In the Supreme Court of the State of California

SUPREME COURT
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THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
LEON BANKS, et al.,
Defendants and Appellants.

Case No. S213819

Frank A. McGuire Clerk

Deputy

Second Appellate District, Division Two, Case No. B236152
Los Angeles County Superior Court, Case No. BA347305
The Honorable Gail Ruderman Feuer, Judge

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ISSUES PRESENTED FOR REVIEW

Was the evidence sufficient to establish that Matthews was a "major participant" within the meaning of Penal Code section 190.2, subdivision (d)?

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.)

INTRODUCTION

In *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127] ("*Tison*"), the United States Supreme Court held that an aider and abettor's "major participation in the felony committed combined with reckless indifference to human life," satisfied constitutional culpability requirements for imposition of the death penalty for felony murder. (*Id.* at p. 158.) The holding in *Tison* was incorporated into Penal Code section 190.2, subdivision (d), the relevant special circumstance provision of California's felony-murder statute, which applies to capital and noncapital cases alike. (*People v. Estrada* (1995) 11 Cal.4th 568, 575-576.)

1. Although neither the United States Supreme Court nor this Court has defined "major participant," several other courts have concluded that the phrase "includes 'notable or conspicuous in effect or scope'" (e.g., *People v. Proby* (1998) 60 Cal.App.4th 922), a determination that is necessarily made on a case-by-case basis.

Appellant Lovie Troy Matthews ("Matthews") contends that his facilitation of the underlying crimes in this case did not rise to the level of "major participation," likening his role to that of the defendant in *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] ("*Enmund*"), 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); he accordingly argues that his special circumstance finding must be set aside.

But unlike the defendant in *Enmund* – as to whom no proof of prior planning was presented and where "the record supported no more than the inference that [he] was the person [sitting in a car some 200 yards away] at the time of the killings" (*Enmund*, *supra*, 458 U.S. at pp. 783-786, 788) – Matthews was involved at the outset in the planned burglary of a medical marijuana dispensary, enlisting the help of two fellow members of the Rollin 30's Harlem Crips, a violent criminal street gang, and driving them and a third accomplice (the shooter) to the dispensary in the shooter's vehicle. Matthews coordinated the men's escape following the murder of the dispensary's security guard, searching for and picking up two of them as they fled.

2. Matthews's participation in the underlying crimes also demonstrated "reckless indifference to human life." (*Tison*, *supra*, 481 U.S. at p. 158.) The targeted business employed a metal security door and mantrap to deter unauthorized entry, a security guard who admitted patients only after confirming the validity of their identifications and medical prescriptions, and closed circuit television cameras and monitors throughout. The accomplices gained entry through the ruse of a physician's statement and, once inside, proceeded to demand money, at one point threatening to kill a witness. Anticipating resistance, the men were armed, wore gloves, and carried zip ties to bind their victims. In sum, Matthews "knowingly engaged in criminal activities known to carry a grave risk of death[.]" (*Id.* at p. 157.)

3. Application of the *Tison* standard compels the conclusion that Matthews was in fact a "major participant" in the underlying felonies, who acted with "reckless indifference to human life." (See *Tison*, *supra*, 481 U.S. at p. 158.) The Court of Appeal's determination that sufficient

evidence supported the special circumstance finding should therefore be upheld.

STATEMENT OF THE CASE

Matthews and codefendant Leon Banks ("Banks") were convicted in a jury trial of first degree murder (Pen. Code,[1] § 187, subd. (a)), attempted second degree robbery (§§ 664/211), and second degree commercial burglary (§ 459). The jury found that the murder was committed by Matthews and Banks during a burglary or attempted robbery, within the meaning of section 190.2, subdivision (a)(17). The jury found principal firearm use allegations true as to both Matthews and Banks (§ 12022.53, subds. (b), (c), (d) & (e)(1)) and found a personal firearm use allegation true as to Banks (§ 12022.53, subd. (b)). The jury also found that all the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang. (§ 186.22, subd. (b).) In a bench trial, the court found prior conviction allegations true as to both Banks and Matthews. Matthews and Banks were sentenced to state prison for life without the possibility of parole for the murder with special circumstances. The remaining sentences were stayed. (2CT 443-456, 501-509, 511-514.)

On August 29, 2013, the Second Appellate District Court of Appeal, Division Two, issued an unpublished opinion striking both men's parole revocation fines, amending the abstract of judgment to reflect that they were sentenced pursuant to section 12022.53, subdivision (e), but otherwise affirming the judgments of conviction and the true findings on the special circumstance. (*People v. Banks et al.*, B236152, opn. at pp. 11-42.) This Court granted Matthews's petition for review.

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

STATEMENT OF FACTS

A. Prosecution Case

1. The Burglary, Attempted Robbery, and Homicide

La Brea Collective ("Collective") was a medical marijuana dispensary located at 812 South La Brea Avenue, in the City of Los Angeles. (2RT 188.) The Collective had a sally port or "mantrap," which was a secured room between the front door and a metal security door. When patients rang the doorbell they were allowed into the sally port, where they were met by the security guard, Noe Gonzalez. On proof of proper identification and a verified medical marijuana prescription, Gonzalez would open the security door to permit the patient to enter the dispensary through the lobby. (2RT 252-253, 255-256; 3RT 303-304.) Another door separated the lobby and the dispensary, where the marijuana was stored, displayed, and sold. Security cameras monitored the front door, the sally port, and the lobby. (2RT 207.)

On the afternoon of October 1, 2008, Gonzalez, Daniel Sosa, Martin Chavero, and Matthew Salinsky were working at the Collective. (2RT 188-189, 203, 248-249.) Salinsky was upstairs in the loft area assisting a patient. Chavero and Sosa were downstairs. (2RT 189, 248.) Chavero was behind the displays in the dispensary area. The doorbell rang and Gonzalez went inside the mantrap. Sosa walked toward Chavero and pointed toward the monitor at the back of the dispensary. (2RT 257, 260; 3RT 310-311.) On it, Chavero saw two African-American males (David Gardiner and Brandon Daniels)[2] armed with semiautomatic handguns on each side of

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[2] Gardiner was apprehended in July 2009, and Daniels was apprehended in March 2010. Daniels was tried, convicted, and sentenced to life without the possibility of parole for his role in the charged crimes. His appeal is currently pending in B249088. Gardiner pleaded no contest (continued...)

Gonzalez. The gunmen linked arms with Gonzalez and escorted him into the lobby. (3RT 283, 310-311, 313, 336.)

Gonzalez said in Spanish, "Trucha," which means "heads up." (2RT 264.) When Chavero heard that, he followed Sosa to the back of the dispensary and closed the safe. Salinsky saw one of the gunman jump over the divider between the lobby and the dispensary and run up the stairs. Salinsky threw himself and the patient to the ground. (2RT 189-191, 199, 206.) The gunman asked, "Where's the shit at?" Salinsky told the gunman it was behind the counter and to take whatever he wanted. (2RT 192.)

A third gunman, later identified as Banks, grabbed Chavero's shoulder from behind and pulled him and Sosa to the front area of the dispensary. (2RT 264-266, 274-275; 3RT 282-284.) Chavero turned and looked at Banks. (3RT 306-308, 320; 5RT 877.) Banks pointed a gun at Chavero and said, "If you look at me, I'll kill you." Banks forced Chavero and Sosa to the ground, placed his knee on Chavero's back, and attempted to bind Chavero with a zip-tie. (3RT 284-285, 331, 359.) Chavero heard two gunshots and Banks said, "Shit, we got to go. We got to go." Banks ran to the lobby. (3RT 286-288, 317-318.)

Chavero stayed on the ground and turned to look at the monitor. He saw Banks, Gardiner, and Daniels in the sally port struggling to push their way out the front door. There was a glass window separating the mantrap and the dispensary area. Banks fired some shots through the slot on the glass. Five or seven additional shots were fired, but Chavero did not see the shooter. (3RT 289-291, 296, 337, 365.) After Banks and the other two assailants left, Chavero removed the zip-ties. (3RT 301, 362.)

(...continued)
to first degree murder in BA347305 and, on April 30, 2013, was sentenced to 45 years to life. He did not appeal.

At approximately 3:45 p.m., Robert Simmons was driving southbound on La Brea Avenue just south of 8th Street. He heard seven or eight popping sounds. (3RT 422, 432-433.) He turned to his left and saw two men pushing the metal door of the Collective back and forth. Gonzalez was attempting to close the door while Banks was pushing his way out. They fired shots at each other. Simmons pulled over to the side of the road. When Simmons looked back, he saw Gonzalez lying on the sidewalk. (3RT 423-426, 434, 436-437.)

James Hustead was at a coffee shop located diagonally across the street from the Collective when the shooting occurred. He saw a scuffle in front of the Collective. Gonzalez was standing outside of the Collective and pushing the metal security door closed while it was being pushed open from the inside. Gonzalez reached his hand around the door to the inside. Banks reached his left hand outside and fired a shot at Gonzalez. As Gonzalez fell backwards, Banks emerged and fired three or four more shots at Gonzalez. (4RT 696-700, 711-713, 716-718.) Banks, Gardiner, and Daniels ran northbound on La Brea Avenue and then eastbound on 8th Street. (4RT 701-702, 720-723, 729.)

Petra Todorovic was in his apartment on South Sycamore Avenue, which was one block east of and parallel to La Brea Avenue, when he heard gunshots. He saw Banks and Gardiner run into a driveway by his building, where they stopped briefly and spoke to each other. (3RT 384-387, 406-413; 5RT 877.) Banks then jumped over a fence and ran eastbound. (3RT 384-385, 387-391, 406.) Gardiner waited a few seconds before he ran southbound on Sycamore. (3RT 392.)

Dominic Agbabiaka was standing on the sidewalk of South Sycamore Avenue between 8th and 9th Streets. He saw Daniels running southbound on South Sycamore Avenue. Daniels crossed the street and asked Agbabiaka if he could use the restroom inside the house; Daniels appeared

excited and nervous. Agbabiaka refused. (2RT 214-216, 224, 230; 5RT 868.)

Todorovic and Agbabiaka separately saw a Ford Expedition sports utility vehicle ("SUV") speed around the corner from 9th Street. The SUV had paper plates that said, "Sun Power" or "Power." As the SUV approached Daniels, he screamed, "Troy, Troy." The SUV slowed but did not stop completely. Daniels and Gardiner ran across the street and jumped inside. The SUV sped off on Sycamore and turned right onto 8th Street. (2RT 218-220, 244-246; 3RT 392-394.)

2. The Police Investigation

At approximately 3:50 p.m., Los Angeles Police Department ("LAPD") Sergeants Elizabeth Ellis and Gregory Whorton responded separately to a robbery in progress call at the Collective. They found Gonzalez lying on the sidewalk, dead. Sergeant Ellis recovered a revolver with the hammer cocked, on the ground near Gonzalez's outstretched arm. (4RT 458-460, 467-468, 472-473, 637-639, 643.) Gonzalez's DNA was found on the revolver. (7RT 1212.) Gonzalez sustained a fatal gunshot wound to his left temple and a second potentially fatal gunshot wound to his left shoulder. (5RT 747-749, 751, 755.)

Police set up a perimeter around the area of La Brea Avenue and 8th Street. (5RT 807.) Banks was spotted walking north on 8th Street and was detained by Sergeant Whorton less than two blocks from the Collective. (4RT 640-645.) Later that afternoon, LAPD Officer Keith Gonzalez and his partner were at South Mansfield Avenue and 8th Street when an SUV with "Power" paper license plates drove by. (5RT 806-808.) Officer Gonzalez followed the SUV and made a traffic stop a few blocks away. Matthews, the only occupant of the vehicle, was taken into custody. (5RT 871-872.) The SUV was registered to Banks and another person, and

clothing belonging to Banks was found inside. (5RT 809-811; 6RT 1087, 1091.)

LAPD Detective John Shafia arrived after Sergeant Ellis and found a single glove and shell casings on the sidewalk in front of the Collective. There were bullet holes in the wall, windows, doorjamb, and metal security door. (3RT 293, 301, 303; 4RT 476-478.) Inside the lobby, Detective Shafia found two zip ties tied together, and eight shell casings ejected from a nine-millimeter semiautomatic weapon. (4RT 478-480, 491-499, 502-503, 559-564, 637-639, 5RT 766-765.) A bullet fragment was recovered from inside the dispensary, and additional bullet fragments were recovered from a store next door and from the coffee shop across the street. (4RT 504-505, 563-564, 567; 5RT 825-827.) Gardiner's DNA was found on the two zip ties. (4RT 527-529, 536-540.) The DNA on the glove recovered at the Collective was a mixture of DNA from multiple individuals, but Gardiner was a major contributor. (4RT 530.)

Later that day, Chavero identified Banks in a field show-up as one of the robbers who had a gun and told the police that Banks had worn a pair of black gloves. (3RT 331.) Agbabiaka identified Daniels as the individual who asked to use the restroom and the SUV as the car that Daniels and Gardiner had gotten into on South Sycamore Avenue. (2RT 226-227, 235; 5RT 868.) On the same day, Todorovic identified Banks in a field show-up. He also identified the SUV. (3RT 396-397.) Simmons and Hustead identified Banks as the person who had fired the shots at Gonzalez. (3RT 428-430, 445, 706.)

The next day, LAPD Officer Javier Hernandez found a photocopy of a physician's statement and recommendation for medical marijuana use by the door in the Collective's lobby area. (4RT 544-547, 551.) On the bottom of the statement was a color photocopy of a driver's license with a photograph of Banks. (6RT 1089.) Banks's palm print was on the

physician's statement. (6RT 959-962, 967.) Daniels's palm print was found on the inside of the front metal security door. (5RT 798-801, 804-805; 6RT 964-966.)

On October 7, 2008, LAPD Detective Kurt Wong and a team of officers searched a residential area off Orange Avenue. In the bushes near the front porch of a house, he found some black plastic zip ties, a semiautomatic handgun, a gun holster, and gloves. (3RT 447-452.) Banks's DNA was on the gloves. (4RT 524-525, 541-542.) The semiautomatic handgun was a nine-millimeter Glock, and the eight shell casings recovered from the crime scene were fired from that gun. (5RT 756-768, 770-771, 783-787.)

3. Global Positioning Satellite and Cellular Telephone Evidence

Detective Shafia recovered a black Motorola cellular telephone from Banks and a red T-Mobile cellular telephone from Matthews. (4RT 509-513, 570-571.) On October 1, 2008, Matthews made six outbound calls to Banks's telephone: (1) at 2:53 p.m. for 24 seconds; (2) at 3:46 p.m. for 32 seconds; (3) at 3:49 p.m. for 49 seconds; (4) at 3:51 p.m. for 48 seconds; (5) at 3:53 p.m. for 31 seconds; and (6) at 3:56 p.m. for 37 seconds. (4RT 676-678.)

Matthews received three incoming calls from Banks: (1) at 1:49 p.m. for 19 seconds; (2) at 3:44 p.m. for 20 seconds; and (3) at 3:58 p.m. for 20 seconds. None of the incoming calls to Matthews's cell phone went to voice mail. (4RT 678-681.)

Matthews was wearing a Global Positioning Satellite device ("GPS") on the day of the incident. (4RT 656-657.) The GPS monitor worn by Matthews was unique to him and it tracked the movement of a person. The system would show an individual's speed of travel and location within 15 meters. (4RT 658-660.)

On October 1, 2008, at approximately 2:51 p.m., the GPS captured Matthews at the intersection of La Brea and 8th Street. At 3:00 p.m., the GPS showed him at Mansfield Street and stationary. At 3:46 p.m., Matthews traveled from Mansfield Street to 9th Street, travelled north on Sycamore Avenue, and then on 8th Street. (4RT 665-669; Peo. Ex. 51.) A cluster of points at Branson Avenue, Norton Avenue, and Wilshire Boulevard showed Matthews's subsequent travel pattern. (4RT 670.)

4. Gang Evidence

Officer James Moon testified as a gang expert who was familiar with the Rollin 30's Harlem Crips gang. (6RT 971-974.) The Rollin 30's was a gang that engaged in criminal activities, primarily narcotic sales, burglaries, robberies, shootings, attempted murders, murders, and gun possession. (6RT 974-975, 1073.) Officer Moon testified to the commission of two predicate crimes committed by members of the Rollin 30's. (6RT 999-1003.) In Officer Moon's opinion, Matthews, Daniels, and Gardiner were members of the gang; Banks was not. (6RT 980, 982, 985, 991-997.)

Officer Moon opined that Matthews was a member of the Rollin 30's based on the following. Matthews had admitted being a member of the gang during contacts with law enforcement in Rollin 30's territory. In addition, Matthews had the word "Harlem" tattooed on his chest, which in Officer Moon's experience was a common tattoo on a Rollin 30's gang member. (6RT 981-983.) Matthews was known to one LAPD officer as "Big Boy," and to another as "Troy"; Troy is Matthews's middle name. (6RT 997.) Officer Moon similarly concluded Gardiner and Daniels were Rollin 30's gang members based on tattoos, a self-admission, a photograph, and other information. (6RT 984-993; Peo. Exs. 65, 70-71.)

When given a hypothetical based on the facts of this case, Officer Moon opined that the crimes were committed in association with the Rollin 30's criminal street gang based on the information that a documented

Rollin 30's gang member was arrested in connection with the crime and would not have committed the crime with people who were not fellow gang members. Officer Moon also opined that when several individuals from the same gang work together in the commission of a crime, the crime is committed in association with the gang. Each gang member was expected to put in work for the gang, and the robbery benefitted the gang and instilled fear in the community by showing that the gang was active and willing to commit violent crimes. (6RT 1003-1007, 1074-1075.)

B. Defense Case

Matthews did not present any evidence in his behalf. (7RT 1167-1168, 1211.) Banks challenged the prosecution's identification evidence by presenting the testimony of an eyewitness and an eyewitness identification expert. (6RT 1101-1149.)

ARGUMENT

I. The Evidence Was Sufficient To Establish That Matthews Was A "Major Participant" Within The Meaning Of Penal Code Section 190.2, Subdivision (D)

Matthews contends that the evidence was insufficient to sustain his special circumstance finding as an aider and abettor under the felony-murder rule, purportedly because he was not a "major participant" within the meaning of section 190.2, subdivision (d). (AOB 15-41.) The Court of Appeal, however, correctly rejected Matthews's contention.

A. General Principles Regarding Sufficiency Of The Evidence

When an appellant challenges the sufficiency of the evidence to support a conviction, this Court must determine "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 [99 S.Ct.

278, 61 L.Ed.2d 560], original italics; accord, *People v. Manibusin* (2013) 58 Cal.4th 40, 87; *People v. Bolin* (1998) 10 Cal.4th 297, 331; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) In doing so, the court "'"presume[s] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Davis* (1995) 10 Cal.4th 463, 509, quoting *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237; accord, *People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Rowland* (1992) 4 Cal.4th 238, 269.)

The question on appeal, therefore, is not whether the evidence as judged by the reviewing court establishes guilt beyond a reasonable doubt, but simply whether substantial evidence was presented at trial to justify the factfinder's conclusion. (*Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.) The appellate court gives deference to the trier of fact in assessing the credibility of the witnesses and does not substitute its evaluation of a witness's credibility for that of the trier of fact. (*Barnes*, *supra*, 42 Cal.3d at pp. 303-304; accord, *People v. Chatman* (2006) 38 Cal.4th 344, 391; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 27 ["A reviewing court neither reweighs evidence nor reevaluates a witness's credibility."].)

The same standard applies when the conviction rests primarily on circumstantial evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1175; accord, *People v. Clark* (2011) 54 Cal.4th 856, 943; *People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Perez* (1992) 2 Cal.4th 1117, 1124.) "Reversal [for insufficient evidence] is unwarranted unless it appears 'that upon no hypothesis whatsoever is there sufficient substantial evidence to support [the conviction].'" (*Bolin*, *supra*, 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing

court that the circumstances might also be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514, quoting *People v. Bean* (1988) 46 Cal.3d 919, 933.)

"To determine the sufficiency of the evidence to support a special circumstance finding, [an appellate court] appl[ies] the same test used to determine the sufficiency of the evidence to support a conviction of a criminal offense. [It] 'review[s] the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791; accord, *People v. Jackson* (2014) 58 Cal.4th 724, 749; *People v. Harris* (2013) 57 Cal.4th 804, 849.)

B. General Principles Regarding California's First Degree Felony-Murder Rule

"In California, the first degree felony-murder rule 'is a creature of statute.' [Citation.] When the prosecution establishes that a defendant killed while committing one of the felonies section 189 lists, 'by operation of the statute the killing is deemed to be first degree murder as a matter of law.'" (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.) The list of felonies includes, as relevant here, attempted robbery and burglary. "With respect to any homicide resulting from the commission of or attempt to commit one of the felonies listed in the statute, [this Court's] decisions generally hold section 189 to be not only a degree-fixing device but also a codification of the felony-murder rule: no independent proof of malice is required in such cases, and by operation of the statute the killing is deemed to be first degree murder as a matter of law." (*People v. Dillon* (1983) 34 Cal.3d 441, 465, italics omitted.)

1. Aider And Abettor Liability

"'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' (§ 31.) Accordingly, an aider and abettor 'shares the guilt of the actual perpetrator.'" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259; accord, *People v. Maciel* (2013) 57 Cal.4th 482, 518.) Persons aiding and abetting the commission of a crime listed in section 189 are guilty of first degree murder "when one of them kills while acting in furtherance of the common design." (*People v. Washington* (1965) 62 Cal.2d 777, 782; §§ 31, 189; accord, *Dillon*, *supra*, 34 Cal.3d at p. 465.)

"'The logical basis for conviction as an aider and abettor is that with knowledge of the unlawfulness of the act, one renders some independent contribution to the commission of the crime or otherwise makes it more probable that the crime will be successfully completed than would be the case absent such participation. [Citation.]'" (*People v. Markus* (1978) 82 Cal.App.3d 477, 481.)

2. The Felony-Murder Special Circumstance As Applied To Aiders And Abettors

Section 190.2, subdivision (d), provides in relevant part: "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsel, 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 . . . imprisonment . . . for life without the possibility of parole . . . ." (See *Estrada* , *supra*, 11 Cal.4th at p. 578; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1219.) The phrase "major participant," as set forth

in section 190.2, subdivision (d), is derived verbatim from the United States Supreme Court's decision in *Tison, supra*, 481 U.S. at page 137. (*Estrada, supra*, 11 Cal.4th at p. 575.)

C. *Tison*, *Enmund*, And The Requirement That The Aider And Abettor Be A "Major Participant"

In *Tison*, the United States Supreme Court held that the Eighth Amendment's proportionality requirement does not prohibit imposition of the death penalty on an aider and abettor convicted of first degree felony murder where the aider and abettor was a "major participant" in the underlying felony and showed "reckless indifference to human life." (*Tison, supra*, 481 U.S. at p. 158 & fn. 12; see also *Estrada, supra*, 11 Cal.4th at p. 575 [observing that the incorporation of *Tison*'s rule into section 190.2, subdivision (d), "brought state capital sentencing law into conformity with prevailing Eighth Amendment doctrine"]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 16.)

The defendants in *Tison* were two brothers sentenced to death for their involvement in the roadside kidnapping, robbery, and murder of a family of four. The defendants orchestrated the prison escape of their father and his cellmate, arming themselves, a third brother, and their father with guns while still inside prison walls, and assisting in the escapees' flight after the breakout. When the group's getaway car suffered a flat tire, one of the defendants flagged down a passing motorist for help. Both of the defendants participated in the kidnapping and robbery of the occupants of the stopped vehicle, and were nearby when their father and his cellmate shot and killed the four victims. (*Tison, supra*, 481 U.S. at pp. 139-141.)

The *Tison* defendants relied on *Enmund, supra*, 458 U.S. at page 782, to contend that, because they did not intend to kill the victims, their death sentences did not comport with the Eighth Amendment's requirement that the death penalty be proportional to the culpability of the defendant. The

high court rejected the defendants' argument. In doing so, it concluded that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state." (*Tison*, *supra*, 481 U.S. at p. 157.) The court therefore held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Id.* at p. 158, fn. omitted.) The court recognized that although it "state[d] these two requirements separately, they often overlap":

> [T]here are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.

(*Id.* at p. 158, fn. 12.)

Because *Tison* addressed the question 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 and Fourteenth Amendments, "[t]he decision itself does not stand for the proposition that imposition of a penalty less severe than death, such as life imprisonment without parole, would offend constitutional principles in the absence of [such] proof . . . .' [Citation.]" (*Estrada*, *supra*, 11 Cal.4th at p. 575.) This Court has nevertheless held that "*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." (*Id.* at pp. 575-576, italics in original.)

Although the relevant language of section 190.2, subdivision (d), is derived from *Tison*, there is no such contribution from *Enmund*. In apparent recognition of that fact, the Court of Appeal in this case distinguished *Enmund* in part by noting it "concern[ed] the proportionality of a sentence of death," whereas Matthews "received a sentence of life without the possibility of parole." (Opn. at p. 22.) This is consistent with United States Supreme Court precedent. As the high court has observed, "*Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the *death penalty* upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill."[3] (*Cabana v. Bullock* (1987) 474 U.S. 376, 385 [106 S.Ct. 689, 88 L.Ed.2d 704], italics added, fn. omitted; see also *id.* at pp. 385-386 [*Enmund* '"does not affect the state's definition of any substantive offense, even a capital offense,'" but is simply a "substantive limitation on sentencing"]; *People v. Contreras* (2013) 58 Cal.4th 123, 163 ["*Enmund*'s limits on death eligibility and sentencing are 'categorical.'"].)[4]

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[3] Nevertheless, in *Kelly v. California* (2008) 555 U.S. 1020, 1023 [129 S.Ct. 564, 172 L.Ed.2d 445], Justice Stevens, dissenting from the denial of petitions for writs of certiorari, suggested that *Tison* represented a departure from *Enmund* and observed, "[i]n *Tison* . . . , rather than adhere to the rule announced in *Enmund* . . . , which prohibited death sentences for defendants who neither killed nor intended to kill a victim, a majority of the Court held that felony murder could qualify as a capital offense."

[4] The United States Supreme Court has held that the cruel and unusual punishment clause of the Eighth Amendment also applies to noncapital sentences that are grossly disproportionate. (See, e.g., *Solem v. Helm* (1983) 463 U.S. 277, 288 [103 S.Ct. 3001, 77 L.Ed.2d 637] ("*Solem*") ["There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."]; see also *Ewing v. California* (2003) 538 U.S. 11, 21 [123 S.Ct. 1179, 155

(continued...)

In *Enmund*, Sampson and Jeanette Armstrong robbed and killed an elderly couple at their farmhouse. Two witnesses saw an unidentified man sitting in a large cream- or yellow-colored car some 200 yards away 5 to 15 minutes before the crimes were committed. Fifteen minutes after the completion of the crimes, another witness saw Enmund driving a yellow Buick "at a high rate of speed," with his common-law wife (the mother of Jeanette) in the front seat and two unidentified passengers in the back. Enmund was convicted of felony murder on an aiding and abetting theory and sentenced to death. (*Enmund, supra*, 458 U.S. at pp. 783-785.)

The United States Supreme Court held that Enmund's participation – as to which no proof of prior planning or intent to kill was presented (see *Enmund, supra*, 458 U.S. at pp. 786, 788) – was so attenuated that it could not justify a sentence of death. In reversing Enmund's sentence, the court stated: "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, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' which means that we must focus on 'relevant facets of the character and record of the individual offender.' [Citation.]" (*Id.* at p. 798, original italics.) Enmund's culpability, the court observed, was minimal because "he did not kill or intend to kill; and, . . . the record . . .

(...continued)
L.Ed.2d 108] ["The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'"]; *Harmelin v. Michigan* (1990) 501 U.S. 957, 996-997 [111 S.Ct. 2680, 115 L.Ed.2d 836] [same]; cf. *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [123 S.Ct. 1166, 155 L.Ed.2d 144] ["The gross disproportionality principle reserves a constitutional violation for only the extraordinary case."].)

d[id] not warrant a finding that Enmund had any intention of participating in or facilitating a murder." (*Ibid.*)[5]

While *Enmund* prohibits the imposition of the death penalty in the absence of intent to kill and substantial participation in the underlying felony, it nevertheless allows for the most severe noncapital sentence available under state law. (See *Solem*, *supra*, 463 U.S. at p. 290 ["[C]learly no sentence of imprisonment would be disproportionate for Enmund's crime."]; see also *State v. Hightower* (N.C.Ct.App. 2005) 609 S.E.2d 234, 241 ["Defendant has failed to show *Enmund/Tison* review applies to this non-capital verdict judgment."]; *Kills On Top v. State* (1996) 279 Mont. 384 [928 P.2d 182, 206-207] [rejecting "wholesale adoption of the Supreme Court's language in *Tison*," holding the defendant's lack of intent and participation in the murder foreclosed imposition of the death penalty under

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[5] Under the statutory scheme by which Enmund was convicted and sentenced to death, the prosecution was required to show only that the aider and abettor to the felony murder intended the underlying crime. The jury was instructed that it need not conclude there was a premeditated design or intent to kill, and there was no requirement under the statutes charged that the prosecution present any proof as to Enmund's mental state. This, the *Tison* court explained, was distinguishable from the statutory schemes of most other states which generally rejected the death penalty for simple accomplice liability in felony murders – what the court later called "felony murder *simpliciter*." (*Tison*, *supra*, 481 U.S. at p. 148.) The court observed that of those states that allowed capital punishment for felony murder accomplices, the death penalty was more narrowly conscribed to situations where sufficient aggravating circumstances were present. And most of those states made it a statutory mitigating circumstance that the defendant was an accomplice in a capital felony committed by another person and that his participation was relatively minor. Specifically commenting on this mitigating circumstance, the court explained: "By making minimal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduce the likelihood that a person will be executed for vicarious felony murder." (*Enmund*, *supra*, 458 U.S. at p. 792.)

Enmund, but approving "imposition of any other penalty provided by law for the crimes of which [the defendant] was convicted . . . , including life in prison"].)[6]

D. California's Application Of The "Major Participant" Requirement

Although the United States Supreme Court has not yet defined what it means to be a "major participant," one California court has proffered a working definition. In *Proby*, *supra*, 60 Cal.App.4th at page 922, the Third District Court of Appeal rejected the defendant's dictionary definition of "major," under which he claimed a common understanding of the word required his role be '"greater in dignity, rank, importance, interest, number, quantity or extent."' (*Id.* at pp. 930-931.) Instead, the *Proby* court concluded that "the common meaning of 'major' also includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.' (Webster's New Internat. Dict. (3d ed. 1971) p. 1363.)" (*Id.* at p. 931.) In applying that less restrictive definition, the court held that sufficient evidence supported a finding of major participation where the defendant provided the shooter with the gun used to commit the murder, saw the victim after he was shot but made no attempt to assist him or determine if he was alive, proceeded to the victim's safe, took money from it and left the store. (*Id.* at pp. 930-931.)

Other appellate courts have reached similar conclusions. In *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755, Division Four of the Second Appellate District found sufficient evidence supported the special circumstance allegation against Loretto, a codefendant who did not actually

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[6] Under Montana's statutory sentencing scheme, the punishment for certain types of "deliberate homicide" is "death . . . , life imprisonment, or . . . imprisonment in the state prison for a term of not less than 10 years or more than 100 years . . . ." (Mont. Code Ann., § 45-5-102(2).)

attack the victim, where Loretto had committed prior robberies with the attacker, planned the charged robbery with the attacker, fled the scene with the attacker and the victim's money, and left the victim to die. In another case from the same division, the defendant was found to be a major participant where the evidence showed he did not intend for the victim to be killed by his accomplice, but arranged the accomplice's entry into the victim's house and, once the victim was shot, carried through with the robbery, leaving the victim to die. (*People v. Mora* (1995) 39 Cal.App.4th 607, 617.)

In *People v. Hodgson* (2003) 111 Cal.App.4th 566, Division Seven of the Second Appellate District found sufficient evidence to support a robbery-murder special circumstance where the defendant held open the electric gate of an underground parking garage to allow his fellow gang member, Salazar, to escape after robbing and shooting to death a motorist who had opened the gate to enter her apartment building. (*Id.* at p. 570.) The *Hodgson* court concluded:

> The present case does not present evidence [the defendant] supplied the gun, or was armed, or personally took the loot, or the like. Nevertheless, his role in the robbery murder satisfies the requirement his assistance be "notable or conspicuous in effect or scope."
>
> To begin with, this is not a crime committed by a large gang or a group of several accomplices. Instead only two individuals were involved. Thus, [the defendant'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 [the defendant] was instrumental in assisting Salazar effect his escape with the loot. From their actions it appears [the defendant] and Salazar believed the garage gate was the only access route for their escape. The evidence showed [the defendant] used the full force of his body to try to keep the gate from closing until Salazar had accomplished the robbery and secured the loot. When the gate became dangerously close to

> closing [the defendant] yelled a warning to Salazar and got out of his way to permit Salazar to exit. [The defendant's] actions suggest he believed Salazar would have been trapped inside the garage with his victim unless he acted to prevent the gate from closing. The fact police later discovered a low wall over which someone could have climbed to reach the street does not alter the men's own perception of the roles each had to play. Because [the defendant] was the only person assisting Salazar in the robbery murder his actions were both important as well as conspicuous in scope and effect.

(*Id.* at pp. 579-580, fn. omitted.)

More recently, in *People v. Smith* (2005) 135 Cal.App.4th 914, Division Three of the Fourth Appellate District held that substantial evidence established that codefendant "Taffolla acted with 'reckless indifference to human life while acting as a major participant' in the attempted robbery of Star," despite the fact that there was no evidence he provided any assistance other than as a lookout:

> We agree with Taffolla that no substantial evidence suggested he was an actual killer or had the intent to kill. No testimony or forensic evidence placed Taffolla in Star's room, other than a single DNA allele on a bathroom towel that was consistent with both Taffolla and Felix, and which the prosecution's own DNA expert dismissed as "very, very weak" and "very minor." That Star was attacked with a knife and an iron does not substantially suggest she was attacked by two different assailants, and even if it did, no evidence suggests one of the assailants was in fact Taffolla. At best, the evidence suggests either Taffolla or Felix may have helped attack Star, without giving us any basis to conclude it was Taffolla and not Felix. A "coin flip" situation like this does not constitute substantial evidence. [Citation.]

(*Id.* at p. 927.)

Relying on *Proby*, the *Smith* court nevertheless concluded that

> substantial evidence showed Taffolla acted "as a major participant" in the attempted robbery of Star. As used in the term "'major participant,'" the word "'major'" means "'notable or conspicuous in effect or scope'" or "'one of the larger or

> more important members . . . of a . . . group.'" (*Proby*, *supra*, 60 Cal.App.4th at pp. 931, 933–934.) The jury could have found beyond a reasonable doubt that Taffolla's 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. (*Hodgson*, *supra*, 111 Cal.App.4th at pp. 579–580 [defendant was "major participant" where robbery involved only two perpetrators and defendant helped actual killer escape].) Unlike the hypothetical "non-major participant" in *Tison*[, *supra*,] 481 U.S. [at p.] 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. (*Ibid.* [noting that major participant and reckless indifference elements "often overlap"].)

(*Smith*, *supra*, 135 Cal.App.4th at p. 928;[7] see *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1117 [holding the defendant was a "major participant" where her "act of luring the victim into the secluded alley was critical to the robbery's success"]; *State v. Forde* (2014) 233 Ariz. 543 [315 P.3d 1200, 1209-1210, 1224-1225] [holding the defendant was a "major participant" where she planned the robbery, led her codefendants into the victims' home, and stood by while a codefendant shot the victims]; *State v. Bearup* (2009) 221 Ariz. 163 [211 P.3d 684, 691-692] [holding the defendant who

[7] Contrary to Matthews's contention that *Smith* improperly "blend[ed] 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" (AOB 29), the *Smith* court conducted a separate analysis of *each* requirement and found *both* to be supported by substantial evidence. (See *Smith*, *supra*, 135 Cal.App.4th at pp. 927-928.) But even if the court engaged in the complained-of "blending," no error could be shown under the facts of that case; as the United States Supreme Court observed in *Tison* (and as the *Smith* court itself pointed out), although "these two requirements [have been stated] separately, they often overlap." (481 U.S. at p. 158, fn. 12.)

brandished a knife and encircled the victim with others was a "major participant" in the kidnapping that ended in the victim's murder]; cf. *State v. Peeler* (2004) 271 Conn. 338 [857 A.2d 808, 876] [under *Tison*, "we can conceive of no reason why a statutory scheme that requires a jury to evaluate aggravating factors need face a more stringent requirement under the [E]ighth [A]mendment when principles of accessorial liability are being used to prove those aggravating factors rather than the commission of the crime itself."]; *Owens v. State* (Tenn.Ct.App. 1999) 13 S.W.3d 742 [same].)

E. The Court Of Appeal Properly Held That Sufficient Evidence Supported The Felony-Murder Special Circumstance Finding Under *Tison* And *Enmund*

1. The Court Of Appeal's Holding

The Court of Appeal held in this case that Matthews was a "major participant" in the underlying felonies. In doing so, it reasoned that Matthews "acted with the intent to facilitate the actions of Banks, Gardiner, and Daniels, prior to, during, and after the commission of the attempted robbery and burglary of the dispensary." It summarized the evidence as follows:

> Matthews received a call on his cell phone from Banks at 1:49 p.m. on the day in question. At 2:51 p.m., while driving an SUV registered to Banks, a GPS tracking device placed him at the intersection of 8th Street and La Brea, in the immediate vicinity of the dispensary. Matthews then drove three blocks and parked on South Mansfield Avenue. At 2:53 p.m. he placed a call to Banks's cell phone. Matthews remained parked three blocks from the dispensary for approximately 45 minutes. Around the same time witnesses reported the shooting at the dispensary, two more cell phone calls occurred between Matthews and Banks. Matthews then drove the SUV to South Sycamore Avenue, one block from the dispensary, where Gardiner and Daniels were waiting for him. Daniels yelled "Troy, Troy," which was Matthews's moniker and also his middle name. Matthews slowed down allowing Daniels and Gardiner to get into the SUV before he sped off. Five more calls

in rapid succession took place between Matthews and Banks prior to Banks being arrested within blocks of the dispensary. When Matthews was arrested later that same day, he was still driving the SUV registered to Banks. . . . [¶] Based on the foregoing evidence, a jury could reasonably conclude that Matthews discussed the robbery and burglary prior to driving to the dispensary and acted as the getaway driver. Therefore, Matthews formed the intent to help Banks, Daniels, and Gardiner get away before cessation of the acts constituting the felonies, which constituted aiding and abetting.

(Opn. at p. 18, fn. & citation omitted.)

The court went on to conclude that sufficient evidence supported the special circumstance finding:

As established [previously], we believe the evidence was sufficient to show that the jury found that Matthews aided and abetted the attempted robbery and burglary prior to Gonzalez'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. [¶] 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, citation omitted.)

The Court of Appeal also distinguished *Enmund* from the facts of this case:

Matthews analogizes his situation to that of the defendant in *Enmund* . . . , but his reliance is misplaced. In that case, two persons robbed and killed an elderly couple at their farmhouse. Enmund was the getaway driver and, at the time of the crimes, was sitting in a car some 200 yards away. In reversing

> Enmund's death sentence, the United States Supreme Court stated: "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, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' [citation], which means that we must focus on 'relevant facets of the character and record of the individual offender.' [Citation.]"
>
> *Enmund* does not assist Matthews. First, it concerns the proportionality of a sentence of death. Matthews received a sentence of life without the possibility of parole. Moreover, *Enmund* predates the United States Supreme Court's decision in *Tison* . . . , in which the high court concluded *Enmund* did not preclude imposition of the death penalty on those who, while not the actual killers, were found to have been major participants and to have acted with reckless indifference to human life.

(Opn. at pp. 22-23, citations omitted.)

2. The Holding Is Supported By Substantial Evidence

The Court of Appeal's holding is supported by substantial evidence. Matthews and his confederates – with the exception of Banks – were all members of the Rollin 30's Harlem Crips. (6RT 980-997.) The Rollin 30's are a violent street gang whose primary criminal activities include burglaries, robberies, and murders. (6RT 974-975, 1073.) According to Officer Moon, the prosecution's gang expert, Rollin 30's members typically commit such crimes together.[8] (6RT 971, 998-999, 1003-1007.)

The target of their plan was the Collective, a medical marijuana dispensary with a metal security door and mantrap to deter unauthorized

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[8] As set forth in the Statement of the Case, *ante*, the jury found that Matthews committed the charged offenses for the benefit of, at the direction of, or in an association with a criminal street gang, pursuant to section 186.22, subdivision (b)(1). (2CT 447-449.)

entry, a security guard who admitted patients only after confirming the validity of their identifications and medical prescriptions, and closed circuit television cameras and monitors throughout. (2RT 188, 207, 252-253, 255-256; 3RT 303-304.) Banks gained entry by showing proof of identification and a physician's statement; the document (which included a color photograph of Banks) was subsequently recovered by police in the Collective's lobby area. (4RT 544-547, 551; 6RT 1089.) Thus, the target of the robbery was one where the risk of violence was particularly high. As the Court of Appeal aptly observed in commenting on such evidence, "Matthews [was] aware of the risk of resistance and the extreme likelihood that death could result [during the course of the planned robbery;] Banks, Daniels, and Gardiner anticipated as much because they were armed." (Opn. at p. 21; see *Mora*, *supra*, 39 Cal.App.4th at p. 617 ["Defendant had to be aware of the risk of resistance to such an armed invasion of the home and the extreme likelihood death could result."]; cf. *Enmund*, *supra*, 458 U.S. at p. 799 ["It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the robbery."].)

In contrast to the defendant in *Enmund*, as to whom "the record supported *no more* than the inference that [he] was the person [sitting in a car some 200 yards away] at the time of the killings" (*Enmund*, *supra*, 458 U.S. at p. 788, italics added), Matthews drove Banks's SUV to the Collective, parked a few blocks away, and waited for the signal to pick up his accomplices. Cellular telephone records showed Matthews received a call from Banks at 1:49 p.m., about two hours before the crimes. At 2:51 p.m., GPS data placed Matthews at the intersection of 8th Street and La Brea, in the immediate vicinity of the Collective. Matthews then drove three blocks and parked on South Mansfield Avenue. At 2:53 p.m. he placed a call to Banks's cell phone. Matthews remained parked three

blocks from the Collective for approximately 45 minutes. Around the time of the crimes, two more phone calls were exchanged between Matthews and Banks. The three accomplices, who had by this time scattered, coordinated their escape with Matthews, causing him to drive to South Sycamore Avenue, one block from the Collective, where Gardiner and Daniels were waiting for him. One of the men yelled "Troy, Troy," which is Matthews's middle name, before Matthews slowed down, enabling both men to get into the SUV before he sped off. Five more calls were exchanged between Matthews and Banks just minutes apart, before Banks was arrested a few blocks from the Collective. (2RT 244-246; 3RT 392-394; 4RT 665-670, 676-681; 6RT 997.) When Matthews was arrested later that afternoon, he was still driving Banks's SUV; clothing belonging to Banks was found inside the vehicle. (5RT 809-811; 6RT 1087, 1091.)

As set forth previously, a reviewing court must """presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.""" (*Davis*, *supra*, 10 Cal.4th at p. 509.) Based on the foregoing, a jury could reasonably deduce that Matthews was involved in planning the underlying felonies (in which Banks used the rather sophisticated ruse of a physician's statement to gain access to the Collective), enlisted the help of fellow gang members to carry out those crimes, drove his confederates to the targeted business, and was an active participant in, and an integral part of, their escape plans. There was thus ample evidence that Matthews was a "major participant" in the underlying felonies to uphold the special circumstance finding. (*Mayfield*, *supra*, 14 Cal.4th at pp. 790-791; see also *Jackson*, *supra*, 58 Cal.4th at p. 749; *Harris*, *supra*, 57 Cal.4th at p. 849.)

Matthews nevertheless maintains that "the Court of Appeal here allowed [the facts that he acted as the getaway driver and knew of the plan to commit a robbery] 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." (AOB 30.) But the felonies listed in section 189 have been deemed by the Legislature to be "inherently dangerous," and therefore properly supply the foundation for a determination of reckless indifference to human life. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 197; *People v. Rios* (2000) 23 Cal.4th 450, 460, fn. 6.) As the United States Supreme Court observed in *Tison*, "there are some felonies as to which one could properly conclude that *any* major participant necessarily exhibits reckless indifference to the value of human life." (481 U.S. at p. 158, fn. 12, italics added.)

Moreover, the court did not conflate Matthews's facilitation of the robbery with the separate requirement that he be a "major participant" in upholding the felony-murder special circumstance. To the contrary, it discussed Matthews's """notable or conspicuous"' role in the commission of the underlying felonies," describing his involvement in the planning of those crimes, his facilitation of the crimes by dropping off and picking up his confederates near the Collective, and his near-constant telephonic contact with Banks both during and after the crimes. (Opn. at p. 21.) As the prosecutor explained during closing argument:

> And what "major participant" means is this: what was his involvement, how important was Mr. Matthews' involvement in the crime, and with that you look at his actions. As I've stated multiple times, 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 everybody at this location. [¶] You know, short of Mr. Banks who actually killed Mr. Gonzalez, 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. Gonzalez.

(7RT 1356-1357.)

Matthews also points to the court's comment that he '"had to be aware of the risk of resistance and the extreme likelihood that death could result,"' argues that the court's "reasoning behind upholding the true finding on the special circumstance amounts to little more than a restatement of the felony murder rule itself," and maintains that the United States Supreme Court rejected this very reasoning in *Tison*. (AOB 31, italics omitted.) Matthews misreads *Tison*. The high court's criticism actually concerned the state court's determination that the defendants' participation in the underlying felonies was sufficient to infer *intent to kill*, based upon the state court's mistaken belief *Enmund* required such a finding:

> [T]he 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 p. 151.)[9]

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[9] Cf. *id.* at p. 153, fn. 8 ["The dissent objects to our classification of California among the States whose statutes authorize capital punishment for felony murder *simpliciter* on the ground that the California Supreme Court in *Carlos v. Superior Court* [(1983) 35 Cal.3d 131] construed its capital murder statute to require a finding of intent to kill. . . . But the California Supreme Court only did so in light of perceived federal constitutional limitations stemming from our then recent decision in *Enmund*."]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1140 [discussing *Tison* and observing that "one of the bases on which we rested our decision in *Carlos* has thus proved to be unsound"].

In contrast, no such determination was made in this case because the prosecution's theory of liability as to Matthews was not based on intent to kill. Rather, it was based on his facilitation of the underlying felonies as a "major participant." (See opn. at p. 21 [noting that "the prosecution did not have to show that Matthews acted with an intent to kill"].)

Finally, Matthews posits that "[b]are 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 . . . ." (AOB 31.) That may well be. But the term "major participant" should not be so narrowly defined as to require a defendant's involvement to be somehow greater than that of his co-participants. (See www.oxforddictionaries.com/us/definition/american_english/major [defining "major" as "[i]mportant, serious or significant"].) Certainly, an aider and abettor must also be a "major participant" or else the special circumstance requirement would have no meaning separate from accomplice liability under the felony-murder rule. A common thread in the authorities previously discussed is that the participants found to be "major" all were people directly involved in the commission of the felony – they were at or near the crime scene, and somehow had a planned role in, or had helped to effect, the completion of the underlying felony. When those circumstances are present, as in this case, sufficient evidence exists to support a finding that the accomplice was a "major participant."

Thus, the term "major participant" for substantial evidence purposes connotes an active participation in the planning or carrying out of the crime: a "major participant" is an individual whose conduct involves the intentional assumption of some responsibility for the completion of the crime regardless of whether the crime is ultimately successful. As such, participation in planning with the intent of facilitating the commission of

the crime, or participating in conduct integral to or for the purpose of facilitating the commission of the crime, constitutes major participation.

Such a finding is necessarily made based on the specific facts of each case. When looking at the facts of *this* case, sufficient evidence established that Matthews was a "major participant" in the underlying felonies, within the meaning of section 190.2, subdivision (d).

II. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT MATTHEWS ACTED WITH "RECKLESS INDIFFERENCE TO HUMAN LIFE" WITHIN THE MEANING OF PENAL CODE SECTION 190.2, SUBDIVISION (D)

Matthews contends in the alternative that even if the evidence was sufficient to establish that he acted as a "major participant in the underlying felon[ies] . . . the felony murder special circumstance must still be stricken for insufficient evidence that [he] acted with reckless indifference to human life." (AOB 42.) To the contrary, the evidence established that Matthews – who enlisted the help of fellow members of a violent criminal street gang – planned the burglary and armed robbery of a marijuana dispensary, knowing that the dispensary was protected by a mantrap, policed by a security guard, and monitored by numerous closed-circuit security cameras. Thus, the evidence was sufficient to show reckless indifference, consistent with constitutional requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution, the California Constitution, and *Enmund.*

In *Estrada*, *supra*, 11 Cal.4th at page 577, this Court considered the phrase "reckless indifference to human life" and observed:

> *Tison* . . . instructs that the culpable mental state of "reckless indifference to life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death," and it is this meaning that we ascribe to the

> statutory phrase "reckless indifference to human life" in section 190.2(d).

(quoting *Tison, supra*, 481 U.S. at p. 157; see also *Tison* at p. 158 ["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"].)

Referring to and relying on *Tison*, this Court defined the phrase as a "subjective awareness of the grave risk to human life created by [the defendant's] participation in the underlying felony." (*Estrada, supra*, 11 Cal.4th at p. 578.) *Tison* "sets forth various descriptions of the life-threatening risk of which a defendant who knowingly participates in criminal activities must be subjectively aware in order for imposition of the death penalty to be constitutionally permissible. (See *Tison, supra*, 481 U.S. at pp. 149 . . . ['likelihood of a killing in the course of a robbery [was] so *substantial*'], 152 . . . ['acts were *likely* to result in the taking of innocent life'] and 157 . . . ['criminal activities known to carry a *grave* risk of death'], italics added.)" (*Id.* at pp. 579-580.)

This Court has also observed that the felonies listed in section 189 – including the underlying felonies committed herein – have been deemed by the Legislature to be "inherently dangerous," and therefore constitute criminal activities that exhibit a reckless indifference to human life. (E.g., *People v. Witkins* (2013) 56 Cal.4th 333, 346 [the "Legislature has said in effect that [the] deterrent purpose [of the felony-murder rule] outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing"]; *Cavitt, supra*, 33 Cal.4th at p. 197 ["only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated" in § 189]; *Rios, supra*, 23 Cal.4th at p. 460, fn. 6 ["Under the felony-murder rule, a homicide is murder when it occurs in the course of certain serious and inherently

dangerous felonies . . . ."]; cf. *People v. Roberts* (1992) 2 Cal.4th 271, 316 ["the consequences of the evil act are so natural or probable that liability is established as a matter of policy"].) And as *Tison* makes clear, "there are some felonies as to which one could properly conclude that *any* major participant necessarily exhibits reckless indifference to the value of human life." (481 U.S. at p. 158, fn. 12, italics added.)

Because Matthews was a "major participant" in two underlying felonies enumerated in section 189, and because at least one of them – robbery – was described in *Tison* to carry a "substantial" risk of death in its commission (*Estrada, supra,* 11 Cal.4th at pp. 579-580; see also *Tison, supra,* 481 U.S. at p. 151 ["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"]), those facts, without more, were sufficient to establish the requisite "reckless indifference to human life." (See *Tison, supra,* 481 U.S. at p. 158, fn. 12; cf. *People v. Medina* (2009) 46 Cal.4th 913, 927 ["Nor is it required that Vallejo and Marron 'must have known Medina was armed.' . . . The issue is 'whether, under all of the circumstances presented, a reasonable person in the defendant's position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.'"], italics in original, citation omitted; *People v. Miranda* (2011) 192 Cal.App.4th 398, 408 ["Crimes involving gun use have frequently been found to be a natural and probable consequence of robbery."].)

But even if Matthews's role as a "major participant" in the enumerated criminal activities does not by itself show reckless indifference, the evidence nevertheless was sufficient to support the special circumstance. (*Tison, supra,* 481 U.S. at p. 158, fn. 12 ["even in cases where the fact that the defendant was a major participant in a felony did not

suffice to establish reckless indifference, that fact would still often provide significant support for such a finding"].)

As set forth previously, Matthews was involved at the outset in the planned burglary of the Collective, a medical marijuana dispensary with a metal security door and mantrap to deter unauthorized entry, a security guard who admitted patients only after confirming the validity of their identifications and medical prescriptions, and closed circuit television cameras and monitors throughout. The burglary was committed to enable Matthews's accomplices to carry out a robbery while inside the Collective, where money and marijuana were kept. (2RT 188-189, 207, 244-246, 252-253, 255-256; 3RT 303-304, 392-394; 4RT 665-670, 676-681; 6RT 997; see also 4RT 665-670, 676-681 [detailing telephone calls between Matthews and Banks both before and after the crimes and GPS evidence showing Matthews's movements].) Matthews and his confederates, with the exception of Banks, were members of the Rollin 30's Harlem Crips, a violent criminal street gang whose primary activities included burglary, robbery, and murder. (6RT 975, 980, 982, 984-997, 1073.) Anticipating resistance, the robbers were armed, wore gloves, and carried zip ties to bind their victims. (2RT 191, 206; 3RT 282-285, 310-311, 313, 331, 336, 359; see also 3RT 447-452.) Banks shot and killed Gonzalez, the Collective's security guard, when Gonzales attempted to prevent the group from escaping. (3RT 422-426, 432-434, 436-437; 4RT 696-700, 711-713, 716-718.)

In describing the danger inherent in such a criminal plan, the prosecutor remarked as follows during closing argument:

> What you have to ask yourself here is this: when Mr. Matthews, knowing that his job was the getaway driver, knowing that there was a robbery that was gonna take place and he proceeded to take the robbers, the people that were going to go into this particular location, this dispensary, did he do this

[with] reckless indifference to human life. In other words, when you take people into a location that have guns, that have zip ties, there's a security guard there, these guys go in with loaded firearms, and Mr. Matthews agrees to do this, agreed to take these individuals, is that something that's done with reckless indifference to human life.

. . . .

And when you take multiple robbers to a location, is it out of the realm of possibilities that multiple robbers with guns and there's a security guard there, there's a good chance someone may die? And the answer's yes.

This is what Mr. Matthews had before him, and he made the conscious decision to drive that vehicle belonging to one of the robbers to that location. So Mr. Matthews did all of this. He participated in the crime before or during the killing. He was clearly a major participant. And when he did this, he did it with reckless indifference to human life, and that's Mr. Matthews' culpability under the special circumstance as a non-shooter.

(7RT 1357-1358.)

Consistent with *Estrada* and *Tison*, the jury was instructed that in order to return a true finding on the special circumstance, it had to conclude Matthews acted with reckless indifference, and a person so acts "when he knowingly engages in criminal activity that he . . . knows involves a grave risk of death." (2CT 424; see *Estrada*, *supra*, 11 Cal.4th at pp. 579-580 [disapproving the use of the phrase "extreme likelihood" in a prior version of the instruction in favor of the word "grave," as used in *Tison*].)

Based on the foregoing, the Court of Appeal concluded the evidence was sufficient to support the jury's finding that Matthews's actions showed "reckless indifference to human life":

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.)

Matthews nevertheless contends that "[t]here is no evidence in this record to suggest that [he] had the *highly culpable state of mind* required for reckless indifference to human life." (AOB 46, original italics.) In support of his contention, Matthews relies in part on *Jackson v. State* (Fla. 1991) 575 So.2d 181, in which the Florida Supreme Court overturned the defendant's death sentence for his role in the murder of a storekeeper. Aside from the fact that *Jackson* is an out-of-state decision and therefore not binding on this Court, the defendant's culpability in *Jackson* was materially different. As the Florida Supreme Court observed:

> There was no evidence that 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. There 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.

(*Id.* at pp. 192-193.)

In contrast, the record in the present case shows Matthews (1) was involved in the planning of the underlying felonies, which targeted a medical marijuana dispensary that employed numerous security measures (including a security guard), thus all but guaranteeing some form of physical resistance contributing to a "grave risk of death," (2) was aware – as the driver who deposited the men at the scene and subsequently aided their escape – that his accomplices were armed, wore gloves, and carried zip ties, and (3) belonged to the same criminal street gang as two of his accomplices, whose members are required to commit violent crimes

together, such as burglary, robbery, and murder, as a condition of membership.

Again, a reviewing court must """presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'"" (*Davis*, *supra*, 10 Cal.4th at p. 509.) A jury could reasonably deduce from the evidence presented in this case that Matthews acted with "reckless indifference to human life" in finding the special circumstance true, consistent with due process. (See U.S. Const. 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Enmund*, *supra*, 458 U.S. 782.) Matthews's contention should therefore be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: June 23, 2014

Respectfully submitted,

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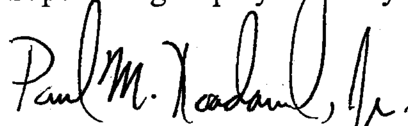

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 11,110 words.

Dated: June 23, 2014

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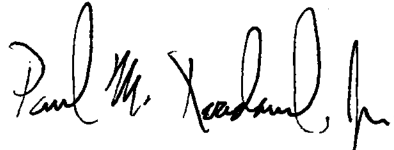

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Leon Banks, et al.** **Case No.:** **S213819**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **June 23, 2014**, I served the attached **ANSWER BRIEF ON MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

On **June 23, 2014**,I caused Original and Thirteen (13) copies of the **ANSWER BRIEF ON MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by Federal Express Tracking Number 8989-0097-7023.

On **June 23, 2014**, I caused one electronic copy of the **ANSWER BRIEF ON MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On **June 23, 2014**, I caused one electronic copy of the ANSWER BRIEF ON MERITS in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 20, 2014, at Los Angeles, California.

Erlinda Zulueta	[signature]
Declarant	Signature

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