the denial, finding a felony-murder special circumstance conclusively established ineligibility for relief under section 1172.6. (*People v. Probus* (Nov. 12, 2021, E072780 [nonpub. opn.]), citing *People v. Jones* (2020) 56 Cal.App.5th 474, 482, review granted Jan. 27, 2021, S265854, depublished and transferred with directions Sept. 28, 2022.) The case is again before us after the California Supreme Court granted review (case No. S272391), deferred briefing, and transferred the matter back to this court with directions to vacate our prior decision and to reconsider the cause in light of *People v. Strong* (2022) 13 Cal.5th 698 (*Strong*).

In post-remand briefing, defendant argues, and the People concede, that the trial court erred when it denied defendant's petition for failure to state a prima facie case. We

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<sup>1</sup> Defendant's petition was made pursuant to section 1170.95. That provision was renumbered as section 1172.6 without change in the text, effective June 30, 2022 (Stats. 2022, ch. 58, § 10). For the sake of simplicity, we refer to the provision by its new numbering. All further statutory references are to the Penal Code.

agree and will reverse with directions to the trial court to issue an order to show cause and hear the matter pursuant to subdivisions (c) and (d) of section 1172.6.

### **BACKGROUND**

In the wee hours of November 8, 2002, neighbors of Ronald Sommer (the victim) heard gunshots coming from the direction of the victim's residence. The following day, the victim was found dead in his home. Investigators believed he had been shot by someone on the front porch while he was standing inside the closed front door. A couple of weeks after the victim's death, defendant was in a car driven by his friend Sebastian Jeremy Martinez, who was driving erratically. When a deputy sheriff attempted to pull them over, Martinez led them on a high-speed chase that resulted in the arrest of both men. Defendant was charged with being a felon in possession of ammunition.

Defendant was still in custody on the possession charges in February 2003 when he wrote a letter to a sheriff's deputy offering to turn over information about a murder. The ensuing investigation revealed evidence of defendant's close friendship with Martinez and their plan to go to the victim's house to smack him around a little and take his money. When the two men left the home of defendant's girlfriend to carry out their plan, defendant was armed with a 20-gauge shotgun, and Martinez had a handgun. In the period between the victim's death and defendant's arrest, the girlfriend heard Martinez and defendant talk about which one of them shot the victim and accusing each other of the murder.

Defendant and Martinez were tried jointly but with separate juries. Defendant's jury convicted him of first degree murder (§ 187) and found as a special circumstance that the murder was committed while defendant was engaged in the crime of attempted robbery (§§ 190.2, subd. (a)(17)(A), 664, 211).

In August 2004, the trial court sentenced defendant to a life term in state prison without possibility of parole. Defendant appealed, and this court affirmed the judgment. (*People v. Probus* (July 30, 2008, E041799) [nonpub. opn.].)

On January 1, 2019, Senate Bill No. 1437 became effective. (Stats. 2018, ch. 1015.) That measure amended sections 188 (defining malice) and 189 (defining degrees of murder) to limit the reach of the felony murder rule in cases of first and second degree murder and to eliminate the natural and probable consequences liability for murder. (Stats. 2018, ch. 1015.) The bill also added section 1172.6, which creates a procedure for convicted persons who could not be convicted under the statutes as amended to retroactively obtain relief. (*Ibid.*)

As the result of the amendments brought about by Senate Bill No. 1437, persons who were not actual killers and did not act with the intent to kill cannot be held liable for murder unless they were major participants in the underlying felony and acted with reckless indifference to human life as defined in section 190.2, subdivision (d), the statute that defines special circumstance felony murder. (§ 189, subd. (e); *People v. Gentile* (2020) 10 Cal.5th 830, 842.)

In January 2019, defendant filed a petition pursuant to section 1172.6. The trial court appointed counsel and set a status hearing. At the hearing, the court announced it had reviewed its own records and concluded that the jury's true finding on the special circumstance allegation precluded Senate Bill No. 1437 relief as a matter of law. Defendant appealed.

### **DISCUSSION**

On appeal, defendant argues the dismissal was error for two reasons: (i) the court incorrectly found he was the actual killer, and (ii) the record of conviction does not support the court's conclusion that he was ineligible for section 1172.6 resentencing relief as a matter of law.

(i) The court did not find defendant was the "actual killer"

The record does not support defendant's argument that the court denied his petition on the grounds he was the actual killer.

His claim stems from the court's remarks made when reviewing the jury's findings at the status review hearing. It said, "[t]hey found not true the finding for committed during a burglary. I'm not going to read the exact wording of that. They also found true personal discharge of a firearm causing great bodily injury within the meaning of 12022.53, subdivision (d)." The court misspoke. The jury found defendant "did *not* personally and intentionally discharge[] a firearm and proximately cause[] great bodily injury or death to another person, not an accomplice, within the meaning of Penal Code

sections 12022.53, subdivision (d) and 1192.7, subdivision (c), subsection 8.” (Italics added.)

Although the record reflects the court misstated the jury’s finding as to the personal discharge of a firearm, it did not bottom the denial of defendant’s petition on a finding he was the actual killer. Rather, the court explained its decision as follows: “[G]iven the jury’s finding that the special circumstance was true, a predicate that... allows him to be charged with first degree murder under 1437 has been determined as a matter of law. For that reason, this petition is summarily denied.”

(ii) The trial court erred when it found the special circumstance finding necessarily precludes defendant from resentencing relief as a matter of law

We agree with the parties that reversal of the trial court’s denial of defendant’s resentencing petition is required.

After the trial court denied defendant’s petition and we affirmed that decision, our Supreme Court issued its opinion in *Strong, supra*, 13 Cal.5th 698. There, a jury had convicted a defendant of murder committed by his accomplice in the course of a robbery. (*Id.* at p. 703.) It also found defendant had been a “ ‘major participant’ who ‘acted with reckless indifference to human life,’ ” which are special circumstances set forth in subdivision (e)(3) of section 189 in which a participant in a certain felonies, including robbery, can be held liable for first degree murder. (*Strong*, at pp. 703, 704.) After Senate Bill No. 1437 became effective, the defendant petitioned the trial court for resentencing relief pursuant to section 1172.6. (*Strong*, at p. 709.) He argued the special

circumstances finding should not preclude him from making a prima facie showing of eligibility for relief because it was made before the Supreme Court provided substantial guidance on the meaning of “ ‘major participant’ ” and “ ‘reckless indifference to human life’ ” in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). (*Strong*, at p. 703.)

The Supreme Court agreed. (*Strong, supra*, 13 Cal.5th at p. 703.) It held that neither a “major participant” finding made before *Banks* was decided nor a “reckless indifference to human life” finding made prior to its opinion in *Clark* will defeat an otherwise valid prima facie section 1172.6 petition for resentencing. (*Strong*, at p. 721.)

Here, the trial court found defendant’s petition failed to state a prima facie case because the jury found he was a major participant and acted with reckless indifference to human life. The jury’s findings were made in 2004, many years before the Supreme Court’s 2015 decision in *Banks* and its 2016 decision in *Clark*. Accordingly, we reverse the trial court’s denial of defendant’s petition.

### **DISPOSITION**

The judgment is reversed with directions to issue an order to show cause pursuant to subdivision (c) of section 1172.6 and thereafter hold a hearing pursuant to subdivision (d) of that section.

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RAMIREZ

P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.