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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, **Plaintiff and Respondent,** **v.** **LOUIS SANCHEZ EMANUEL,** **Defendant and Appellant.**	**No. S_____** **Court of Appeal No. H049147** **(Superior Court No. C1246799)**

PETITION FOR REVIEW

On Appeal from a Judgment of the Superior Court of the State of California, County of Santa Clara Honorable Vanessa Zecher, Judge Presiding

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Under Appointment by the Court of Appeal
(Sixth District Appellate Program – Independent Case)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LOUIS SANCHEZ EMANUEL, Defendant and Appellant.	]]]]]]]]]	Case No. S_____ Court of Appeal No. H049147 (Santa Clara County Superior Ct. No. C1246799)

TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Appellant Louis Sanchez Emanuel hereby petitions this Honorable Court to review the unpublished decision of the Court of Appeal, Sixth Appellate District, filed in that court on May 12, 2023. A copy of the Court of Appeal's decision is attached as Exhibit A. The Court denied Emanuel's petition for rehearing on May 24, 2023.

ISSUE PRESENTED FOR REVIEW

I. Does an aider and abettor to a two-participant robbery act with reckless indifference to human life where he does not know the other participant is armed, leaves the scene and urges the other to do the same when the victim refuses to give up his property, and has already left when the other participant bludgeons and shoots the victim?

FACTUAL AND PROCEDURAL BACKGROUND

For the purpose of this petition, Emanuel adopts the facts and procedure set forth in the "Factual and Procedural Background" section of the Court of Appeal's decision. (Decision, pp. 2-9.) Additional relevant facts will be incorporated in the arguments which follow.

NECESSITY FOR REVIEW

I.

This Court should grant review to decide if an aider and abettor to a robbery acts with reckless indifference to human life when he does not know his accomplice has a gun and leaves the scene, while urging the armed participant to do the same, before the shooting happens.

A. Summary of argument

Louis Emanuel and Jacob Whitley committed a daytime robbery of a marijuana dealer at or near a public park. The dealer was in the driver seat of his truck when the robbery happened. Whitley had a gun but Emanuel did not know it. When the dealer unexpectedly refused to give up his property, Emanuel left and told Whitley to leave, as well. Afterwards, Whitley struck the dealer with his gun and fatally shot him. The prosecution presented no evidence that, after Emanuel left, he remained close enough to the ongoing confrontation to see and intervene in the escalating violence, see the dealer had been shot, or come to the dealer's aid.

The issue in this case is whether Emanuel's initial presence at the robbery scene provided sufficient basis for a finding of reckless indifference to human life, even though he urged Whitley to leave and personally walked away before the shooting. The trial court and Court of Appeal answered this question in the affirmative. This Court should grant review.

B. Background

The Court of Appeal took judicial notice of the records in two previous appeals, both cited in this petition. The first was Emanuel's original appeal – *People v. Whitley* et al., H043651. The second was *People v. Emanuel*, H047062 – a previous appeal arising out of these same Penal Code section 1172.6 proceedings. The Court of Appeal eventually dismissed Case No. H047062 as moot.

Within this petition, citations to the "ORT" or "OCT" refer to the record in Emanuel's original appeal. Citations to the previous petition appeal will be designated by the case number in that appeal – H047062. Unspecified record citations refer to the record in the present petition proceedings.

1. The December 11, 2012 robbery and shooting

In late December, 2012, Emanuel and Jacob Whitley arranged to buy a pound of marijuana from a dealer named John Cody S. ("Cody"). (6 ORT 480-483.) The sale was to take place around 2:30 or 3:00 p.m. on December 11, 2012, at or near Cherry Park in San Jose. (4 ORT 304-306; 6 ORT 521, 536.) In reality, the arranged sale was a ruse for an intended robbery.

During the robbery, Whitley shot Cody in the neck while Cody was in the driver seat of his pickup truck. (10 ORT 1080-1081; see 6 ORT 461-462.) The shot caused the truck to lurch violently backward, ejecting Cody out the front passenger door. (6 ORT 459-462.) Cody died of a single gunshot wound to the neck. (4 ORT 236, 256.)

Emanuel, Whitley, and Cody were the only witnesses to the actual robbery and none of them testified at trial. However, Emanuel and Whitley discussed the robbery with Emanuel's girlfriend, Breanna Santos. (10 ORT 1057-1058, 1068.) Santos later related their conversation to the police. (10 ORT 1054-1055, 1057-1058.)

Santos told police that, when Cody refused to give up the marijuana, Emanuel left while telling Whitley, "Let's go." (10 ORT 1078, 1080-1081.) After Emanuel began walking away, Whitley struck Cody in the head with the gun. (10 ORT 1078, 1081.) Cody fought back. (10 ORT 1078, 1081.) Whitley aimed the gun for his leg but Cody pushed it up and the shot struck him in the neck. (10 ORT 1078, 1081.) When Emanuel learned what had happened, he asked Whitley, "What the fuck you doing?" (10 RT 1082.) Emanuel "started panicking" and went home. (10 RT 1082.) No other facts are known about the robbery or about Emanuel's participation in that robbery.

In 2015, a jury found both Emanuel and Whitley guilty of "first degree felony murder." (3 OCT 821-822.) The jury also found that Whitley, and only Whitley, personally discharged a firearm resulting in death. (3 OCT 822.) The Court of Appeal affirmed in *People v. Whitley* et al., H043651.

2. Petition proceedings

Emanuel filed a petition to vacate his murder conviction under what is now Penal Code section 1172.6.[1] (1 CT [H047062]: 1-7.) The case proceeded to an evidentiary hearing, where the court based its ruling on the original trial record. (See 1 CT 197; Aug. RT [Dec. 16, 2020] ("Aug. RT"): 60.)

The trial court found Emanuel to be a major participant who acted with reckless indifference to human life. (1 CT 202, 210.) In doing so, it relied primarily on Emanuel's physical presence at the crime scene and failure to come to Cody's aid after the shooting. (1 CT 205-210; see also Aug. RT 43, 59.) The court found "no evidence that the [robbery] plan involved the use of a gun" (1 CT 204), or that Emanuel "knew Whitley was armed." (1 CT 198.) However, it found that Emanuel learned of the gun after

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[1] All statutory references are to the Penal Code.

Whitley pulled it out and struck Cody with it. (1 CT 205.) The court expressed the view that, once this happened, Emanuel still had time to prevent the shooting. (1 CT 205.)

The trial court also faulted Emanuel for failing to come to Cody's aid after the shooting despite being "immediately present." (1 CT 209-210.) During oral argument on the petition, the trial court called such actions "horrific" and "as bad as pulling the trigger." (Aug. RT 43, 59.)

The trial court posited that Emanuel may have been "motivated by a desire to . . . avoid criminal liability" when he urged Whitley to leave the scene. (1 CT 207.) At the hearing, the court remarked that Emanuel helped bring about the encounter at the park and he could not "wash[] [his] hands" of responsibility after Whitley disregarded his calls to leave. (Aug. RT 54.)

Emanuel did not challenge the major participation finding on appeal. He did, however, argue that there was no substantial evidence he acted with reckless indifference to human life. The Court of Appeal affirmed, citing Emanuel's "physical proximity to the crime and opportunities to restrain the crime as well as aid the victim." (Decision, p. 12.)

C. Review is necessary to clarify the circumstances in which an aider and abettor's physical presence at the crime scene weighs in favor of reckless indifference to human life.

This case presents an important question about the significance of physical presence at the crime scene in evaluating reckless indifference to human life in felony-murder cases. Relatedly, the case also poses important questions about what steps a physically present aider and abettor should take in order to prevent deadly violence or aid the victim – and thereby undercut the usual link between presence and reckless indifference. (See *People v. Garcia* (2020) 46 Cal.App.5th 123, 148 ["Presence at the scene of the murder is a particularly important

aspect of the reckless indifference inquiry"].) By granting review in Emanuel's case, this Court will have the opportunity to provide much-needed guidance on these issues.

Senate Bill No. 1437 (2017-2018 Reg. Sess.), which took effect on January 1, 2019, made substantial revisions to California's murder laws. (Stats. 2018, ch. 1015 (SB 1437).) The bill arose out of a legislative desire to make murder liability "commensurate with the culpability of the individual." (SB 1437, § 1, subd. (e).) A preamble to SB 1437 called it a "bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability." (SB 1437, § 1, subd. (d).)

SB 1437 took specific aim at vicarious liability theories like the felony-murder doctrine. Under the pre-2019 version of that doctrine, any participant in a statutorily enumerated felony became guilty of first degree murder if either he or an accomplice killed in the commission of that felony. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) The prosecution did not have to prove "intent to kill, or even implied malice, but merely an intent to commit the underlying felony." (*Ibid.*)

SB 1437 changed the felony-murder doctrine for those who do not personally kill. It did so by incorporating the "major participation" and "reckless indifference to human life" elements already required for a felony-murder special circumstance finding against a defendant who was not the actual killer. (*People v. Harris* (2021) 60 Cal.App.5th 939, 954; see §§ 189, subd. (e); 190.2, subd. (d).) The phrases "major participation" and "reckless indifference to human life" have the same meaning under the revised felony-murder statute as they do under section 190.2, subdivision (d). (§ 189, subd. (e)(3).)

Reckless indifference to human life requires subjective awareness of a risk to life, above and beyond that inherent to the

underlying felony. (*People v. Banks* (2015) 61 Cal.4th 788, 808 (*Banks*).) The concept entails "a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*People v. Clark* (2016) 63 Cal.4th 522, 617 (*Clark*).) In *Clark*, at pp. 618-622, this Court identified five factors a court or jury should consider when assessing reckless indifference to human life: (1) knowledge of weapons, use of a weapon, and the number of weapons used; (2) physical presence at the crime scene and opportunities to prevent the shooting or aid the victim; (3) the duration of the felony; (4) the defendant's knowledge that his accomplice would likely kill; and (5) the defendant's attempts to minimize violence during the crime.

Here, Emanuel did not use or possess a weapon and the trial court found no proof that he knew Whitley to be armed. (1 CT 198, 204; see also Decision, p. 12 ["we conclude there was no evidence . . . that, prior to the robbery, Emanuel knew Whitley possessed a gun, would bring that gun to the robbery, or 'was likely to use lethal force'"].) It follows that Emanuel could not have known the incident would end with deadly violence. In fact, Emanuel made attempts to minimize violence by planning the robbery for "a public [park] during the daytime, when the possible presence of witnesses might reasonably be thought to keep [Whitley] within the bounds of the plan." (*In re Scoggins* (2020) 9 Cal.5th 667, 683 (*Scoggins*).) Although the duration of the robbery is unknown, the evidence showed that, when Cody refused to give up the pound of marijuana, Emanuel walked away and urged Whitley to do the same. (10 ORT 1078, 1081.)

The trial court found reckless indifference to human life based primarily on Emanuel's presence at the crime scene and his failure to prevent the shooting or come to Cody's aid. (See 1 CT 206-207.) The two factors are closely related, since physical

proximity to the crime is the very feature which potentially enables an aider and abettor to calm the escalating violence or aid the victim. That is precisely what this Court said in *Clark* – explaining that a defendant's physical presence at the scene "allows him to observe his cohorts" and "act as a restraining influence" when the potential for deadly violence becomes apparent. (*Clark*, *supra*, 63 Cal.4th at p. 619.) If he fails to do so, he "is arguably more at fault for the resulting murders." (*Ibid.*)

But what if the aider and abettor **does** use his physical presence to try to act as a restraining influence by urging his accomplice to leave and then leaving himself – thus, signaling his desire to opt out of an encounter which has become unforeseeably fraught with danger? Are such actions enough to prevent a finding of reckless indifference to human life or, at the very least, to prevent an adverse inference based on physical proximity to the crime scene? And what if the deadly violence occurs only after the aider and abettor has already left the scene – with no affirmative evidence he was in position to see or prevent it? May the fact-finder still rationally infer that the aider and abettor had sufficient opportunity to intervene and failed to do so? Those are precisely the questions presented by this case.

By focusing only on Emanuel's physical presence, and ignoring Emanuel's departure from the scene and his attempts to restrain Whitley while he was still there, the trial court and Court of Appeal decoupled the fact of physical presence from the very circumstances which make it indicative of reckless indifference. In the process of doing so, they endorsed a virtual per se rule that physical presence, alone, supports a finding of reckless indifference – even when every other factor weighs against such a finding. Such an outcome cannot be reconciled with this state's jurisprudence.

In *Clark*, the aider and abettor was the "mastermind" of a computer store robbery which called for the employees to be handcuffed at the point of an unloaded gun. (*Clark*, *supra*, 63 Cal.4th at pp. 536, 612-613.) The aider and abettor acted as getaway driver, waiting just outside the store in the parking lot and driving off quickly after the unexpected shooting. (*Id.* at pp. 536-537.) Despite his close proximity to the crime, this Court pointed out that there was no evidence he could see what had happened or was in position to prevent the killing. (*Id.* at pp. 619-620.) The Court ultimately discerned no basis for a finding of reckless indifference to human life. (*Id.* at p. 623.)

Other, more recent, cases have found reckless indifference to human life lacking despite the defendant's physical presence at, or very close to, the crime scene. (*In re Ramirez* (2019) 32 Cal.App.5th 384, 404; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 989; *People v. Keel* (2022) 84 Cal.App.5th 546, 560 (*Keel*); *People v. Guiffreda* (Jan. 3, 2023) 87 Cal.App.5th 112, 126-127 (*Guiffreda*).) The decisions in *Keel* and the two *Ramirez* cases are especially instructive.

In re Ramirez, *supra*, 32 Cal.App.5th at p. 404, involved a fatal shooting in response to the victim's unanticipated resistance during a robbery. The defendant "was in close proximity to the shooting" – possibly "only feet away," but with cars parked between the two locations. (*Id.* at p. 405.) In such circumstances, the Court of Appeal found no basis for inferring the defendant was "close enough to exercise a restraining effect on the crime or his colleagues." (*Ibid.*)

In *People v. Ramirez*, *supra*, 71 Cal.App.5th at pp. 976-979, one gang member came to a vehicle's driver side window and fatally shot him, while Ramirez and another gang member stood at the vehicle's passenger side window. The Court of Appeal found that, despite his presence, Ramirez had no "meaningful

opportunity" to intervene since the shooting occurred on the other side of the vehicle. (*Id.* at p. 989.)

In *Keel*, *supra*, 84 Cal.App.5th at pp. 552-553, the victim was shot to death during a robbery in which Keel and another man both brandished guns. (*Id.* at p. 553.) The trial court found reasonable doubt whether Keel was the shooter, but found him to be a major participant who acted with reckless indifference to human life. (*Id.* at pp. 554-555.) The Court of Appeal reversed the latter finding, observing that Keel had little opportunity to restrain his accomplice since the decision to shoot arose quickly and in response to "unexpected resistance." (*Id.* at p. 560.)

On the other hand, an aider and abettor's physical presence may take on more significance when that presence enables him to see the increasing risk of violence and take steps to rein it in. Indeed, the decision in *Clark* said just this. It was not physical presence, per se, which this Court identified as a factor indicative of reckless indifference. It was "Physical Presence at the Crime and Opportunities to Restrain the Crime and/or Aid the Victim." (*Clark*, *supra*, 63 Cal.4th at p. 619, original capitalization.) The same is true in the context of major participation, where this Court asks: "Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death?" (*Banks*, *supra*, 61 Cal.4th at p. 803.)

Physical presence may also loom large when coupled with personal use of a weapon or participation in a crime with a "particularly high risk of violence." (*In re McDowell* (2020) 55 Cal.App.5th 999, 1013 (*McDowell*).) *McDowell*, for instance, upheld a finding of reckless indifference where the aider and abettor personally possessed a knife and participated in an unusually high-risk crime – a home invasion robbery of a methamphetamine dealer at 3:00 a.m. (*Id.* at pp. 1005, 1013-

1014.) While inside the home, the actual killer fired a warning shot "a few seconds" before the fatal one. (*Id.* at p. 1005.) The Court of Appeal characterized the case for reckless indifference as "close to the line." (*Id.* at p. 1015.) However, the court deemed it significant that, in between the warning shot and the fatal shot, the aider and abettor had a "brief but critical opportunity . . . to say or do something to deescalate the situation." (*Id.* at p. 1014.) Instead, he did nothing. (*Ibid.*)

Similarly, in *People v. Bradley* (2021) 65 Cal.App.5th 1022, 1026-1028 (*Bradley*), the two defendants, plus a third man, all drew guns during an attempted robbery of a man and a woman inside a car. When the male victim reached for his own gun, one of the defendants shot him. (*Id.* at pp. 1027-1028.) In finding reckless indifference, the Court of Appeal pointed out that the two defendants both displayed guns and "did not flee or alter their plans" even after it became apparent that the victim was armed. (*Id.* at pp. 1033-1034.)

In *People v. Mitchell* (2022) 81 Cal.App.5th 575, 580 (*Mitchell*), Mitchell and his brother held up the driver of a car as he pulled out of a fast food drive-through line. During the robbery, the brother shot the driver five times. (*Id.* at p. 581.) The first shot or shots came after the driver refused to turn over the money. (*Ibid.*) The others came after the car drove away. (*Ibid.*) Citing Mitchell's inaction between the two rounds of shots, the Court of Appeal found substantial evidence of reckless indifference. (*Id.* at p. 593.) Among other things, the court noted that Mitchell "had the chance to tell his brother to stop the shooting. He could have tried to call off the plan. Or he could have fled the scene." (*Ibid.*)

The decision in *Mitchell* drew a sharp dissent from Presiding Justice Stratton, who accused the majority of making unsupported factual inferences based on a scant record. (*Mitchell*,

supra, 81 Cal.App.5th at p. 596, fn. 1 [dis. opn. of Stratton, P.J.].) That scant record contained no evidence that Mitchell was armed, knew his brother had a gun, or knew of his brother's violent history. (*Id.* at pp. 596-598 & fn. 1.) While Justice Stratton acknowledged Mitchell's presence at the crime scene, she emphasized that Mitchell was "some distance away," did not see the shooting, and "was not in a position to restrain his brother." (*Id.* at pp. 598-599.) She also noted that the shooting was a "spontaneous reaction to victim resistance as opposed to a planned part of the robbery." (*Id.* at p. 599.)

The split decision in *Mitchell* highlights the difficulties which this state's tribunals have had in evaluating the impact of physical presence on the reckless indifference to human life calculus. Emanuel's case, however, included none of the factors present in cases like *McDowell*, *Bradley*, and *Mitchell*. By contrast, it did include many of the factors present in *Clark*, *Scoggins*, *Keel*, and the two *Ramirez* cases.

The robbery in this case did not involve a late-night home invasion or an armed victim. Rather, Emanuel set out to commit a "garden-variety robbery" in a public place in broad daylight. (*McDowell*, *supra*, 55 Cal.App.4th at p. 1011; 6 RT 536.) There was no evidence that Emanuel had a weapon, knew of Whitley's gun, or knew Whitley had a propensity for violence. (1 CT 204.) He also had no reason to believe that Cody would resist the robbery attempt. (See *In re Taylor* (2019) 34 Cal.App.5th 543, 558 (*Taylor*).) Unlike in *McDowell*, Whitley fired no warning shot which might have alerted Emanuel to not only the gun's presence but also Whitley's willingness to use it.

Perhaps most importantly, Emanuel left the scene, and urged Whitley to do the same, when it became apparent to him that the robbery was not going as planned. (10 ORT 1078, 1081.) Importantly, Emanuel walked away before Whitley struck Cody

with the gun and shot him. Emanuel's statements to Breanna Santos (as later recounted to the police) constituted the sole evidence regarding the chronology of events. In those statements, Emanuel said that, when Cody refused to give up the marijuana, Emanuel left and told Whitley "let's go" – only for Whitley to strike Cody with the gun "when I was walking away." (10 ORT 1078, 1081.) Afterwards, Whitley shot Cody. (10 ORT 1078.) When Emanuel learned what had happened, he scolded Whitley for his actions – asking, "What the fuck you doing?" (10 RT 1082.)

The trial court accorded little significance to Emanuel's departure from the scene or his plea for Whitley to leave. In its written decision, the court speculated that Emanuel may have been "motivated by a desire to . . . avoid criminal liability" when he urged Whitley to leave the scene. (1 CT 207.) It made similar remarks at the hearing – commenting that Emanuel helped plan out the entire robbery only to say "I'm washing my hands now," after Whitley refused to leave. (Aug. RT 54.)

The court's comments constituted both pure speculation and a misunderstanding of current felony-murder law. After SB 1437, Emanuel had no need to "wash his hands" of legal responsibility for a future killing which he did not commit, intend, or foresee. (Aug. RT 54.) Instead, the law presumes he bore no criminal liability for that killing; it fell on the prosecution to prove otherwise by showing major participation and reckless indifference to human life. Far from signaling an intent to evade responsibility for a crime which he never intended, and which had not yet happened, Emanuel's departure signaled that he did not wish to participate in a potentially more serious crime beyond the scope of his original plan.

Even if the court's speculation was correct – and Emanuel walked away out of a desire to avoid further criminal liability (1 CT 207) – what difference does it make? If an aider and abettor

walks away from a potentially violent encounter, he has not exhibited "a willingness to kill (or to assist another in killing) to achieve a distinct aim." (*Clark*, *supra*, 63 Cal.4th at p. 617.) The law does not care whether this unwillingness to kill stemmed from religious conviction or pure self-interest.

Emanuel's mid-crime departure – and his exhortation for Whitley to do the same – set him apart from the aiders and abettors in *McDowell*, *Bradley*, and *Mitchell*. Unlike McDowell, Emanuel did "say or do something to deescalate the situation" as soon as he sensed that it had become more fraught with danger. (*McDowell*, *supra*, 55 Cal.App.5th at p. 1014.) Unlike the defendants in *Bradley*, Emanuel did "flee [and] alter [his] plans" when Cody refused to give up the marijuana. (*Bradley*, *supra*, 65 Cal.App.5th at p. 1034.) And, unlike Mitchell, Emanuel did flee the scene and "tr[y] to call off the plan." (*Mitchell*, *supra*, 81 Cal.App.5th at p. 593.)

Despite these facts, the trial court found that Emanuel would have learned of the gun after Whitley used it to strike Cody and then shoot him. (1 CT 206.) The Court of Appeal expressed the view that, even before Emanuel left, he would have seen the beginning of a struggle after Cody refused to give up the marijuana. (Decision, p. 13.) Both courts concluded that these events gave Emanuel "at least a brief window of opportunity" to try to step in and prevent the eventual shooting. (Decision, p. 13; see also 1 CT 206.) The record does not support this conclusion.

Contrary to the Court of Appeal's belief, Emanuel's statement to Breanna Santos did not show that any physical struggle broke out before Emanuel walked away. It merely showed that Cody "wasn't trying to give it up" – that is, he did not want to give up the pound of marijuana. (10 ORT 1078, 1081.) Emanuel did not elaborate on whether the refusal entailed a physical struggle or merely an oral statement by Cody that he

would not turn over the marijuana. In fact, Emanuel did not even say whether Whitley had already produced the gun at this time, or whether the gun came out only after Emanuel had left.

Likewise, there was no evidence which spoke to Emanuel's ability to see the ongoing fracas after he walked away. The record did not show how soon after Emanuel's departure the bludgeoning and shooting took place. Nor did it show how far away Emanuel had walked, whether he had turned a corner or returned to the car, or whether he was even looking in Cody and Whitley's direction. Besides, even if Emanuel was still nearby and looking in the correct direction, his view would have been obstructed since the shooting took place inside Cody's truck. (5 ORT 369; 6 ORT 461-462; see *Scoggins*, *supra*, 9 Cal.5th at pp. 678-679 [victim's van "would have blocked Scoggins's view" of the confrontation].) Emanuel's account to Santos suggested that he did not actually see the shooting for, while relating the events, he repeatedly used the phrase "Jacob said." (10 ORT 1078, 1081.)

"A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*People v. Herrera* (2006) 136 Cal.App.4th 1191, 1205.) With no facts established about how far away Emanuel had walked, or his ability to see inside the truck, the trial court had no basis for inferring that he actually saw Whitley hit Cody with the gun and shoot him.

The trial court had even less basis for inferring that Emanuel possessed the ability to meaningfully restrain the escalating violence, above and beyond his call for Whitley to leave. The court's inference again rested on unsupported speculation about Emanuel's continuing proximity to the scene and his ability to see and intervene despite the physical barrier of Cody's truck. (See *People v. Ramirez*, *supra*, 71 Cal.App.5th at p. 989.) Furthermore, the trial court overlooked the sudden and

unexpected nature of Cody's resistance, which gave Emanuel little opportunity to inject himself into the struggle. (*In re Ramirez*, *supra*, 32 Cal.App.5th at p. 404; *Keel*, *supra*, 84 Cal.App.5th at p. 560.)

In any event, even if Emanuel remained close enough to the struggle to intercede, there is nothing he could realistically do which he had not already done. The Court of Appeal suggested the possibility of trying to disarm Whitley. (Decision, p. 12.) But that is exactly the mistake which Cody made, with tragic consequences. (10 ORT 1078, 1081.) The risk of a similar tragedy would not have been any less if Emanuel had been the one to grab the gun. Even those cases which have upheld findings of reckless indifference have never proposed that the aider and abettor should try to wrest away the gun from an armed accomplice.

In re Loza (2017) 10 Cal.App.5th 38, 54 (*Loza*), suggested several possible actions which an aider and abettor may reasonably be expected to take when a fellow perpetrator is becoming increasingly threatening or aggressive. *Loza*'s suggested actions did not include trying to disarm an accomplice who is holding a gun. They did, however, include yelling at the perpetrator to stop, demanding that the group leave, or distracting or attempting to calm the perpetrator. (*Ibid.*) In *Loza*, the aider and abettor did none of these things, despite a five-second window to do so. (*Ibid.*) As a result, the Court of Appeal found reckless indifference to human life. (*Ibid.*)

In this case, the trial court not only cited *Loza* throughout its written decision, but specifically included *Loza*'s list of suggested actions. (1 CT 206-207, citing *Loza*, *supra*, 10 Cal.App.5th at p. 54; see also 1 CT 201-203, 206.) The Court of Appeal also cited *Loza* for its holding that five seconds gave the aider and abettor sufficient time to intervene. (Decision, p. 13.) The courts' reliance on *Loza* was ironic, given that Emanuel

actually did some of the very things which the *Loza* court faulted the defendant in that case for not doing. Most obviously, Emanuel demanded that he and Whitley leave and implicitly told Whitley to stop by saying "let's go." (10 ORT 1081.) He also potentially created a distraction by immediately walking away from the ongoing robbery. (10 ORT 1078, 1081.)

Finally, the trial court placed considerable weight on the fact that Emanuel failed to come to Cody's aid after the shooting. (1 CT 209-210.) During the hearing, the court characterized this failure as "horrific" and equivalent to "pulling the trigger." (Aug. RT 43, 59.) But the trial court had no basis for inferring that Emanuel knew Cody had been hit by the bullet, recognized that he was badly injured, and was in position to render aid. (1 CT 209-210.) Again, the court's inference rested on the assumption that Emanuel remained "immediately present" even after walking away. (1 CT 210.) The evidence provided no way to know if this was true.

Furthermore, the court's comments at the hearing again revealed a significant misunderstanding of the changes effected by SB 1437. If the Legislature regarded a failure to come to the victim's aid as the equivalent of "pulling the trigger" (Aug. RT 59), there would have been no reason to revamp this state's felony-murder statute. The old statute already accorded identical legal treatment to the triggerman and all aiders and abettors – including those at the scene who failed to come to the victim's aid.

If failing to aid the victim were the legal equivalent of "pulling the trigger" (Aug. RT 59), there would almost never be an aider and abettor who escaped felony-murder liability. The case law has recognized that such a result is not what the Legislature intended when it enacted SB 1437. At least one court has squarely held that "a defendant's actions *after* a murder betraying an indifference to the loss of life does not, standing

alone, establish that the defendant knowingly created a grave risk of death." (*Taylor*, *supra,* 34 Cal.App.5th at pp. 546-547, original emphasis.) Multiple other cases have found reckless indifference wanting even where the defendant left the scene without aiding the fallen victim. (*Clark*, *supra*, 63 Cal.4th at pp. 619-620; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1025-1026; *In re Ramirez*, *supra*, 32 Cal.App.5th at pp. 390-391, 406; *People v. Ramirez*, *supra*, 71 Cal.App.5th at p. 989; *Guiffreda*, *supra*, 87 Cal.App.5th at p. 127.)

If Emanuel's conduct in this case was sufficient to show reckless indifference to human life, it is difficult to imagine any physically present aider and abettor who would ever escape felony-murder liability. That is not at all consistent with the "bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability." (SB 1437, § 1, subd. (d).) For these reasons, this Court should grant review to clarify the circumstances in which physical presence may bear on reckless indifference to human life, and to provide important guidance about what a physically present aider and abettor must do in order to rebut the adverse inference which his presence creates.

Should this Court decline to grant full review, Emanuel alternatively requests that it grant review and transfer this case back to the Court of Appeal with directions to reconsider in light of: (1) the evidence (or lack thereof) about Emanuel's ability to see or intervene in the ongoing struggle; and (2) the discussion in *McDowell*, *Loza*, *Bradley*, and *Mitchell* about the type of conduct which a physically present aider and abettor should take when an ongoing felony turns increasingly violent.

LEGAL DISCUSSION

I.

Emanuel's murder conviction violates the Fourteenth Amendment's due process clause, as there was no substantial evidence he acted with reckless indifference to human life.

A conviction violates the Fourteenth Amendment's due process clause where "no rational trier of fact could find guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 (*Jackson*).) In assessing whether this is so, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) On appeal following a section 1172.6 petition proceeding, a challenge to the sufficiency of the evidence is subject to this same substantial evidence standard. (*People v. Nieber* (2022) 82 Cal.App.5th 458, 476.)

Although section 1172.6 petitions arise in a state-created post-conviction context, there is no logical reason why they should not be subject to the Fourteenth Amendment due process principles articulated in *Jackson*. After all, the entire point behind section 1172.6 was to allow convicted defendants to re-litigate their murder liability under current law – at least as to issues not already decided at the original trial. (*People v. Strong* (2022) 13 Cal.5th 698, 714-715.) If due process sufficiency of the evidence principles did not apply following a section 1172.6 hearing, a defendant like Emanuel would be denied his fundamental right to challenge all elements of his murder conviction by a federal habeas petition.

For the reasons discussed in Argument (I)(C), *supra*, at pp. 9-22, of the Necessity for Review section, there was no substantial evidence that Emanuel acted with reckless indifference to human life. Accordingly, his murder conviction violates the Fourteenth Amendment's due process clause and must be reduced to second degree robbery. (See also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [state court's arbitrary disregard of state law violates Fourteenth Amendment's due process clause].)

CONCLUSION

For all of the foregoing reasons, this Court should grant review in this matter. Alternatively, this Court should grant review and transfer this case to the Sixth District Court of Appeal with orders to reconsider its decision in light of: (1) the lack of evidence about Emanuel's ability to see or intervene in the ongoing struggle; and/or (2) the discussion in *McDowell*, *Loza*, *Bradley*, and *Mitchell* about the actions an aider and abettor may reasonably be expected to take in order to prevent an adverse inference based on his physical presence at the crime scene.

DATED: June 20, 2023

Respectfully Submitted,

/s/ Solomon Wollack
SOLOMON WOLLACK
Attorney for Appellant
Louis Sanchez Emanuel

WORD COUNT CERTIFICATE
(Cal. Rules of Court, rule 8.504(d)(1))

I Solomon Wollack, appointed counsel for Louis Sanchez Emanuel, hereby certify, pursuant to rule 8.504(d)(1) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 5,934 words, which does not include the tables, the Court of Appeal's opinion, or this certificate. The petition therefore complies with rule 8.504(d)(1), which limits a petition for review to 8,400 words. I certify that I prepared this document in Wordperfect 21 and that this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Pleasant Hill, California on this 20th day of June, 2023.

By: /s/ Solomon Wollack
Solomon Wollack

EXHIBIT A

(Court of Appeal's May 12, 2023 Decision)

Filed 5/12/23 P. v. Emanuel CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS SANCHEZ EMANUEL, Defendant and Appellant.	H049147 (Santa Clara County Super. Ct. No. C1246799)

In 2015, a jury convicted Louis Sanchez Emanuel and his codefendant, Jacob Craig Whitley, of first-degree felony murder (Pen. Code, § 187, subd. (a)).[1] The trial court sentenced Emanuel to an indeterminate term of 25 years to life.

Emanuel filed a petition for resentencing under section 1172.6, alleging that his crime no longer constituted first degree murder under 2018 amendments to the felony murder law (Stats. 2018, ch. 1015, § l, subd. (f); § 189, subd. (e)(3)).[2] Following an evidentiary hearing, the trial court denied Emanuel's petition after finding that he was a major participant in the underlying crime and acted with reckless indifference to human life.[3] On appeal, Emanuel challenges the sufficiency of the evidence to support the trial court's findings. We affirm.

[1] Unspecified statutory references are to the Penal Code.

[2] Emanuel initially filed his petition under former section 1170.95. Effective June 30, 2022, former section 1170.95 was renumbered to 1172.6 without substantive change. (Stats. 2022, ch. 58, § 10.) For clarity, we refer to the statute as section 1172.6.

[3] Emanuel's petition for resentencing was heard by the same judge who presided over his trial.

I. FACTUAL AND PROCEDURAL BACKGROUND[4]

A. Procedure

On April 15, 2015, the Santa Clara County District Attorney filed a second amended information charging Emanuel and Whitley with one count of first degree murder (§ 187, subd. (a); count 1).[5] After a trial, a jury convicted both men of first degree felony murder and found true the allegations that Whitley personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)). In a bifurcated proceeding, the trial court found true Whitley's prior strike conviction and prior serious felony conviction allegations. The trial court sentenced Emanuel to 25 years to life in prison.[6]

B. Facts

1. The prosecution case

Mansour Amini and John Cody S.[7] were friends who exercised and smoked marijuana together. Cody also sold marijuana to Amini numerous times.

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[4] This court granted Emanuel's requests for judicial notice of the trial record and this court's opinion in Emanuel's direct appeal, *People v. Whitley et al*. (H043651 (Nov. 22, 2019) [nonpub. opn.] (*Whitley*)), as well as the records in Emanuel's appeals from the trial court's earlier denial of his petition for resentencing in *People v. Emanuel*, H047062 and H047347. After the trial court granted Emanuel's petition for resentencing, we dismissed the appeals in H047062 and H047347 as moot.

We observe that both parties here rely on the factual summary contained in our prior opinion in *Whitley*. We derive our recitation of the procedural history of this case from our prior opinion, but our factual recitation is based on the trial transcripts. (See *People v. Clements* (2022) 75 Cal.App.5th 276, 292 (*Clements*).)

[5] The operative information further alleged that Whitley personally used a firearm in the commission of the offense, resulting in the victim's death, and also that Whitley had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)).

[6] The trial court sentenced Whitley to a total term of 80 years to life.

[7] To protect the victim's privacy, we first refer to him by his given name and the first initial of his surname. In the rest of the opinion, we refer to the victim as Cody, the name used to identify him at trial. (See Cal. Rules of Court, rule 8.90(b)(4).)

About two weeks before Cody was shot, Amini was at the community college he attended, when Emanuel and Whitley approached him. Amini had never seen either man before.[8] After initially saying they were thinking of enrolling, Emanuel told Amini they were looking to purchase a pound of marijuana. Amini said he could get that for them, but it would take a couple of weeks. Amini exchanged phone numbers with Emanuel.

Emanuel called Amini frequently over the next few days asking about the marijuana. Amini contacted several people who he thought might be able to supply a pound of marijuana and ultimately Cody said he could get that much for Amini. Cody said that Amini would receive $200 for brokering the deal.

Amini and Cody met with Emanuel and Whitley at a restaurant to discuss the deal. Amini and Cody showed Emanuel and Whitley a sample of the marijuana. Emanuel took a photo of the sample and said he and Whitley planned to ship the pound of marijuana to their uncle in Las Vegas.

Emanuel offered to pay either $2,200 or $2,600 for the marijuana. Amini knew "there was something wrong" because a pound of marijuana sold for around $1,800. Amini and Cody were "confused" by the offered price, and Amini "didn't have a good feeling at that time" about the situation.

Two or three days later, Amini and Cody met with Emanuel and Whitley at the restaurant again. Emanuel and Whitley got into Cody's truck and drove with him and Amini to Cody's supplier's house to pick up the marijuana. When they arrived, Emanuel and Whitley said they did not have the money for the marijuana.

Emanuel and Whitley asked which house belonged to the supplier, but Cody said the supplier would not meet with them unless they had the money. The men agreed to meet the following day, December 11, at a park to complete the deal.

[8] Whitley told Amini his name was "Louis" although that was Emanuel's first name, and also that Emanuel was his "cousin."

On the morning of December 11, Amini and Cody exchanged numerous texts, including several angry messages from Amini when it appeared that Cody was backing out of the deal. Amini received a call from Emanuel and Whitley as well as text messages about doing the deal.

Cody picked up Amini, and they drove in Cody's truck to the park, arriving around 2:30 p.m. While in the truck, Cody showed Amini the pound of marijuana, packaged in a plastic bag inside a "Vans" shoebox. Amini called Emanuel's phone and spoke to Whitley, who said they were on their way and were around the corner.

While Amini and Cody were waiting in the truck, they started to argue about when they would smoke marijuana after finishing the deal. Cody suddenly threw Amini's gym bag out of the truck, spilling Amini's marijuana stash. Amini and Cody got out of the truck, and after Cody "got in [Amini's] face" for about a minute, Cody got in his truck and drove away.

Amini believed Cody was trying to cut him out of the marijuana deal. Amini called and sent multiple text messages to Cody inquiring about his whereabouts and the $200 he was owed for the deal. Amini also texted and called Emanuel, but there was no response.[9]

Between 3:00 and 3:20 p.m., a witness heard what she thought was a gunshot, followed by the screeching of tires, and she saw Cody's truck traveling at high speed from one side of the street to the other. Cody "fell out and rolled down the street and landed in the gutter" before the truck collided with a tree. Another witness came out of her house after hearing screeching tires followed by a loud noise and thought there had been a car accident. She saw Cody's truck on the sidewalk against a tree and Cody face

[9] Cody texted Emanuel's phone at 2:37 p.m., saying he was "at the park right now with it. We do this without this fool [Amini]. I'll get you for 21 instead of 22."

down on the ground, not moving. The witness called 911 and told Cody that she had summoned help. Cody was "moaning," but not using words.

The forensic pathologist testified that Cody died at the scene from a close-range[10] gunshot wound to the right side of his neck that perforated his carotid artery. Cody also had multiple blunt force injuries on his body, including an abrasion on his left forehead and other abrasions and lacerations on his head consistent with being struck by a solid blunt object. Cody would have lost consciousness within minutes of being shot.

Responding officers found blood in the vehicle as well as on the right front tire, wheel well, and front bumper. An accident reconstruction expert opined that, after falling out of the truck, Cody's body was caught underneath it and dragged until it came to rest against the curb. Inside the truck, officers found an unusable amount of marijuana as well as an empty shoebox with the brand name "Supra."[11]

Around the time of the crime, Emanuel had an "on and off" relationship with Breanna Santos. Santos testified that she recalled being interviewed by police at least twice about the events surrounding the murder in December 2012. Santos, however, repeatedly claimed she could not recall what she said to police or anything that occurred the day of the shooting. Following a hearing outside the presence of the jury, the trial court found that Santos's inability to recall was disingenuous and her testimony was "evasive to say the least." The trial court then permitted one of the officers who interviewed Santos, San Jose Police Sergeant Stewart Davies, to testify about her statements during those interviews.

Sergeant Davies testified that he interviewed Santos twice, once on December 12, 2012 and again on December 14, 2012. Santos initiated the December 12 interview by

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[10] Based on the gunpowder stippling on Cody's face, the barrel of the gun was within three feet of his face when it was fired.

[11] During his testimony, Amini was shown a picture of this shoebox and denied seeing it in Cody's truck that day.

calling the police and voluntarily showing up at the police station. Santos explained she wanted to talk to the police because a phone registered in her name had been used by Whitley to "set something up" and the "text messages . . . would cause the police to come looking for her."

During the December 12 interview, Santos told police that, on December 11 (the day of Cody's death), Santos returned to Emanuel's house to pick up their son around 4:00 p.m. Emanuel and Whitley were both there and Santos asked Whitley to return the phone. Whitley told her he had "shot a white boy" at a park, repeating " 'I shot him' " three times. According to Santos, Emanuel confirmed that Whitley was telling the truth and had shot somebody.

Police asked Santos to return for a second interview on December 14. Based on their investigation, the officers believed that Santos had lied about Emanuel not being present at the shooting. At the December 14 interview, the police confronted Santos with phone records, and she admitted that Emanuel had her phone on December 11 and had not loaned it to Whitley on that day. She also said that Emanuel suggested telling police the story about Whitley having the phone.

Sergeant Davies testified further that, during the December 14 interview, Santos said she returned to Emanuel's house around 5:00 or 5:30 p.m. When she arrived, Whitley and Emanuel were in Emanuel's room and Whitley said, " 'I shot him. I shot him.' " Emanuel told Santos " '[Whitley] did shoot him,' " and the shooting happened at the park. Santos asked Emanuel what happened, and Emanuel replied, " '[Whitley] just shot him and then we came home.' " Emanuel also said " '[t]hat shit was crazy.' "

When Santos asked Whitley why he shot the person, Whitley replied, " 'I don't know. I don't know. I shot him.' " Emanuel told Santos that Whitley " 'had set something up to meet a guy at Cherry Park . . . to get some weed.' " When Cody refused to give them the marijuana, Emanuel told Santos he told Whitley, " 'let's go,' " but Whitley would not walk away. Whitley hit Cody with the gun to get him to let go of the

marijuana, and Cody started fighting back. Emanuel told Santos that " '[Whitley] said he [was] pointing the gun down, he was trying to aim down, but the guy hit his hand, it went up and [Whitley] pulled the trigger and he said he shot him in his neck.' "

Emanuel told Santos that he asked Whitley, " 'What the fuck you doing?' " After the gun went off, Emanuel "started panicking," and he and Whitley went to Emanuel's house. When Santos "started panicking" about Whitley's and Emanuel's use of the phone that was in her name, Emanuel " 'started crying and saying that, "I didn't do nothing, though. I didn't do nothing." ' "

Sergeant Davies testified Santos told the police that Emanuel and Whitley said " 'they got rid of the phone' " and suggested that Santos " 'report the phone lost.' " Santos told the police that Emanuel had had long dreadlocks when she dropped off their son with him that day, but when she returned that afternoon, he had cut off his dreadlocks.

Destinee Kindle testified that she was Whitley's "[o]n, off" girlfriend in December 2012. On the evening of December 11, Whitley called Kindle and asked her to pick him up at Emanuel's house. Whitley told Kindle that he and Emanuel were involved in a shooting and showed her a news story about the shooting. Whitley explained that he was trying to rob someone of marijuana, and accidentally shot him in the neck though he intended to shoot him in the foot. Whitley told Kindle that Emanuel was with him when the shooting took place.

Police interviewed Kindle on December 14, after Whitley was arrested at her house. On cross-examination, Kindle admitted that when police told her Whitley had shot someone, she pretended to be surprised by that because she "didn't want to believe it [to be true]." Kindle told police that Whitley had not talked to her about the shooting.

2. The defense case

Whitley did not present any witnesses. Emanuel presented three witnesses but their trial testimony was not relevant to the issues addressed in the petition for

resentencing, i.e., whether he was a major participant in the offense and acted with reckless disregard for human life.[12]

C. The petition for resentencing

In December 2018, Emanuel filed a petition for resentencing under section 1172.6, alleging that the prosecution had proceeded on the theory that he was guilty of first degree felony murder, and he could no longer be convicted of first degree murder under the current law.[13]

The trial court issued an order to show cause, finding that Emanuel's petition established a prima facie case for relief. Neither party presented new evidence. The trial court took judicial notice of the original trial record and based its ruling "on the evidence adduced at trial." In a lengthy written order, dated January 12, 2021, the trial court denied Emanuel's petition, finding he "was a major participant in the underlying robbery and that he acted with reckless indifference to human life."

The trial court stated that Emanuel "was intimately involved in planning the robbery[] . . . was present at the scene[,] and was integral in setting up the marijuana sale at which he and Whitley planned to rob Cody." "Of particular significance, . . . [Emanuel] was present at the scene of the robbery and murder[,] [and] . . . did nothing while Whitley pulled out a gun, hit Whitley [*sic*] over the head with it, and then shot him during the struggle." After acknowledging that: (1) Emanuel did not use a gun; (2) no

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[12] Emanuel presented an expert in social psychology and psychological factors related to police interrogation techniques, a police detective who testified about Amini's identification of Emanuel, and Emanuel's mother, who testified he was home at the time of the shooting.

[13] The trial court initially denied Emanuel's petition on the ground that Senate Bill No. 1437 was unconstitutional, and Emanuel appealed (H047062). After this court stayed the appeal in H047062 in order to allow the trial court to reconsider its ruling in light of new appellate authority upholding Senate Bill No. 1437's constitutionality, the trial court vacated its prior ruling. This court then dismissed Emanuel's appeal in H047062 as moot.

evidence showed he knew Whitley was armed prior to Whitley pulling out his gun; and (3) no evidence Emanuel knew Whitley was likely to use lethal force, the court concluded the evidence showed "there was at least a minimal period of time in which [Emanuel] was aware of the gun and in which he could have tried to prevent the shooting." After the shooting, Emanuel "made no attempt to check if Cody was still alive, to render aid, or to obtain medical assistance." The court also noted that Emanuel's actions after the shooting were probative, as he "altered his appearance . . . disposed of [the] phone . . . used to communicate [with the victim] . . . [and] instructed Santos to lie to police" about that phone. Emanuel also "made no effort to assist the police in solving the crime, as he might have done if he did not condone Whitley's actions."

Emanuel timely appealed.

II. DISCUSSION

On appeal, Emanuel challenges the sufficiency of the evidence supporting the trial court's findings that he acted with reckless indifference to human life. Viewing the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the trial court's determinations.

A. Senate Bill No. 1437

Senate Bill No. 1437 (2017-2018 Reg. Sess.) amended the Penal Code "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, § l, subd. (f); § 189, subd. (e)(3).)

Defendants convicted of murder based on the felony murder rule or the natural and probable consequences doctrine prior to passage of Senate Bill No. 1437 can now petition for resentencing on the ground that they could not be convicted of murder under the current version of the law. (*People v. Lewis* (2021) 11 Cal.5th 952, 957.) Upon a petitioner's prima facie showing of entitlement to relief, the prosecution has the burden to

establish, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under a legally valid theory. (§ 1172.6, subd. (d)(3).)

We review a trial court's factual findings in connection with a section 1172.6 petition for substantial evidence. (*Clements*, *supra*, 75 Cal.App.5th at p. 298.) Thus, "[w]e ' "examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value that would support a rational trier of fact in finding [the defendant guilty] beyond a reasonable doubt." ' " (*Ibid*.) That the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v*. *Thomas* (2017) 15 Cal.App.5th 1063, 1071 [defendant on substantial evidence review "bears an 'enormous burden' "].)

B. **Banks/Clark *Factors***

The California Supreme Court has sought to clarify the circumstances under which an accomplice who lacks the intent to kill may qualify as a major participant in *People v*. *Banks* (2015) 61 Cal.4th 788, 794 (*Banks*). The high court identified the relevant inquiry as including the following: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force used?" (*Id*. at p. 803, fn. omitted.) The *Banks* court clarified that "[n]o one of these considerations is necessary, nor is any of them necessarily sufficient" and that all the factors may be weighed to determine whether the defendant was a major participant. (*Ibid*.)

In *People v*. *Clark* (2016) 63 Cal.4th 522 (*Clark*), the California Supreme Court addressed the mental state of reckless indifference to human life, holding that it

comprises both subjective and objective components. (*Id*. at p. 617.) "The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what 'a law-abiding person would observe in the actor's situation.' " (*Ibid*.) Factors to be considered—some of which overlap with those examined in *Banks*—include: (1) a defendant's knowledge of weapons, use of weapons, and number of weapons; (2) a defendant's physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) the duration of the crime; (4) a defendant's knowledge of his or her cohort's likelihood of killing; and (5) a defendant's efforts to minimize the risks of violence during the felony. (*Clark*, *supra*, at pp. 618-622; *In re Scoggins* (2020) 9 Cal.5th 667, 677 [applying *Clark* factors].) Like the factors considered in *Banks*, " '[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient.' " (*Clark*, *supra*, at p. 618.)

The high court in *Clark* acknowledged "the interrelationship" between major participation in an underlying felony and reckless indifference to human life. (*Clark*, *supra*, 63 Cal.4th at p. 614.) The two requirements significantly overlap, " 'for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.' " (*Id*. at p. 615.)

C. Substantial evidence supports the trial court's finding that Emanuel acted with reckless indifference to human life[14]

We conclude that there is sufficient evidence in the record that Emanuel displayed a reckless indifference to human life based upon the factors described by the California Supreme Court in *Banks* and *Clark*. As noted, the factors considered in determining

[14] In his opening brief, Emanuel states that he is not contesting the trial court's finding that he was a major participant in the robbery, so we do not analyze that part of the trial court's ruling.

whether a defendant was a major participant and whether he or she acted with reckless indifference overlap, " 'for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.' " (*Clark*, *supra*, 63 Cal.4th at p. 615.)

We acknowledge that some of the *Banks* and *Clark* factors are either neutral or do not support a finding of reckless indifference, such as Emanuel's knowledge and involvement as to the use of weapons in the robbery, as well as his knowledge of Whitley's likelihood of using deadly force. (*Clark*, *supra*, 63 Cal.4th at p. 618 [knowledge of weapons].) As did the trial court, we conclude there was no evidence in the record demonstrating that, prior to the robbery, Emanuel knew Whitley possessed a gun, would bring that gun to the robbery, or "was likely to use lethal force." We therefore examine whether there is substantial evidence supporting one or more of the remaining *Clark* factors.

Both Emanuel's physical proximity to the crime and opportunities to restrain the crime as well as aid the victim, support the trial court's determination that Emanuel acted with reckless disregard for human life. The trial court could legitimately conclude that, as one who planned the robbery and was one of its intended beneficiaries, Emanuel had the ability to prevent it from happening or could have done more to prevent Whitley from shooting Cody. Although, according to Emanuel, he encouraged Whitley to let Cody keep the marijuana and walk away, it became apparent Whitley was ignoring his advice when Whitley struck Cody with his gun. There is no evidence that Emanuel made any further attempt to dissuade Whitley or intercede, perhaps by trying to take the gun from Whitley or distracting him so that Cody might have driven away. There is also no evidence that Emanuel made any effort to assist Cody, even by calling for an ambulance,

after the shooting itself.[15] Instead, Emanuel joined Whitley in fleeing the scene and leaving Cody to his fate.

Substantial evidence also supports the trial court's finding that Emanuel had an opportunity to minimize the risk of violence during the robbery itself but failed to do so. (*Clark, supra,* 63 Cal.4th at pp. 621-622 [defendant's efforts to minimize risk of violence].) Although there is little evidence of how much time elapsed between Emanuel and Whitley meeting up with Cody and Whitley shooting him, Emanuel's version of the events, as recounted in Santos's police interview, implied there was some struggle over the marijuana before Whitley pulled out his gun, struck Cody with it, and then shot him. Emanuel had enough time to tell Whitley, "Let's go" and even begin to walk away from the scene. Given Emanuel's proximity to the scene, the trial court could have reasonably inferred that there was at least a brief window of opportunity for Emanuel to intervene or attempt to deescalate the violence. (*In re McDowell* (2020) 55 Cal.App.5th 999, 1014 [defendant had a brief but critical opportunity to intervene when accomplice fired a warning shot]; *In re Loza* (2017) 10 Cal.App.5th 38, 51 [defendant did not intervene when accomplice counted down for five seconds before shooting].)

Emanuel's actions after he fled were also ambiguous at best—for example, he participated in covering up his involvement by throwing away Santos's cellphone and cutting his hair. Yet it is unclear whether these actions demonstrated that he acquiesced or approved of Whitley's use of lethal violence, or whether he simply wanted to avoid arrest. (*Clark, supra,* 63 Cal.4th at p. 620 [ambiguous circumstances surrounding defendant's hasty departure make it difficult to infer frame of mind].) According to

[15] There was no direct evidence as to whether Cody might have survived with immediate medical attention. The witness who came to the scene and called 911 could hear him moaning, and the forensic pathologist testified Cody would have lost consciousness in a "matter of minutes." (See *In re Taylor* (2019) 34 Cal.App.5th 543, 560 (*Taylor*) [evidence that defendant did not know extent of victim's injuries as well as no evidence victim would have survived had defendant acted otherwise does not support "reckless indifference" conclusion].)

Santos's interview with police, both Emanuel and Whitley were panicked after the shooting. "[E]ven if a defendant is unconcerned that a planned felony resulted in death . . . there must also be evidence that the defendant's participation in planning or carrying out the crime contributed to a heightened risk to human life." (*Taylor*, *supra*, 34 Cal.App.5th at p. 560.)

Considering the totality of the circumstances together, the trial court's determination that Emanuel acted with reckless indifference to human life is supported by the evidence that he (1) remained in close physical proximity to the crime; (2) did not take the opportunity to minimize the risk of violence during the robbery when Whitley pulled out a gun and Cody refused to give up the marijuana; and (3) failed to either render assistance to Cody or call for help after he was shot. Examining the evidence in a light most favorable to the judgment, we conclude that the trial court's determination that Emanuel was not eligible for relief under section 1172.6 because he "was a major participant in the underlying robbery and that he acted with reckless indifference to human life" was supported by substantial evidence.

III. DISPOSITION

The order denying Emanuel's petition for resentencing under Penal Code section 1172.6 is affirmed.

_____
Wilson, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
Danner, J.

PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am over the age of 18, an active member of the State Bar of California, and not a party to this action. My business address is P.O. Box 23933, Pleasant Hill, California 94523. On the date shown below, I served the within:

PETITION FOR REVIEW

to the parties on the attached service list by:

__X__ **BY ELECTRONIC TRANSMISSION** – Transmitting a PDF version of this document by electronic mail to the party identified below, using the e-mail address indicated:

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Court of Appeal
Sixth Appellate District
San Jose, CA 95113
(Per Cal. Supreme Court
TrueFiling policy)

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__X__ **BY MAIL** – Placing a true copy of the foregoing, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed to:

Ms. Louis Sanchez Emanuel
(Defendant/Appellant

I declare under penalty of perjury the foregoing is true and correct. Executed this 20th day of June, 2023 at Pleasant Hill, California.

/s/ Solomon Wollack