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 REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

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

The Attorney General disagrees with our position that the evidence is insufficient to establish that Lovie T. Matthews, the getaway driver in an armed robbery who did not kill or intend to kill, was a "major participant" in the underlying felonies. (Answer Brief on the Merits ("Answer Brief") at pp. 11-32.) Respondent makes several points we will address in seriatim. However, we will not repeat all the points that were discussed in Matthews's Opening Brief ("AOB"), and we do not intend to waive any point not repeated in this brief.

In discussing the application of the seminal decisions of *Tison v. Arizona* (1987) 481 U.S. 137 ("*Tison*") and *Enmund v. Florida* (1982) 458 U.S. 782 ("*Enmund*"), in determining whether a nonkiller accomplice is a "major participant," respondent acknowledges that in *People v. Estrada* (1995) 11 Cal.4th 568, 575 ("*Estrada*"), this Court recognized that "*Tison* is the source of the language of [Pen. Code] section 190.2(d)[1], 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." (*Estrada, supra*, 11 Cal.4th at pp. 575-576, original italics; Answer Brief at p. 16.) However, respondent contends that "although the relevant language of section 190.2, subdivision (d), is derived from *Tison,* there is no such contribution from *Enmund*." (Answer Brief at p. 17.)[2] Respondent supports the Court of Appeal's decision that *Enmund* is distinguishable from this case because *Enmund* " '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.)" (Answer Brief at p. 17.)

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[1] All further statutory references are to the Penal Code, unless otherwise indicated, and section 190.2, subdivision (d) will be referred to as "190.2(d)."

[2] Section 190.2(d), states: "Notwithstanding subdivision (c), every 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 found to be true under Section 190.4." (Italics added.)

Respondent appears to be suggesting that, while *Tison* applies 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[]" (*Estrada, supra*, 11 Cal.4th at pp. 575-576, original italics), *Enmund* only applies if the People seek and exact the death penalty. (Answer Brief at pp. 15-20; see e.g., *id.* at p. 19 ["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"].) However, respondent does not inform us *how* a court would separate *Enmund* and *Tison* and apply only *Tison* to cases where the ultimate sentence is life without the possibility of parole and *Enmund / Tison* to cases where a jury imposes the death penalty. [3]

The law must be applied in a uniform manner in all capital cases. In California, "[a] crime is a capital offense if the statute makes it potentially punishable by death, even if the prosecutor has agreed not to seek the death penalty. [Citations.]" (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, §92, at p. 332; *In re Freeman* (1980) 102 Cal.App.3d 838, 840 [charge of first degree murder and

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[3] Respondent cites *State v. Hightower* (N.C.Ct.App 2005) 609 S.E.2d 235, 241, for the proposition that *Enmund / Tison* does not apply to a non-capital case. (Answer Brief at p. 19.) However, in that case, the defendant asked for a "proportionality review" of his sentence, claiming that the imposition of a sentence of life without parole constitutes cruel and unusual punishment under the Eighth Amendment and the cases of *Enmund* and *Tison.* The court rejected the claim, finding that no North Carolina case has "extended the application of proportionality factors to a non-capital verdict and judgment." (*Hightower*, at p. 241.) Aside from the fact that *Hightower* is an out-of-state decision and is not binding on this court, it simply does not apply here because this case does not present an Eighth Amendment challenge.

special circumstances under section 190.2, subd. (a)(1) embraces capital offense]; §1270.5 [defining "capital offense" as one where "[a] defendant [is] *charged* with an offense punishable with death"], italics added.)

Whether the penalty of death or life without the possibility of parole will be sought in a capital case is strictly a prosecutorial determination. It would be unworkable and nonsensical to ascribe one meaning to a "major participant" under section190.2(d) if the People seek the death penalty, and another meaning to the term "major participant" under section 190.2(d) if the People do not seek the death penalty. The interpretation of a statute should not vary depending upon the facts to which it is applied. (*Wotton v. Bush* (1953) 41 Cal.2d 460, 467-468.) "A statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." (*People v. Engram* (2010) 50 Cal.4th 1131, 1161.) " 'In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences.' " (*People v. Leiva* (2013) 56 Cal.4th 498, 518, citing *In re J.W.* (2002) 29 Cal.4th 200, 213.)

As we have demonstrated, section 190.2(d) is based on *Tison*, and, as applicable here, *Tison* was based on *Enmund*. (AOB at pp. 17-22.) *Enmund* and *Tison* cannot be bifurcated in the manner suggested by respondent. First and manifestly, *Tison* was predicated upon, and decided around *Enmund*. One cannot read *Tison* without gaining a thorough understanding of *Enmund* and how the High Court came to its decision in *Tison* on the basis of its earlier decision in *Enmund*. *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 was an extension of *Enmund* and these two cases have been viewed as one "holding" by the High Court. (See e.g., *Miller v. Alabama* (2012) __ U.S. __; 132 S.Ct. 2455, 2476 (conc. opn. of Breyer, J.) ["the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was 'in the car by the side of the road . . ., waiting to help the robbers escape.' *Enmund, supra,* at 788. Cf. *Tison, supra,* at 157-158 (capital punishment permissible for aider and abettor where kidnaping led to death because he was 'actively involved' in every aspect of the kidnaping and his behavior showed 'a reckless disregard for human life'). Given [*Graham v. Florida* (2010) 560 U.S. 48], *this holding* applies to juvenile sentences of life without parole *a fortiori*"], italics added.)

We believe *Estrada, supra,* 11 Cal.4th 568, resolves the question of whether the *Enmund / Tison* definition of a "major participant" within the meaning of section 190.2(d) applies to sentences of life without parole. In *Estrada,* when this Court addressed the phrase "reckless indifference to human life" in section 190.2(d), it made perfectly clear that "[t]he portion of the statutory language of section 190.2(d) at issue here derives verbatim from [*Tison*]" and that *Tison* applies in California "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, original italics.) *Estrada* considered the *entire phase* from *Tison*, on which the statutory language of section 190.2(d) is based. That phrase is written in the conjunctive, bringing a non-killer accomplice within the meaning of the statute if he or she acts "with reckless indifference to human life *and* as a major participant" in committing one of the felonies enumerated in section 190.2, subdivision (a)(17). *Estrada* did not find only half of the *Tison* decision, pertaining to

reckless indifference, applicable in California – it found section 190.2(d) was enacted to bring California law into conformity with the High Court's decision in *Tison*. (*Estrada,* at p. 575.)[4] To the extent *Tison* relies on *Enmund* in formulating the definition of a "major participant" in the underlying felony, *Enmund* applies in California "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." (*Estrada,* at pp. 575-576, original italics.)

Respondent seems to be arguing that *Enmund* is merely a substantive limitation on sentencing.[5] We agree that *Enmund* has created a categorical ban on imposing "capital punishment upon an aider and abettor in a robbery[-murder] where that individual did not intend to kill and simply was 'in the car by the side of the road . . ., waiting to help the robbers escape.' " (*Miller v. Alabama, supra,* __ U.S. __; 132 S.Ct. at p. 2476 (conc. opn. of Breyer, J.); *People v. Contreras* (2013) 58 Cal.4th 123, 163 [*Enmund* prohibits "death for a getaway driver who waited outside the crime scene to help his associates escape a robbery, and who did not join in the killings or possess either an intent to kill or other lethal mental state"].)

Respondent cites *Cabana v. Bullock* (1986) 474 U.S. 376, a case pre-dating *Tison*, for the proposition that "*Enmund* 'does not affect the state's definition of any substantive offense, even a capital offense,' but is simply a 'substantive limitation on sentencing.' " (Answer Brief at p. 17, some

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[4] Respondent acknowledges that *Tison* was incorporated into section 190.2(d) "which applies to capital and noncapital cases alike." (Answer Brief, at p. 1, citation omitted.)

[5] We would point out that the government has not made its position clear, or explained how the sentencing aspect of *Enmund* is relevant here.

internal quotations omitted.) In *Cabana v. Bullock*, the United States Supreme Court remanded the case because during the pendency of Mr. Bullock's appeal, *Enmund* was decided and, under the instructions given to Bullock's jury, the jury may not have found that the defendant killed, attempted to kill, or intended that a killing take place, as required for a sentence of death under *Enmund.* The High Court found the Court of Appeal was correct to require such a determination be made under *Enmund*, but was incorrect insofar as it held that a *jury* had to make that determination. (*Cabana v. Bullock, supra,* 474 U.S. at pp. 383-385.) In explaining that, "[t]he decision whether a particular punishment – even the death penalty – is appropriate in any given case is not one that we have ever required to be made by a jury[,]" the High Court contrasted a finding of death eligibility with findings on the elements of a substantive offense. As to the latter, the court said that, "Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." (*Id.* at pp. 384-385.) It then said, "But our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury. Rather, as the Fifth Circuit itself has recognized, *Enmund* 'does not affect the state's definition of any substantive offense, even a capital offense.' " (*Id.* at p. 385.)

We fail to see how the statement respondent quotes from *Cabana v. Bullock*, or the court's opinion in *Cabana v. Bullock*, can be read to support the position that *Tison's* explanation of a "major participant" in the underlying felony, and its reliance on *Enmund* to explain that term, does not apply to sentences of life without the possibility of parole. *Tison* was not decided in 1986 when *Cabana v. Bullock* was decided, so *Cabana*

v. Bullock did not undermine *Tison*. *Enmund* created a categorical ban on death for someone like Mr. Matthews[6] – someone merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery – but it is not "simply a 'substantive limitation on sentencing ' " as the Attorney General suggests. (Answer Brief at p. 17.)

Indeed, the *reason* for the categorical ban against imposing capital punishment on persons like Mr. Enmund and Mr. Matthews is because they were not major participants in the underlying felony, who acted with reckless indifference to human life. (Cf. *Tison, supra,* 481 U.S. at p. 158 [the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree felony murder who was a "major participant" in the underlying felony, and whose mental state is one of "reckless indifference to human life"].) And, it was this history that informed the drafters of section 190.2(d).

This case addresses the question of what it means to be a "major participant" within the meaning of section 190.2(d), and whether substantial evidence supported the jury's finding that Mr. Matthews was a major participant in the underlying felony, who acted with reckless indifference to human life. The *Enmund / Tison* cases should guide, if not dictate, California's definition of the term. This case does not challenge the validity, or proportionality of the punishment imposed. This is a sufficiency question, the answer to which turns on an *Enmund / Tison* analysis. (*Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104, 1118 [" 'it is a basic premise of statutory

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[6] "[A] person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death." (*Cabana v. Bullock, supra,* 474 U.S. at p. 386 .)

construction that when a state law is patterned after a federal law, the two are construed together' "].)

As we explained in the opening brief, the level of participation in the underlying felony for a non-killer accomplice, and whether he qualifies as a "major participant," is decided on a case-by-case basis, but culpability was marked by the High Court in *Tison* at three points along a continuum: first, at the most culpable end of the spectrum is the actual killer, who is clearly a major participant in the underlying felony; second, at the *opposite* end of the spectrum, is Mr. Enmund, "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" who the court found to be a *minor participant*; and finally, 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.)

Respondent does not dispute that the High Court has marked three points along a continuum, nor does the Attorney General suggest that Mr. Matthews's conduct rose to the level of the Tison brothers. However, respondent suggests that Mr. Matthews's conduct was "unlike the defendant in *Enmund*." (Answer Brief, at p. 2.) We could not disagree more. Respondent argues:

> 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 killing" (*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.

(Answer Brief at p. 2; see also *id.* pp. 26-28.)

We will respond point-by-point to demonstrate to this Court that respondent's position lacks merit. Respondent contends that in Mr. Enmund's case no proof of prior planning was presented. That is not so. While the majority opinion did not discuss evidence of "prior planning" related to the robbery itself, the dissent in *Enmunds*[7] elaborated more on the underlying facts of the case. The dissent pointed out that after the shooting, when Mr. Enmund returned to the home where he was staying, he told Ida Jean Shaw, his common-law wife, that "he had decided to rob Thomas Kersey after he had seen Kersey's money a few weeks earlier." (*Enmund, supra,* 458 U.S. at p. 803 (dis. opn. O'Connor, J.).) The dissent also noted, "Thomas Kersey normally kept large sums of money in his wallet and indiscriminately showed the cash to people he dealt with. A few weeks before his murder, Kersey revealed the contents of his wallet to [Mr. Enmund] and bragged that at any time he could 'dig up $15,000, $16,000.' " (*Id.* at p. 803, fn. 5.) Thus, *completely unlike* this case, there was direct evidence that Mr. Enmund planned the robbery *weeks* in advance. Indeed, he may have even conceived of and initiated the plan to rob Thomas Kersey after Mr. Kersey showed Mr. Enmund his wad of money a few weeks before his murder.

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[7] Authored by Justice O'Connor, with whom the Chief Justice, Justice Powell, and Justice Rehnquist joined.

In addition to the direct evidence of a plan to rob the Kerseys, there was strong circumstantial evidence that Mr. Enmund planned to rob the Kerseys – *much stronger* circumstantial evidence than we have in this case. The only reasonable inference to be drawn from the fact that Mr. Enmund drove his two armed accomplices to the *remote* farmhouse of an elderly couple in central Florida is that he did so in accordance with a planned robbery. There was no other reason to drive to the remote farmhouse of an elderly couple in central Florida.

In this case, the evidence of planning, if any, is *far less* than what the record revealed about Mr. Emnund.[8] We submit there was no sufficient evidence that Mr. Matthews planned this attempted robbery / burglary. There is certainly no *direct* evidence of any planning here. However, respondent contends that Mr. "Matthews was involved at the outset in the planned burglary of a medical marijuana dispensary . . . " (Answer Brief at pp. 2, 27-28.) This assertion rests on evidence of three phone calls, averaging about 20 seconds each, between Banks and Matthews before the shooting, for a total of 63 seconds. (Answer Brief at p. 27.) However, there is no evidence that Matthews and Banks discussed a plan to rob the dispensary. There is no evidence of what was discussed or if all the calls went through. (4RT 676-678.) Also, unlike Mr. Enmund who had no other reason for driving to the remote farmhouse of an elderly couple, other than to commit a robbery, Mr. Matthews could have very well driven Mr. Banks to the dispensary to pick up marijuana in accordance with his lawful and valid medical

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[8] We challenged the sufficiency of the evidence that Mr. Matthews aided and abetted the attempted robbery / burglary in the Court of Appeal, which included, inter alia, the lack of evidence regarding prior planning. We do not intend to waive any of those challenges here. However, review was not granted on those issues.

marijuana prescription. Therefore, in this case there was no direct evidence of a planned robbery and the circumstantial evidence was extremely weak and subject to the reasonable interpretation that Mr. Matthews had a valid, lawful reason for his conduct.

However, even assuming for argument's sake only, that the meager evidence presented at trial was enough to demonstrate a plan to commit a robbery, we submit that it is *less* evidence than the High Court had before it *Emnund.* Therefore, at most, Mr. Matthews is no different from Mr. Enmund, who planned to rob Thomas Kersey *a few weeks* before the robbery-murder.

We also submit that evidence of planning the underlying robbery is of limited relevance in the context of determining the applicability of section 190.2(d). In *Enmund*, the majority opinion did not focus its attention on Enmund's liability for the robbery – the planning or anything else that made him guilty of robbery. The dissent focused more on the facts of the underlying offense and the manner in which it came to be, and was, committed. The majority dismissed that approach. After noting that the dissent argued that Enmund planned the robbery, the majority responded: "As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us . . . whether or not Enmund intended that life be taken or anticipated that lethal force would be used." (*Edmund, supra,* 458 U.S. at p. 786, fn. 2.)

As in *Enmund,* we should not focus entirely upon whether the evidence of planning a robbery was sufficient, or particularly strong. Mr. Matthews was found guilty of aiding and abetting an attempted robbery / burglary in which a death occurred. For his role in those crimes, he could have been sentenced to serve 25 years-to-life in prison. The issue

here is whether he is guilty of a special circumstance: whether he was a major participant who acted with reckless indifference to human life in his role as the getaway driver who waited three blocks away from the crime scene to help his associates escape a robbery, but who did not join in the killings or possess either an intent to kill or other lethal mental state. While a major participant could participate in the planning of the underlying felony, more than just planning the underlying felony is required to a defendant's culpability to the level of a true finding on a special circumstance.

Respondent also claims that this case is different from *Enmund*, because the record there supported no more than an *inference* that Mr. Enmund was the person sitting in a car some 200 yards away at the time of the killing. (Answer Brief at pp. 2, 27 ["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' [citation], Matthews drove Banks SUV to the Collective, parked a few blocks away, and waited for the signal to pick up his accomplices"], original italics.) The alleged distinction respondent attempts to draw here is a red herring. To put this in context, the High Court explained that, "The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. [Citation.] Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car." (*Id.* at p. 786, fn. 2.)

In this case, we need not resort to inference. The evidence is undisputed – Mr. Matthews was the getaway driver who was parked *more* than 200 yards away from the scene of the crime. Mr. Matthews was three blocks, or 352 yards away from the dispensary. (AOB at pp. 37-38.) Mr. Matthews is no different from Mr. Enmund, except he was farther away from the scene of the crime. Neither of them were on the scene of the killings, neither intended to kill, and neither were found to have had any culpable mental state. Their conduct was limited to driving the getaway car. (*Enmund, supra*, 458 U.S. at p. 798.)

Respondent also claims that Mr. Matthews "*enlist[ed]* the help of two fellow members of the Rollin 30's Harlem Crips, a violent criminal street gang, and [drove] them and a third accomplice [Mr. Banks] to the dispensary in the [Banks's] vehicle." (Answer Brief at pp. 2, 27-28.) As with the evidence of planning, there is no evidence Mr. Matthews *enlisted* the help of anybody. As we mentioned, there were three extremely brief phone calls between Banks and Matthews prior to the attempted robbery, which averaged about 20 seconds each – hardly enough time to enlist anyone's help in a robbery. Significantly, however, there were *no phone records* of Mr. Matthews calling or receiving any calls from Daniels or Gardiner. Respondent does not address how Mr. Matthews allegedly enlisted their help.

Respondent's assumption that Mr. Matthews "drove his confederates to the targeted business[]" (Answer Brief at p. 28), is similarly based on pure speculation. The evidence established Mr. Matthews drove near the dispensary's location almost one hour before the crime. No one saw him driving with or dropping *anyone* off at or near the dispensary. By 2:55 p.m., nearly one hour before the attempted robbery, he was parked on Mansfield Avenue (three blocks east of La

Brea Avenue) where he remained until 3:45 p.m., the moment the shots were fired. (Peo's Exh. 51 [1st & 2d Zip file].) However, even assuming for argument's sake only, that Mr. Matthews drove Banks, Daniels and Gardiner to the dispensary, it does not make him any different from Mr. Enmund who drove Sampson and Jeanette Armstrong (the shooters) to the remote farmhouse of an elderly couple.

Finally, based on a series of phone calls between Matthews and Banks at and after 3:45 p.m. (when the shots were fired), respondent argues that Mr. Matthews "coordinated" the men's escape following the murder and searched for and picked up two of them as they fled. (Answer Brief at pp. 2, 28.) We believe this overstates the evidence, and question whether the evidence supports an inference that this was a "coordinated" escape. Daniels and Gardiner had to yell out Mr. Matthews's middle name, Troy, to get his attention so the men could get in the car, and Banks went off in a completely different direction. Nevertheless, even assuming for argument's sake, that Mr. Matthews "coordinated" this escape, that does not make him any different than Mr. Enmund who waited on the side of the road during the robbery-murder to help the Armstrongs escape with the Kerseys' money.

As we have shown, there is *no* meaningful distinction between Mr. Enmund's conduct and the conduct of Mr. Matthews, except perhaps that Mr. Matthews did less than Mr. Enmund. We submit that because Mr. Matthews is California's version of Mr. Enmund, this ends the inquiry. There is no sufficient evidence that Mr. Matthews was a "major participant" in the underlying felony because the High Court has already decided what it means to play a "minor" role in the underlying felony. *Tison* found that Mr. Enmund, the getaway driver in an armed robbery, who was not on the scene, who neither intended to kill nor was found to

have had any culpable mental state, was a "minor actor in an armed robbery." (*Tison, supra,* 481 U.S. at p. 149.) Respondent does not dispute that *Tison* made this clear.

Mr. Matthews does not even qualify as a "major participant" under California's current more expansive definition of that term.[9] *People v. Proby* (1998) 60 Cal.App.4th 922 ("*Proby*"), the only Court of Appeal case to define a "major participant," held that a major participant is " '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.) No reported California Court of Appeal decision has ever found a defendant *not* to be a major participant under this expansive definition.

However, in all the cases cited by the parties which have found the defendant to be a "major participant," the defendant was on the scene of the killing. No reported case in California has addressed a getaway driver who was not on the scene, and neither intended to kill nor was found to have had any culpable mental state, who the High Court has already determined to be, "the minor actor in an armed robbery[.]" (*Tison, supra*, 481 U.S. at p. 149.)

The closest California has come to addressing the situation we have here was *People v. Smith* (2005) 135 Cal.App.4th 914 ("*Smith*"). In that case, the nonkiller accomplice served as the only *lookout* to an attempted robbery occurring in an occupied motel room, which turned into a rambunctious killing as the victim was stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head

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[9] The parties discussed all the same California cases, so we will not repeat our discussion of each case herein. (See AOB at pp. 25-33, Answer Brief at pp. 20-24.)

slammed *through* the wall. (*Id.* at p. 927.) However, *Smith* explicitly distinguished a lookout from a getaway driver: "Unlike the hypothetical 'non-major participant' in [*Tison*] – 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 [the victim's] room, where the jury could infer he monitored and guarded the increasingly lengthy, loud, and violent attempted robbery-turned-murder. [Citation.]" (*Smith,* at p. 928.)

As we have explained, Mr. Matthews *is* the hypothetical "non-major" participant identified in *Tison* as Mr. Enmund. No reported California case has found a getaway driver meets *Proby's* definition of a major participant. (See e.g., Answer Brief at p. 31 ["A common thread in the authorities previously discussed [the California cases] is that the participants found to be 'major' were all people directly involved in commission of the felony – they were at or near the crime scene, and somehow had a planned roll in it, or had helped to effect, the completion of the underlying felony"].)

Respondent suggests that the term "major participant" 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." (Answer Brief at p. 31.) We do not recommend this Court adopt such a broad definition of the term.

Active participation in *planning* a crime may not even rise to the level of aiding and abetting[10], so we do not agree that active participation

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[10] Knowledge of another's criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime. (*People v.*

in the mere planning of a crime is sufficient to qualify someone for a *special circumstance*. Active participation in carrying out the crime would seem to be a mandatory minimum, however, there needs to be more to be found guilty of the special circumstance, as distinguished from the crime itself. For example, the Court of Appeal's decision here, finding Mr. Matthews to be a "major participant," simply because he allegedly participated in planning the attempted robbery / burglary and acted as a getaway driver, is contrary to state and federal law. No state case has found a getaway driver to be a "major participant" and *Tison specifically said* that a getaway driver, even one who planned and may have initiated the robbery, like Mr. Enmund, who was not on the scene, who neither intended to kill nor was found to have had any culpable mental state, *is a minor participant*. (*Tison, supra,* 481 U.S. at pp. 149-150.)

The oversimplified and extremely broad definition offered by respondent fails to distinguish between defendants who commit "ordinary" felony murder, and those who commit a felony murder warranting the imposition of a special circumstance. As we explained in the opening brief, if mere participation in the commission of 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, and section 190.2(d) would not serve its constitutional purpose of providing a rational basis for distinguishing between those who deserve to be considered for the capital punishment and those who do not. (See *Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S.

Beeman (1984) 35 Cal.3d 547, 560; cf. *People v. Morante* (1999) 20 Cal.4th 403, 433 [aiding and abetting does not require participation in an agreement to commit an offense, but merely assistance in committing the offense].)

153; *People v. Green* (1980) 27 Cal.3d 1, 61; AOB at p. 32.) Respondent's approach is oversimplified and would run afoul of the constitution. "A statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." (*Engram, supra,* 50 Cal.4th at p. 1161.)

We suggest this Court adopt the *Tison* standard: whether someone qualifies as a "major participant" is decided on a case-by-case basis along a continuum consisting of Mr. Matthews at the low-end, "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 pp. 149-150), who this Court can readily find to be a *minor participant* under the High Court's precedent in *Enmund* and *Tison*; and, at the opposite end of the spectrum, the actual killer, who may have intended to kill, but who is clearly a major participant in the underlying felony. (*Ibid.*) The middle case – someone who is more akin to the Tison brothers – has yet to be decided.

In sum, *Enmund* is not merely a substantive limitation on sentencing in a death penalty case. *Enmund* informed *Tison's* definition of what it means to be a "major participant" in the underlying felony and *Enmund* serves as one of three marks along a continuum of conduct. *Enmund* represents what it means to be a *minor participant* in the underlying felony. *Estrada* has already said the *Tison* decision, which informed the drafters of section 190.2(d) and resulted in the Legislature adopting the *Tison* standard verbatim, applies in California *regardless* of whether the People seek or exact the death penalty or life without the possibility of parole. This Court does not need to, nor does respondent suggest that it, overrule *Estrada* because *Estrada* correctly determined that the statute, section 190.2(d), must be applied the same regardless of the penalty ultimately imposed. *Tison* applies in California. Under the *Tison*

standard, Mr. Matthews is – by the High Court's definition – only a *minor participant* in the underlying felonies. Mr. Matthews is California's version of Mr. Enmund. Therefore, the true finding on the special circumstance must be reversed.

II.

THE TRUE FINDING ON THE SPECIAL CIRCUMSTANCE VIOLATES DUE PROCESS BECAUSE THE EVIDENCE IS ALSO INSUFFICIENT TO ESTABLISH THAT MATTHEWS ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE, WITHIN THE MEANING OF SECTION 190.2(d).

Respondent argues that "[b]ecause 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 [citations], those facts, without more, were sufficient to establish the requisite reckless indifference to human life.' " (Answer Brief at p. 34.) We disagree and believe that *Tison* actually stands for the opposite proposition.

As an initial matter, Mr. Matthews was *not* a major participant in the underlying felonies. (See ante., at pp. 1-20; AOB at pp. 13-41.) Secondly, section 190.2(d) is written in the conjunctive, to require *both* reckless difference to human life and that the non-killer accomplice be a major participant in the underlying felonies. (See also *Tison, supra,* 481 U.S. at p. 158.) Respondent's argument that active participation in the planning or carrying out of a robbery makes a defendant a major participant (Answer Brief at pp. 31-32), which in turn automatically means he acted with reckless indifference to human life (Answer Brief at p. 34), is profound bootstrapping which would extinguish the constitutionality of section 190.2(d).

A state's capital punishment scheme must employ "some narrowing principle" (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363) in order to "circumscribe the class of persons eligible for the death penalty"

(*Zant v. Stephens* (1983) 462 U.S. 862, 878) from the class of persons not eligible for that penalty. (See also *People v. Green, supra,* 27 Cal.3d at p. 61.) As we understand respondent's position, the getaway driver in any armed robbery that results in a murder would be eligible for capital punishment under section 190.2(d) with no additional findings required. Clearly, this would not pass constitutional scrutiny. (*Engram, supra,* 50 Cal.4th at p. 1161 ["A statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"].)

We also do not believe *Tison* stands for the proposition that all armed robberies carry such a substantial risk of death that the mere commission of that crime is sufficient to establish that the getaway driver acted with reckless indifference to human life. (Cf. Answer Brief at p. 34.) *Tison* stated:

> 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.

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

If the High Court agreed with respondent's position, it would have found Mr. Enmund acted with reckless indifference to human life in his role as the getaway driver to an armed robbery. However, the High Court did not come to that conclusion. In fact, the High Court in *Tison* specifically noted that the *Enmund* "Court found that Enmund's degree of participation in *the murders* was so tangential that it could not be said to justify a sentence of death." (*Tison, supra,* 481 U.S. at p. 148, original

italics.) "In reaching this conclusion [that neither the deterrent nor the retributive purposes of the death penalty were advanced by imposing the death penalty upon Enmund], the [*Enmund*] Court relied upon the fact that killing *only rarely occurred during the course of robberies,* and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill. The Court acknowledged, however, that '[i]t 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 felony.' " (*Id.* at pp. 148-149, italics added, citing *Enmund, supra*, 458 U.S. at p. 799.) We do not interpret *Tison* or *Enmund* as supporting respondent's position and we urge this Court to reject such reasoning.

Alternatively, respondent claims the evidence was sufficient to show that Mr. Matthews acted with reckless indifference to human life, even if he was not a major participant. (Answer Brief at pp. 34-35.) We disagree. *Tison* held "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, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Tison, supra,* 481 U.S. at pp. 157-158.) The High Court then turned to facts before it, finding that:

> The *petitioners' own personal involvement in the crimes was not minor*, but rather, as specifically found by the trial court, "substantial." *Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner 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 of the Lyons family and the subsequent flight. The Tisons' high level of participation in these crimes further implicates them in the resulting deaths. Accordingly, they fall well within the overlapping second intermediate position which focuses on the *defendant's* degree of participation *in the felony*.

(*Tison, supra,* 481 U.S. at p. 158, italics added.)

Mr. Matthews's own personal involvement *in the crimes* was nil. He was doing exactly what the High Court distinguished as minor; he was "merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery[.]" (*Tison, supra,* 481 U.S. at p. 158.) Unlike the Tison brothers, who were physically present at the scene of the crime and during the entire sequence of criminal activity, and were actively involved in every element of the crimes of kidnaping and robbery, Mr. Matthews was not on the scene of the crime and he did not participate in any element of the attempted robbery / burglary. Mr. Matthews, himself, personally, did not participate in the commission of the crimes, or do anything during the crimes to evince a reckless indifference to human life – he was three blocks away from the scene sitting in a car when the crimes occurred.

Respondent claims Mr. Matthews acted with reckless indifference to human life because: he alleged participated in planning the robbery; a robbery was committed at the dispensary; Matthews and his confederates, except Banks, were members of the same gang; the robbers anticipated resistance as shown by the fact they brought guns, gloves and zip ties; and, Banks shot Gonzalez. (Answer Brief at p. 35.) We fail to see how planning a robbery, even assuming there was evidence that Mr. Matthews planned this attempted robbery, evinces the

"highly culpable mental state" to which the Supreme Court referred in *Tison*. The mere planning of a robbery cannot be a basis for finding the "reckless indifference to human life" aspect of the felony-murder special circumstance. Merely planning a robbery might not even amount to aiding and abetting, let alone constitute sufficient evidence of reckless indifference to human life. (*Tison, supra,* 481 U.S. at p. 148 [killing only rarely occurs during the course of a robbery].) Moreover, as with respondent's argument that mere planning makes one a "major participant" in the underlying felony, this argument fails here too because it does not distinguish defendants who commit an "ordinary" felony-murder from those deserving of a felony-murder special circumstance.

Also, other than the so-called evidence of planning, which in no way distinguishes Mr. Matthews from Mr. Edmund, none of the facts on which respondent relies establishes *Mr. Matthews's own personal involvement in the crimes*. Mr. Matthews was not actively involved in any element of the robbery, nor was he "physically present during the entire sequence of criminal activity culminating in the murder[.]" (*Tison, supra,* 481 U.S. at p. 158.) Perhaps the *robbers* anticipated resistance as shown by the fact *they* brought guns, gloves and zip ties, or perhaps even Mr. Matthews, like Mr. Enmund "may well have so anticipated." (*Id.* at pp. 150-151.) However, *Tison* already rejected the argument that the mere anticipation of resistance to the robbery, as shown by the fact that the principals armed themselves, is enough to establish that the getaway driver acted with the highly culpable mental state of reckless indifference to human life. (*Ibid.* & *id.* at pp. 148-149.) As in *Enmund,* there was no proof that Mr. Matthews had any culpable mental state. (See *id.* at p. 149.) And yes, Banks shot Gonzalez, but again Mr. Matthews did not

personally participate in that aspect of the crime. (Cf. Answer Brief at p. 35.)

The defendant's *own personal* participation *in the crime* must demonstrate a reckless indifference to human life. (*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"], italics added; *Enmund, supra,* 458 U.S. at p. 798 ["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"], original italics; *Tison, supra,* 481 U.S. at p. 149 [same].) Respondent's focus on the conduct of those who committed the attempted robbery and shot Gonzalez is misplaced.

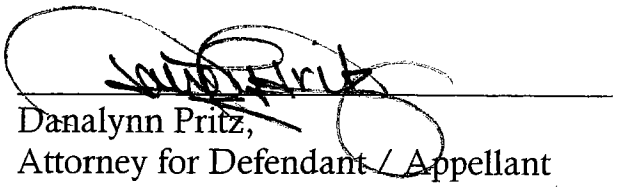
As we have shown here, and in the Opening Brief, there is no sufficient evidence Mr. Matthews acted with reckless indifference to human life. (AOB at pp. 42-47.) Therefore, the true finding on the special circumstance violates due process. A conviction, or true finding on a special circumstance, that 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* (1979) 443 U.S. 307, 319; *People v. Mickey* (1991) 54 Cal.3d 612, 678 [applying the *Jackson* standard to a special circumstance finding].)

Mr. Matthews was neither a "major participant" in the underlying felonies, nor did he act with reckless indifference to human life. For either, or both of these reasons, this Court should reverse the true finding on the special circumstance (§190.2(d)) for insufficient evidence.

CONCLUSION

Predicated on the foregoing, and that set forth in the Opening Brief, we respectfully request this Court strike the true finding on the special circumstance (§190.2(d)) and dismiss it under the Double Jeopardy provisions of the state and federal constitutions for insufficient evidence, and remand this case for resentencing.

Dated: July 23, 2014 Respectfully Submitted,



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

Appellant's Reply Brief on the Merits consists of 7,670 words as counted by the word-processing program used to generate the brief.

Dated: July 23, 2014

Respectfully Submitted,

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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 182, Westlake Village, California 91362.

On July 23, 2014, I served the foregoing document, described as: **APPELLANT MATTHEWS'S REPLY BRIEF ON THE MERITS** on the interested parties in this action by transmitting: [ ] the original; [X] a true copy thereof as follows:

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[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 July 23, 2014.

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