

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**LOUIS SANCHEZ EMANUEL,**

**Defendant and Appellant.**

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Case No. S280551

**On Review of a Decision of the Court of Appeal  
Sixth Appellate District, Case No. H049147**

**On An Appeal From The Superior Court Of California  
Santa Clara County No. C1246799  
Hon. Vanessa Zecher, Judge**

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**OPENING BRIEF ON THE MERITS**

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**By Appointment of the California Supreme Court  
Under the Sixth District Appellate Program –  
Independent Case System**

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	]	Case No. S280551
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LOUIS SANCHEZ EMANUEL,	]	
	]	
Defendant and Appellant.	]	

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**ISSUE PRESENTED**

Does sufficient evidence support the trial court’s finding that appellant Louis Sanchez Emanuel acted with reckless indifference to human life and therefore was ineligible for resentencing pursuant to Penal Code section 1172.6?<sup>1</sup>

**SUMMARY OF ARGUMENT**

In 2012, Jacob Whitley and 21-year old Louis Emanuel tried to rob Cody S. around 3:15 p.m. near a public park. When Cody would not cooperate, Emanuel walked away and told Whitley, “Let’s go.” Rather than leave, Whitley pulled out a gun and used it to strike and shoot Cody. Emanuel did not have any weapon or know that Whitley had one. Nonetheless, at a section 1172.6 proceeding, the trial court found that Emanuel acted with reckless indifference to human life. The Court of Appeal upheld its finding against a substantial evidence challenge.

In *People v. Clark* (2016) 63 Cal.4th 522, 618-622 (*Clark*), this Court established a five-factor test for assessing reckless

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

indifference to human life. Here, all five factors weighed in Emanuel's favor. Emanuel set out to commit an unarmed robbery at a public place in broad daylight. The robbery did not last long and Emanuel's youth likely impacted his ability to appreciate its risks. Emanuel's statements and actions at the scene showed that Cody's resistance, and Whitley's violent response, both took him by surprise. Perhaps most importantly, when the dangers of the situation escalated, Emanuel left and urged Whitley to follow.

The trial court and Court of Appeal inappropriately focused on what Emanuel did not do, while dismissing what he did do. Specifically, both courts placed paramount importance on his failure to physically restrain Whitley or aid Cody after the shooting. The courts' analysis presupposed that Emanuel could actually see the ongoing struggle and the eventual shooting. Yet, the struggle broke out only after he had walked away and while both participants were inside Cody's truck. Emanuel's later statements implied that he had learned about the details from Whitley and not from first-hand observation.

In any event, no published authority suggests that an unarmed robbery participant must physically intervene against an armed cohort in order to negate the element of reckless indifference. To demand that he do so would create a risk to life beyond that inherent in the robbery itself. Likewise, a failure to aid the victim has little bearing on reckless indifference. The mental state of reckless indifference must exist when the defendant undertakes to commit the felony. After-the-fact actions, under dramatically changed circumstances, provide little insight into the defendant's earlier mental state.

By ending his own involvement in the encounter, and trying to induce Whitley to leave, Emanuel manifestly disavowed the sort of "willingness to kill" required for reckless indifference to human life. (*Clark, supra*, 63 Cal.4th at p. 617.) If an aider and

abettor had to take the almost-unheard-of step of trying to physically restrain a confederate or aid the victim, it would create a de facto rule of automatic felony-murder liability for all participants at the scene. Such an outcome would be little different than the now defunct practice of imputing malice to participants who do not actually kill. This Court should reverse.

## **STATEMENT OF THE CASE**

### **A. Introduction**

Emanuel has asked this Court to take judicial notice of the records and dockets in his two previous appeals. The first was his original direct appeal – *People v. Whitley et al.*, H043651. The second was *People v. Emanuel*, H047062/H047347 – a previous appeal arising out of these same section 1172.6 proceedings. Within this brief, citations to the “ORT” or “OCT” refer to the record in Emanuel’s original appeal. Citations to the previous section 1172.6 appeal will be designated by H047062, which was one of its two case numbers. Unspecified record citations refer to the record in the present proceedings.

### **B. Emanuel’s jury trial and first resentencing petition**

After a joint trial with Jacob Whitley, a jury found Emanuel guilty of “first degree felony murder.” (3 OCT 821.) The jury returned the same verdict against Whitley with an additional finding that he personally discharged a firearm resulting in death. (3 OCT 822.) Emanuel received a prison sentence of 25 years to life. (4 OCT 1000-1001.)

On December 20, 2018, Emanuel filed a petition for resentencing under what is now section 1172.6. (1 CT [H047062]: 1-6.) The trial court initially denied the petition, finding Senate Bill No. 1437 unconstitutional. (1 CT [H047062]: 107.) Emanuel’s ensuing appeal was eventually stayed so the trial court could reconsider its ruling in light of new case law. (See Case No. H047062, Aug. 19, 2020 docket entry.) When the trial court

reversed its earlier ruling (1 RT 5), the Court of Appeal dismissed the then pending appeal as moot. (See Case No. H047062, Feb. 3, 2021 docket entry.)

**C. Trial court’s ruling on the merits and Court of Appeal’s decision**

On November 2, 2020, the trial court issued an order to show cause, finding that Emanuel’s petition established a prima facie case for relief. (1 CT 87.) Neither side presented new evidence following the order to show cause. Instead, the trial court based its ruling on the original trial record and on the attorneys’ briefing and oral argument. (Aug. RT 60; see 1 CT 112-139, 141-179.) In a 25-page written decision, the trial court denied Emanuel’s petition on the merits, finding proof beyond a reasonable doubt he was a major participant who acted with reckless indifference to human life. (1 CT 187, 198-211.)

On appeal, Emanuel argued there was no substantial evidence to support the finding of reckless indifference to human life. (Opn., p. 9.) The Court of Appeal affirmed in an unpublished opinion. (Opn., p. 14.) This Court granted review.

**STATEMENT OF FACTS**

On December 11, 2012, Jacob Whitley fatally shot J. Cody S. (Cody) during a robbery at or near a San Jose park. Emanuel also participated in the robbery but, when things did not go as planned, he walked away and urged Whitley to do the same. The shooting happened after Emanuel had left.

**A. Whitley and Emanuel arrange to buy a pound of marijuana from Mansour Amini and Cody**

In 2012, Mansour Amini and Cody were close friends who shared a common interest in working out and smoking marijuana. (6 ORT 476-477.) Cody also sold marijuana. (6 ORT 478.)

Amini attended De Anza College. (6 ORT 480.) Around two weeks before Cody’s death, Emanuel and Whitley approached

Amini on campus. (6 ORT 480-481.) Whitley identified himself as Louis. (6 ORT 479, 485.) Emanuel identified himself as Louis's cousin. (6 ORT 480.) Both men said they were from Las Vegas, which was untrue. (6 ORT 500; 9 ORT 972; 10 ORT 1073-1074.)

Whitley and Emanuel asked Amini if he knew where they could buy a pound of marijuana. (6 ORT 482-483, 555.) Amini replied that he could get it for them but it would take a couple weeks. (6 ORT 482, 485.) At the end of the conversation, Amini exchanged telephone numbers with Emanuel. (6 ORT 486.)

Over the next few days, Emanuel called Amini multiple times. (6 ORT 487-489.) Amini contacted Cody and asked if he had access to a pound of marijuana. (6 ORT 490.) Cody said he did but "[n]ot right away." (6 ORT 490.) He promised to pay Amini a \$200 commission. (6 ORT 490-491.)

Amini and Cody set up a meeting with Emanuel and Whitley so Cody could show them a sample of the marijuana. (6 ORT 558; 7 ORT 628.) The meeting took place at a parking lot outside a Panda Express restaurant in San Jose. (6 ORT 491-492.) During the meeting, Emanuel took a picture of the marijuana sample. (6 ORT 500.) Emanuel explained that he was buying it for an uncle and wanted to show him what it looked like. (6 ORT 500-501.) Amini found Emanuel's behavior "weird." (6 ORT 562.) He also believed it odd that the men offered an inexplicably high price for the marijuana and made no effort to negotiate. (6 ORT 501-503.)

Two or three days later, the men had a second meeting outside the same Panda Express. (6 ORT 512-513, 565.) It was already dark when Whitley and Emanuel arrived on foot. (6 ORT 514, 569.) Cody did not have the pound of marijuana so he drove the group to his supplier's house in his white pickup truck. (6 ORT 514-516.) After he parked his truck, Emanuel and Whitley

said they did not have the money. (6 ORT 515, 517.) Both men wanted to meet Cody's supplier. (6 ORT 516.)

Cody left for around 5 to 10 minutes. (6 ORT 517.) When he returned, he reported that his supplier did not wish to meet with Emanuel and Whitley since they did not have the money. (6 ORT 516-517.) Emanuel and Whitley suggested postponing the sale to a different day. (6 ORT 519.) The group agreed to meet at Cherry Park on December 11, 2012. (6 ORT 521.) Cherry Park is in San Jose and is also known as Paul Moore Park. (4 ORT 279, 283.)

#### **B. Amini and Cody arrive at Cherry Park**

On December 11, Cody picked up Amini and drove to Cherry Park. (6 ORT 524-525.) Around 2:30 p.m., he parked on a corner near the park. (6 ORT 530, 536.) Cody showed Amini the pound of marijuana inside a shoe box. (6 ORT 532.) Amini called Whitley, who said they were on their way. (6 ORT 538.)

Amini had his gym bag with him, as well as a small amount of his own marijuana on top of the gym bag. (6 ORT 535-537.) He and Cody had plans to work out after they left the park. (6 ORT 533, 535.) They also planned to smoke Amini's marijuana but could not agree on whether to do so on the way to the gym or after they arrived. (6 ORT 535.) Their disagreement soon grew into an argument. (6 ORT 533.) Cody opened the front passenger door and threw Amini's gym bag out of the truck, causing Amini's marijuana to spill. (6 ORT 536-537.) Amini got out of the truck and Cody drove off. (6 ORT 537, 539.)

At 3:06 p.m., Cody sent a text to Emanuel's phone. (12 ORT 1307, 1312.) The text said, "I be at the park right now with it. We can do this without this fool [Amini]." (12 ORT 1307-1308.)

#### **C. Cody's death**

The shooting of Cody took place between 3:15 and 3:20 p.m. at the corner of Lupine Court and Fairhaven Drive near the park. (4 ORT 298; 5 ORT 423-424.) Just before that time, several people

saw a four-door sedan in the area, described by witnesses as gold, tan, beige, or bronze. (4 ORT 266; 5 ORT 350-351, 394-396.) Some witnesses heard shots and the sound of screeching tires. (4 ORT 298; 5 ORT 365-367, 402.)

Lori Kelly noticed a white truck moving very fast in a direction “perpendicular to the street.” (5 ORT 367.) Seconds later, its door swung open and a man fell out and rolled into a gutter. (5 ORT 368-369.) Accident reconstruction testimony showed that the truck suddenly and violently lurched backward with enough force to throw Cody out the passenger side door. (6 ORT 459-462.)

Kimberly Salmon, who lived on Fairhaven, heard the screeching tires and a loud bang while inside her house. (5 ORT 390, 402.) She went outside and saw a white truck on top of the curb and a man lying face down on the ground. (5 ORT 403.) Salmon retrieved her phone from inside the house then returned outside and called 911. (5 ORT 404.) While on the phone, Salmon approached Cody and told him help was on the way. (5 ORT 405.) Cody made moaning sounds but did not respond. (5 ORT 405.)

The police dispatch went out at 3:20 p.m. (5 ORT 423.) Multiple people in the area heard sirens. (4 ORT 299; 5 ORT 372.) Fire captain James Aparicio was less than a mile away at the time of the dispatch. (5 ORT 413-414, 420.) He arrived at the accident scene within “only a couple minutes.” (5 ORT 414.) Police and fire personnel found the white truck with its engine still running and the driver side door locked. (5 ORT 417; 9 ORT 909.) Aparicio did not find any usable amount of marijuana inside the truck. (9 ORT 922, 929-930.)

After emergency personnel arrived, Kelly saw a beige car pull up and stop on a street which intersected with Fairhaven. (5 ORT 373-375.) The car remained there for several minutes before pulling away slowly. (5 ORT 375-376.) As it left, it stopped in the

middle of the intersection for around a minute. (5 ORT 376-377.) From that vantage point, its occupants would have been able to look down Fairhaven toward the accident scene. (5 ORT 377.)

Cody died from “a close-range gunshot wound of the neck.” (4 ORT 256.) The presence of stippling on his face indicated the barrel was within three feet of him. (4 ORT 238-239.) Cody also had an abrasion to his forehead consistent with being struck by a blunt object. (4 ORT 255.) He likely lost consciousness within minutes. (4 ORT 256.)

#### **D. Emanuel and Whitley speak to Breanna Santos**

Breanna Santos was Emanuel’s one-time girlfriend and the mother of his son, L.R. (8 ORT 749-750.) By December, 2012, their romantic relationship had ended. (8 ORT 749.) Emanuel still looked after L.R. during Santos’s work hours. (8 ORT 776.)

On December 12, 2012, Santos contacted the police, then went to the station for an interview with Sergeant Stewart Davies. (10 ORT 1054.) Santos told Davies that Emanuel had a cell phone in her name. (10 ORT 1055.) Whitley borrowed the phone on December 10. (10 ORT 1056.) Around 12:30 p.m. the next day, Santos dropped off L.R. at Emanuel’s house. (10 ORT 1056.) Whitley still had the phone at that time. (10 ORT 1056.)

Santos reported that she returned to Emanuel’s house sometime after 4:00 p.m. (10 ORT 1058.) Both Emanuel and Whitley were there. (10 ORT 1057.) Santos asked Whitley to return her phone. (10 ORT 1057.) Whitley replied that he had “shot a white boy” at Cherry Park. (10 ORT 1057-1058.) Emanuel confirmed that Whitley was telling the truth. (10 ORT 1058.)

On December 14, 2012, Davies brought Santos back for a second interview. (10 ORT 1061.) This time, he confronted her with phone records suggesting that Emanuel had accompanied Whitley to Cherry Park. (10 ORT 1063.) Eventually, Santos

admitted she had lied about Whitley having her phone. (10 ORT 1066-1067.)

Santos related that, when she returned to Emanuel's house on the evening of December 11, she noticed Emanuel had cut off the long dreadlocks which he had earlier in the day. (10 ORT 1071.) Whitley and Emanuel told her they had gone to Cherry Park to obtain marijuana. (10 ORT 1072, 1078.) When the dealer would not "give it up," Emanuel left. (10 ORT 1078.) As Emanuel was walking away, Whitley hit the man but did not knock him out. (10 ORT 1078.) Whitley then aimed his gun at the man's leg but the man pushed it upward, causing the gun to discharge and strike the man. (10 ORT 1078.)

After Santos's initial account, Davies asked her to repeat what Emanuel and Whitley had told her – this time taking care to specify who had made which statement. (10 ORT 1080.) Santos again said that Emanuel and Whitley went to "get some weed" from a man at Cherry Park. (10 ORT 1080-1081.) When the man would not "give it up," Emanuel "told [Whitley], let's go, but he wouldn't come on." (10 ORT 1081.) Whitley hit the man with a gun but he continued fighting back. (10 ORT 1081.) Whitley next pointed the gun downward but the man struck his hand, causing the gun to point upward as Whitley pulled the trigger. (10 ORT 1081.) The shot hit the man in the neck. (10 ORT 1081.)

After the shooting, Emanuel scolded Whitley, asking, "What the fuck you doing?" (10 ORT 1082.) Emanuel then "started panicking" and went home. (10 ORT 1082.)

Whitley told Santos he had thrown away the gun and the clothes he was wearing at the time of the incident. (10 ORT 1069.) Both men said they had gotten rid of Santos's phone. (10 ORT 1079.) Fearing that her phone might contain incriminating texts, Santos asked the two men what they had gotten her into. (10 ORT 1078-1079.) Emanuel began crying and replied, "I didn't do

nothing . . . Jacob was the one who shot him.” (10 ORT 1078.) Emanuel added, “[H]e’s so dumb. He’s so dumb. I can’t believe he did this.” (10 ORT 1085.)

Both Whitley and Emanuel urged Santos to report her phone as lost. (10 ORT 1079.) Emanuel suggested she tell the police that Whitley had the phone. (10 ORT 1079-1080.)

**E. Whitley reports the shooting to his girlfriend**

Destinee Kindle was Whitley’s ex-girlfriend. (9 ORT 971; 10 ORT 998.) After the shooting, Whitley showed her a news story about the incident and said he and Emanuel were involved in it. (9 ORT 983-984.) Whitley explained that he “was trying to rob the boy of some weed” and accidentally shot him in the neck while aiming for his foot. (9 ORT 984.) Kindle later sent an e-mail to the prosecutor stating that Whitley admitted shooting Cody “in self-defense.” (10 ORT 1012-1014.)

**F. Emanuel’s age**

The abstract of judgment shows that Emanuel was 21 years old on December 11, 2012. (4 CT 1001.)

**ARGUMENT**

**I.**

**No substantial evidence supported the trial court’s finding that Emanuel acted with reckless indifference to human life.**

The trial court found that Emanuel acted with reckless indifference to human life. The Court of Appeal upheld the ruling against a challenge that no substantial evidence supported it. In fact, the evidence showed that Emanuel had no weapon and did not know of Whitley’s gun. When the robbery became more fraught with danger, Emanuel ended his own participation in the crime and tried to persuade Whitley to leave. In the face of such evidence, no reasonable factfinder could conclude that Emanuel acted with reckless indifference to human life.

## **A. Background**

The trial court based its reckless indifference finding almost entirely on Emanuel's physical presence at the robbery scene and on its belief that he made inadequate efforts to prevent the shooting or aid Cody after the fact. (1 CT 205-206, 209.)

The trial court found "no evidence" that Emanuel "knew Whitley was armed" or "that the [robbery] plan involved the use of a gun." (1 CT 198, 204.) However, it concluded that Emanuel learned of the gun after Whitley pulled it out and struck Cody with it. (1 CT 205.) Once this happened, the court believed Emanuel still had time to prevent the shooting while Whitley and Cody were struggling. (1 CT 205-206.) The court did not specify what further actions Emanuel could have taken to restrain Whitley.

The trial court accorded little significance to Emanuel's departure from the scene or his plea for Whitley to leave. (See 1 CT 207.) The court called it "unclear" whether these events occurred before or after the shooting. (1 CT 207.) It also posited that Emanuel may have told Whitley to leave out of a desire "to avoid criminal liability." (1 CT 207.) During the hearing on the petition, the court expressed the view that Emanuel actively participated in planning the robbery, then tried to "wash[] his hands" of liability when Whitley revealed a gun and refused to leave. (Aug. RT 54.) The court opined that "walking away [while] Cody had a gun pointed at him" was "as bad as pulling the trigger." (Aug. RT 59.)

The trial court, likewise, downplayed the fact that the robbery occurred in a public setting during daylight hours. While it acknowledged that such facts could potentially deter violence, it found "no evidence that the robbery was planned for that time or that it was planned to occur at that time for the purpose of minimizing the risk of violence." (1 CT 208.)

Emanuel did not challenge the major participation finding on appeal. He did, however, argue that there was no substantial evidence he acted with reckless indifference to human life. The Court of Appeal affirmed, citing Emanuel’s physical proximity to the killing, his failure to minimize the risk of violence after Whitley produced a gun, and his failure to come to Cody’s aid or call for help. (Opn., p. 14.)

As the trial court had done, the Court of Appeal found no evidence “that, prior to the robbery, Emanuel knew Whitley possessed a gun, would bring that gun to the robbery, or ‘was likely to use lethal force.’” (Opn., p. 12.) Yet, because of Emanuel’s role in planning the robbery, the court called it a reasonable inference that he could have done more to prevent the shooting. (Opn., p. 12.) The court elaborated that the record showed a “struggle over the marijuana” even before Whitley produced the gun. (Opn., p. 13.) In the court’s view, Emanuel had a brief opportunity to take action either during that struggle or after Whitley produced the gun and struck Cody with it. (Opn., pp. 12-13.) The court raised the possibilities of “trying to take the gun from Whitley or distracting him so that Cody might have driven away.” (Opn., p. 12.)

#### **B. Standard of review**

When the trial court finds a defendant ineligible for resentencing under section 1172.6, the Court of Appeal reviews its ruling for substantial evidence. (*People v. Ramirez* (2021) 71 Cal.App.5th 970, 985.) Substantial evidence means “evidence that 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. Kraft* (2000) 23 Cal.4th 978, 1053.) A conviction violates the Fourteenth Amendment’s due process clause when there is no substantial evidence to support it. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

### C. Applicable legal principles

Before 2019, California’s felony-murder statute imposed first degree murder liability for all killings “committed in the perpetration of, or attempt to perpetrate certain enumerated felonies including robbery.” (*People v. Cavitt* (2004) 33 Cal.4th 187, 197, internal brackets omitted.) The statute drew no distinction between actual killers and accomplices and it required no jury findings about any defendant’s “individual state of mind.” (*Ibid.*) So long as the killing occurred during the commission of an enumerated felony, all participants in that felony became strictly liable for first degree murder. (*Ibid.*)

Senate Bill No. 1437, which took effect on January 1, 2019, overhauled California’s murder statutes – taking specific aim at imputed malice theories like felony-murder. (Stats. 2018, ch. 1015 (SB 1437).) Section 1 of SB 1437 set forth a series of legislative findings which gave rise to the bill’s enactment. Those findings emphasized the need for more equitable homicide laws which align liability with individual actions and culpability. (SB 1437, § 1, subd. (b), (d) & (e); § 188, subd. (a)(3).) Under the revised statute, felony-murder liability now extends only to the actual killer or an aider and abettor who “was a major participant in the underlying felony and acted with reckless indifference to human life.” (§ 189, subd. (e)(3).)

The concepts of major participation and reckless indifference to human life trace their origin to a pair of United States Supreme Court decisions – *Enmund v. Florida* (1982) 458 U.S. 782, and *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). In *Enmund*, the Court struck down a death sentence for the getaway driver in a robbery, convicted under a felony-murder theory though he was not present at the scene of the fatal shooting and had no intent to kill. (*Enmund*, at pp. 788, 798.) A few years after *Enmund*, the Supreme Court clarified that a nonkiller may be

sentenced to death for felony-murder only if he was a major participant in the underlying felony and acted with reckless indifference to human life. (*Tison*, at pp. 151, 158.)

The defendants in *Tison* were two brothers who brought an ice chest full of guns to a prison, locked up the guards in a storage closet, and helped two convicted murderers escape. (*Tison*, *supra*, 481 U.S. at p. 139.) Two days after the escape, the group's car broke down. (*Ibid.*) When a family of four came to aid them, the group held them up. (*Id.* at pp. 139-140.) Eventually, the two escaped inmates shot and killed all four family members after a protracted robbery in which one family member "begged" for his life. (*Id.* at pp. 140-141.) The Supreme Court deemed such facts sufficient to support findings of major participation and reckless indifference to human life. (*Id.* at pp. 151-152.) This Court has since characterized the conduct in *Enmund* and *Tison* as establishing end points on a continuum of culpability for nonkillers in felony-murder cases. (*People v. Banks* (2015) 61 Cal.4th 788, 800, 801-801 (*Banks*).)

In 1990, California voters passed Proposition 115 which codified *Tison*'s "major participant" and "reckless indifference to human life" elements. (*Banks*, *supra*, 61 Cal.4th at p. 794.) It did so by amending this state's death penalty statute to include these requirements for nonkiller accomplices charged with a felony-murder special circumstance allegation. (§ 190.2, subd. (d).) When the Legislature later enacted SB 1437, it imported these same requirements into this state's general first degree felony-murder statute. (§ 189, subd. (e)(3).) Only reckless indifference to human life is at issue in this appeal.

**D. Under this Court's five-part test for reckless indifference to human life, there was no substantial evidence that Emanuel acted with this mental state.**

Reckless indifference to human life "encompasses a willingness to kill (or to assist another in killing) to achieve a

distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.” (*Clark, supra*, 63 Cal.4th at p. 617.) In *Clark*, this Court identified five factors which are relevant to the reckless indifference analysis: (1) knowledge of weapons, use of a weapon, and the number of weapons used; (2) physical presence at the crime scene and opportunities to prevent the shooting or aid the victim; (3) the duration of the felony; (4) the defendant’s knowledge that his accomplice would likely kill; and (5) the defendant’s attempts to minimize violence during the crime. (*Id.* at pp. 618-622.) No single factor is “necessarily sufficient” to establish reckless indifference. (*Id.* at p. 618.)

The trial court purported to apply *Clark*’s five-factor test in this case. (1 CT 203.) But the court ignored the factor of duration and dismissed Emanuel’s genuine attempts to prevent greater violence as ambiguous, self-serving, or inconsequential. Having disregarded the steps Emanuel took to minimize violence, the court then placed outsized emphasis on what he did not do. The Court of Appeal largely repeated these same analytical mistakes when it upheld the trial court’s ruling. When applied correctly, all five of *Clark*’s factors weigh against a finding that Emanuel acted with reckless indifference to human life.

**1. The trial court made a specific finding, upheld on appeal, that Emanuel did not know a gun would be used.**

The trial court resolved *Clark*’s first factor in Emanuel’s favor – finding no evidence that Emanuel personally used a gun, had ever seen Whitley with a gun, or planned for a gun to be used in the Cherry Park robbery. (1 CT 204-205.) The Court of Appeal agreed that “there was no evidence in the record” to show Emanuel knew Whitley had a gun. (Opn., p. 12.)

While the prosecutor vehemently argued that Emanuel’s knowledge of the gun could be inferred from the circumstances

(Aug. RT 13-15, 18-19), the trial court's finding settles the point. "When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Primm v. Primm* (1956) 46 Cal.2d 690, 694.) In such circumstances, "the trial court's finding is conclusive on appeal," so long as it rests on a reasonable inference. (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 851.)

Here, the Court of Appeal specifically upheld the trial court's finding that Emanuel did not know of the gun. (Opn., p. 12.) Indeed, not only did the Court of Appeal deem this a reasonable inference; it stated that there was "no evidence" to support a contrary inference. (Opn, p. 12.) As such, this Court must accept the trial court's finding as conclusive.

**2. Emanuel had no knowledge that Whitley would likely kill.**

*Clark's* fourth factor is whether the aider and abettor had notice that his accomplice would likely kill. (*Clark, supra*, 63 Cal.4th at p. 621.) Such notice may come from either general knowledge about the cohort's "propensity for violence" or more specific knowledge that the intended crime involves an unusually high risk of death. (*In re Scoggins* (2020) 9 Cal.5th 667, 677, 681-682 (*Scoggins*).) "Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient." (*Banks, supra*, 61 Cal.4th at p. 808.)

*Clark's* fourth factor is intertwined with its first factor. To be sure, mere knowledge that an accomplice is armed does not, by itself, establish reckless indifference. (*Clark, supra*, 63 Cal.4th at p. 618.) At the same time, a defendant who participates in a robbery, despite knowing that his accomplice has a loaded gun, surely understands that the crime carries at least some potential

for deadly violence. The same cannot be said of a defendant like Emanuel who did not know his confederate had a gun.

Furthermore, there was no evidence that Emanuel knew of Whitley's propensity for violence. The record showed that Whitley had a prior residential burglary conviction. (3 OCT 829, 833.) In written papers, the prosecutor represented that Emanuel acted as a lookout during that incident. (1 CT 97, 107.) But the prosecutor presented no evidence to back up this claim. He also presented no evidence that Whitley used or possessed any weapon in that burglary – as the trial court correctly pointed out in its decision. (1 CT 204.)

It should be noted that Emanuel was but 21 years old on December 11, 2012. (See 4 CT 1001.) “[A] defendant’s youth is a relevant factor in determining whether [he] acted with reckless indifference to human life.” (*In re Moore* (2021) 68 Cal.App.5th 434, 454 (*Moore*); see also *People v. Jones* (2022) 86 Cal.App.5th 1076, 1079 (*Jones*); *People v. Pittman* (2023) 96 Cal.App.5th 400, 418 (*Pittman*).) After all, reckless indifference requires subjective awareness that the robbery carries “a graver risk of death than” the usual robbery. (*Moore*, at p. 454; see also *Scoggins, supra*, 9 Cal.5th at p. 677.) A young defendant is less likely to possess this subjective awareness since the “hallmark features of youth” include “immaturity, impetuosity, and failure to appreciate risks and consequences.” (*Moore*, at p. 454.)

Emanuel's age was not a focal point at either the section 1172.6 hearing or in the Court of Appeal. Since that time, however, case law has made clear that youth is relevant to reckless indifference analysis even for young adults who have reached the age of majority. (*Jones, supra*, 86 Cal.App.5th at pp. 1092-1093 [youth a relevant factor for 20-year old defendant]; *Pittman, supra*, 96 Cal.App.5th at p. 418 [21-year old defendant].) As these cases understand, the impetuosity and immaturity of

youth do not magically go away when a person turns 18. They continue until the brain reaches full development in the mid-20s. (See *People v. Edwards* (2019) 34 Cal.App.5th 183, 198; *People v. Hardin* (2022) 84 Cal.App.5th 273, 287, rev. granted.)

Emanuel's youth likely impacted his ability to appreciate the potential dangers which existed when he and Whitley undertook to rob Cody. Indeed, Emanuel's own statements and actions revealed that he had given no thought to the possibility of Cody resisting or refusing to give up the marijuana. (See *Banks, supra*, 61 Cal.4th at p. 811; *In re Taylor* (2019) 34 Cal.App.5th 543, 557-558 (*Taylor*)). If he had, he would have had a plan in place to deal with that scenario when it actually arose. Instead, his first instinct was to leave and call on Whitley to abandon the robbery attempt. (10 ORT 1078, 1081.)

Similarly, Emanuel's words and conduct showed that the deadly violence took him by surprise. Emanuel reacted to the shooting with incredulity – demanding to know “what the fuck” Whitley had just done. (10 ORT 1082.) Later, while recounting the events to Santos, Emanuel broke into tears, called Whitley “dumb,” and said he could not believe Whitley had done this. (10 ORT 1078, 1085.) Emanuel's post-crime comments and actions conveyed that Whitley's conduct far exceeded the scope of what Emanuel had contemplated.

**3. Though the trial court did not address the robbery's duration, it could not have been longer than 9 to 14 minutes.**

The third of *Clark*'s five factors is the duration of the underlying felony. (*Clark, supra*, 63 Cal.4th at p. 620.) As this Court has explained, the longer the crime goes on, the greater the potential for increased violence including possibly homicide. (*Ibid.*) This Court gave the example of the two brothers in *Tison*, who “guarded the victims at gunpoint while [the group of perpetrators] considered what next to do.” (*Clark*, at p. 620,

original brackets.) By contrast, when the events happen quickly, and the shooting occurs in response to the victim's "unexpected resistance," the nonkiller participants have little notice that deadly violence might ensue. (*Taylor, supra*, 34 Cal.App.5th at p. 558; *People v. Keel* (2022) 84 Cal.App.5th 546, 561 (*Keel*); see also *In re Ramirez* (2019) 32 Cal.App.5th 384, 404.)

The trial court did not address *Clark's* third factor except to note that the robbery lasted long enough for Whitley and Cody to struggle after the former pulled out a gun. (1 CT 206.) But the record included no evidence about how long that struggle lasted. Hence, the court had no basis for inferring that it lasted long enough to alert Emanuel that deadly violence might occur.

While the record did not show how long Whitley and Cody struggled, it did show that the entire robbery could not have lasted more than 9 to 14 minutes. At 3:06 p.m., Cody texted Emanuel to say he was at the park – an indication that the group had not yet met up. (12 ORT 1307-1308, 1312.) The police dispatch went out at 3:20 p.m. (5 ORT 414, 423.) According to one witness, the shooting happened between 3:15 and 3:20 p.m. (4 ORT 298.) There is reason to believe it occurred on the early end of that time range for, after the shooting, Kimberly Salmon had enough time to step outside her house, see what had happened, return to the house to retrieve her phone, dial 911, and describe to the dispatcher what she had seen. (5 ORT 402-405.) Such actions would surely have taken at least a few minutes.

Even if the shooting occurred just seconds before the 3:20 p.m. dispatch call, that still left only 14 minutes for Whitley and Emanuel to drive to Cody's truck and commit the robbery. That window of opportunity was 10 minutes less than the one in *In re Bennett* (2018) 26 Cal.App.5th 1002, 1008-1009, 1024 & fn 8 (*Bennett*), which the Court of Appeal described as "negligible."

Unlike *Tison*, this was not a protracted encounter in which the participants had time to carefully plot their next moves. As discussed in the previous subsection, Emanuel's incredulous reaction to the shooting indicated that he had not anticipated either Cody's resistance or Whitley's violent response. (10 ORT 1082.) That makes this case similar to *Taylor* and *Keel*, where the killings happened unexpectedly after the victim resisted. (*Taylor, supra*, 34 Cal.App.5th at p. 558; *Keel, supra*, 84 Cal.App.5th at p. 561.) Had the trial court considered the crime's duration, it could only have concluded that this factor weighed against a finding of reckless indifference.

**4. Emanuel made efforts to minimize violence by committing the robbery at a public place during daylight hours.**

*Clark*'s fifth factor looks to whether the aider and abettor made "efforts to minimize the risks of the violence during the felony." (*Clark, supra*, 63 Cal.4th at p. 621, original capitalization omitted.) Although this Court used the phrase "during the felony," its discussion focused on the planning stage of the felony. (*Id.* at pp. 621-623.) Emanuel, therefore, saves for the next subsection his discussion of what he did to minimize violence while the robbery was ongoing.

In *Clark, supra*, 63 Cal.4th at pp. 536, 612, the aider and abettor was the "mastermind" behind an after-hours robbery of a computer store. The plan called for Clark to wait just outside the store in the getaway car while his accomplice handcuffed the employees at the point of an unloaded gun. (*Id.* at pp. 536, 612-613.) Instead, the accomplice went off script by loading the gun and shooting a woman who showed up at the store to pick up one of the employees. (*Id.* at pp. 536-537.) In finding no substantial evidence of reckless indifference, this Court took note of Clark's efforts to minimize violence by planning for the gun to be

unloaded and planning the robbery for after hours when few people would typically be present. (*Id.* at pp. 621-622.)

Similarly, in *Scoggins, supra*, 9 Cal.5th at pp. 671-672, the fatal shooting occurred during a robbery in a strip mall parking lot. This Court held that the organizer of the attack did not act with reckless indifference – citing, among other things, his efforts to minimize violence by planning the attack in a public location during daytime hours and instructing the assailants only to “beat the shit” out of the victim. (*Id.* at p. 683.)

By contrast, *In re McDowell* (2020) 55 Cal.App.5th 999, 1005 (*McDowell*), involved a home-invasion robbery of a methamphetamine dealer at 3:00 a.m. McDowell, the nonkiller, brandished a “palm knife” during the incident. (*Id.* at p. 1013.) His accomplice had a gun which he used to fire a warning shot moments before killing the victim. (*Id.* at p. 1005.) At the time of the robbery, the home had three occupants. (*Ibid.*) The Court of Appeal characterized the case for reckless indifference as “close to the line.” (*Id.* at p. 1015.) But it ultimately found substantial evidence due to: (1) McDowell’s personal display of a weapon; (2) “the particularly risky” nature of “a home invasion robbery of a methamphetamine dealer;” and (3) the fact that the defendants “were outnumbered, increasing the chances of resistance.” (*Id.* at pp. 1011, 1013.)

The facts of this case differ markedly from those in *McDowell*. Emanuel did not commit a late-night home invasion robbery of a methamphetamine dealer. He committed a “garden-variety robbery” in a public setting and in broad daylight. (*McDowell, supra*, 55 Cal.App.4th at p. 1011.) Emanuel and Whitley had the numerical advantage and would have had no disadvantage even if Amini had shown up. Emanuel did not have any weapon and did not know Whitley had one. (1 CT 204-205.) When a defendant plans only an “*unarmed* robbery,” it weighs

against a finding of reckless indifference. (*Scoggins, supra*, 9 Cal.5th at p. 682, original italics.)

The trial court downplayed the robbery’s daytime hours and public location as coincidental – finding no evidence that Emanuel and Whitley chose that time and place in order to minimize violence. (1 CT 208.) Such reasoning inverted the burden of proof. Emanuel did not have to prove that he planned out every detail of the crime with an eye toward reducing risk. The prosecution had to prove that Emanuel’s plans revealed a willingness to bring about Cody’s death if necessary to ensure the robbery’s success.

The evidence in *Scoggins* and *Clark* did not specify that the defendants chose the time and place of their robberies for the express purpose of reducing violence. Yet, this Court had no difficulty acknowledging that the times and places chosen were inherently difficult to reconcile with reckless indifference to human life. The same is true in this case. A defendant who foresees the risk of deadly violence, and is willing to participate in such deadly violence, would not likely choose daylight hours and a public venue to commit that potential violence.

**5. Emanuel was present at the start of the robbery but left, and urged Whitley to leave, before Whitley struck Cody with the gun and shot him.**

Of *Clark*’s five factors, the one which weighed most heavily in the trial court’s analysis was the second: “physical presence at the crime and opportunities to restrain the crime and/or aid the victim.” (*Clark, supra*, 63 Cal.4th at p. 619, original capitalization omitted; see 1 CT 205-210.) In considering this factor, however, the court overemphasized the mere fact of physical presence and ignored Emanuel’s attempts to restrain the crime.

As this Court observed in *Clark*, a defendant’s physical presence at the scene “allows him to observe his cohorts” and “act as a restraining influence” when the potential for deadly violence

becomes apparent. (*Clark, supra*, 63 Cal.4th at p. 619.) If the opportunity to restrain the crime presents itself, and the aider and abettor does nothing, he “is arguably more at fault for the resulting murders.” (*Ibid.*) On the other hand, there is ample middle ground between doing nothing and physically injecting oneself into an ongoing struggle in a way which places the aider and abettor, and potentially others, in harm’s way. Nothing in *Clark* suggested that such actions should reasonably be expected of an aider and abettor – especially an unarmed one.

In point of fact, Emanuel did try to “act as a restraining influence” on Whitley. (*Clark, supra*, 63 Cal.4th at p. 619.) When it became apparent that Cody was not planning to easily give up his pound of marijuana, Emanuel walked away and told Whitley, “Let’s go.” (10 ORT 1078, 1081.) It was only after Emanuel began walking away that Whitley struck Cody on the head with the gun. (10 ORT 1078, 1081.) When Cody continued resisting, Whitley shot him. (10 ORT 1078, 1081.)

Emanuel’s actions conveyed the unmistakable message that, much as he hoped to obtain the pound of marijuana from Cody, he was not willing to kill or assist in a killing to do so. Yet, the trial court explained away his actions in a single, six-line paragraph – calling it “unclear whether [Emanuel] asked Whitley to leave before or after the shooting occurred.” (1 CT 207.) The record refutes this statement.

The evidence offered but one account of how the robbery unfolded: the account told to Breanna Santos by Emanuel and Whitley, which Santos later reported to Sergeant Davies. (10 ORT 1077-1081.) In that account, Emanuel said he left when he saw Cody did not want to give up the marijuana. (10 ORT 1078.) Emanuel then added, “when I was walking away, [Whitley] hit [Cody].” (10 ORT 1078.) Emanuel later clarified that Whitley did not merely strike Cody with a fist, but “hit him on the head with

the gun.” (10 ORT 1081.) Cody continued resisting and Whitley shot him. (10 ORT 1078.)

When Davies later asked Santos to repeat what Emanuel and Whitley had told her, she added that, when Cody would not give up the marijuana, Emanuel told Whitley, “let’s go” – though to no avail. (10 ORT 1081.) Santos’s statements to Sergeant Davies left no doubt that Emanuel walked away, and urged Whitley to do the same, **before** Whitley struck Cody with the gun and shot him.

The trial court also speculated that Emanuel’s call for Whitley to leave may have been insincere and motivated, not by a desire to protect Cody, but “to avoid criminal liability.” (1 CT 207.) The court made similar remarks at the hearing – stating that Emanuel helped plan out the entire robbery only to say, “I’m washing my hands now” once Whitley revealed the gun. (Aug. RT 54.) The court’s comments betrayed a misunderstanding about SB 1437’s changes to the felony-murder law.

Before SB 1437, a withdrawal defense to a felony-murder charge required a showing that the aider and abettor withdrew from the enterprise early enough to avoid liability for the underlying felony. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1379-1380 (*Fiore*)). If he did not, then he became liable for any killing even if he was no longer “a willing participant in the [target felony] at the time of the killing.” (*Id.* at p. 1379.)

After SB 1437, a nonkiller need not present a viable withdrawal defense to the target felony in order to avoid murder liability for any resulting killing. Instead, the murder charge carries separate and additional elements which the prosecution must prove beyond a reasonable doubt. Emanuel’s departure from the scene may well have been an ineffectual attempt to “wash his hands” of liability for the robbery. But the purpose of the section

1172.6, subdivision (d)(3) hearing was to assess his guilt of murder, not robbery.

As to the murder, Emanuel had no need to “wash his hands” of liability. At the time of his departure, the killing had not yet happened. And, at least up to the point of his departure, he had no reason to foresee or expect that any killing would happen in what he believed to be an unarmed robbery. The murder became foreseeable – if at all – only after Whitley pulled out the gun. By that time, Emanuel had already walked away, signaling that he was no longer “a willing participant in the robbery.” (*Fiore, supra*, 227 Cal.App.4th at p. 1379.) That may not have absolved him of liability for the robbery, but it spoke volumes about his willingness or unwillingness to participate in a crime which had become increasingly dangerous.

By evaluating Emanuel’s guilt under now defunct withdrawal principles, the trial court misunderstood the changes which SB 1437 made to this state’s felony-murder law. As a result, the court gave short shrift to Emanuel’s pivotal decision to walk away, and urge Whitley to do the same, when the robbery became more fraught with danger.

**E. Emanuel was in no position to restrain Whitley in his ongoing struggle with Cody and, even if he was, an unarmed aider and abettor cannot reasonably be expected to physically intervene against an armed accomplice.**

Having effectively disregarded Emanuel’s departure from the scene, and his call on Whitley to leave, the trial court then faulted Emanuel for not doing enough to prevent the shooting. (1 CT 206-208.) In this regard, it focused on the brief time period between Whitley’s production of the gun and the shooting itself. (1 CT 206.) The trial court found that, during this period, Emanuel knew of the gun’s presence and could have “tried to prevent the shooting.” (1 CT 206.)

The Court of Appeal highlighted the period at the very outset of the encounter – even before Whitley produced the gun. (Opn., p. 13.) Citing Emanuel’s account to Breanna Santos, the court stated that “there was some struggle over the marijuana before Whitley pulled out his gun, struck Cody with it, and then shot him.” (Opn., p. 13.) That struggle, in the court’s view, afforded Emanuel “at least a brief window of opportunity . . . to intervene or attempt to deescalate the violence.” (Opn., p. 13.)

Contrary to the Court of Appeal’s view, Emanuel did not tell Santos that a “struggle over the marijuana [occurred] before Whitley pulled out his gun.” (Opn., p. 13.) He merely told her that Cody “wasn’t trying to give [the marijuana] up.” (10 ORT 1078, 1081.) A refusal to give up the marijuana does not necessarily require a physical struggle; it might entail nothing more than a terse verbal refusal. Besides, if Whitley had not yet produced the gun, and Emanuel did not know he had one, then Emanuel had no reason to suspect the encounter required intervention. A weaponless struggle over marijuana poses no apparent risk of deadly violence.

The trial court’s analysis rested on a similar misreading of the record. Relying on Emanuel’s statements to Santos, the court found that Emanuel had a chance to prevent the shooting after he saw Whitley strike Cody with the gun and saw Cody fighting back. (1 CT 206.) But Emanuel did not actually say that he personally observed these events and the evidence provided no way to know if he did. If anything, it suggested he did not.

When recounting the events to Santos, Emanuel repeatedly used the phrase “Jacob said.” (10 ORT 1078, 1081.) He used this phrase when relating that Whitley bludgeoned Cody with the gun. (10 ORT 1081.) And he used it again when describing the shooting itself. (10 ORT 1078, 1081.) He also used the phrase “I guess” to describe how Cody continued fighting back after being

struck with the gun. (10 ORT 1078.) Such phrasing implied that Emanuel did not actually see these events but was merely reporting what Whitley had told him.

The evidence showed, quite definitively, that Emanuel had already begun walking away by the time the bludgeoning and shooting happened. There was no evidence about how far away he had walked or whether he was looking back in the direction of Whitley and Cody when the incident escalated. And it is doubtful he could have seen the events anyhow, as his view would have been obstructed.

When the bludgeoning and shooting happened, Cody was in the driver seat of his truck. (See 5 ORT 368-369; 6 ORT 461-462.) The stippling on his face indicated that the gun's barrel was within three feet of him. (4 ORT 238-239.) That meant Whitley could only have been in one of two places: outside the driver side window or inside the truck on the passenger side. Either way, it would have been difficult for any onlooker to see what was happening since at least one of the participants was inside the truck. (See *Scoggins, supra*, 9 Cal.5th at pp. 678-679 [victim's van "would have blocked Scoggins's view" of the confrontation]; *People v. Ramirez, supra*, 71 Cal.App.5th at p. 989 [defendant on passenger side of vehicle had no way to intervene when accomplice pulled out gun on driver side].)

It would have been even more difficult for Emanuel to see the struggle – let alone, inject himself into it – if both participants were inside the truck. That is exactly the scenario suggested by the evidence. Immediately after the shooting, Cody's truck jerked backward, ejecting him out the front passenger side door. (6 ORT 461-462.) There would be no reason for that door to be open in the first place unless Whitley had opened it to enter the truck, then left it open after he fled.

Notably, the trial court offered no specifics about what more it believed Emanuel could have done to prevent the shooting. (See 1 CT 206-207.) The Court of Appeal raised two possibilities. The first was to distract Whitley so Cody could drive away. (Opn., p. 12.) But driving away would have done little good if Whitley was already inside the truck's passenger area. The Court of Appeal did not identify the particular distraction tactics which Emanuel could have employed in order to command Whitley's attention and lure him out of Cody's truck.

The Court of Appeal also suggested that Emanuel could have tried to disarm Whitley. (Opn., p. 12.) The prosecutor took a similar position at the hearing in the trial court – arguing that Emanuel should have tackled Whitley, tried to wrest away his gun, or even “taken the bullet” himself. (Aug. RT 39.) The case law provides no support for the remarkable proposition that an aider and abettor must take these types of heroic measures to avoid conviction on felony-murder principles.

This state's Courts of Appeal have differed on whether a reckless indifference finding may rest on an aider and abettor's presence at the scene combined with his inadequate efforts to prevent the deadly violence. Several cases have answered this question in the negative. (*In re Ramirez, supra*, 32 Cal.App.5th at pp. 404-406; *People v. Ramirez, supra*, 71 Cal.App.5th at pp. 987-989; *Keel, supra*, 84 Cal.App.5th at pp. 559-560.) Indeed, the court in *Keel* found no reckless indifference even though the aider and abettor, himself, possessed a gun and may have actually brandished it. (*Id.* at p. 559.)

At the other end of the spectrum are a series of cases which faulted the aider and abettor for failing to do more despite a window of opportunity which lasted just seconds. (See *In re Loza* (2017) 10 Cal.App.5th 38, 54 (*Loza*) [shooter gave victim five seconds to turn over the money, then counted down the seconds];

*McDowell, supra*, 55 Cal.App.5th at pp. 1005, 1014-1015 [aider and abettor had a “few seconds” to do something between time of warning shot and time of fatal shot]; *People v. Mitchell* (2022) 81 Cal.App.5th 575, 581, 593 (*Mitchell*) [aider and abettor continued participating in holdup after shooter fired a shot or shots at the victim and victim drove away].)

Also instructive is *People v. Bradley* (2021) 65 Cal.App.5th 1022, 1026-1028 (*Bradley*), which arose from a three-man hold-up of a man and a woman inside a truck. All three robbers had guns and demanded that the male occupant raise both hands. (*Id.* at p. 1027.) The male occupant raised only one hand, using the other to reach for his own gun. (*Id.* at pp. 1027-1028.) Two of the robbers immediately pulled him out of the truck and one of them shot him. (*Id.* at pp. 1027-1028.) Unable to prove which robber fired the fatal shot, the prosecution proceeded on the theory that both were major participants who acted with reckless indifference to human life. (*Id.* at p. 1028.) The Court of Appeal upheld the jury’s verdict, observing that both robbers brandished guns and “did not flee or alter their plans” when it became apparent the man inside the truck had his own gun. (*Id.* at p. 1034.)

Notably, none of the foregoing cases proposed that the aider and abettor should have physically intervened or tried to wrest away the gun from the actual killer. This omission is unsurprising. The act of reaching for another’s gun is “fraught with grave and inherent danger to human life.” (*Brooks v. Superior Court* (1966) 239 Cal.App.2d 538, 540.) Such conduct could easily lead to an unpredictable response or an accidental discharge which endangers the lives of both the participants and bystanders. One need look no further than this very case as an example. Cody lost his life precisely because he made the tragic decision to physically resist Whitley at the point of a gun. Yet, the

Court of Appeal's logic would encourage unarmed accomplices to do exactly what Cody did – creating a similar risk of tragedy.

Short of physical intervention, there are certainly steps which an unarmed aider and abettor might take to try to deescalate an increasingly dangerous encounter or signal his own desire not to participate. The court in *Loza* gave a series of examples, including yelling at the killer to stop, trying to halt the killer's five-second countdown, demanding that they leave the holdup scene, or attempting to calm the killer. (*Loza, supra*, 10 Cal.App.5th at p. 54.) The courts in *Bradley* and *Mitchell* both brought up the possibility of fleeing the scene when the risk of violence increased. (*Bradley, supra*, 65 Cal.App.5th at p. 1034; *Mitchell, supra*, 81 Cal.App.5th at p. 593.) The *Mitchell* court additionally suggested calling off the robbery or telling the armed accomplice not to shoot. (*Mitchell*, at p. 593.)

As these cases recognize, reckless indifference to human life is about state of mind. A defendant need not place his life at risk to foreclose the possibility of a felony-murder conviction. He need only do enough so that no reasonable factfinder could infer his willingness to kill or assist in killing. (*Clark, supra*, 63 Cal.4th at p. 617.) By fleeing the scene, trying to call off the robbery, and demanding that Whitley leave, Emanuel did some of the very things suggested in *Loza, Mitchell*, and *Bradley*. His actions cannot reasonably be reconciled with a finding of reckless indifference.

**F. Emanuel was in no position to see what had happened to Cody and, even if he was, his failure to aid Cody did not reflect his state of mind when he undertook the robbery.**

In their analysis of reckless indifference, both the trial court and Court of Appeal faulted Emanuel for his actions after the shooting. (1 CT 208-210; Opn., pp. 12-14.) The trial court found it significant that Emanuel “made no attempt to check if

Cody was still alive, to render aid, or to obtain medical assistance.” (1 CT 209.) The Court of Appeal pointed out that, rather than call an ambulance, Emanuel fled the scene with Whitley. (Opn., pp. 12-13.) During the hearing on Emanuel’s petition, the trial court referred to his departure from the scene as “horrific” and “as bad as pulling the trigger.” (Aug. RT 43, 59.)

Both the trial court and Court of Appeal also took note of Emanuel’s actions in the hours after the shooting, when he cut his dreadlocks, helped get rid of the phone, and instructed Santos to lie about the phone to the police. (1 CT 209; Opn., p. 13; see also 10 ORT 1071, 1079-1080.) The trial court characterized such actions as less significant than Emanuel’s inaction at the shooting scene, but still probative. (1 CT 209.)

A failure to aid the victim may weigh in favor of a reckless indifference finding if the defendant was present and in position to provide aid. (*Clark, supra*, 63 Cal.4th at p. 619.) Nonetheless, numerous cases have found substantial evidence of reckless indifference wanting even though the accused left the scene without helping the victim. (*Id.* at pp. 619-620; *Scoggins, supra*, 9 Cal.5th at pp. 679-680; *Bennett, supra*, 26 Cal.App.5th at pp. 1025-1026; *In re Ramirez, supra*, 32 Cal.App.5th at pp. 390-391, 406; *People v. Ramirez, supra*, 71 Cal.App.5th at p. 989; *Moore, supra*, 68 Cal.App.5th at pp. 451-452; *People v. Guiffreda* (2023) 87 Cal.App.5th 112, 127 (*Guiffreda*)). These cases rested on two different rationales. The first rationale was a factual one: absent a clear record that the defendant knew of the victim’s injuries and had the ability to meaningfully help, a court cannot infer that his inaction evinced a willingness to let the victim die.

In *Clark*, for instance, the defendant was a getaway driver who fled the scene and left the shooter and victim behind just as a police officer arrived. (*Clark, supra*, 63 Cal.4th at pp. 536-537.) This Court declined to draw any adverse inferences from his

departure, calling the circumstances “ambiguous” and pointing out that he would have known help had already arrived. (*Id.* at p. 620; see also *Moore, supra*, 68 Cal.App.5th at p. 452 [defendant “could have reasonably assumed that help would arrive quickly,” given the presence of others in the area]; *Taylor, supra*, 34 Cal.App.5th at p. 559 [failure to aid shooting victim not indicative of reckless indifference when there was “no evidence that Taylor appreciated how badly [the victim] was wounded”]; *Bennett, supra*, 26 Cal.App.5th at pp. 1025-1026 [citing accused’s inability to see if someone had been hurt or killed by shooting].)

Here, the prosecution presented no evidence about Emanuel’s ability to see that Cody had been shot and had fallen out of the truck. As previously discussed, Emanuel walked away before the shooting happened. He would, no doubt, have heard the shot but would not necessarily have known that Cody had been hit. In fact, the sound of screeching tires may have led him to believe that Cody had managed to drive off. (5 ORT 365-367.)

Moreover, if Emanuel could see the shooting, he would also have seen Kimberly Salmon approach Cody with a phone to her ear. (5 ORT 371-372, 405.) This, plus the sound of sirens, would have alerted him that help was on the way and he had no need to call 911. (4 ORT 299; 5 ORT 372.) As it turned out, the help arrived within “only a couple minutes.” (5 ORT 414.) There was no evidence that Emanuel possessed the type of life-saving skills which might have materially improved Cody’s chance of survival if Emanuel had come to his aid during the minutes before emergency personnel arrived. (5 ORT 414; see *Opn.*, p. 13, fn. 15 [“There was no direct evidence as to whether Cody might have survived with immediate medical attention”].)

The second reason the courts have declined to attach much weight to post-crime inaction is that it is “not . . . very probative of [the defendant’s] mental state.” (*Scoggins, supra*, 9 Cal.5th at

p. 679; see also *Guiffreda, supra*, 87 Cal.App.5th at p. 127.) Reckless indifference requires that the defendant “consciously disregard the significant risk of death his or her actions create.” (*Scoggins*, at p. 677.) By definition, this means the state of mind must exist at the time the underlying crime occurred. No matter how callous a defendant’s post-crime actions or statements, they reveal very little about his state of mind when he undertook to commit the crime. (*Taylor, supra*, 34 Cal.App.5th at p. 560.)

The facts of *Taylor* illustrate this principle. Taylor and Shackelfoot quickly fled the scene following a botched robbery in which their confederate shot a woman. (*Taylor, supra*, 34 Cal.App.5th at pp. 547-548.) The next day, Shackelfoot asked Taylor what they should do. (*Id.* at p. 548.) Taylor replied, “Fuck that old bitch,” and urged Shackelfoot to stay quiet since “they would be just as guilty as [the actual killer].” (*Ibid.*) The Court of Appeal called these remarks “abhorrent” but not indicative that Taylor had “knowingly *create[d]* a serious *risk* of death.” (*Id.* at p. 560, original italics.)

As *Taylor* implicitly recognized, a defendant’s post-crime statements and actions in a felony-murder case occur under very different circumstances than those which existed at the time of the crime. When a cohort unexpectedly kills during the course of a robbery, it injects an element of duress into the nonkiller’s analysis of what to do next. The question the nonkiller faces is not merely whether to aid the victim; it is whether to aid the victim and thereby incriminate himself on a potential murder charge with life-altering consequences. A failure to aid the victim when under this type of duress cannot be equated to a willingness to kill from the get-go.

For much the same reasons, Emanuel’s actions after leaving the scene revealed very little about his state of mind at the time of the crime. Emanuel may well have been trying to

avoid police detection when he cut his dreadlocks, helped get rid of the gun, and encouraged Santos to lie to the police. (10 ORT 1071, 1079-1080.) But such conduct merely showed that he correctly understood his potential liability for Cody's murder under then existing law. It did not show that he acted with any particular mental state – least of all, a mental state which the law did not even require at the time. (See *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1050 [consciousness of guilt does not mean consciousness of guilt of the specific crime charged].)

It bears mention that neither the prosecutor's opposition papers, nor the decisions of the trial court and Court of Appeal, cited even a single anecdotal instance of an aider and abettor physically intervening against an armed accomplice or coming to a fallen victim's aid. (See 1 CT 128-131, 133-134, 205-207, 209-210; Opn., pp. 12-14.) This omission was surely no oversight. It would be the exceedingly rare case where one participant in a serious crime tries to physically restrain his armed counterpart or come to the aid of a fallen victim. If such cases happened with any regularity, it stands to reason that the prosecutor would have pointed them out in his briefing and the courts would have cited them in their opinions.

To treat something which almost no robbery participant ever does as the equivalent of "pulling the trigger" would amount to a rule of near-automatic felony-murder liability for any participant at the crime scene. Had the Legislature intended such a result, it could have just left the old felony-murder statute in place. Alternatively, it could have created a narrow exception for defendants who are not present at the scene or who are present but try to restrain the killer or come to the victim's aid. Instead, the Legislature chose to more broadly eliminate the practice of imputing malice based on the accused's participation in a crime. Allowing physical presence to serve as a proxy for reckless

indifference would thwart this objective – replacing discarded rules of imputed malice with a new rule which imputes reckless indifference based on proximity to the crime.

In short, the evidence showed that the 21-year old Emanuel planned a garden variety robbery during daytime hours in a public place. He neither knew of Whitley’s weapon nor possessed one of his own. When the robbery did not go as planned, Emanuel walked away and called on Whitley to do the same. Based on such facts, no reasonable factfinder could conclude that Emanuel acted with reckless indifference to human life. To demand that he physically try to restrain Whitley, or come to Cody’s aid after the fact, would effectively shift the burden to the defendant to show the absence of reckless indifference. That is not what the Legislature intended when it enacted SB 1437.

For these reasons, this Court should reverse the Court of Appeal’s decision and remand this case with orders that Emanuel’s petition be granted.

### **CONCLUSION**

For all of the foregoing reasons, this Court should reverse the Court of Appeal’s decision upholding the trial court’s denial of Emanuel’s petition for resentencing. This Court should then remand this case to the Court of Appeal with orders to direct that the petition be granted.

DATED: November 24, 2023

Respectfully Submitted,

/s/ Solomon Wollack  
**SOLOMON WOLLACK**  
Attorney for Appellant  
Louis Sanchez Emanuel

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**(Cal. Rules of Court, rule 8.520(c)(1))**

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By: /s/ Solomon Wollack  
**SOLOMON WOLLACK**  
Attorney for Appellant  
Louis Sanchez Emanuel

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/s/ Solomon Wollack

STATE OF CALIFORNIA  
Supreme Court of California

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