

No. S179454 - CAPITAL CASE

**In the Supreme Court of the State of California**

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*

v.

CHRISTOPHER GUY JASSO,  
*Defendant and Appellant.*

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Riverside County Superior Court, Case No. INF047207  
The Honorable Richard A. Erwood, Judge

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**SUPPLEMENTAL RESPONDENT'S BRIEF**

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## **INTRODUCTION**

In response to this Court's recent invitation to address any relevant changes in the law applicable to this case since the completion of the merits briefs, appellant Christopher Jasso filed a supplemental brief in which he contends he is entitled to relief pursuant to Senate Bill No. 1437's amendment of the felony-murder rule. As explained below, appellant is ineligible for this relief as a matter of law because the record conclusively establishes that he was the actual killer.

## **SUMMARY STATEMENT**

In 2003, appellant and an accomplice robbed or attempted to rob a taxi driver. When the driver resisted, appellant shot him twice in the head with a .25 caliber firearm, killing the driver. (20RT 4041, 4056-4058; 21RT 4296, 4302, 4305.) A jury convicted appellant of first degree murder (Pen. Code, § 187, future statutory references are to the Penal Code) and found true a robbery-murder special-circumstance allegation (§ 190.2, subd. (a)(17)). (26CT 7350.) The jury also found that appellant personally used a firearm (§ 12022.5, subd. (a)) and that he personally and intentionally discharged the firearm causing the victim's death (§ 12022.53, subd. (d)). (26CT 7348-7351; 22RT 4582-4583.) Appellant was sentenced to death, and a determinate term of 25 years to life in state prison for the section 12022.53, subdivision (d), enhancement. (27CT 7567; 26RT 5393.)

The parties completed the merits briefing in this automatic appeal in 2017. On December 13, 2023, this Court invited the

parties to file supplemental briefs to address any relevant legislation passed since the reply brief was filed.

On January 29, 2024, appellant filed a timely supplemental opening brief in which he argues this Court should reverse his murder conviction and the special circumstance finding because of ameliorative changes made to the definition of felony murder in Senate Bill No. 1437 (SB 1437). (SAOB 7-24; Stats. 2018, ch. 1015.) But the amended statute maintains murder liability for actual killers, and the verdicts here conclusively establish that the jury found appellant fired the fatal shots. Thus, he is ineligible for relief as a matter of law.

In addition to appellant's contention regarding SB 1437, a second piece of recent legislation may be applicable to this case. Senate Bill No. 620 (SB 620) amended section 12022.53, such that trial courts now have the discretion to dismiss or strike firearm allegations like the one in this case. The version of section 12022.53 in effect at the time of appellant's sentencing mandated imposition of the subdivision (d) discharge enhancement. Pursuant to this change, appellant is entitled to a sentencing decision that is informed by the new discretion to either strike the enhancement or select a lesser enhancement term.

## **ARGUMENT**

### **I. APPELLANT IS INELIGIBLE FOR RELIEF PURSUANT TO SENATE BILL NO. 1437 AS A MATTER OF LAW**

Appellant contends he is entitled to relief pursuant to SB 1437, which amended the definition of felony murder as a theory of liability for a first degree murder conviction. (SAOB 15-

24.)<sup>1</sup> This Court should deny his claim because the jury’s verdicts establish that it convicted him of first degree murder as the actual killer. Even after the amendments to the felony murder rule, a defendant is ineligible for relief as a matter of law where he was convicted as the actual killer.

**A. Senate Bill No. 1437**

In 2018, the Legislature passed SB 1437, which “significantly narrowed the scope of the felony-murder rule.” (*People v. Strong* (2022) 13 Cal.5th 698, 703.) Specifically, it amended section 189, subdivision (e), which now provides: “A participant in the perpetration or attempted perpetration of [an enumerated felony] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a

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<sup>1</sup> This Court’s December 13, 2023, order invited appellant to file a supplemental opening brief addressing relevant changes in the law since the filing of the reply brief, if any were applicable to this matter. The majority of appellant’s supplemental brief reasserts and reargues claims raised and addressed by the parties in the original merits briefs. (See SAOB 7-15.) Given the limited scope of this Court’s order, respondent does not address or respond here to the arguments in appellant’s supplemental brief that were addressed by the parties in the initial briefing. (See Cal. Rules of Court, rule 8.520(d)(1) [“A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party’s brief on the merits”].)



major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.” (See *Strong*, at p. 703 [“This provision repurposes preexisting law governing felony-murder special-circumstance findings — the findings a jury makes in felony-murder cases to determine whether the defendant may be sentenced to death or life without possibility of parole (Pen. Code, § 190.2, subd. (d)) — to define eligibility for sentencing relief”].)

SB 1437 also created a mechanism for individuals convicted of felony murder under the prior law to petition for relief in the form of vacatur of the murder conviction and resentencing on any underlying crimes. (§ 1172.6.)<sup>2</sup> Initially, a petitioner must make a facially sufficient claim that alleges an eligible murder conviction that now cannot be a basis for conviction of murder under the amended law. (§ 1172.6, subd. (a).) To obtain relief under the resentencing procedures in section 1172.6, the petitioner must then make a prima facie showing of entitlement to relief. (§ 1172.6, subd. (c); *People v. Lewis* (2021) 11 Cal.5th 952, 960.) At the prima facie stage, the trial court should consider the record of conviction to “distinguish petitions with potential merit from those that are clearly meritless.” (*Lewis*, at p. 971.) The court may not engage in fact finding about the petitioner’s culpability at the prima facie stage but should deny a

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<sup>2</sup> At the time, the relief mechanism was codified at section 1170.95. Effective June 30, 2022, section 1170.95 was renumbered 1172.6. (*People v. Bratton* (2023) 95 Cal.App.5th 1100, 1104, fn. 1.) All references are to renumbered section 1172.6

petition if the petitioner is ineligible for relief as a matter of law because the conviction was necessarily based on a still-valid theory of liability. (*People v. Curiel* (2023) 15 Cal.5th 433, 463-464].)

In contrast, if a petitioner satisfies this initial showing and the record fails to conclusively establish ineligibility as a matter of law, the trial court must issue an order to show cause and then conduct a hearing to determine whether the petitioner is eligible for relief. (§ 1172.6, subd. (d).) At the hearing stage, both parties are expressly permitted to present new evidence not contained in the record of the trial. The prosecution must prove beyond a reasonable doubt that the petitioner is guilty of murder under California law “as amended by the changes to Section 188 or 189 made effective January 1, 2019.” (§ 1172.6, subd. (d)(3); *Lewis, supra*, 11 Cal.5th at p. 960.)

Effective January 1, 2022, Senate Bill No. 775 amended section 1172.6 in several respects such as expanding the crimes eligible for vacatur to include attempted murder and manslaughter; including, among petitioners entitled to relief, those whose murder convictions were based not only on felony murder and the natural and probable consequences doctrine but also on any “other theory under which malice is imputed to a person based solely on that person’s participation in a crime”; and requiring the superior court to hold a prima facie hearing and provide a statement fully setting forth its reasons for declining to issue an order to show cause. (Stats. 2021, ch. 551, § 2.).

Additionally, to address application of SB 1437 on direct appeal to nonfinal convictions obtained before the law became effective, the Legislature added subdivision (g) to section 1172.6 which provides: “A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018).” For petitioners who raise their section 1172.6 claim for the first time on direct appeal and make the initial prima facie showing, subdivision (g) does not provide any additional guidance regarding how the appellate court would take and consider new evidence, should either party wish to present it, or make the necessary factual findings. However, subdivision (g) has been unanimously interpreted to provide potential relief under an instructional error analysis of “alternative-theory error”—when a court instructs on two theories of an offense, only one of which is legally valid. (*People v. Wilson* (2023) 14 Cal.5th 839, 871; *People v. Birdsall* (2022) 77 Cal.App.5th 859, 868-870; *People v. Holo* (2022) 77 Cal.App.5th 362, 375 [“A postconviction change in the law invalidating a prosecution theory is the equivalent of a trial error because it means the jury was instructed on a legally invalid theory”].)

### **B. The instructions and verdicts**

The trial court instructed the jury on two theories of first degree murder: (1) premeditation and deliberation, and (2) murder during the commission of a robbery or attempted

robbery, i.e., felony murder. (26CT 7322-7325.) In addition, if the jury determined appellant was guilty of murder, it then had to determine whether the firearm allegations were true. (26CT 7341.) To return a true finding on the use enhancement, the jury had to find that appellant *personally* used a .25 caliber firearm during the commission of the murder. (26CT 7340.) To find the discharge enhancement true, the jury had to find the following three things: (1) that appellant *personally discharged* the firearm during the commission of the murder, (2) that appellant *intentionally discharged* the firearm during the commission of the murder, and (3) that appellant's act *caused the death of the victim*. (26CT 7341.)

The jury convicted appellant of first degree murder and returned true findings on all the enhancements. (26CT 7348-7351; 22RT 4582-4583.)

**C. Appellant is ineligible for relief because he was the actual killer**

SB 1437 relief is unavailable if a defendant acted with the intent to kill or if he was the actual killer. (*Strong, supra*, 13 Cal.5th at p. 710; see §§ 189, subd. (e)(3), 1172.6, subd. (a).) Here, the jury was instructed it could find appellant guilty of first degree murder under two theories: either because it was “willful, deliberate, and premeditated” or because the “murder was committed during the course of a robbery.” (26CT 7325.) If the jury found first degree murder through the first theory, then appellant necessarily acted with malice, i.e., an intent to kill. Alternatively, if the jury relied on the felony murder theory, its verdicts on the firearm enhancements conclusively establish that

it found appellant was the actual killer. Under either theory, he is foreclosed from relief pursuant to SB 1437.

As the actual killer in a felony murder, appellant is ineligible for resentencing under section 1172.6 as a matter of law. (§ 189, subd. (e)(1); see *Strong, supra*, 13 Cal.5th at p. 710; [“Senate Bill 1437 relief is unavailable if the defendant was ... the actual killer”]; *People v. Delgadillo* (2022) 14 Cal.5th 216, 233 [defendant ineligible for section 1172.6 relief where record established he was the actual killer]; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 [jury’s true finding that defendant personally and intentionally discharged a firearm causing death within meaning of section 12022.53, subd. (d), is an implicit finding defendant was “ ‘actual killer’ ”]; cf. *People v. Harden* (2022) 81 Cal.App.5th 45, 47, 55 [jury’s true finding that defendant personally inflicted great bodily injury on homicide victim within meaning of section 12022.7, subd. (a), necessarily means jury determined defendant was actual killer].)

Because appellant was necessarily convicted of first degree murder as the actual killer, he is ineligible for relief under SB 1437 as a matter of law. (§§ 189, subd. (e), 1172.6, subd. (a)(3).)

**II. APPELLANT IS ENTITLED TO A LIMITED REMAND TO PERMIT THE TRIAL COURT AN OPPORTUNITY TO EXERCISE ITS NEWLY CODIFIED SENTENCING DISCRETION UNDER SENATE BILL NO. 620**

Although appellant is not entitled to relief pursuant to SB 1437, and he has not cited to any additional changes in the law relevant to his appeal, the People wish to bring to the Court’s attention that appellant may be entitled to relief pursuant to SB

620, which would afford him a limited remand to permit the trial court an opportunity to exercise its discretion regarding imposition of the 25-to-life term on the personal-discharge-of-a-firearm enhancement.

When appellant was sentenced in 2010, trial courts had no authority to strike firearm enhancements proven true under sections 12022.5 and 12022.53. (See former §§ 12022.5, subd. (c), 12022.53, subd. (h).) If a section 12022.53 enhancement was admitted or found true, the court was required to “impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other [provision of] law, unless another enhancement provides for a greater penalty or a longer term of imprisonment.” (Former § 12022.53, subd. (j).) Section 12022.53, subdivision (f), stated that if “more than one enhancement per person is found true under this section,” the court must impose the “enhancement that provides the longest term of imprisonment.” (*Ibid.*)

Consistent with the law in effect at that time, the court imposed an additional term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), resulting in an indeterminate term in addition to the death judgment. (27CT 7567; 26RT 5393.) The court imposed a term of four years for the section 12022.5, subdivision (a), enhancement and stayed that term pursuant to Penal Code section 654. (27CT 7567.) The court’s reference to section 12022.53, subdivision (f), when it stayed punishment for the section 12022.5, subdivision (a),

enhancement shows it was aware of its lack of authority with regard to the firearm enhancements. (26RT 5393.)

But SB 620, which became effective January 1, 2018, amended section 12022.53 and removed the prohibition on striking the enhancements. Section 12022.53, subdivision (h), now provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” Alternatively, the trial court can modify a section 12022.53 firearm enhancement by imposing a lesser enhancement under that section. (*People v. Tirado* (2022) 12 Cal.5th 688, 700.)

“[T]he grant of discretion to strike firearm enhancements in the amended statute applies retroactively to all nonfinal convictions.” (*People v. Humphrey* (2020) 44 Cal.App.5th 371, 377.) The judgment of conviction in appellant’s case was not yet final when SB 620 took effect and this Court issued its decision in *Tirado*; thus he is entitled to retroactive application of both. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324 [court assumes Legislature intends ameliorative statutes to apply to “all defendants whose judgments are not yet final on the statute’s operative date”]; *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023 [in general, judicial decisions are given retroactive effect to cases not final on appeal]; *In re Estrada* (1965) 63 Cal.2d 740.)

Where, as here, the record on appeal does not contain “a clear indication that the trial court, when it originally sentenced defendant, would not have stricken” the section 12022.53,

subdivision (d), enhancement, then “a limited remand is appropriate under the circumstances for the sole purpose of allowing the trial court to consider whether to exercise its newly conferred discretion and strike” that enhancement. (*People v. Mataele* (2022) 13 Cal. 5th 372, 437.) Therefore, a limited remand is appropriate to allow the trial court to consider whether it should exercise its discretion to strike the firearm enhancement under section 12022.53, subdivision (d), and, if so, “to amend the abstract of judgment accordingly.” (*People v. Mataele*, 13 Cal. 5th at pp. 437-438.)



## CONCLUSION

The judgment should be affirmed in its entirety. The matter should be remanded solely for the trial court to consider whether to strike the firearm enhancement under section 12022.53, subdivision (d), and thereafter to amend the abstract of judgment accordingly.

Respectfully submitted,

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March 1, 2024

**CERTIFICATE OF COMPLIANCE**

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13-point Century Schoolbook font and contains 2,545 words.

ROB BONTA  
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*/s/ Paige B. Hazard*  
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March 1, 2024

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STATE OF CALIFORNIA  
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