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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO BOLANOS,

Defendant and Appellant.

B297681

(Los Angeles County  
Super. Ct. No. LA023708)

THE COURT:

Gustavo Bolanos appealed the order of the superior court denying a petition for resentencing pursuant to Penal Code<sup>1</sup> section 1170.95. We appointed counsel to represent Bolanos on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. Bolanos filed his own supplemental brief, in propria persona.

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

## **PROCEDURAL BACKGROUND**

Following the 1992 killing of a uniformed police officer and the attempted killing of a bystander during the commission of an armed robbery by Bolanos and four other men, Bolanos was convicted by jury of one count of first degree murder (§ 187, subd. (a); count 1), one count of attempted murder (§§ 664/187, subd. (a); count 2), and four counts of second degree robbery (§ 211; counts 3–6). In finding Bolanos guilty of murder, the jury found true the following felony-murder special circumstances: (1) the murder occurred during the commission of a robbery (§ 190.2, subd. (a)(17)); (2) the murder was committed for the purpose of avoiding and preventing a lawful arrest (§ 190.2, subd. (a)(5)); and (3) the victim was a peace officer who was intentionally killed while engaged in the performance of his duties, and Bolanos knew or reasonably should have known that the officer was a peace officer performing his duties (§ 190.2, subd. (a)(7)). As to all counts, the jury found that a principal was armed with a firearm. (§ 12022, subd. (a)(1).)

Bolanos was sentenced on the first degree murder conviction to life in prison without the possibility of parole. Bolanos appealed the judgment. We affirmed, rejecting the contention, among others, that there was insufficient evidence to support the jury's findings that Bolanos was a major participant in the underlying robberies and that he acted with reckless indifference to human life.

On March 28, 2019, Bolanos filed a petition pursuant to section 1170.95 for resentencing on the first degree murder conviction. In the petition, Bolanos averred that he could not now be convicted of first degree murder based on changes to section 189, which became effective January 1, 2019, for the

reasons that “[he] was not a major participant in the felony or [he] did not act with reckless indifference to human life during the course of the crime or felony; [and] [¶] [t]he victim of the murder was not a [p]eace [o]fficer in the [p]erformance of his or her duties, or [he] was not aware that the victim was a [p]eace [o]fficer in the [p]erformance of his or her duties and the [c]ircumstances were such that [Bolanos] should not reasonably have been aware that the victim was a [p]eace [o]fficer in the performance of his or her duties.”

On April 2, 2019, the superior court summarily denied the petition. Citing section 189, subdivisions (e) and (f), the superior court declared Bolanos ineligible for resentencing under section 1170.95 as a matter of law, based on the jury’s specific findings that (1) “the victim was a peace officer who was intentionally killed while engaged in the performance of his duties, and Petitioner knew or reasonably should have known the victim was a peace officer acting in the performance of his duties, within the meaning of Penal Code section 190.2, [subdivision] (a)(7)”; and (2) “[P]etitioner was a major participant in the underlying robberies and . . . he acted with reckless indifference to human life.”

## **DISCUSSION**

In his supplemental brief Bolanos contends: (1) He is entitled to relief under section 1170.95; (2) The superior court violated Bolanos’s rights to due process by summarily denying his petition without affording him an opportunity to be heard; and (3) Senate Bill No. 1437 and section 1170.95 are “void for vagueness,” and thereby violate equal protection and Bolanos’s “due process right to relief under newly enacted State law.” For added measure, Bolanos asserts that his trial counsel rendered

ineffective assistance of counsel. The contentions lack merit.

1. *The superior court correctly found Bolanos to be ineligible for relief under section 1170.95*

Senate Bill No. 1437 (2017–2018 Reg. Sess.), which became effective on January 1, 2019, revised the felony-murder rule in California “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, § 1, subd. (f), italics added.) Specifically, the bill “amends sections 188, which defines malice, and 189, which defines the degrees of murder to address felony-murder liability, and it adds section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2–4.)” (*People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417.)

Section 1170.95, subdivision (c) provides that when a person convicted of felony murder files a petition for resentencing under section 1170.95, the superior court “shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” In order to make such a showing, all three of the following conditions must apply:

“(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

“(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of

a trial at which the petitioner could be convicted for first degree or second degree murder. [And]

“(3) *The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.*” (§ 1170.95, subd. (a), italics added.)

As pertinent here, the amendments to section 189 include two new subdivisions:

“(e) A participant in the perpetration or attempted perpetration of a [robbery] 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 major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

“(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.” (Stats. 2018, ch. 1015, § 3.)

Here, the jury found beyond a reasonable doubt that the victim was a peace officer, he was killed in the course of his duties, and Bolanos knew or reasonably should have known the victim was a peace officer performing his duties. Moreover, in affirming the judgment of conviction, we found substantial evidence for the special circumstance under section 190.2, subdivision (d) that Bolanos was a major participant in the

underlying robberies and that he acted with reckless indifference to human life. Based on these express felony-murder special-circumstance findings, the superior court correctly determined that Bolanos did not fall within the provisions of the statute because he clearly could be convicted of first degree murder under section 189 as amended by Senate Bill No. 1437. (§ 189, subds. (e) & (f).)

2. *Bolanos's due process rights were not violated by the superior court's summary denial of the petition because Bolanos failed to state a prima facie case for relief*

Because the superior court properly determined that Bolanos had failed to state a prima facie case for relief under section 1170.95, Bolanos's due process rights were not violated by the summary denial of the petition. Section 1170.95 lays out in order the requirements for the petition, an order to show cause, and any hearing on the petition. Subdivision (a) sets forth the conditions for seeking relief under the statute, subdivision (b) directs where the petition shall be filed and lists the information that must be included in the petition, and subdivision (c) specifies that the court must determine if the petition states a prima facie case for relief. Where the court concludes that the petitioner does not fall within the provisions of the statute, no purpose would be served by proceeding to the next stages (appointment of counsel, response by the prosecutor, order to show cause), and summary denial of the petition without a hearing is proper.

Here, because the superior court correctly determined Bolanos had not made the requisite prima facie showing, a summary denial of the petition was appropriate. Bolanos suffered no due process violation.

3. *Neither section 1170.95 nor Senate Bill No. 1437 is  
unconstitutionally vague, violates equal protection, or  
denies due process rights*

Our reading of Senate Bill No. 1437 as a whole, and section 1170.95 in particular, reveals no ambiguity or vagueness as the new law applies to Bolanos’s case. The Legislative Counsel’s Digest states that Senate Bill No. 1437 was enacted to “prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or 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, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.” (Stats. 2018, ch. 1015.) To effect the purposes of the legislation, the law precludes certain persons from obtaining relief. Given the jury’s explicit special circumstance findings in this case, Bolanos plainly falls outside Senate Bill No. 1437’s intended beneficiaries.

4. *Bolanos’s claim of ineffective assistance of trial counsel is  
not cognizable*

Bolanos’s jury trial took place in 1996, and the remittitur was issued on August 18, 1999. Any claim Bolanos might have had for ineffective assistance of trial counsel is long overdue, and is not cognizable in this appeal.

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Based on our examination of the entire record we are satisfied that defendant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

**DISPOSITION**

The judgment is affirmed.

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LUI, P.J.

ASHMANN-GERST, J.

CHAVEZ, J.