Filed 12/19/17 In re Ramirez CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re RAYMOND S. RAMIREZ on Habeas Corpus.	B282005 (Los Angeles County Super. Ct. No. KA060104)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Charles E. Horan, Judge. Petition granted and remanded with directions.

Ralph J. Novotney Jr., Christa M. Hohmann, Directing Attorney, Post Conviction Assistance Center for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Jonathan M. Krauss, Deputy Attorneys General, for Respondent.

In 2003, petitioner Raymond Salvador Ramirez was convicted of first degree murder with a felony-murder special circumstance finding (Pen. Code, § 190.2, subds. (a)(17), (d)),[1] and sentenced to state prison for life without the possibility of parole (LWOP). Recently, in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), our Supreme Court explained the requirements for a special circumstance finding as to an aider and abettor of felony-murder. In April 2017, petitioner filed a petition for writ of habeas corpus, claiming the special circumstance finding against him is not supportable under *Banks* and *Clark*. We agree and accordingly grant the petition.

BACKGROUND

Facts

On an August day in 2002, petitioner, Juan Soto, Frank Quintero, and Lorraine Calvillo, riding in Calvillo's car, traveled to the La Puente residence of Bobby Bionghi. They met Vincent Lopez at Bionghi's home or picked him up on the way.

At Bionghi's residence, while Lopez, Quintero, and petitioner stood near the car talking, a few feet away Soto asked Bionghi in a "common loud tone of voice" if he would be the getaway driver for a robbery. Soto took a revolver out of the air filter compartment from under the hood of Calvillo's car; Bionghi observed two or three other guns in the same spot. Bionghi then spoke to Lopez, who briefly explained the robbery plan, mentioning a store in El Monte and a nearby tax service business that had a box full of money in the lobby. Bionghi said he was not interested in participating. Bionghi did not speak with petitioner but at one point saw Soto speaking with him.

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1 All undesignated statutory references are to the Penal Code.

The four defendants (petitioner, Soto, Lopez, and Quintero) and Calvillo got back into Calvillo's car and left Bionghi's residence. At trial, Calvillo testified Soto said "that he knew that tax place, they were just going to go—it was a clear box of money and that he was going—and they were just going to go inside just to check it out and they would be right out." As the defendants got out of the car near the tax service business, Quintero said that he did not want to go, but Soto told him not to worry about it. Calvillo remained in the car as the defendants walked toward the business.

As petitioner stood outside, Lopez, Quintero, and Soto entered the tax service business. In the lobby was a large clear donation box containing cash for the Abandoned in Nicaragua Foundation, a charity founded by Camilo Castro, who operated the tax business with his sister, Carmen Castro. When the three men entered, Carmen, who was in a front office, began screaming. Camilo, who was in a rear office with two acquaintances, heard about three or four gunshots. A man holding a gun then entered Camilo's office and ordered Camilo and the two others to get under a desk. The man took a cell phone, wallet, credit cards, a camera, and keys. In the front, another defendant dropped a fax machine on the donation box, breaking the box open. Most of the money was taken. After the men left, Camilo went to the front office and found Carmen slumped in her chair, dead.

Charles Visitor, an African-American man who owned the neighboring business, testified he heard gunshots and went outside to look. He did not see anyone outside and so walked into the Castros' business. Visitor saw two men picking up money from the floor. He tried to leave but another man, whom Visitor later identified as Quintero, grabbed him. Visitor managed to get outside, but Quintero pinned him against a window and struck him on the shoulder with what appeared to be a handgun. Quintero ran off. Another

man, identified by Visitor as Soto, ran by and struck Visitor on the back of the head with an object. A third man then ran by. Visitor saw a dark-colored car, driven by a women with at least three passengers, drive away. Visitor testified he saw only three men involved in the robbery, and he did not see a lookout. He further testified, however, that his view may have been obscured by a sign.

As the defendants got into Calvillo's car, Calvillo could see that Lopez and Soto each had a gun and money, and Quintero talked about "filling up his pockets with money." Calvillo did not see any money on petitioner. As Calvillo drove toward her residence, Soto was asked why he shot the woman. He replied that he told the woman to be quiet but she would not shut up. Petitioner told everyone that, as he was standing outside, he saw a black man and hit him, and others said they hit the man too. When they arrived at Calvillo's residence, Soto, Lopez, and Quintero dumped cash onto the kitchen table and divided it four ways with petitioner. Calvillo was given gas money.

The next day, Lopez told Bionghi that he and the other defendants "robbed the place," that petitioner stood outside and the remaining three went inside with guns, and that Soto "f'd up" and shot a woman at point-blank range because she screamed. Bionghi later spoke to police officers about the robbery, hoping to get a break on a pending drug case. Police contacted Calvillo, who also provided information on the incident. Officers then searched petitioner's residence and found a box of the same caliber bullets used to kill Carmen Castro.

Petitioner, when interviewed by a sheriff's detective, said that he went to the tax service business but did not enter. He saw a black man outside but did not think the man saw him. He also said he could have "gotten away with it claiming that he wasn't there," but he "decided not to fight the case."

He told the detective the evidence against him was strong and he would probably be convicted since he believed a woman would "say things" and "give up everything" when the police spoke to her.

Relevant Procedural History

In addition to first degree murder, petitioner was convicted of two counts of second degree robbery, assault with a deadly weapon, and conspiracy to commit robbery. The jury found true the special circumstance allegation that petitioner committed the murder in the commission of robbery (§ 190.2, subd. (a)(17)). Petitioner was sentenced to LWOP for the special circumstance murder, with sentence stayed on the remaining counts.[2] This division affirmed the conviction, rejecting petitioner's argument that the evidence was insufficient to support the finding under section 190.2, subdivision (d) that he was a major participant in the robbery who acted with reckless indifference to human life.

In July 2017, we issued an order to show cause why the April 2017 petition—requesting the special circumstance finding be vacated for insufficient evidence in light of *Banks* and *Clark*—should not be granted. A return and a traverse were filed, which we have considered along with the petition.

DISCUSSION

Petitioner contends he must be resentenced because the section 190.2 special circumstance finding is not supported by sufficient evidence. The People respond that petitioner is procedurally barred from raising this argument and, in any event, substantial evidence supports the finding.

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[2] Lopez, Quintero, and Soto were also convicted and sentenced to LWOP.

I. Claimed Procedural Bar

The People advance several arguments for why we should not reach petitioner's claim that the special circumstance finding is improper.

First, the People contend that the *Waltreus* rule (*In re Waltreus* (1965) 62 Cal.2d 218, 225)—which generally bars the assertion in a habeas petition of a legal claim previously raised and rejected on direct appeal—prevents petitioner from making a sufficiency of the evidence argument here since he already did so on appeal. We disagree. *In re Miller* (2017) 14 Cal.App.5th 960 (*Miller*), a recent opinion involving the application of *Banks* and *Clark*, rejected this same procedural bar contention. As *Miller* noted, *Banks* and *Clark* clarified the actual meaning of section 190.2, a statute that had previously been misapplied. (*Miller,* at pp. 978-979.) Habeas corpus is an appropriate remedy when a court has acted "in excess of its jurisdiction by imposing a punishment for conduct not prohibited by the relevant penal statute." (*Id.* at p. 979, citing *People v. Mutch* (1971) 4 Cal.3d 389, 394-396.) Review here is appropriate since petitioner asserts his conduct was not proscribed as a section 190.2 special circumstance.

Second, the People argue that petitioner's sufficiency of the evidence claim is barred by the *Lindley* rule (*In re Lindley* (1947) 29 Cal.2d 709), another contention rejected in *Miller, supra,* 14 Cal.App.5th at pp. 979-980. The *Lindley* rule generally prohibits consideration on habeas corpus of "routine claims that the evidence presented at trial was insufficient." (*In re Reno* (2012) 55 Cal.4th 428, 505.) A claim that a prior special circumstance finding cannot be supported in light of *Banks* and *Clark* is not the sort of "'routine'" claim addressed by the *Lindley* rule. (*Miller,* at pp. 979-980.)

Third, the People assert that petitioner should have brought his claim earlier and improperly failed to raise it in prior habeas petitions. These

arguments also fail. The bar against "piecemeal" presentation of claims applies to "newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." (*In re Clark* (1993) 5 Cal.4th 750, 767-768.) This is the first petition filed by petitioner in this Court following *Banks*. Moreover, petitioner did not unduly delay in filing this petition. *Banks* was decided on July 9, 2015, and *Clark* was decided on June 27, 2016. Given that *Banks* and *Clark* represented a significant change compared to how section 190.2 was previously implemented, petitioner raised the issue in a reasonably prompt manner.

II. Legality of Petitioner's Sentence

A. *Banks* and *Clark*

Section 190.2, subdivision (d) provides for a sentence of death or LWOP for a defendant convicted of first degree murder who is not the actual killer but is found to have acted with "reckless indifference to human life and as a major participant" in an enumerated felony. Robbery is a qualifying felony under section 190.2. (§ 190.2, subd. (a)(17)(A).)

The California Supreme Court, in *Banks*, considered for the first time the scope of section 190.2, subdivision (d)'s requirements that an aider and abettor be a "major participant" who acts "with reckless indifference to human life." (*Banks, supra,* 61 Cal.4th at p. 798.) These two requirements are directly drawn from the holdings of *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*) and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). (*Banks,* at p. 794.) *Banks* explained that *Tison* and *Enmund* recognized a "continuum" of an aider and abettor's personal involvement in felony murder, along which only "'substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life'" will justify a sentence of LWOP or death. (*Banks,* at pp. 801-802, quoting *Tison,* at p. 154.) In determining

whether the elements of section 190.2, subdivision (d) are met, the "totality of the circumstances" must be considered. (*Banks,* at p. 802.)

Banks identified the following factors relevant to whether a defendant is a "major participant" within the meaning of *Tison*: "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 was used?" (*Banks, supra,* 61 Cal.4th at p. 803, fn. omitted.) The *Banks* court explained: "No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' (*Tison v. Arizona, supra*, 481 U.S. at p. 157) was sufficiently significant to be considered 'major' (*id.* at p. 152; see *Kennedy v. Louisiana* [2008] 554 U.S. [407,] 421.)" (*Banks,* at p. 803.)

Banks further held that a defendant acts with a "'reckless indifference to human life'" when he "'"knowingly engag[es] in criminal activities known to carry a grave risk of death."'" (*Banks, supra*, 61 Cal.4th at pp. 800-801, quoting *People v. Estrada* (1995) 11 Cal.4th 568, 577, quoting *Tison, supra*, 481 U.S. 137, 157.) Subsequently, our Supreme Court, in *Clark*, identified several nonexclusive factors relevant to this element. First, the defendant's awareness that a gun will be used in the felony is not alone sufficient to establish reckless indifference, though the defendant's "*use* of a firearm, even

if the defendant does not kill the victim or the evidence does not establish which armed robber killed the victim, can be significant to the analysis of reckless indifference to human life." (*Clark, supra,* 63 Cal.4th at p. 618, original italics.) Second, "[p]roximity to the murder and the events leading up to it may be particularly significant," even though "physical presence is not invariably a prerequisite to demonstrating reckless indifference to human life." (*Id.* at p. 619.) Third, the duration of the felony may be relevant. (*Id.* at p. 620.) For example, if the murder "came at the end of a prolonged period of restraint of the victims by defendant," that would tend to show reckless indifference. (*Id.* at p. 620.) Fourth, the defendant's "knowledge of factors bearing on a cohort's likelihood of killing" is significant, such as when a defendant knows a cohort has a propensity for violence. (*Id.* at p. 621.) The fifth factor identified is the defendant's efforts to minimize the risks of violence during the robbery. (*Ibid.*) Evidence of an effort to minimize the risks of violence could potentially rebut a conclusion that the defendant intended to engage in activities risky to human life, though an unreasonable belief that he or she was not posing a risk to human life will not preclude a determination of reckless indifference. (*Id.* at p. 622.)

Factors relevant to the requirements of major participation and reckless indifference must be viewed in context because the elements "'significantly overlap . . . , for the greater the defendant's participation in the felony murder, the more likely he acted with reckless indifference to human life.'" (*Clark, supra,* 63 Cal.4th at pp. 614-615.)

B. Application to the facts of this case

"The standard of review for a sufficiency of the evidence claim as to a special circumstance is whether, when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.' [Citations.] The standard is the same under the state and federal due process clauses. [Citation.] We presume, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial. [Citation.]" (*Clark, supra,* 63 Cal.4th at p. 610.)

Viewing the evidence in the light most favorable to the judgment, we first examine whether petitioner could properly be found to be a "major participant." Applying the criteria of "major participant" set out in *Banks, supra,* 61 Cal.4th at page 803, the evidence at trial showed petitioner knew of the plan to rob the tax business, but no evidence showed he had a significant role in the planning. Rather, Soto, and perhaps Lopez, appeared to be the "masterminds" behind the robbery. Petitioner also was aware that firearms would be used, but the guns were supplied by Soto, and, importantly, petitioner did not personally use a gun in connection with the incident. Furthermore, the evidence did not demonstrate petitioner was aware of prior violent crimes committed by his codefendants.

Moreover, petitioner was not present at the scene of the killing. Although he was standing near the business, it appears he had no forewarning that one of his accomplices would shoot a victim, he did not instigate the shooting, and he was not in a position to prevent it. Instead, the shooting by Soto appeared to take all others by surprise; Soto afterward claimed it was a spontaneous reaction to the victim's screaming. Nevertheless, petitioner presumably heard the gunshots, so he could have investigated and tried to aid the victim, which he did not do. Petitioner also claimed to hit Visitor as Visitor fled. The effect of this act in relation to the murder was negligible, though, because the shooting had already occurred

and Visitor was understandably trying to get away from the scene rather than help the victim.

Considering all pertinent facts, due to petitioner's physical presence near the scene of the robbery, he was a more significant participant than the getaway driver found ineligible for LWOP in *Banks, supra*, 61 Cal.4th at page 805, but not by much. As an unarmed lookout with little to no role in the planning of the crime or the use of firearms, and with no direct involvement in the unforeseen shooting, it cannot reasonably be said that petitioner was a major participant.

It therefore is unsurprising that the evidence of reckless indifference to human life is also lacking. (See *Clark, supra,* 63 Cal.4th at pp. 614-615 [elements "'significantly overlap"'].) Petitioner's mere awareness that firearms would be used was not enough to show he acted with reckless indifference. (See *id.* at p. 618.) Further, although he was close enough to hear gunshots, he was not present at the scene of the killing and so had little chance to prevent it. (See *id.* at pp. 619-620.) The robbery was not of particularly prolonged duration, such as a crime involving kidnapping or restraint. (See *id.* at pp. 620-621.) And, again, there was no evidence petitioner knew a cohort had a propensity to kill. (See *id.* at p. 621.) Finally, although petitioner did not take steps to minimize the risk of violence during the robbery (see *id.* at p. 621-622), since he did not plan the crime or enter the establishment, it is questionable how much difference any such efforts would have made.

Thus, considering the evidence in the light of the guidance provided by *Banks* and *Clark*, the finding that petitioner was a major participant who acted with reckless indifference to human life is not supportable.

DISPOSITION

The petition is granted to the extent it seeks relief under *Banks, supra,* 61 Cal.4th 788 and *Clark, supra,* 63 Cal.4th 522, and a writ of habeas corpus hereby issues. The special circumstance finding against petitioner is stricken, and the matter is remanded to the superior court for resentencing.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.