IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, vs. **LEON BANKS, et al.,** Defendants and Appellants.	**Case No. S213819** Second Appellate District, Division Two, Case No. B236152

Los Angeles County Superior Court No. BA347305
The Honorable, Judge Gail R. Feuer

APPELLANT MATTHEWS'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

This Court's order granting review, was confined to the following issues:

> Was the evidence sufficient to establish that Matthews was a "major participant" within the meaning of Penal Code section 190.2, subdivision (d) [1]?
>
> Does the true finding on the special circumstance violate due process? (U.S. Const., 5th & 14th Amends.; Cal. Const., art I., §§ 7, 15; *Enmund v. Florida* (1982) 458 U.S. 782.)

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

STATEMENT OF THE CASE

Appellant Matthews and co-appellant Leon Banks were tried together before a single jury. The jury found Matthews guilty of the first degree murder of Noe Gonzales and found true the special circumstance that the murder was committed during the commission of an attempted robbery or burglary (count 1: §187, subd. (a) / §190.2, subd. (a)(17) / §211, 212.5). Matthews was also found guilty of attempted second degree robbery (count 2: §§664 / 212), and second degree commercial burglary (count 3: §459), and the jury found gang (§186.22, subd. (b)(1)) and firearm enhancements (§12022.53, subds. (d) & (e)) true on all counts. (2CT 447-449 [verdicts].)[2] On September 16, 2011, Matthews was sentenced to serve life without the possibility of parole. (2CT 506-509.)

On September 22, 2011, Matthews timely appealed from the judgment of conviction and sentence pronounced on September 16, 2011. (2CT 510; §1237, subd. (a).) Among other issues in the direct appeal, Matthews challenged the sufficiency of the evidence to support the true finding on the special circumstance. On August 29, 2013, the Second Appellate District Court of Appeal, Division Two, filed its unpublished opinion, striking the parole revocation fine (§1202.45) and amending the abstract of judgment to reflect that Matthews was sentenced pursuant to section 12022.53, subdivision (e), but otherwise affirming the judgment of conviction and the true finding on the special circumstance. (Court of Appeal Opinion ("Opinion") at pp. 11-28.) Matthews timely filed a petition for review, which this court granted, on the foregoing issues, on December 11, 2013.

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[2] The jury reached the same verdicts for Banks. (2CT 443-446.)

STATEMENT OF THE FACTS

A. THE PROSECUTION'S CASE.

1. THE ROBBERY / HOMICIDE.

Martin Chavero, Matthew Salinsky, Daniel Sosa and security guard Noe Gonzales, worked at the La Brea Collective, a medical marijuana dispensary located at 812 South La Brea Avenue in Los Angeles (the "dispensary"). (2RT 188-189.) Salinsky had worked with Gonzales for about three months before Gonzales's death. (2RT 203.) Salinsky and Chavero knew Gonzales to be unarmed. (2RT 203, 249.)

The dispensary was a two story facility, with display cases on both floors. (2RT 266-271.) The front door of the dispensary was a metal security door with glass slots that opened. (2RT 252.) The entrance to the dispensary, on La Brea Avenue, had a mantrap, a little room that divided the street from the lobby. (2RT 252-253.) When a person came to the dispensary with a prescription, they would ring the doorbell outside and be let into the mantrap. (2RT 252-253.) The buyer was then required to show the security guard a physician's statement and identification. (2RT 255.) Only patients with proper identification and verified medical marijuana authorizations were permitted inside the dispensary. (2RT 253, RT 304.).)

In the afternoon of October 1, 2008, Chavero was standing by a display case on the first floor of the dispensary when the doorbell rang. (2RT 259.) On the store's video monitor, Chavero saw two armed African-American men leading Gonzales, by his arms, into the lobby. (2RT 261-263.) Gonzales said "heads up" in Spanish, which caused Chavero to quickly follow Sosa to the back of the dispensary where the safe was located. (2RT 263-265, 3RT 312-313.)

Salinsky was working upstairs when his attention was drawn to an African-American man jumping over the center divider from the lobby area into the reception area of the dispensary. (2RT 189-190, 206.) One of the assailants came up the stairs, pointing a gun at Salinsky. (2RT 191.) Salinsky did not get a good look at the gun, or the assailant. (2RT 191, 193.) The assailant asked Salinsky, "Where's the shit at?" and Salinsky directed him behind the counter. (2RT 192.) The assailant did not physically touch Salinsky or his client. (2RT 192.)

Meanwhile, as Chavero was walking towards the back of the dispensary, someone kicked the dispensary door open and Banks entered through the open door. (3RT 282-283.) Banks ran after Chavero, grabbing him just as Chavero was locking the safe. (3RT 284, 314.) Banks told Chavero, "If you look at me, I'll kill you." (3RT 284.) Banks had a gun. (3RT 284.)

Banks pushed Chavero and Sosa to the front of the dispensary, and then to the ground, where he put his knee in Chavero's back and began tying Chavero's wrists together with plastic zip ties. (3RT 285-287.) As Banks was doing this, two shots rang out. Banks said, "Shit, we gotta go. We gotta go." and he ran to the lobby. (3RT 286.)

On the video monitor, Chavero saw Banks and two other men in the mantrap, trying to push their way out the front door. (3RT 287-289.)[3] Banks fired his weapon through the glass slot in the front door. (3RT 289-290.) Someone else was also shooting, but Chavero could

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[3] Besides Banks, "[t]he other two men were later identified as David Gardiner, arrested in July 2009, and Brandon Daniels, arrested in March 2010. They are not parties to this appeal." (Opn. at p. 4, fn. 3.)

not recall who it was. (3RT 291.) All three men had guns. (3RT 336.)

Chavero could not see who was on the other side of the mantrap, but he saw someone trying to put their arm around the door. (3RT 290, 291.) The men pushed their way out of the mantrap, and Chavero heard six to seven shots, but he did not see who fired them. (3RT 291.)

Salinsky heard the wrestling downstairs, and a gunshot or two, then nothing, then a series of about four to five gunshots. (2RT 192-193, 207.) When Salinsky came downstairs, he saw Gonzales lying lifeless on the ground near the front door. (2RT 196.)

At 3:45 p.m., on October 1, 2008, Robert Simmons was driving in the number one lane southbound on La Brea Avenue, south of 8th Street, when he heard seven to eight popping sounds and saw an altercation in front of the dispensary. (3RT 422-423.) He saw Banks and Gonzales pushing the front door back and forth. (3RT 424, 428-430.) Banks was inside trying to push the door open, as Gonzales pushed the door closed. (3RT 424.) The men were pointing firearms and firing at each other. (3RT 425.) Gonzales had a gun in his right hand and was trying to reach around the door with his gun. (3RT 425.) Gonzales fired his gun. (3RT 434.) Banks had a gun in his left hand and was trying to reach around the door with his gun. (3RT 425.) Simmons stopped his car, but by that time Gonzales was lying on the sidewalk. (3RT 426.)

James Hustead was sitting at a coffee shop, catty-corner to the dispensary, when a gunshot caught his attention. (4RT 697.) He saw Gonzales standing outside, pushing the front metal security door shut, as it was being pushed open from the inside. Gonzales reached

his hand around the door to the inside and Hustead heard a gunshot. (4RT 697, 714.) Banks then reached his left hand out and around the door and fired a shot at Gonzales. (4RT 698-699, 706.) It looked like it hit Gonzales's body, but Hustead could not be sure. (4RT 716.) Banks then stepped out from behind the door and began shooting at Gonzales's head as he was falling backwards. (4RT 698-699.) Banks was about two feet away from Gonzales when he fired three or four additional shots into his head. (4RT 700.) After Gonzales hit the ground, Banks fired one additional shot into his head. (4RT 700, 717.)[4]

2. THE ESCAPE.

Banks, Daniels, and Gardiner ran north on La Brea Avenue, and turned right on 8th Street. Hustead ran across the street and attempted to resuscitate Gonzales. (4RT 701.) Hustead saw a handgun and a glove lying on the ground next to Gonzales. (4RT 726-727.)

Peter Todorovic was in his upstairs apartment on South Sycamore Avenue when he heard three or four shots coming from La Brea Avenue, the next street over. (3RT 384.) He saw Banks and Gardiner running southbound on Sycamore. They ran into the driveway of the building next to Todorovic's building where they stopped and had a brief conversation. (3RT 385-386.) Banks then ran across the street, jumped a fence, and headed eastbound. (3RT 390.)

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[4] The medical examiner determined that Gonzales died from two gunshot wounds. (5RT 755.)

Gardiner ran south on Sycamore and got into a white Ford Expedition. (3RT 392.) Todorovic said that the Expedition was stopped on Sycamore Avenue when he first noticed the vehicle, although he was not sure if the vehicle had been there, or just got there right before he noticed it. However, when he first noticed the car, it was not moving. (3RT 414, 419-420.) The driver of the Expedition was a very large African-American man. (3RT 393.) The Expedition had a paper license plate that said, "Play," or "Power Play," or "Power." (3RT 393-394.) The vehicle drove northbound on Sycamore and made a right turn onto 8th Street heading east. (3RT 394.) Todorovic was not able to identify the driver. (3RT 397-399.)

Dominic Agbabiaka was on the sidewalk of South Sycamore Avenue, which runs parallel to La Brea Avenue, when Daniels came running south down the street. He asked Agbabiaka if he could use his restroom, but Agbabiaka refused. (2RT 214-216.) Agbabiaka then saw Gardiner come running up the street, and both of them got into a gray Ford Expedition that had just come around the corner from 9th Street. (2RT 217-219.) The Expedition had paper license plates that said, "Power" or "Sun." (2RT 218, 231, 234.) The vehicle was moving faster than normal for a residential street, and as it approached, Daniels yelled out, the name "Troy, Troy" as he jumped into the car. (2RT 218-220.)[5] The car did not come to a complete stop when the two men jumped in quickly. (2RT 219.) The Expedition took off northbound on Sycamore and turned right onto 8th Street heading east. (2RT 220.)

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[5] Matthews's middle name is Troy (6RT 997), and Brandon Daniels goes by the name "Tray." (5RT 874.)

3. BANKS AND MATTHEWS ARE DETAINED.

Police set up a perimeter around the area of La Brea Avenue and 8th Street. (5RT 807.) A helicopter pilot saw Banks walking north on 8th Street, and he was detained about one-and-one-half blocks away from the dispensary. (4RT 640-645.) Matthews was arrested later that day, after driving by Los Angeles Police Department ("LAPD") officers in a Silver Ford Expedition with Power paper license plates on Wilshire Boulevard. (5RT 809-810, 1CT 205.) He was alone in the car when detained. (5RT 810.) The Expedition was registered to Banks and another person, and clothing belonging to Banks was found inside the vehicle. (6RT 1087, 1091.)

4. CRIME SCENE INVESTIGATION, BALLISTICS AND FORENSIC EVIDENCE.

LAPD Officer Elizabeth Ellis arrived at the crime scene at 3:45 or 3:50 p.m. (4RT 459, 637-638.) Gonzales was lying on the ground, his arm partially extended, and there was a silver revolver next to him. (4RT 460-463.)

Detective John Shafia, the investigating officer, arrived shortly after Officer Ellis. (4RT 477-478.) There were bullet holes in the walls, windows, and door jam of the dispensary. (4RT 478.) Three fingerprints were lifted from inside the front door of the dispensary, one of which belonged to Daniels. (5RT 804-805, 6RT 964.)

A physician's statement and recommendation form, with Banks's photograph on it, was found inside the dispensary. (4RT 546-547, 6RT 1089.) One partial palm print on the back of the card belonged to Banks. (6RT 961, 967.)

A revolver was found on the sidewalk in front of the dispensary. (4RT 478-479.) The hammer of the revolver was cocked, and the gun was loaded with two live rounds and three spent rounds. (4RT 564-567.) Officers also found a glove and several 9 mm expended cartridge casings on the sidewalk in front of the dispensary. (4RT 478-479 491-499, 564, 637-639.) The expended casings were fired from a semi-automatic weapon, later determined to be a 9 mm Glock. (4RT 499, 5RT 766-765.) Two zip ties that were tied together were found in the lobby area inside the dispensary. (4RT 478-479.)

On October 7, 2008, LAPD Detective Kurt Wong searched a residential area off Orange Avenue . (3RT 447.) In the bushes near a house, he recovered six black plastic zip ties, a semi-automatic handgun, a gun holster, and a pair of athletic-type gloves. (3RT 449-452.)

Ballistics testing revealed that the semi-automatic pistol Wong found in the bushes had fired the casings found in front of the dispensary. (5RT 765-768, 770-771.) That gun had also fired a bullet fragment that was recovered from Gonzales's body. (5RT 786-787m 822-825.)

DNA analysis showed that Matthews was excluded as a potential contributor of the DNA found in the dispensary, on the zip ties, the gloves, the revolver, the semi-automatic gun, gun magazine, and the gun holster. (4RT 531-535.)

Banks was determined to be a major contributor of the DNA on the gloves Wong found at the house. (4RT 540.) Gardiner's DNA was on the two zip ties and the glove found at the dispensary. (4RT 527-529.) Gonzales's DNA was found on the revolver. (7RT 1212.) No

blood, or DNA belonging to Gardiner or Daniels was found in the Ford Expedition. (5RT 873-874.)

5. CELL PHONE RECORDS AND GLOBAL POSITIONING SATELLITE (GPS) EVIDENCE.

Phone records revealed that Matthews called Banks six times on October 1, 2008. The first call was at 2:53 p.m., and lasted 24 seconds; the second call was at 3:46 p.m., and lasted 32 seconds; the third call was at 3:49 p.m., and lasted 49 seconds; the fourth call was at 3:51 p.m., and lasted 48 seconds; the fifth call was made at 3:53 p.m., and lasted 31 seconds; and, the sixth and final call was made at 3:56 p.m., and lasted 37 seconds. (4RT 675-678.) Matthews also received three incoming calls from Banks: one at 1:49 p.m., which lasted for 19 seconds, one at 3:44 p.m. for 20 seconds, and one at 3:58 p.m. which lasted 20 seconds. (4RT 678-679.) Records did not indicate whether the calls to Banks's phone went through, or went to voice-mail. (4RT 680.)

The parties stipulated that Matthews was wearing a GPS device on October 1, 2008. (4RT 656.) The device captured Matthews's location by longitude and latitude, within 15 meters of his exact location. (4RT 656, 662.) At 2:51 p.m. the GPS device indicated that Matthews was on La Brea Avenue, north of 8th Street, near the dispensary. (4RT 656-666; Peo's Exh. No. 51 [CD Rom of GPS locations, 1st Zip file].) Matthews drove from that location to Mansfield Avenue (three blocks east of La Brea Avenue) where he remained stationary from 2:55 p.m. until 3:45 p.m. (Peo's Exh. 51 [1st & 2d Zip file].)

At 3:46 p.m. (the time at which witnesses reported hearing shots fired) Matthews drove from Mansfield Avenue to 9th Street, then to 8th Street, east of Sycamore Avenue. (Peo's Exh. 51 [1st & 2d Zip file].) At 3:48 p.m. he drove west down Olympic Boulevard, went east on San Vicente, north on Curson Avenue, west on Wilshire Boulevard between Sycamore and Orange, back to Mansfield Avenue between Wilshire and 8th Street, then westbound on Wilshire. At 4:02 p.m. Matthews was on Wilshire between Bronson and Norton Avenue. (*Ibid.*) Matthews remained near the corner of Wilshire and Norton Avenue from 4:02 p.m. until 5:21 p.m. (Peo's Exh. 51 [2d & 3d Zip file].) At 5:21 he drove up Norton Avenue to 6th Street and remained at that location until 6:38 p.m. (Peo's Exh. 51 [3d Zip file].) At 6:38, Matthews drove down Pico Boulevard to Venice Boulevard were he remained from 6:49 until 7:00 p.m. (*Ibid.*)

6. GANG EVIDENCE.

LAPD Officer James Moon testified as the People's gang expert. (6RT 972.) He was familiar with the Rollin 30's gang. It is a Crips gang with approximately 750 members. (6RT 974-975.) The primary activities of the Rollin 30's gang include: narcotics sales, burglaries, robberies, shootings, attempted murders, murder, and carrying guns. (6RT 975, 999-1001 [predicate offenses].)

Banks was not a member of the Rollin 30's gang. (6RT 980.) However, Moon believed Matthews, Daniels, and Gardiner were members of the gang. (6RT 982-985, 991-997.) Matthews was known by one officer as "Big Boy," and another officer knew him as "Troy." Troy is Matthews's middle name. (6RT 997.) There were no field

identification cards in the LAPD database regarding Matthews. (6RT 1031-1035.)

The dispensary was not located within the gang's claimed territory. (6RT 1007.) Nevertheless, Moon was of the opinion that the individuals involved here were putting in work for the gang, and committing the crime in association with the Rollin 30's gang, and that the gang benefitted because the crime put direct fear into the community, showing that the gang was active and willing to commit violent crimes. (6RT 1006.) However, Moon admitted that no one identified themselves as a member of the Rollin 30's gang, no gang signs were thrown, no one wore gang clothing, or flashed gang tattoos, and none of the victims believed this to be a gang-related crime. (6RT 1045, 1067.) Gang members can commit crimes for their own benefit. (6RT 1045.)

B. THE DEFENSE.

Banks's theory of defense was mistaken identity and he called Dr. Robert Shomer, an expert on the factors involved in perception, memory, and eyewitness identification (6RT 1102-1117), and Juan Renteria, who worked next door to the dispensary, but was never interviewed by police. (6RT 1139-1140, 1144.) Renteria did not see Banks on the day of the shooting. (6RT 1143-1144.)

Matthews did not present any evidence in his defense, but argued that the prosecution had not met its burden to prove the charges beyond a reasonable doubt, and specifically that the circumstantial evidence was not sufficient to prove that Matthews had the requisite intent to aid and abet the commission of these crimes. (8RT 1434-1464.)

SUMMARY OF THE ARGUMENT

Section 190.2, subdivision (d) (hereinafter "190.2(d)") of California's capital sentencing scheme, was enacted to bring California law into conformity with the High Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137 ("*Tison*"), and the statutory language of section 190.2(d) derives verbatim from the decision in *Tison*. (*People v. Estrada* (1995) 11 Cal.4th 568, 575 ("*Estrada*").) *Tison* held that the Eighth Amendment did not prohibit capital punishment for an accomplice to a felony murder if the accomplice acted as a major participant in the underlying felony *and* his or her mental state was one of "reckless indifference to human life." (*Estrada,* at p. 575.) *Tison* and section 190(d) are written in the conjunctive, to require both elements.

Neither *Tison* nor this Court has defined what it means to be a "major participant" in the underlying felony. *Tison* did, however, define what it means to play a "minor" role in the underlying felony. *Tison* found that Mr. Enmund, the getaway driver in an armed robbery, in *Enmund v. Florida* (1982) 458 U.S. 782 ("*Enmund*"), was a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." (*Tison, supra,* 481 U.S. at p. 149.) Mr. Matthews is California's version of Mr. Enmund.

Tison stands for the proposition that what constitutes "major participation" is a fact-dependent determination along a continuum marked by three points: Mr. Enmund, the *minor* participant at one end who does *not* qualify for capital sentencing; the actual killer at the opposite end; and, the Tison brothers, major participants in the

underlying felonies who acted with reckless indifference to human life, who fall somewhere in the middle. (*Tison, supra,* 481 U.S. at pp. 149-150.)

Application of the *Tison* standard, defining what it means to play a *minor* role in the underlying felony, compels a finding that Mr. Matthews was a *minor* participant, just like Mr. Enmund. Because the true finding on the special circumstance in this case is based on insufficient evidence that Mr. Matthews was a major participant in the underlying felonies who acted with reckless indifference to human life, this Court should strike the true finding and modify his sentence to an indeterminate term of 25 years to life for first degree murder.

ARGUMENT

I.

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT MATTHEWS WAS A "MAJOR PARTICIPANT" WITHIN THE MEANING OF SECTION 190.2, SUBDIVISION (d).

A. INTRODUCTION.

In order to answer this Court's first question, whether the evidence was sufficient to establish that Matthews was a "major participant" within the meaning of section 190.2(d), we will first explain what it means to be a "major participant" under *Enmund* and *Tison* and California law. We will then show that under those standards, the evidence here is insufficient to establish that Mr. Matthews was a major participant within the meaning of section 190.2(d). Mr. Matthews was the getaway driver in an attempted robbery/burglary who was sitting in a car three blocks away from the dispensary during the commission of the crimes. He was not the actual killer, and there is no evidence that he intended to kill.

B. CALIFORNIA'S FELONY-MURDER SPECIAL CIRCUMSTANCE.

Section 190.2, subdivision (a), allows for a punishment of death, or life in prison without the possibility of parole, if a defendant is found guilty of first degree murder and one of the special circumstances enumerated therein is found true. Murder committed while the defendant was engaged in, or was an accomplice in the commission, or attempted commission of a robbery, or burglary are two such special circumstances. (§190.2, subds. (a)(17)(A) [robbery], (a)(17)(G) [burglary].)

When, as here, the defendant is not the actual killer in a felony murder, the prosecution must additionally prove that the accomplice either had the "intent to kill" (§190.2, subd. (c)[6]), *or* acted with reckless indifference to human life and as a major participant in the underlying felony. (§190.2(d)).

In this case, it was undisputed that Matthews was not the actual killer, and the special circumstance was *not* based on the theory that he harbored an intent to kill.[7] Instead, the special circumstance here was based upon the language of section 190.2(d), which states:

> [E]very person, not the actual killer, who, with reckless indifference to human life *and* as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been

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[6] Section 190.2, subdivision (c), provides: "Every person, not the actual killer, who, with the intent to kill, aids, abets, . . . or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4."

[7] Contrary to the Court of Appeal's statement on page 21 of its opinion, we *never* contended in the direct appeal that the prosecution had to prove that Matthews acted with intent to kill.

found to be true.

(Italics added.)

The federal constitution does not prohibit imposition of the death penalty upon an accomplice if that person acted with reckless indifference to human life *and* as a major participant in the underlying felony. (*Tison, supra,* 481 U.S. at pp. 138, 158; *People v. Mora* (1995) 39 Cal.App.4th 607, 616.)

As explained in *Estrada, supra,* 11 Cal.4th at page 575, section 190.2(d) was added in 1990 through Proposition 115, to make California's capital sentencing scheme consistent with *Tison, supra,* 481 U.S. 137. (See also *People v. Mil* (2012) 53 Cal.4th 400, 408-409.) Prior to that time, California's statute had been construed to require intent to kill for the felony-murder special circumstance of a defendant who was not the actual killer.

Under section 190.2(d), a defendant must *both* act with reckless indifference to human life *and* be a major participant in the underlying felony. While the United States Supreme Court has observed that the *facts* establishing "reckless indifference" and "major participation" can often overlap, the *elements* are different and *both* elements are required under *Tison* and section 190.2(d). (*Tison, supra,* 481 U.S. at pp. 152-153.)

C. THE DEFINITION OF A "MAJOR PARTICIPANT."

1. THE STANDARDS ANNOUNCED IN *ENMUND* AND *TISON.*

There is no set definition of what it means to be a major participant in the underlying felony. The United States Supreme Court addressed this question in two seminal cases: *Enmund, supra,* 458 U.S. 782, was the first of these cases, and *Tison, supra,* 481 U.S.

137 followed and expanded upon *Enmund*.

In *Enmund, supra,* 458 U.S. 782, the defendant drove his two accomplices to the remote farmhouse of an elderly couple and parked on the side of the road, about 200 yards from the farmhouse, while his accomplices knocked on the back door. When the husband opened the door, one accomplice grabbed him, held a gun to him and told the other accomplice to take his money. Alerted by the husband's cries for help, the wife appeared with a gun and shot one of the accomplices. One or both of the accomplices returned fire, killing the couple. The accomplices then took the couple's money and fled to the car, where Enmund was waiting to drive them away. Enmund was convicted of first degree felony-murder and sentenced to death. (*Id.* at pp. 784-785.)

The High Court considered Mr. Enmund's participation in the underlying felony to be "minor." The Court stressed that, because Enmund neither killed nor intended to kill, his mental state could not be equated with that of his accomplices, who actually killed, attempted to kill, or intended to kill. (*Enmund, supra,* 458 U.S. at p. 798.) The Court found that the goals of deterrence and retribution were not served by imposing the death penalty on a robber who neither killed nor intended to kill, as crime statistics showed that killing is very rare during a robbery, and unintentional killings very rarely result in a sentence of death. (*Ibid.*) "Here the robbers did commit murder; but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus

must be on *his* culpability, not on that of those who committed the robbery and shot the victims[.]" (*Ibid.*, original italics.)

The Supreme Court reversed Enmund's sentence, observing that the defendant was not on the scene of the killings, and he did not intend to kill nor was he found to have had any culpable mental state. His conduct was limited to driving the getaway car. The Court further noted the killings were apparently spontaneous, precipitated by the wife's armed resistance to the robbery. (*Enmund, supra,* 458 U.S. at p. 798.)

Tison, supra, 481 U.S. 137, is an extension of *Enmund*. In *Tison,* two brothers, along with other members of the Tison family, made plans to help their father, Gary Tison, and his cellmate, escape from an Arizona prison. (*Id.* at p. 139.) The brothers knew their father was serving a life sentence as the result of a prior prison escape during which he killed a guard, and that the cellmate was also a convicted murderer. (*Ibid.*)

"The Tison family assembled a large arsenal of weapons" and plans for the escape were plotted with the father and his cellmate. (*Tison, supra,* 481 U.S. at p. 139.) The Tison brothers brought a large ice chest filled with guns into the prison and, brandishing those weapons, they locked prison guards and visitors in a closet to facilitate the escape. (*Ibid.*) As they were fleeing, the getaway car broke down, so one brother, Raymond, flagged down a passing car while the rest of the group hid by the side of the road. The plan was to steal the car. (*Id.* at pp. 139-140.) However, when a family of four, including a two-year-old boy, pulled over to help, Gary Tison and his cellmate "brutally murdered their four captives with repeated blasts from their

shotguns." (*Id.* at p. 141.) The brothers stood by and watched as the family was killed. The brothers made no attempt to assist the victims before, during, or after the shootings, but instead chose to assist the killers in their continuing criminal endeavors. (*Id.* at pp. 151-152.)

On these facts, the Supreme Court held that the brothers could be sentenced to death despite the fact they had not actually committed the killings themselves because their own personal involvement in the crimes was not minor, but rather "substantial," and their mental state was one of reckless indifference to the value of human life. In these circumstances, the High Court concluded that the *Enmund* culpability requirement was met. (*Tison, supra,* 481 U.S. at pp. 157-158, italics added.)

The High Court found that the Tison brothers' own personal involvement in the crimes was substantial because, "[f]ar from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery [like Mr. Enmund], each [brother] was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder[s] . . . and the subsequent flight. The Tisons' high level of participation in these crimes . . . implicates them in the resulting deaths." (*Tison, surpa,* 481 U.S. at pp. 157-158.) "These facts not only indicate that the Tison brothers' participation in the crime was anything but minor; they also would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life." (*Id.* at p. 152.)

However, *Tison* made clear that for death eligibility, it is not enough if a defendant simply intended to use lethal force during the

underlying felony, as "[p]articipants in violent felonies like armed robberies" frequently anticipate the use of lethal force, and "Enmund himself may well have so anticipated." (*Tison, supra,* 481 U.S. at pp. 150-151.) *Tison* continued: "Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves." (*Id.* at p. 151.)

While *Enmund* and *Tison* require a court to focus on the defendant's own personal culpability in the underlying felony, *Tison* declined to "precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty." (*Tison, supra,* 481 U.S. at p. 158.) "Rather, we simply hold that major participation in the felony committed, *combined with* reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Ibid.*, italics added.)

The High Court described a continuum of conduct, marked by three points:

> At one pole was Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. . . . *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill. . . . The Tison brothers' cases fall into neither of these neat categories.

(*Tison, supra,* 481 U.S. at pp. 149-150.)

The *Tison* case can thus be described as the middle ground, or "intermediate case" (*Tison, supra,* 481 U.S. at p. 152), between Mr. Enmund on the low-end, where death eligibility is not appropriate,

and the actual killer who acts with the intent to kill at the opposite end of the continuum.

In determining where a defendant falls along this continuum, *Tison* instructs that it is a very fact-specific determination, based on the defendant's *own personal involvement* in the underlying crimes. (*Tison, supra,* 481 U.S. at pp. 151-153.) The *Tison* Court focused on the individual role each brother played in the crime, and not on the crimes committed by their father or his cellmate. The brothers "brought an arsenal of lethal weapons into the Arizona State Prison" and armed the actual killers knowing they had previously killed others; they participated in the escape from prison; Raymond actually flagged down the family; the brothers robbed the family and "guarded the victims at gunpoint while they considered what next to do"; they were present and stood by and watched their companions shoot and kill the victims, and could have foreseen that lethal force might be used. (*Ibid.*) These facts made the brothers major participants in the underlying felonies.

2. *ENMUND* AND *TISON* APPLY WHEN, AS HERE, THE PUNISHMENT SOUGHT IS LIFE WITHOUT THE POSSIBILITY OF PAROLE.

The Court of Appeal here reasoned that *Enmund* did not apply in this case, because, "First, [*Enmund*] concerns the proportionality of a sentence of death. Matthews received a sentence of life without the possibility of parole. [And secondly, because] *Enmund* predates the United States Supreme Court's decision in [*Tison*]." (Opn. at p. 22.) This reasoning must be rejected. We will quickly dispose of the second point first.

For our purposes, it is of no moment that *Enmund* predated *Tison*. *Tison* did not overrule *Enmund*. *Tison* is an extension of *Edmund*. Both the United States Supreme Court and this Court have recently cited *Enmund* with approval. (See e.g., *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 2475] (conc. opn. of Breyer, J. joined by Sotomayor, J.); *People v. Letner* (2010) 50 Cal.4th 99, 193 [" '*Enmund* explicitly dealt with two distinct subsets of all felony murders [1] the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state . . . [and 2] the felony murderer who actually killed, attempted to kill, or intended to kill' "], quoting *Tison, supra,* 481 U.S. at pp. 149-150; see also e.g., *In re Coley* (2012) 55 Cal.4th 534, 566; *People v. Contreras* (2013) 58 Cal.4th 123, 163-165.)

This Court should also reject the reviewing court's first point, that the *Enmund-Tison* analysis does not apply here because "those cases concerned the proportionality of a sentence of death [and] Matthews received a sentence of life without the possibility of parole." (Opn. at p. 22.) Our special circumstance statute cannot be construed differently based on the *punishment* (i.e., death or life without the possibility of parole) ultimately sought by the People. This appeal does not challenge the validity, or proportionality of the punishment imposed. Rather, it challenges the *sufficiency of the evidence* to support the true finding on the felony-murder circumstance.

This Court's decision in *Estrada, supra,* 11 Cal.4th 568, exemplifies our point. In *Estrada,* the defendant received a sentence of life without the possibility of parole, after a jury found the felony-murder special circumstance true, under section 190.2(d). Estrada was

not the actual killer, but he was an accomplice to a robbery / burglary during which the victim was killed. (*Id.* at pp. 572-574.) This Court granted review to determine "whether a trial court has a sua sponte duty to define the phrase 'reckless indifference to human life' when instructing a jury regarding a felony-murder special-circumstance allegation against a defendant who is not the actual killer." (*Id.* at p. 571.)

This Court in *Estrada* noted that "[t]he portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137." (*Estrada, supra,* 11 Cal.4th at p. 575.) When discussing *Tison*, this Court acknowledged that, even though "*Tison* was concerned with whether imposition of the death penalty on an accomplice to a felony murder who neither killed nor intended to kill the victim would violate the Eighth or Fourteenth Amendments[:]

> . . . *Tison* is the source of the language of section 190.2(d), and the constitutional standards set forth in that opinion are therefore applicable to *all* allegations of a felony murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole. We therefore begin our inquiry into whether the import of section 190.2(d) is adequately conveyed by its express statutory terms by looking to *Tison* for the meaning of the statutory phrase "reckless indifference to human life."

(*Estrada, supra,* 11 Cal.4th at pp. 575-576, original italics; accord, *People v. Mil, supra,* 53 Cal.4th at p. 417.)

To the extent that *Tison's* interpretation is intertwined with *Enmund* in defining section 190.2(d), *Enmund* as well must apply to all allegations of the felony-murder special circumstances, regardless of whether the death penalty or imprisonment without the possibility of parole is sought by the prosecution. Clearly, the statutory language and any judicial interpretation must have the same meaning regardless of which penalty is chosen by the People. Therefore, notwithstanding the proportionality analysis in *Enmund* and *Tison,* their principles delineating the scope of a "major participant" in a felony-murder, when the defendant is not the actual killer, applies equally even when the People do not seek the death penalty.

3. CALIFORNIA'S DEFINITION AND APPLICATION OF THE "MAJOR PARTICIPANT" REQUIREMENT.[8]

In California, there is no minimum threshold of participation that qualifies a person as a "major participant" in the underlying felony. Perhaps for this reason, we could find no published authority in this state which has found a defendant's role in the underlying felony to be minor. This Court should define that minor role as Mr. Matthews who, like Mr. Enmund, was "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." (*Tison, supra,* 481 U.S. at p. 149.)

In *People v. Proby* (1998) 60 Cal.App.4th 922, 934 ("*Proby*"), the Court of Appeal found the phrase "major participant" to be a

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[8] There are three intermediary decisions that specifically address the sufficiency of evidence of the "major participant" aspect of section 190.2(d), and we could not find any California Supreme Court authority on this particular subject.

commonly understood term, having no technical meaning peculiar to the law. (*Id.* at pp. 933-934.) "The common meaning of 'major' includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.' [Citation.]" (*Id.* at pp. 933-934.) The defendant need not necessarily be the ringleader or the triggerman. (*Ibid.*)

In *Proby, supra,* 60 Cal.App.4th 922, the defendant contended there was insufficient evidence that he acted as a major participant with reckless indifference to human life. The defendant, and his co-perpetrator, Vines, both worked at a McDonald's restaurant. Vines robbed the restaurant and locked the employees in a walk-in freezer. Proby realized the victims would remain in the freezer for five hours, until the morning manager arrived (though he claimed he did not think this would hurt them). Proby also admitted helping plan that robbery. Approximately two weeks later, the pair robbed another McDonald's where Vines had previously worked. During that robbery, Vines shot and killed an employee. (*Id.* at p. 927.)

On appeal, the reviewing court found sufficient evidence to support the finding that Proby was a major participant in the crimes who acted with reckless indifference to human life. (*Id.* at p. 929.) Although Proby was not the actual killer, he admitted planning the robbery; he supplied the murder weapon to the actual killer; he was present at the scene of the murder armed with a semiautomatic handgun; he saw "pus" ooze out of the victim's head but did nothing to assist the victim, or determine whether he was still alive; and, he helped his cohort take money and gift certificates out of the restaurant safe. (*Id.* at pp. 926, 929.)

In *People v. Hodgson* (2003) 111 Cal.App.4th 566 ("*Hodgson*"), the Court of Appeal found sufficient evidence to support a robbery-murder special circumstance where the defendant held open the electric gate of an underground parking garage to facilitate the escape of his fellow gang member, Salazar, who robbed and shot to death a woman who had opened the gate to enter. (*Id.* at p. 568.) As the defendant stood at the gate, Salazar approached the victim's car and shot out one of the windows. After the car rolled forward and into a pillar and a parked car, Salazar fired another bullet through the window and into the victim's head. (*Id.* at p. 570.)

The court in *Hodgson* concluded the defendant was a major participant in the crime, notwithstanding the fact he did not supply the murder weapon, was not himself armed, and did not take anything from the victim. (*Hodgson, supra,* 111 Cal.App.4th at p. 579.) The court explained: "This is not a crime committed by a large gang or a group of several accomplices. Instead only two individuals were involved. Thus, appellant's role was more 'notable and conspicuous' – and also more essential – than if the shooter had been assisted by a coterie of confederates. By slowing down the closing automatic electric garage gate appellant was instrumental in assisting Salazar effect his escape with the loot." (*Id.* at pp. 579-580.)

In *People v. Smith* (2005) 135 Cal.App.4th 914 ("*Smith*"), overruled on other grounds in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291, the Court of Appeal concluded that substantial evidence showed co-defendant "Taffolla acted with 'reckless indifference to human life while acting as a major participant' in the attempted robbery of Star." (*Smith, supra,* at p. 927.) Star, the victim, was

"stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall. In addition, when Smith emerged from her room covered in enough blood to leave a trail from the motel to McFadden Street, Taffolla chose to flee rather than going to Star's aid or summoning help." (*Ibid.*, original italics.)

The reviewing court reasoned that the jury could have found that Taffolla was a major participant, that his contributions were " 'notable and conspicuous' because he was one of only three perpetrators, and served as the only lookout to an attempted robbery occurring in an occupied motel complex. [Citation.] Unlike the hypothetical 'non-major participant' in *Tison v. Arizona* (1987) 481 U.S. 137, 158 – who 'merely [sat] in a car away from the actual scene of the murders acting as the getaway driver to a robbery' – Taffolla stood sentry just outside Star's room, where the jury could infer he monitored and guarded the increasingly lengthy, loud, and violent attempted robbery-turned-murder. [Citation.]" (*Smith, supra,* at p. 928.)

In finding the evidence sufficient to support the true finding on the special circumstance, *Smith* cited *Tison* for the proposition that the "reckless indifference" and "major participant" "*elements* often overlap." (*Smith, supra,* 135 Cal.App.4th at p. 928, italics added; *Tison, supra,* 481 U.S. at p. 158, fn. 12.) However, *Smith* misread *Tison* in this regard.

Tison held "that major participation in the felony committed, *combined with* reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Tison, supra,* 481 U.S. at p. 158, italics added.) *Tison* noted that, while the "major

participant" and "reckless difference to human life" requirements are "separate," some felonies carry such a grave risk of death that "one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life." (*Tison, supra*, at p. 158, fn. 12.) However, *Tison* found that armed robbery is *not* an example of one such felony. (*Id.* at pp. 150-151.) *Tison* and section 190.2(d), are written in the conjunctive: an accomplice must act with reckless indifference to human life *and* act as a major participant in the commission or attempted commission of one of the enumerated felonies in paragraph (17) of subdivision (a) of section 190.2.[9]

Smith is not the only case to blend the elements of the special circumstance, to use a finding of reckless indifference – or a willingness to commit the underlying felony – to establish that the defendant was also a major participant in the underlying felony. (See e.g., *People v. Mora* (1995) 39 Cal.App.4th 607, 617 ["There can be no question as to the 'major participant' element. Even by his own statement defendant helped plan the robbery and was instrumental in arranging for Arredondo to enter the home with the rifle. Assuming the trial court gave credence to defendant's statement to police that he did not intend the victim to be killed, defendant's statement did not negate reckless indifference to life"].)

Our case is also illustrative of a misapplication of the required findings under section 190.2(d). The Court of Appeal here found that Matthews was a major participant in the crimes, because:

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[9] The word "and" ordinarily is conjunctive. (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 528.)

> As established in part II.A., ante, *we believe the evidence was sufficient to show that the jury found that Matthews aided and abetted the attempted robbery and burglary prior to Gonzale[s]'s death to sustain his first degree murder conviction.* Matthews did not play a "minor role," as he asserts, but was a major participant in the crimes. *Matthews drove Banks's car to the location, parked a few blocks away and waited for the signal to pick up his fellow perpetrators.* He had a ' "notable or conspicuous" ' role in the commission of the underlying felonies. (*People v. Proby* (1998) 60 Cal.App.4th 922, 930-931.)
>
> With advance knowledge of the planned robbery and burglary, Matthews *had to be aware of the risk of resistance* and the extreme likelihood that death could result. Banks, Daniels, and Gardiner anticipated as much because they were armed. Evidence was introduced at trial that Matthews belonged to the Rollin 30's – as did Daniels and Gardiner. This was a gang with a history of violence and was known for possessing guns and committing robberies, shootings, and murders.

(Opn. at p. 21, italics added.)

Matthews's role as the getaway driver, and his purported knowledge of the plan to commit a robbery made him guilty of felony-murder under an aiding and abetting theory of liability. (§§187 / 189, 31.) However, the Court of Appeal here allowed those facts to subsume the additional two elements – major participation in the underlying felony and reckless indifference to human life – required for a true finding on the felony-murder special circumstance. The defendant must do more than commit the underlying crime to qualify

for the special circumstance. (*Tison, supra,* 481 U.S. at pp. 150-151), and a getaway driver in an armed robbery, who is not on the scene, who neither intended to kill nor was found to have had any culpable mental state does *not* play a "notable or conspicuous role" in the commission of the underlying felonies. (*Id.* at p. 149.)

The Court of Appeal also found that, "With advance knowledge of the planned robbery and burglary, *Matthews had to be aware of the risk* of resistance and the extreme likelihood that death could result." (Opn. at p. 21, italics added.) *Tison* also rejected this reasoning. (*Tison, supra,* 481 U.S. at pp. 150-151.)

> Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself.

(*Tison, supra,* 481 U.S. at pp. 150-151.)

The same is true here. The Court of Appeal's reasoning behind upholding the true finding on the special circumstance amounts to little more than a restatement of the felony murder rule itself. Bare participation in a robbery that resulted in murder is not enough culpability to warrant death eligibility, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this

possibility is generally foreseeable and foreseen." (*Tison, supra,* 481 U.S. at p. 151.)

If a willingness to commit the felony can be used to establish that the defendant was also a major participant in the underlying felony, then there is no distinction between felony murder and the felony-murder special circumstance. If there is no distinction between felony murder and the felony-murder special circumstance, then, section 190.2(d) is not serving its constitutional purpose of providing a rational basis for distinguishing between those who deserve to be considered for the death penalty and those who do not. (See *Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153; *People v. Green* (1980) 27 Cal.3d 1, 61.)

Therefore, while California has not yet set a minimum threshold of participation that qualifies a person as a "major participant" in the underlying felony, we know from *Enmund* and *Tison* that the defendant must do more than commit the underlying crime to qualify for the special circumstance (*Tison, supra,* 481 U.S. at pp. 150-151), and his level of participation must be *more than* that of the getaway driver in a robbery who is "merely sitting in a car away from the actual scene of the murders[.]" (*Id.* at p. 158; cf. e.g., *State v. Forde* (2014) 233 Ariz. 543, 315 P.3d 1200, 1224 [sufficient evidence supported the jury's finding that Forde was a major participant in the burglary or robbery. She planned to rob the house, scouted the house the day of the shootings, took the lead entering the house, directed other participants, and took jewelry from [the victim's] bedroom. "She led a late-night home invasion with armed men, . . . and barged into the victims' home, threatening violence." Because Forde actively

planned and executed the burglary and robbery, which culminated in the murders, she was a major participant in these crimes]; *State v. Bearup* (2009) 221 Ariz 163, 170-171, 211 P.3d 684, 691-692 [concluding that a defendant who held a knife and encircled the victim to prevent him from leaving as a co-defendant administered a savage beating was a major participant in the kidnaping that ended with victim's murder].)

D. THE EVIDENCE HERE WAS INSUFFICIENT TO ESTABLISH THAT MATTHEW WAS A MAJOR PARTICIPANT WITHIN THE MEANING OF SECTION 190.2(D).

1. THE GENERAL LAW REGARDING THE SUFFICIENCY OF THE EVIDENCE.

In reviewing a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on 'isolated bits of evidence.' " (*People v. Cuevas* (1985) 12 Cal.4th 252.)

To be substantial, evidence must be of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Johnson, supra,* 26 Cal.3d at p. 576.) It is not enough simply to point to *some evidence* supporting each jury finding, for not every surface conflict of evidence remains substantial in light of other facts. (*Id.* at p. 577.) " 'Substantial evidence' means evidence which, when viewed

in light of the entire record, is of solid probative value, maintains its credibility, and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner* (1983) 34 Cal.3d 141, 149.) The same standards apply in cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Jones* (2013) 57 Cal.4th 899, 960-961; *People v. Young* (2005) 34 Cal.4th 1149, 1175.)

"The prosecution's burden is a heavy one: 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.' [¶] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to 'substantial' evidence . . . [T]his test . . . [applies] to all elements of the prosecution's case [citation]." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

While an appellate court must accept *logical* inferences that the jury may have drawn from circumstantial evidence (*People v. Maury* (2003) 30 Cal.4th 342, 396), evidence is not substantial if it is based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, guess work or probabilities. (*People v. Morris* (1988) 46 Cal.3d 1, 21.) "[M]ere speculation cannot support a conviction." (*People v. Marshall* (1997) 15 Cal.4th 1, 35.)

These principles apply to a challenge to the sufficiency of the evidence to support a special circumstance finding. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129; *People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25.) The legal sufficiency of evidence to support a conviction is a question of law which the reviewing court reviews de novo. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 316, fn. 3.)

2. THE EVIDENCE ADDUCED AT TRIAL.

The shooting occurred at 3:45 p.m. on October 1, 2008. Banks called Matthews at 1:49 p.m. on the day of the shooting – nearly two hours before the shooting – the call lasted 19 seconds and did not appear to go to voice-mail. At 2:51 p.m., almost one hour before the shooting, while driving an SUV registered to Banks, Matthews drove down La Brea Avenue near the intersection of 8th Street, near the dispensary. (4RT 656-666.) At 2:53 p.m., again nearly one hour before the shooting, Matthews placed a call to Banks's cellular phone which lasted 24 seconds. It could not be determined whether that call went to voice-mail. At 2:55 p.m., 50 minutes before the shooting, the GPS evidence established that Matthews parked on Mansfield Avenue, three blocks east of La Brea Avenue, where he remained until 3:45 p.m., the minute the shooting occurred. [10]

At 3:44 p.m. Banks called Matthews. (4RT 678-679.) Matthews left the parking lot on Mansfield Avenue at 3:45 p.m. and drove in the direction of the dispensary. At 3:46 p.m., 3:49 p.m., 3:51 p.m., 3:53 p.m. and 3:56 p.m. Matthews called Banks. (4RT 678.) It could not be determined if any of those calls went to voice mail. (4RT 680.) Matthews picked up Daniels and Gardiner on South Sycamore

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[10] Witness Peter Todorovic testified that the Expedition was stopped on Sycamore Avenue when he first noticed the vehicle, although he was not sure if the vehicle had been there, or just got there right before he noticed it. (3RT 414, 419-420.) Indisputably, the far more accurate GPS evidence showed that Mr. Matthews parked on Mansfield Avenue at 2:55 p.m. and did not move from that location until 3:45 p.m. (People's Exhibit No. 51 [Zip files 1 & 2].) Thus, the Expedition had to have arrived on Sycamore Avenue just before Mr. Todorovic noticed the vehicle.

Avenue, one block east of La Brea Avenue. Witness Agbabiaka said the Ford Expedition came around the corner from 9th Street. (2RT 217-218.) He said the car did not completely stop when Daniels and Gardiner ran to the car and got in quickly. (2RT 219.) Daniels was screaming out the name, "Troy, Troy," as he jumped into the car. (2RT 220.) Banks ran eastbound. (3RT 390.) Matthews drove out of the area. (3RT 394.)

In closing argument, the prosecutor argued that Matthews was a major participant because: "Mr. Matthews is the one that gets everyone to this location. Mr. Matthews is the guy that drives the getaway vehicle. Mr. Matthews is the one that's supposed to pick up everyone at this location. [¶] You know, short of Mr. Banks who actually killed Mr. Gonzales, next most involved person had to be Mr. Matthews, right? Mr. Matthews is the one that started all this process. He gets everyone to the location, waits around, and his job was to get everyone to safety afterwards. [¶] I submit to you, ladies and gentlemen, that Mr. Matthews was a major participant. Without him, you don't even have an attempted robbery. Without him, you don't have a burglary. And honestly, without him taking Mr. Banks to this location, you wouldn't have the murder of Mr. Gonzales." (7RT 1356-1357.)

3. ANALYSIS.

Mr. Matthews was merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery. Under *Enmund* and *Tison*, Mr. Matthews was *not* a major participant in the felony-murder as a matter of law. He was a minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found

to have had any culpable mental state. (*Tison, supra,* 481 U.S. at p. 149.) There are no facts here which distinguish this case from *Enmund*. (*Enmund, supra,* 458 U.S. 782.)

Even assuming for the sake of this argument only, that Mr. Matthews knew of the plan to commit a robbery, that he drove the co-perpetrators to the dispensary, and that he waited to pick them up, these facts do *not* distinguish him from Mr. Enmund. The State Supreme Court of Florida found that Mr. Enmund planned the robbery (*Enmund, supra,* 458 U.S. at p, 808); and indeed, there would have been no other reason for Mr. Enmund to have driven his two accomplices out to a remote farmhouse in Central Florida. Mr. Enmund drove his accomplices to the scene, waited for them to commit an armed robbery, and drove them away from the scene after the robbery-murder.

Also as in *Enmund*, there was no evidence here that Mr. Matthews provided the murder weapon. Matthews was *excluded* as a potential contributor of the DNA found on the guns, the gun magazine, and the gun holster (as well as the zip ties, and the gloves). (4RT 531-535.)

Mr. Matthews was not present when the killing took place. In *Enmund*, the Court pointed out that Mr. Enmund was parked on the side of the road 200 yards from the farmhouse. (*Enmunds, supra,* 458 U.S. at p. 784.) Here, Mr. Matthews was parked on Mansfield Avenue, three blocks away from the dispensary located on South La Brea Avenue near 8th Street. The corner of South La Brea Avenue and 8th Street is .2 miles, or 352 yards, from the corner of 8th Street and Mansfield Avenue. (See www.google.com/maps, as of March 6,

2014.) Thus, Mr. Matthews was further away from the scene of the crime than was Mr. Enmund.[11]

In addition, as in *Enmund*, "the record [here] does not warrant a finding that [Matthews] had any intention of participating in or facilitating a murder." (*Enmund, supra,* 458 U.S. at p. 798.) The prosecutor never claimed Matthews acted with an intent to kill. In addition, unlike *Tison*, this record is devoid of any evidence that Mr. Matthews knew that any of the perpetrators had previously killed. (Cf. *Tison, supra,* 481 U.S. at p. 151.)

Also, as in *Enmund*, the killing here was spontaneous, and was precipitated by Gonzales's armed resistance to the robbery. (*Id.* at p. 809, fn. 18.) Both dispensary employees testified that Gonzales was *known to be unarmed*. (2RT 203 [Salinshky], 249 [Chavero].) However, the evidence established that he *was* armed, and that *he* engaged the perpetrators in a shoot-out at the front door. (3RT 425 [Simmons], 4RT 697, 714 [Hustead].) Forensic and ballistics evidence confirmed that a revolver, with Gonzales's DNA on it (7RT 1212), was found next to Gonzales, the hammer of the revolver was cocked and the gun was loaded with two live rounds and three *spent* rounds. (4RT 564-567.)

Moreover, even though Banks, Daniels and Gardiner were armed, bare participation in a robbery that resulted in a murder is not enough culpability to warrant a true finding on the special circumstance, even if the defendant anticipated that lethal force might

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[11] Even if he stopped momentarily on Sycamore Avenue, as reported by Todorovic, that was *after* the shooting, and Mr. Matthews was still one block away from the dispensary.

be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." (*Tison, supra,* 481 U.S. at p. 151.) The evidence here, however, was susceptible to the interpretation that the perpetrators did not expect violence to erupt during the robbery. First, as noted, Gonzales was known to be *unarmed*. (2RT 203, 249.) Second, no violence actually erupted until *Gonzales* started a fight to keep the perpetrators *inside* the dispensary and engaged them in a shoot-out at the front door. The killing here was a spontaneous reaction, precipitated by Gonzales's armed resistance to the robbery and furious attempt to prevent the perpetrators' escape.

Finally, like Mr. Enmund, Mr. Matthews was not a robber who had the opportunity to help the victim but chose instead to let him die. From his parking place three blocks away, Mr. Matthews did not witness the shooting. There is no evidence that Mr. Matthews heard the shots. Witness Todorovic testified to hearing shots in his upstairs apartment on S. Sycamore Avenue (3RT 384), however, Mansfield Avenue, where Mr. Matthews was parked, is two blocks east of South Sycamore Avenue, and three blocks away from La Brea Avenue, where the dispensary was located. Even assuming Mr. Matthews heard the shots, he had no way of knowing that Gonzales, or anyone else, had actually been shot. Moreover, after Gonzales was shot in the left temple, at point blank range (5RT 749-750), there was nothing Mr. Matthews could have done to assist him. Like Mr. Enmund, he did not go back to assist the victim.

Mr. Matthews did no more in this case than Mr. Enmund did by driving the getaway car in an armed robbery. Just as Mr. Enmund,

Matthews was a *minor* participant in the underlying offenses. (*Tison, supra,* 481 U.S. at p. 150 [Enmund was a minor actor in an armed robbery who was not on the scene, and who did not intend to kill].) Mr. Matthews's did *not* exhibit that high level of participation in every aspect of the underlying felony which the Court *Tison* found sufficient to be a major participant. (*Id.* at pp. 151-152.)

The California cases which have found sufficient evidence that the defendant acted as a major participant in the underlying felony, also demonstrate that the defendant's individual culpability has to be ***far more substantial*** than Mr. Matthews's involvement here. In *Proby, supra,* 60 Cal.App.4th 922, the defendant provided his accomplice with the gun, *they committed the robbery together,* and the defendant made no effort to assist the victim but instead joined the killer in taking money. Similarly in *Hodgson, supra,* 111 Cal.App.4th 566, defendant was *present* during the robbery-murder, holding an electric gate open to facilitate the perpetrator's escape. (*Id.* at pp. 579-580.) And, in *Smith, supra,* 135 Cal.App.4th 914, the accomplice was right outside the door of a motel room, acting as a lookout, while the perpetrator brutally beat the victim to death, making enough noise for the accomplice to hear and intervene, but he chose instead to let the victim die. *Smith* actually distinguished Mr. Enmund's situation from the facts before it (*Smith,* at p. 928), which supports our position that Mr. Matthews, who merely sat in a car away from the actual scene of the murder acting as the getaway driver, was *unlike* the accomplice in *Smith* and therefore, *not* a major participant in the underlying felony.

Mr. Matthews is the hypothetical defendant in *Tison* who was far from the scene of the murder merely sitting in a car, acting only as the getaway driver. (*Tison, supra,* 481 U.S. at p. 158.) The evidence is insufficient to establish that Mr. Matthews was a major participant in the underlying felony (§190.2(d)).

II.

THE TRUE FINDING ON THE SPECIAL CIRCUMSTANCE VIOLATES DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION, ARTICLE 1, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND *ENMUND v. FLORIDA* (1982) 458 U.S. 782.

A conviction that is not supported by substantial evidence violates due process under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 7 and 15 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 313-324; *People v. Rowland* (1992) 4 Cal.4th 238, 269-270.)[12]

We demonstrated in the previous argument that the evidence is insufficient to establish that Matthews acted as a major participant in the underlying felony. (Arg. §I.D., ante.) However, if this court disagrees, the felony murder special circumstance must still be stricken for insufficient evidence that Matthews acted with reckless indifference to human life. In order to uphold the true finding on the special circumstance, there must be substantial evidence of *both* major participation in the underlying felony and that the defendant acted with reckless indifference to human life. (*Tison, supra,* 481 U.S. at p. 158; §190.2(d).)

"*Tison* . . . instructs that the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es]

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[12] We incorporate the general law regarding the sufficiency of the evidence set forth in Argument §I.D.1., ante.

in criminal activities known to carry a grave risk of death' (481 U.S. at p. 157), and it is this meaning that we ascribe to the statutory phrase 'reckless indifference to human life' in section 190.2(d)." (*Estrada, supra,* 11 Cal.4th at p. 577.) "Reckless indifference to human life" means "that the defendant was subjectively aware *that his or her participation in the felony* involved a grave risk of death." (*Ibid.*, italics added.)

Since Mr. Matthews was not at the scene of the crime and did not participate in the felony, but rather was parked in a car three blocks away from the dispensary during the robbery-murder, it is hard to envision how his minor participation in the crime could evince a reckless indifference to human life. (*Estrada, supra,* 11 Cal.4th at p. 577.)

In the California cases that have found sufficient evidence of reckless difference to human life, the defendant was present at the scene, and typically participated in some critical aspect of the crime, *other than* merely driving the getaway vehicle. In *People v. Lopez* (2011) 198 Cal.App.4th 1106, for example, the reviewing court found sufficient evidence that the defendant acted with reckless indifference to human life where the evidence established that she was aware of her co-perpetrator's intent to commit a robbery, that he had a gun, and *she* lured the victim to a secluded alley where the robbery turned to murder. (*Id.* at pp. 1116-1118.) "Brousseau's act of luring the victim into the secluded alley was critical to the robbery's success. After hearing what she knew was a gunshot, she failed to help the victim or call 911. Instead she went to Lynch's house and stayed with defendant and Crawford for the rest of the night and, on the evidence,

engaged in sexual intercourse with Lopez. Her actions reflect utter indifference to the victim's life." (*Id.* at p. 1117.)

In *People v. Bustos* (1994) 23 Cal.App.4th 1747, the court found sufficient evidence that co-defendant Loretto acted with reckless indifference to human life in a robbery in a public restroom in Malibu. Loretto admitted planning the robbery, and the two men had previously participated in a robbery together in another state. Loretto admitted knowing about and having seen the knife, he admitted going into the restroom to rob the victim, he admitted hitting the victim, whereupon she fell to the floor, and Loretto engaged in a struggle with the resisting victim before Bustos ran in and stabbed the victim. Loretto was not surprised that Bustos stabbed the victim, nor did Loretto attempt to prevent Bustos from stabbing the victim. Loretto fled together with his accomplices and the robbery loot, leaving the victim to die. (*Id.* at p. 1754.)

Also, in *Smith, supra,* 135 Cal.App.4th 914, 927, the defendant, who was present and served as the lookout, "gained a subjective awareness of grave risk to human life during the many tumultuous minutes" it took for his accomplice to beat and stab the victim to death. The defendant in *Hodgson, supra,* 111 Cal.App.4th 566, 568, held clear the exit route and was present while his accomplice shot the victim and the defendant "consciously rendered . . . aid knowing [the accomplice's] purpose and intent to commit the robbery and murder." In *Proby, supra,* 60 Cal.App.4th 922, 929, the defendant supplied his accomplice with a gun before the robbery, knew the accomplice was willing to use violence, and participated in the robbery. The defendant in *People v. Mora, supra,* 39 Cal.App.4th 607, 617, helped

plan the robbery was instrumental in arranging for his accomplice to enter the victim's home with a rifle, and when his cohort shot the victim he carried through with the plan to steal, carried the loot away, and not knowing whether the victim was dead or alive, left the victim to die.

The defendants in the foregoing cases either participated in the crime (*Lopez, Bustos, Proby, Mora*), or were at least present at the scene during the commission of the crime to provide some instrumental assistance (*Hodgson & Smith*), and were therefore "subjectively aware *that his or her participation in the felony* involved a grave risk of death." (*Estrada, supra,* 11 Cal.4th at p. 577, italics added.) We have not found any case in California upholding a special circumstance finding under section 190.2(d), for the getaway driver who is parked in a car three blocks from the crime scene.

Tison requires more than minor participation in an armed robbery to establish the reckless indifference to human life, required for a defendant who was not the actual killer. (*Tison, supra,* 481 U.S. at pp. 150-151.) *Jackson v. State* (Fla. 1991) 575 So.2d 181, is an example of an application of this aspect of *Tison*. In *Jackson*, the Supreme Court of Florida reversed the true finding on the felony-murder special circumstance for insufficient evidence that the defendant acted with reckless difference in a robbery-murder. The facts established that Mr. Jackson previously indicated his intent to rob Phillibert's store; that he was present during the robbery; that Mr. Jackson was seen driving in the vicinity of the store shortly before and after the crime; and, that Mr. Jackson made statements implicating himself, and his brother, in the robbery. However, the evidence failed

to establish that Mr. Jackson personally possessed or fired a weapon during the robbery, or that he harmed the victim; there was no evidence that Mr. Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery; and, "[t]here was no real opportunity for Jackson to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance. No other innocent lives were jeopardized." (*Jackson v. State, supra,* 575 So.2d at pp. 192-193, fn. omitted.) Under these facts, the Florida Supreme Court found that Mr. Jackson's state of mind was not any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. (*Ibid.*, citing, *Tison, supra,* 481 U.S. at pp. 150-151.) Under *Jackson*, Mr. Matthews clearly did *not* act with reckless indifference to human life in his role as the getaway driver sitting three blocks away from the scene of the crime.

There is no evidence in this record to suggest that Matthews had the *highly culpable state of mind* required for reckless indifference to human life. (*Tison, supra,* 481 U.S. at pp. 157-158.) To impose the special circumstance for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would render section 190.2(d) unconstitutional for failing to "genuinely narrow the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.)

Therefore, if this court does not reverse the true finding on the special circumstance for insufficient evidence that Mr. Matthews was a major participant in the underlying felony, it should reverse for

insufficient evidence that he acted with reckless indifference to human life as required under *Tison, Estrada,* and section 190.2(d). The true finding on the special circumstance, in the absence of sufficient evidence to support it, violates due process. (U.S. Const., 5th & 14th Amends.; Cal. Const., art I., §§ 7, 15: *Enmund, supra,* 458 U.S. 782.)

CONCLUSION

Predicated on the foregoing, we respectfully request that this Court strike the true finding on the special circumstance for insufficient evidence, order Mr. Matthews to be resentenced to an indeterminate term of 25 years to life for felony murder, and reinstate the parole revocation fine (§1202.45).

Dated: March 21, 2014 Respectfully Submitted,

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CERTIFICATE OF WORD COUNT
[California Rules of Court Rule 8.520(c)(1)]

Appellant's Opening Brief on the Merits consists of 12,115 words as counted by the word-processing program used to generate the brief.

Dated: March 21, 2014 Respectfully Submitted,

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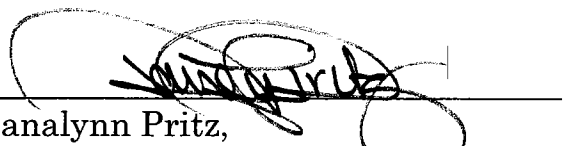

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PROOF OF SERVICE
(People v. Banks / Matthews S213819)

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action; my business address is 3625 East Thousand Oaks Boulevard, Suite 176, Westlake Village, California 91362.

On March 21, 2014, I served the foregoing document, described as: **APPELLANT MATTHEWS'S OPENING BRIEF ON THE MERITS** on the interested parties in this action by transmitting: [ ] the original; [X] a true copy thereof as follows:

Party Served: SEE ATTACHED MAILING LIST

[X] (BY MAIL) I am familiar with the regular mail collection and processing practices of said business, and in the ordinary course of business, the mail is enclosed in a sealed envelope with postage thereon fully prepaid and deposited with the United States Postal Service on same day. I deposited such envelope in the mail at Thousand Oaks, California.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at Westlake Village, California on March 21, 2014.

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