

No. S280551

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
LOUIS SANCHEZ EMANUEL,
Defendant and Appellant.

Sixth Appellate District, Case No. H049147
Santa Clara County Superior Court, Case No. C1246799
The Honorable Vanessa A. Zecher, Judge

ANSWERING BRIEF ON THE MERITS

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ISSUE PRESENTED

Does sufficient evidence support the superior court's finding that defendant Emanuel acted with reckless indifference to human life within the meaning of Penal Code section 1172.6?

INTRODUCTION

In 2012, defendant Louis Sanchez Emanuel and codefendant Jacob Whitley planned the purchase of a pound of marijuana with the intention of robbing the sellers. During the robbery, Whitley shot and killed Cody S., one of the sellers. Emanuel was convicted of felony murder.¹

The superior court subsequently denied Emanuel's petition for resentencing pursuant to Penal Code section 1172.6.² The court found that Emanuel was a major participant in the robbery and acted with reckless indifference to human life. Emanuel challenges the sufficiency of the evidence to support the superior court's reckless indifference finding.

A superior court's findings at a resentencing hearing under section 1172.6 are evaluated under the well-settled sufficiency-of-the-evidence standard of review. Guided by the factors set forth in *People v. Clark* (2016) 63 Cal.4th 522, and based on the totality of the circumstances presented by the record in this case, substantial evidence supports the superior court's finding that

¹ Consistent with the Court of Appeal's opinion and to protect the victim's privacy, respondent first refers to the victim by his given name and the first initial of his surname. (Opn. 2, fn. 7.) Subsequent references are to his given name only.

² Undesignated statutory references are to the Penal Code.

Emanuel acted with reckless indifference to human life when he participated in the robbery and murder of Cody. The superior court's denial of Emanuel's resentencing petition should be affirmed.

LEGAL BACKGROUND

A shift in approach to measuring culpability of those who participate in a felony resulting in murder can be traced back to two United States Supreme Court cases, *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137, which grappled with the issue in the context of Eighth Amendment limitations on capital murder liability.

In *Enmund*, the defendant was merely the getaway driver for two armed associates during the commission of a robbery. (458 U.S. at p. 784.) The Court held that the Eighth Amendment bars the death penalty for any felony-murder aider and abettor “who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” (*Id.* at p. 797.) Absent the further “intention of participating in or facilitating a murder” (*id.* at p. 798), a defendant who acts as “the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape” (*id.* at p. 788) cannot constitutionally be sentenced to death.

In *Tison v. Arizona*, *supra*, 481 U.S. 137, the defendant's role was more significant. Tison and his cellmate escaped from prison with the help of Tison's sons. (*Id.* at p. 139.) During the escape, their car suffered a flat tire. One of Tison's sons flagged down a passing car, and Tison and his cellmate killed the family of four

inside. (*Id.* at pp. 140-141.) The Court addressed the level of culpability necessary to impose the death penalty on those participants who did not “specifically intend to kill the victims” or “inflict[] the fatal gunshot wounds.” (*Id.* at p. 138.) The Court endorsed *Enmund*’s holding that the Eighth Amendment prohibits the imposition of death for “felony murder simpliciter.” (*Id.* at p. 147; see *id.* at pp. 146-150.) It described the range of felony-murder participants as a spectrum: at one end are people like “Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state” (*id.* at p. 149); at the other, actual killers and those who attempted or intended to kill (*id.* at p. 150). Death was disproportional and impermissible for the former, but permissible for the latter. (*Ibid.*) In between the two poles, the Court announced that those who were major participants in the underlying felony and who acted with reckless indifference to human life were culpable enough to satisfy Eighth Amendment principles for purposes of imposition of the death penalty. (*Id.* at p. 158.)

California codified the holdings of *Enmund* and *Tison* in 1990, in section 190.2, subdivision (d). That subdivision provides, in relevant part: “[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a[n enumerated] felony . . . 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” (§ 190.2, subd. (d).)

This Court, in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark, supra*, 63 Cal.4th 522, provided additional guidelines for determining whether a defendant was a major participant and acted with reckless indifference to human life such that the death penalty could be imposed. The Court did not create any bright line rules, but held that the trier of fact must “consider the totality of the circumstances.” (*Banks*, at p. 802; accord, *Clark*, at p. 618.)

In *Banks*, the Court, relying on holdings in *Tison* and *Enmund*, identified several factors to consider in determining whether a defendant is a major participant whose culpability is sufficient to render the defendant death eligible: (1) What role did the defendant have in planning the criminal enterprise that led to one or more deaths? (2) What role did the defendant have in supplying or using lethal weapons? (3) What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? (4) Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did the defendant’s own actions or inaction play a particular role in the death? (5) What did the defendant do after lethal force was used? (*Banks, supra*, 61 Cal.4th at p. 803.) The Court noted that “[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant’s

participation ‘in criminal activities known to carry a grave risk of death’ was sufficiently significant to be considered ‘major.’”

(*Ibid.*, internal citations omitted.)

In *Clark*, this Court recognized that the “major participant” and “reckless indifference” elements significantly overlap, “for the greater the defendant’s participation in the felony murder, the more likely that he acted with reckless indifference to human life.” (63 Cal.4th at p. 615, quoting *Tison*, *supra*, 481 U.S. at p. 153.) Reckless indifference has both a subjective and an objective element. (*Clark*, at p. 617.) “The subjective element is the defendant’s conscious disregard of risks known to him or her.” (*Ibid.*; accord, *Banks*, *supra*, 61 Cal.4th at p. 801 [“Subjectively, ‘[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed,’ and must consciously disregard ‘the significant risk of death his or her actions create.’”].) Objectively, “[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” (*Clark*, at p. 617, quotation marks omitted.)

This Court provided a nonexclusive list of factors relevant to the “reckless indifference” determination: (1) the defendant’s “knowledge of weapons, and use and number of weapons”; (2) “physical presence at the crime and opportunities to restrain the crime and/or aid the victim”; (3) the “duration of the felony”;

(4) the “defendant’s knowledge of cohort’s likelihood of killing”; and (5) the defendant’s efforts, if any, “to minimize the risks of violence during the felony.” (*Clark, supra*, 63 Cal.4th at pp. 618-622, original capitalization omitted; accord, *In re Scoggins* (2020) 9 Cal.5th 667, 677.) As with the major participant inquiry, no one of these factors is required and none is necessarily sufficient to prove reckless indifference. (*Clark*, at p. 618, citing *Banks, supra*, 61 Cal.4th at p. 803.)

Beginning January 1, 2019, the Legislature extended these major participant and reckless indifference concepts to general felony-murder liability. Senate Bill No. 1437 (2017-2018 Reg. Sess.) amended the Penal Code “as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f); § 189, subd. (e)(3); see *People v. Strong* (2022) 13 Cal.5th 698, 708 [acknowledging Legislature’s intent to limit murder liability].) The purpose behind the legislation was “to more equitably sentence offenders in accordance with their involvement in homicides.” (Stats. 2018, ch. 1015, § 1, subd. (b).)

The Legislature also provided a mechanism for defendants convicted of murder to petition for resentencing on the ground that they could no longer be convicted under current law. (Former § 1170.95, added by Stats. 2018, ch. 1015 and renumbered to § 1172.6, Stats. 2022, ch. 58, § 10; accord, *People v. Lewis* (2021) 11 Cal.5th 952, 957.) Petitioners must file a

petition declaring that the requirements for relief are met, including that “[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189[.]” (§ 1172.6, subd. (a)(3); accord, *People v. Curiel* (2023) 15 Cal.5th 433, 450.) If a prima facie showing is made, the court shall issue an order to show cause and hold a hearing to determine whether to vacate petitioner’s conviction. (§ 1172.6, subds. (c), (d)(1).)

At the hearing, the superior court acts as an independent factfinder. (*People v. Owens* (2022) 78 Cal.App.5th 1015, 1021-1022; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 984.) The parties may rely on the record of conviction or offer new or additional evidence. (§ 1172.6, subd. (d)(3); *People v. Lewis, supra*, 11 Cal.5th at p. 960.) It is the prosecutor’s burden to establish, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under a legally valid theory. (§ 1172.6, subd. (d)(3).) “A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.” (*Ibid.*) “If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.” (*Ibid.*)

STATEMENT OF THE CASE

A. Underlying offense

In December 2012, Emanuel and Whitley arranged to buy a pound of marijuana from Mansour Amini and Cody. (Opn. 2-4;

see 6ORT 478, 480, 482-489.)³ Amini and Cody were friends who exercised and smoked marijuana together. (6ORT 477.) Cody had sold marijuana to Amini numerous times. (6ORT 478.)

Emanuel and Whitley first approached Amini in the parking lot of De Anza College under the guise of asking about the school, saying they were thinking of enrolling. (6ORT 480-482.) Then Emanuel told Amini they were looking to purchase a pound of marijuana. (6ORT 482-483.) Amini said he could get that for them, but it would take a couple of weeks. (6ORT 485.) Amini and Emanuel exchanged phone numbers. (6ORT 486.)

Over the next few days, Emanuel “bl[ew] up” Amini’s phone, repeatedly calling to ask about the marijuana. (6ORT 487-489.) Amini contacted several people who he thought might be able to supply a pound of marijuana, mostly to no avail. (6ORT 489-490.) Ultimately Cody said he could get it for Amini and that he would give Amini \$200 for brokering the deal. (6ORT 489-491.)

Amini and Cody met with Emanuel and Whitley in the parking lot of a Panda Express restaurant to discuss the deal. (6ORT 491.) Amini and Cody showed Emanuel and Whitley a sample of the marijuana. (6ORT 492-493.) Emanuel took a photo

³ Emanuel has requested that the Court take judicial notice of the record in his underlying appeal; respondent agrees that judicial notice of that material is appropriate. Consistent with the parties’ briefing thus far, “ORT” and “OCT” refer to the reporter’s and clerk’s transcripts in Emanuel’s underlying direct appeal, case No. H043651. (See PR 7; Ans. 7 fn. 2.) “RT” and “CT” refer to the reporter’s and clerk’s transcripts in the appeal from the section 1172.6 proceeding, case No. H049147.

of the sample and said they planned to ship it to a contact in Las Vegas. (6ORT 500.) Emanuel offered to pay either \$2,200 or \$2,600 for the marijuana. (6ORT 501-502.) Amini knew “there was something wrong” because a pound of marijuana sold for around \$1,800. (6ORT 502-503.) Amini “didn’t have a good feeling” about the situation. (6ORT 503.)

Two or three days later, Amini and Cody met with Emanuel and Whitley at the same restaurant. (6ORT 513.) Emanuel and Whitley got into Cody’s truck and they all drove to the supplier’s house to pick up the marijuana. (6ORT 515-516.) When they arrived, Emanuel and Whitley said they did not have the money for the marijuana but they wanted to know which house belonged to the supplier because they wanted to meet the supplier. (6ORT 515-516, 519-520.) Cody checked with his supplier, then told Emanuel and Whitley the supplier was not interested in meeting without the money. (6ORT 516-517.) The men agreed to meet December 11 at Cherry Park (Paul Moore Park) to complete the deal. (6ORT 521-522.)

On the morning of December 11, Amini and Cody exchanged numerous text messages, which included several angry messages from Amini when it appeared that Cody was backing out of the deal. (6ORT 524-528; 7ORT 589-593.) Cody eventually picked up Amini in his truck, and they drove to Cherry Park, arriving around 2:30 p.m. (6ORT 524-530, 536.) While in the truck, Cody showed Amini the pound of marijuana packaged in plastic inside a Vans shoebox. (6ORT 532-533.) Amini called Emanuel’s phone

and spoke to Whitley, who said they were on their way. (6ORT 538.)

While Amini and Cody waited in the truck, they started to argue about whether they would smoke marijuana before or after going to the gym. (6ORT 533-535, 539.) Cody threw Amini's gym bag out of the truck, spilling Amini's marijuana stash. (6ORT 536-537.) Amini got out of the truck, and shortly thereafter Cody drove away. (6ORT 539.) At approximately 2:37 p.m., Cody texted Emanuel's phone saying he was "at the park right now with it. We do this without this fool [Amini]. I'll get you for 21 instead of 22." (12ORT 1307-1308, 1312.)

Between 3:00 and 3:20 p.m., in a residential area adjacent to Cherry Park, witnesses heard a gunshot, screeching tires, and a loud bang. (4ORT 284, 289, 297-298, 307-308, 366-367; 5ORT 402.) One witness saw Cody's truck traveling at a high rate of speed. (5ORT 367-369.) Cody "fell out" of the moving truck "and rolled down the street" into the gutter. (5ORT 369-372.) The truck collided with a tree. (5ORT 403, 417.) Witnesses saw Cody's truck on the sidewalk against a tree, and Cody face down on the ground, "moaning" and bleeding. (5ORT 372, 403-406.) At least one witness called 911. (5ORT 404-405.)

Cody died at the scene from a gunshot wound to the right side of his neck that perforated his carotid artery. (4ORT 256.) Based on the gunpowder stippling on Cody's face, the gun barrel was within three feet of his face when it was fired. (4ORT 238-239.) Cody also had multiple blunt-force injuries to his body, and abrasions to his left forehead and face consistent with being

struck with a solid object. (4ORT 254-256.) Responding officers found Cody's truck running and blood in the passenger compartment as well as on the passenger-side front tire, wheel well, and front bumper. (5ORT 417-418.) An accident reconstruction expert opined that after falling out of the truck, Cody's body was caught underneath it and dragged until it came to rest against the curb. (6ORT 461-465.)

The next day, Breanna Santos, Emanuel's "on and off" girlfriend and the mother of his child, went to the police station and spoke with San Jose Police Sergeant Stewart Davies.⁴ (8ORT 749-751; 10ORT 1054.) Santos said that Emanuel had a cell phone registered in her name, Emanuel had lent it to Whitley who used it "to set something up," and she had not gotten it back. (10ORT 1054-1055, 1058.) Santos said that she had gone to Emanuel's house the previous day, Emanuel and Whitley were there, and Whitley said he had "shot a white boy" at Cherry Park. (10ORT 1057.) He repeated "I shot him" three times. (10ORT 1057.) Emanuel told Santos that Whitley had, in fact, shot someone. (10ORT 1058.)

Two days later, on December 14, Santos returned to the police station and admitted that she had lied, at Emanuel's request, about Whitley having her phone. (10ORT 1054, 1061, 1066, 1069-1070, 1079, 1089, 1093.) Emanuel had told her that

⁴ At trial, Santos testified to being interviewed by police at least twice, but claimed she could not recall what she told them or anything that happened on the day of the shooting. (8ORT 754, 761-763, 770, 772, 781-788.)

Whitley used her phone to set up the transaction and there would be text messages on her phone leading the police to her. (10ORT 1078, 1085.) Santos said that she arrived at Emanuel's house on December 11 around 5:00 or 5:30 p.m. and Whitley and Emanuel were in Emanuel's room. (10ORT 1068.) Emanuel initially lied about being at the crime scene, but later admitted to being there. (10ORT 1073, 1077.) She heard Whitley say, "I shot him. I shot him." (10ORT 1077.) Emanuel told Santos "[Whitley] did shoot him," and the shooting happened at a park. (10ORT 1077.)

According to Emanuel, "[Whitley] just shot him and then we came home," and "[t]hat s[**]t was crazy." (10ORT 1076-1077.) Emanuel told Santos that "Whitley 'had set something up to meet a guy at Cherry Park . . . to get some weed,'" but when the guy would not "give it up," Emanuel said, "let's go," but Whitley "wouldn't come on." (10ORT 1078, 1080-1081.) Emanuel said that the guy "wouldn't like, you know, let go, so [Whitley] hit him with the gun." (10ORT 1081.) "The guy started fighting back and [Whitley] pointed the gun." (10ORT 1081.) Emanuel told Santos that "[Whitley] said he [was] pointing the gun down, but the guy hit his hand, it went up and [Whitley] pulled the trigger and he said he shot him in his neck." (10ORT 1078, 1081.) Emanuel asked Whitley, "[W]hat the f[**]k you doing?" (10ORT 1081.) After the gun went off, Emanuel "started panicking." (10ORT 1082.)

Emanuel and Whitley "got rid of everything" after the shooting and went to Emanuel's house. (10ORT 1079.) When Santos confronted Emanuel about the use of her cell phone,

Emanuel “started crying and saying that, “I didn’t do nothing, though. I didn’t do nothing.”” (10ORT 1078, 1087, 1089.)

Emanuel suggested that Santos “report the phone lost.” (10ORT 1079.) According to Santos, when she saw him after the shooting, Emanuel had cut off the long dreadlocks he had been wearing. (10ORT 1071.)

Destinee Kindle was Whitley’s “[o]n, off” girlfriend in December 2012. (9ORT 972.) On the evening of December 11, Whitley asked her to pick him up at Emanuel’s house. (9ORT 975-976.) Whitley told Kindle that he and Emanuel were involved in a shooting and showed her a news story about the shooting. (9ORT 983.) Whitley explained that he was trying to rob someone of marijuana, and accidentally shot him in the neck though he intended to shoot him in the foot. (10ORT 995-997.) Whitley told Kindle that Emanuel was with him when the shooting occurred. (9ORT 984-985.)

In 2015, a Santa Clara County jury convicted Emanuel and codefendant Whitley of the first degree felony murder of Cody (§ 187; former § 189) and found true as to Whitley an allegation that he had personally and intentionally discharged a firearm (§ 12022.53, subd. (d)). (3OCT 821-822.) The trial court sentenced Emanuel to 25 years to life. (25ORT 4646.) Emanuel’s conviction was affirmed on appeal in 2019. (*People v. Whitley, et al.* (Nov. 22, 2019, H043651) [nonpub. opn.])

B. Emanuel’s petition for resentencing

In December 2018, Emanuel filed a petition for resentencing under section 1172.6 alleging he was no longer guilty of murder

because he was not a major participant in the robbery and he did not act with reckless indifference to human life. (1CT 141-168.) The superior court issued an order to show cause and held a hearing on the petition. (1CT 188.)⁵ At the People’s request, the court took judicial notice of the original trial record. (1CT 197, fn. 6.) Neither party presented new evidence at the hearing. (1CT 188, fn. 4.)⁶ In a written order, the superior court denied Emanuel’s petition, finding that he “was a major participant in the underlying robbery and that he acted with reckless indifference to human life.” (1CT 188; accord, 1CT 187-211.)

The superior court found that Emanuel “was intimately involved in planning the robbery[] . . . was present at the scene[,] and was integral in setting up the marijuana sale at which he and Whitley planned to rob Cody.” (1CT 201.) “Of particular significance, . . . [Emanuel] was present at the scene of the robbery and murder[,] [and] . . . did nothing while Whitley pulled out a gun, hit [Cody] over the head with it, and then shot him during the struggle.” (1CT 201.)

⁵ Initially, the superior court denied the petition on the ground that Senate Bill No. 1437 was unconstitutional. (Opn. 8, fn. 13.) Emanuel appealed (case No. H047062). (Opn. 8, fn. 13.) The Court of Appeal stayed the appeal and ordered the superior court to reconsider its ruling in light of new authority upholding Senate Bill No. 1437’s constitutionality. The superior court vacated its prior ruling and the appeal was dismissed as moot. (Opn. 8, fn. 13.)

⁶ The superior court judge who adjudicated Emanuel’s resentencing petition was the same judge who presided over his trial. (Opn. 1.)

The court acknowledged that: (1) Emanuel did not use a gun; (2) there was no evidence that Emanuel knew Whitley was armed prior to Whitley pulling out his gun; and (3) there was no evidence that Emanuel knew Whitley was likely to use lethal force. (1CT 203-205.) It concluded, however, that “there was at least a minimal period of time in which [Emanuel] was aware of the gun and in which he could have tried to prevent the shooting.” (1CT 206.) After the shooting, Emanuel “made no attempt to check if Cody was still alive, to render aid, or to obtain medical assistance.” (1CT 209.) The court also noted that Emanuel’s actions after the shooting were probative of his mental state in that he “altered his appearance . . . disposed of [the] phone . . . used to communicate [with the victim] . . . [and] instructed Santos to lie to police.” (1CT 209.) Emanuel also “made no effort to assist the police in solving the crime, as he might have done if he did not condone Whitley’s actions.” (1CT 209.)

C. Appeal from the denial of the resentencing petition

Emanuel appealed the superior court’s ruling on his resentencing petition and contested the finding that he acted with reckless indifference to human life.⁷ (Opn. 1, 9.) The Court of Appeal held that the superior court’s finding that Emanuel acted with reckless indifference was supported by substantial evidence.

⁷ Emanuel did not contest the superior court’s major-participant finding. (Opn. 11, fn. 14.)

The Court of Appeal considered the *Clark* factors and acknowledged that some factors were either neutral or did not support a finding of reckless indifference, specifically Emanuel's lack of knowledge and involvement regarding the use of weapons in the robbery and his lack of knowledge of Whitley's propensity to use deadly force. (Opn. 12.) Nonetheless, the court found substantial evidence that Emanuel planned the robbery and was one of its intended beneficiaries, and therefore he had the ability to prevent the robbery from happening in the first place. (Opn. 12.) He was in close physical proximity to the crime and could have done more to prevent the shooting than simply saying "let's go," particularly when it became clear that Whitley ignored him and struck Cody with the gun. (Opn. 12.) Based on the evidence that there was a struggle before Whitley pulled out the gun and that Whitley hit Cody before shooting him, the superior court "could have reasonably inferred that there was at least a brief window of opportunity for Emanuel to intervene or attempt to deescalate the violence." (Opn. 13.) Emanuel had enough time to say, "let's go," and then begin to walk away. (Opn. 13.) And there was no evidence that Emanuel made any effort to assist Cody after the shooting, such as calling for an ambulance.⁸ (Opn. 12.) Instead, Emanuel fled the scene with Whitley. (Opn. 13.)

The appellate court described Emanuel's actions after fleeing as "ambiguous at best." (Opn. 13.) He tried to conceal his

⁸ The appellate court noted that there was no direct evidence about whether Cody might have survived with immediate medical attention. (Opn. 13, fn. 15.)

involvement by throwing away Santos’s cell phone and cutting his hair, but it was unclear whether those actions demonstrated acquiescence in Whitley’s conduct or an effort to avoid arrest, making it difficult to infer a particular frame of mind. (Opn. 13.) Even if Emanuel was “panicked” after the shooting, the evidence still demonstrated that he planned or participated in carrying out the crime that contributed to a heightened risk to human life. (Opn. 13-14.)

Considering the totality of the evidence in a light most favorable to the judgment, the appellate court held that the superior court’s determination that Emanuel was not eligible for relief under section 1172.6 was supported by substantial evidence. (Opn. 14.) Sufficient evidence supported the finding that Emanuel acted with reckless indifference to human life in that he: “(1) remained in close physical proximity to the crime; (2) did not take the opportunity to minimize the risk of violence during the robbery when Whitley pulled out a gun and Cody refused to give up the marijuana; and (3) failed to either render assistance to Cody or call for help after he was shot.” (Opn. 14.)

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTS THE SUPERIOR COURT’S FINDING OF RECKLESS INDIFFERENCE TO HUMAN LIFE

Emanuel does not seek the announcement of a new rule or an expansion of an existing rule. He simply disagrees with the superior court’s assessment of the facts and its reasoning under *Clark*, and asks this Court to engage in error review. To conclude contrary to the superior court’s finding of reckless indifference would involve ignoring not only the record in this case but also

the well-established deferential standards governing review of sufficiency claims and findings of fact. Considering the *Clark* factors under the appropriate standard of review, the superior court reasonably concluded, based on sufficient evidence, that Emanuel’s conduct places him more toward the *Tison* end of the *Enmund/Tison* spectrum.

A. Standard of review

The standard of review that applies to a superior court’s findings at a section 1172.6 hearing is the traditional sufficiency of evidence standard. (*People v. Sifuentes* (2022) 83 Cal.App.5th 217, 232-233; *People v. Owens, supra*, 78 Cal.App.5th at p. 1022 [superior court’s factual findings are reviewed for substantial evidence].) This standard governs even when the trial court is simply evaluating the underlying trial record. (*People v. Njoku* (2023) 95 Cal.App.5th 27, 41-43; *People v. Oliver* (2023) 90 Cal.App.5th 466, 479-480; *People v. Underwood* (2024) ___ Cal.App.5th ___ [2024 WL 337197, at *6-*7]; accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1066 [applying substantial evidence review to trial court’s evaluation of underlying trial record for another resentencing statute].)

In conducting a substantial evidence review, a reviewing court reviews the entire record to determine whether “*any* rational trier of fact could have found the essential elements” required for denying relief under section 1172.6 “beyond a reasonable doubt.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *In re Scoggins, supra*, 9 Cal.5th at p. 677 [“We analyze the totality of the circumstances to determine whether

Scoggins acted with reckless indifference to human life”].) “The record must disclose substantial evidence to support the verdict—i.e., 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.” (*Zamudio*, at p. 357; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 325-326.) “In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*Zamudio*, at p. 357.)

“Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Reviewing courts] resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” (*Zamudio, supra*, 43 Cal.4th at p. 357, internal citations and quotation marks omitted; accord, *Jackson v. Virginia, supra*, 443 U.S. at pp. 317-320.) A holding contrary to the conclusion reached by the superior court “is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support” the superior court’s conclusion. (*Zamudio*, at p. 357, internal quotation marks omitted.)

The same standard applies where the prosecution relies on circumstantial evidence. “Although it is the [trier of fact]’s duty to acquit a defendant if it finds the circumstantial evidence

susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the [trier of fact], not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Zamudio, supra*, 43 Cal.4th at pp. 357-358; accord, *People v. Tran* (2022) 13 Cal.5th 1169, 1204.)

B. The evidence presented, and the reasonable inferences drawn from it, sufficiently support the superior court's factual finding that Emanuel acted with reckless indifference to human life

"Reckless indifference to human life is 'implicit in knowingly engaging in criminal activities known to carry a grave risk of death.'" (*Scoggins, supra*, 9 Cal.5th at p. 676, quoting *Tison, supra*, 481 U.S. at p. 157.) It "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.)

The undisputed fact that Emanuel was a major participant in Cody's murder should set the stage for this Court's review of the superior court's finding of reckless indifference and its consideration of the *Clark* factors because, as this Court has recognized, "[t]he greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life." (*Clark, supra*, 63 Cal.4th at p. 615.) In finding that Emanuel was a "major participant," the superior court found that Emanuel was "intimately involved in planning

the robbery”; was present at the scene; was “integral in setting up the marijuana sale at which he and Whitley planned to rob Cody”; and did nothing when Whitley pulled out a gun, hit Cody over the head, and shot him. (1CT 201-202.) Based on the totality of the circumstances, the superior court concluded that Emanuel’s participation was more than just as a lookout or getaway driver, and having a major role in the robbery he was “significantly closer to the *Tison* end of the spectrum.” (1CT 202.) Emanuel did not challenge this finding below and does not do so here.

With those undisputed findings as a backdrop, applying the *Clark* factors and viewing the facts in a light favorable to the judgment, the record is sufficient to support the superior court’s reckless-indifference determination.

1. Knowledge and use of the gun

Although the superior court found that Emanuel did not have a gun during the robbery and had no *prior* knowledge that a gun would be used in the robbery, those facts are not dispositive of the superior court’s reckless indifference determination. (*Clark, supra*, 63 Cal.4th at p. 618; *Banks, supra*, 61 Cal.4th at p. 803.)

Additionally, the evidence showed that, even if Emanuel was not aware that Whitley had a gun when the robbery started, Emanuel saw Whitley pull a gun and hit Cody with it to get Cody to let go of the marijuana. (10ORT 1077, 1081 [Emanuel told Santos that Cody “wasn’t trying to give it up,” and Whitley “hit him with the gun”].) Emanuel saw that Cody continued to resist,

and Whitley shot him. (4ORT 256; 10ORT 1077, 1081 [Emanuel told Santos that “the guy started fighting back and [Whitley] pointed the gun” and that Whitley “shot him”].) At the very least, once Whitley pulled out the gun, Emanuel had full awareness of the lethal weapon. Moreover, once Whitley started using the gun to hit Cody in the head, Emanuel had confirmation that Whitley intended to use the gun in a way that was dangerous to life. “Any pistol, even a short one, may be a ‘dangerous’ weapon . . . since it is capable of being used as a bludgeon.” (*People v. Aranda* (1965) 63 Cal.2d 518, 532, *superceded in part by* Cal. Const., art. I, § 28(d); see also *In re McDowell* (2020) 55 Cal.App.5th 999, 1013 [defendant knew “by no later than the warning shot” that his accomplice was “both carrying and willing to fire a gun”].) While Emanuel is correct that the lack of evidence of his prior knowledge of a firearm weighs in his favor, there was additional evidence that—once Emanuel became aware of the gun—his actions demonstrated his reckless indifference to Cody’s life.

2. Physical presence, proximity to the crime, and opportunity to restrain the crime or aid the victim

“Proximity to the murder and the events leading up to it may be particularly significant where . . . the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force.” (*Clark, supra*, 63 Cal.4th at p. 613.) “In such cases, ‘the defendant’s presence allows him to observe his cohorts so that it

is fair to conclude that he shared in their actions and mental state. . . . [Moreover,] the defendant's presence gives him an opportunity to act as a restraining influence on the murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders." (*Ibid.*) "A defendant who is present also has the opportunity to assist the victim." (*In re Loza* (2017) 10 Cal.App.5th 38, 54; accord, *Clark, supra*, at p. 619.)

Here, Emanuel admitted to Santos that he was present when Whitley robbed, struck, and shot Cody. (10ORT 1073, 1077.) He explained that Cody would not "give [the marijuana] up" when Whitley tried to take it from him, so Whitley struck Cody with the gun. (10ORT 1078, 1080-1081.) Then, when Cody continued to fight back, Whitley pointed the gun at him (10ORT 1081) and Emanuel "started panicking" when the gun went off (10ORT 1082). Emanuel's statements to Santos demonstrate he was present not only for the robbery but also for the shooting. He saw Whitley pull the gun, he saw Whitley hit Cody with the gun, he heard the gunshot (even if he did not see it), and then he left the scene with Whitley. Even if Emanuel had briefly averted his gaze from the struggle, the evidence demonstrated that he remained in close physical proximity to the scene and knew what was happening. Additionally, Whitley told Kindle that Emanuel was with him when the shooting occurred. (9ORT 984-985.) Sufficient evidence supports the superior court's finding that Emanuel's presence and proximity to the crime weighed toward reckless indifference to human life.

The evidence also demonstrated that Emanuel had the opportunity to observe the interaction between Cody and Whitley, and the opportunity to try to restrain or intervene before Whitley fired the gun. Whitley and Cody physically struggled over the marijuana for an undetermined amount of time before Whitley pulled out his gun. (10ORT 1078, 1080-1081.) When Cody would not “give it up,” Whitley struck him with the gun. (10ORT 1081.) When Cody continued to struggle with Whitley, again for an unknown amount of time, Whitley pointed the gun at him. (10ORT 1081.) At any point, between the time Cody and Whitley first started to struggle over the marijuana and when Whitley fired the gun at Cody, Emanuel could have tried to restrain Whitley or intervene in the struggle. Even if the timeframe for intervention is limited to between Whitley pulling out his gun and firing at Cody, Emanuel had time to intervene, once Whitley began striking Cody with the gun and Cody continued to struggle even after being hit.

As the superior court noted, the amount of time that elapsed between Whitley pulling out the gun and shooting Cody was unknown, but the evidence showed that Cody continued to struggle after being struck in the head, indicating “at least a minimal period of time in which [Emanuel] was aware of the gun and in which he could have tried to prevent the shooting.” (1CT 206.) The court analogized the circumstances to *People v. Loza*, *supra*, 10 Cal.App.5th 38, where the shooter counted down from five before firing. (*Id.* at p. 54.) The *Loza* court reasoned that those five seconds were a sufficient amount of time for the

defendant to do “any number of things to intercede or assist the victims—e.g., yell at [the shooter] to stop, try to halt the countdown, demand that they leave, distract [the shooter], to name a few. But instead [the defendant] did nothing during that crucial time period other than stand idly by with indifference” (*Ibid.*; see also 1CT 206-207.) In light of the totality of the circumstances, the court made the reasonable inference that Emanuel had an opportunity to prevent the shooting and he did not attempt to do so. (1CT 207.) That inference is entitled to deference. (*Tran, supra*, 13 Cal.5th at p. 1204; *Zamudio, supra*, 43 Cal.4th at pp. 357-358.)

The superior court also reasonably concluded that Emanuel’s failure to assist or aid Cody after the shooting demonstrated his reckless indifference. The court found that “[b]eing at the scene the second Cody was shot, [Emanuel] had the opportunity to assist Cody but chose not to do so.” (1CT 209.) Instead of assisting Cody or calling for help, the evidence showed he immediately fled the scene with Whitley in their car. (10ORT 1079.) The court also found that there was no evidence to prove that Emanuel believed that others would assist Cody. (1CT 210.) And there was evidence showing that Cody likely had been alive for minutes after the shooting, indicating some possibility that he might have been saved. (1CT 210.) Thus, it was not a situation where the victim could not have benefitted from some assistance or aid; Emanuel, being on scene, could have at least called for an ambulance. Instead, he did nothing. Having the opportunity to render aid to a victim, and failing to do so, knowing that the

victim might not be dead weighs toward reckless indifference.
(*Clark, supra*, 63 Cal.4th at p. 619.)

Emanuel argues that the evidence proves that “he did try to ‘act as a restraining influence’ on Whitley,” because 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.’” (OBM 29.) Specifically, he alleges that the record indisputably shows he “walked away” or “began walking away” *before* Whitley struck Cody with the gun (OBM 29-30, citing 10ORT 1078, 1081), refuting the superior court’s conclusion that it was “unclear whether [Emanuel] asked Whitley to leave before or after the shooting occurred.” (OBM 29, quoting 1CT 207.)

Emanuel’s argument that he was definitively walking away *prior* to the shooting and could not have personally observed Whitley with the gun stretches the record. As explained above, Santos relayed to Sergeant Davies what Emanuel told her, which included: Emanuel watched Whitley and Cody struggle over the marijuana; Cody would not “give it up”; Emanuel said “let’s go,” but Whitley would not leave; Cody would not let go of the marijuana so Whitley pulled out the gun and struck Cody; Cody did not get knocked out; and Whitley pointed the gun at Cody. (10ORT 1081.)

Santos prefaced only three facts with “Jacob [Whitely] said,” and those three facts related not to the occurrence of the events themselves, but rather to particular details best known to the shooter. Specifically, after reporting Emanuel’s account that Whitley hit Cody with the gun, Santos specified that “Jacob said

he hit him on the head with the gun.” (10ORT 1081.) She then continued with Emanuel’s account that Cody started fighting back and that Whitley pointed the gun at Cody. (10ORT 1081.) She then returned to the specific details known to Whitley: “Jacob said he pointing [*sic*] the gun down, he was trying to aim down, but [Cody] hit his hand, it went up and Jacob pulled the trigger and he said he shot him in the neck.” (10ORT 1081; see also 10ORT 1078 [“Jacob said that he tried to aim for his leg, that the dude pushed the gun up and he shot him and then he fell to the ground”].)⁹

Emanuel contends that the references to “Jacob said” indicate that Emanuel’s account of the shooting was based entirely on Whitley’s recounting and that he did not observe any part of that altercation. (OBM 32-33.) While that may be one interpretation of the record, it is not the only interpretation, and certainly not the only reasonable interpretation. The superior court, acting as factfinder, reasonably viewed those three interjections as referring to specific details provided by Whitley, while the overall description and account was still based on Emanuel’s personal observations.¹⁰

⁹ The officer recounting the interviews noted that in Santos’s initial statement she said that only Whitley made admissions, but at the subsequent interview Santos acknowledged that both defendants (“they”) recounted the incident. (10ORT 1080 [Santos acknowledges “both of them” told her what happened].)

¹⁰ Moreover, the factfinder was not obligated to accept Emanuel’s or Santos’s statements in their entirety. (See *People v.* (continued...))

Emanuel also takes issue with the meaning assigned to his “let’s go” comment. (OBM 30-31.) Emanuel argues that the evidence that he said, “let’s go,” and walked away from the robbery leads only to one inference: that he left *before* Whitley pulled out the gun and had no reason to foresee or expect a killing. (OBM 30-31.) Not so. The record is not definitive as to the timing of that statement, and factfinder could reasonably infer as much. Emanuel’s comment was made during Whitley’s struggle with Cody, but the record reflects that Whitley struggled with Cody both before and after pulling the gun. (See 10ORT 1078, 1080-1081 [when Cody would not “give it up” Emanuel told Whitley, “let’s go,” but Whitley “wouldn’t come on”].)

The superior court characterized the comment as ambiguous as to any light it might shed on Emanuel’s mental state. (1CT 207.) That conclusion was fair given the lack of evidence in the record of Emanuel’s reasons for saying it, the lack of evidence of tone or urgency with which it was said, and the lack of clarity as to the timing of the comment. Certainly, there is nothing in the record compelling a factfinder to conclude that Emanuel was attempting to restrain Whitley or protect Cody.

(...continued)

Crooker (1956) 47 Cal.2d 348, 355 [factfinder “may accept as true a portion of the testimony of a witness and disbelieve the remainder”].) Santos and Emanuel had incentive to cast Emanuel’s conduct in an exculpatory light. As noted, Santos was Emanuel’s “on and off” girlfriend and mother of his child, and she effectively refused to testify against him at trial. (8ORT 819-825, 828-829; 10ORT 1081.)

There is also nothing in the record to support a finding equating Emanuel’s “let’s go” comment with Emanuel himself physically leaving the scene. The superior court found the record was unclear about when Emanuel made that statement, i.e., whether Emanuel said it before or after the shooting. (1CT 207.) And other evidence establishes Emanuel was present throughout the robbery and up to the point of seeing Whitley point the gun at Cody. (10ORT 1073, 1076-1078, 1080-1081.)

Assuming, as Emanuel argues, that he said “let’s go” before Whitley pulled out the gun—before Emanuel was on notice that Whitley was armed—his statement could not have been an attempt to restrain, or intervene in, a situation carrying the risk of the use of lethal force. If it was said after Whitley pulled the gun, it was a paltry attempt to restrain, at best. The Court of Appeal gave examples of steps Emanuel could have taken, e.g., trying to disarm Whitley or distracting him so that Cody could drive away. (Opn. 12.) But Emanuel would not have had to go so far as succeeding in preventing the shooting, such as by disarming Whitley, in order for this factor to weigh in his favor. He could have done any number of other things short of that: bang on the car, yell to get Whitley’s attention or to distract him, or entreat Whitley to let go of the marijuana and leave Cody alone. (See, e.g., *People v. Loza, supra*, 10 Cal.App.5th at p. 54.)

Emanuel also contends that the evidence does not support the superior court’s conclusion that there had been a physical struggle over the marijuana prior to Whitley pulling out the gun. (OBM 32.) We disagree. Emanuel told Santos that Cody “was

trying—wasn't trying to give it up. So I just told [Whitley] let's go, but he wouldn't come on. He wouldn't let—he wouldn't like, you know, let go, so [Whitley] hit him with the gun.” (10ORT 1081.) But whether there was a physical struggle or only a verbal altercation prior to Whitley pulling out the gun ultimately is of no consequence. (See OBM 32; but see 10ORT 1081[.] What matters is that Emanuel saw Whitley strike Cody with a gun, struggle with Cody, then aim the gun at Cody, and that during that time Emanuel had time to register what was happening and say “let's go.” (10ORT 1077-1078, 1080-1082.) Emanuel had sufficient opportunity to intervene and restrain Whitley.

Emanuel further argues that any failure to aid Cody cannot support an inference of reckless indifference because he had already walked away by the time Cody was shot. (OBM 38.) As discussed above, there is not sufficient evidence to support such a finding. Indeed, the evidence demonstrated that Emanuel and Whitley drove away from the scene together. (10ORT 1077 [“[Whitley] just shot him and then we came home”], 1079 [Emanuel and Whitley “got rid of everything” after the shooting and went to Emanuel's house].) Emanuel could not have been so far away from the scene that he could not see what had happened to Cody and to not have had an opportunity to help him. Certainly, he could have called 911 as he fled with Whitley. The witness who did call 911, along with the first responders who arrived shortly thereafter, were still minutes behind Whitley and Emanuel. (See 10ORT 1077, 1079.) A call for an ambulance from Emanuel could have resulted in a more expedient response from

medical personnel that might have yielded life-saving procedures. (See 4ORT 256.)

Emanuel cites a number of cases holding that the defendants did not act with reckless indifference even though they left the scene without helping the victim. (OBM 37-38.) However, when deciding “issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts.” (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) Moreover, as discussed, no one factor is necessary and none are necessarily sufficient. (*Clark, supra*, 63 Cal.4th at p. 618.) Courts must look to the totality of the circumstances, guided by the factors identified in *Clark*, in coming to a determination about whether a defendant acted with reckless indifference to human life. The fact that Emanuel did not stop to check on Cody or even call an ambulance as he fled the scene does not necessarily mean he acted with reckless indifference. But the trial court’s determination that those facts tipped the scale toward *Tison* is supported by substantial evidence and entitled to deference.

Emanuel cites to *Scoggins, supra*, 9 Cal.5th at page 679, wherein this Court noted that, “when different inferences may be drawn from the circumstances, the defendant’s actions after the shooting may not be very probative of his mental state.” But the superior court here did not find the circumstances of Emanuel’s failure to assist Cody despite having the opportunity to do so in dispute, and it instead drew appropriate inferences therefrom.

Emanuel relies on *In re Taylor* (2019) 34 Cal.App.5th 543, to support his contention that post-crime actions in aiding or failing to aid the victim have little relevance in assessing a defendant's state of mind at the time of the crime. (OBM 39-40.) In *Taylor*, however, several factors mitigated the defendant's inaction: (1) there was no evidence the defendant appreciated how badly the victim was wounded, (2) he knew help was arriving, (3) that help reached the victim almost immediately, and (4) there was no evidence the victim might have survived had the defendant acted differently. (*Id.* at p. 559.) Thus, Taylor's failure to assist the victim before fleeing the scene did not support reckless indifference. (*Ibid.*) This case, however, presented the court with a different calculus. While Emanuel may not have appreciated the extent of Cody's wounds, the court concluded that Emanuel was present for the shooting and witnessed the immediate aftermath: Cody's truck speeding backward, Cody being ejected from the truck and rolling into the gutter. (1CT 209.) Moreover, in contrast to *Taylor* there was no evidence Emanuel knew help was arriving, help did not reach Cody as quickly as in *Taylor*, and there is some evidence that a prompt response may have resulted in a different outcome. (Opn. 13, fn. 15; 4RT 256 [pathologist testimony that Cody would have been conscious for only minutes after being shot]; 5RT 369-370 [911 calls placed after truck collided with tree], 372-373, 407 [emergency personnel arrived minutes after 911 calls].) Unlike *Taylor*, Emanuel's immediate post-crime conduct is more probative of reckless indifference.

Emanuel further contends that other post-crime evidence, unrelated to assisting the victim, is even more attenuated to a determination of a defendant's state of mind at the time of the crime. (OBM 39-40.) However, as the superior court noted, Whitley and Emanuel got rid of "everything," Emanuel cut his hair, he instructed Santos to lie to police about his involvement, and he made no effort to assist police in their investigation of the shooting. (1CT 209.) Although it recognized such evidence was inherently less valuable than conduct at the time of the crime, the superior court reasonably concluded that Emanuel's actions were relevant to its ultimate determination. (1CT 209.) The court cited *People v. Gonzalez* (2016) 246 Cal.App.4th 1358. In *Gonzalez*, the defendants orchestrated the robbery and were both at the scene. (*Id.* at p. 1385.) They knew the victim had been physically violent in the past and would likely resist, thus requiring the use of lethal force. (*Ibid.*) And when the victim was shot, they did not call 911 for aid or the police to assist after the shooting. (*Ibid.*) One defendant spent the afternoon and evening after the murder with the shooter and the other fled the scene with the shooter and helped dispose of the weapon. (*Ibid.*) The totality of these facts sufficed as substantial evidence to support a finding of reckless indifference. (*Ibid.*) Here, too, Emanuel's actions after the crime provided additional support for the superior court's reasonable inference that he acted with reckless indifference.

In sum, the totality of the evidence and the reasonable inferences from that evidence support the superior court's finding

that Emanuel was present at the murder, had an opportunity to restrain or intervene, and had an opportunity to aid Cody after the shooting.

3. The duration of the interaction between Emanuel, Whitley, and Cody

Courts consider “whether a murder came at the end of a prolonged period of restraint of the victims by defendant” in assessing a defendant’s culpability. (*Clark, supra*, 63 Cal.4th at p. 620.) Prolonged restraint provides “a greater window of opportunity for violence’ [citation], possibly culminating in murder,” thus suggesting reckless indifference to life. (*Ibid.*)

We agree with Emanuel that the evidence here suggests an interaction between Whitley, Emanuel, and Cody of less than 15 minutes. (OBM 25.) On December 11, Cody left Amini across the street from Cherry Park after their fight shortly before 3:03 p.m. (7ORT 599-600.) At 3:06 p.m., Cody texted Emanuel about continuing with the deal without Amini. (12ORT 1307.) And first responders were dispatched at 3:20 p.m. (5ORT 414, 423.) It took witness Kimberly Salmon a couple of minutes from the time she saw Cody lying in the street to get her cell phone and dial 911. (5ORT 404-407.) Thus, the duration of contact between Cody, Emanuel, and Whitley was likely not more than 12 minutes, and the duration of violent contact between Cody and Whitley presumably even less than that. (See *People v. Bennett* (2018) 26 Cal.App.5th 1002, 1008-1009, 1024 & fn. 8 [minutes-long encounter between the defendants and the victim was “negligible”].)

However, Emanuel incorrectly asserts that based on the 12-minute period, “the court had no bases for inferring that it lasted long enough to alert Emanuel that deadly violence might occur.” (OBM 25.) Here, the court reasonably concluded that the interaction lasted long enough to give Emanuel time to restrain Whitley or to aid Cody once he saw Whitley’s threatening behavior. (See Arg. I.B.2, *ante*.) Although 12 minutes may not be a significant duration under some circumstances, it may be more than enough under others to support a finding of reckless indifference. Moreover, as this Court has stated, “no one of these considerations is necessary, nor is any one of them necessarily sufficient.” (*Clark, supra*, 63 Cal.4th at p. 618.) It is the totality of the circumstances that determine whether a defendant acted with reckless indifference to human life. (See *Scoggins, supra*, 9 Cal.5th at p. 677.) While in the abstract, the duration of contact between Cody, Emanuel, and Whitley is neutral, the superior court made reasonable inferences about the surrounding circumstances and Emanuel’s opportunity to restrain the violence to support its finding of reckless indifference.

4. Emanuel’s knowledge of Whitley’s likelihood of using lethal force

“A defendant’s knowledge of a confederate’s likelihood of using lethal force, which may be evidence before *or during* the felony, is significant to the analysis of the defendant’s mental state.” (*Scoggins, supra*, 9 Cal.5th at p. 681, citing *Clark, supra*, 63 Cal.4th at p. 621, italics added.) That knowledge alone, however, is not sufficient to establish reckless indifference.

(*Scoggins*, at p. 677; *Clark*, at p. 623; *Banks*, *supra*, 61 Cal.4th at p. 808.)

The superior court found no evidence from which it could conclude that Emanuel knew Whitley was likely to use lethal force, or that he had used lethal force in the past. (1CT 204.) Further, the court appreciated that Emanuel's observations of Whitley pulling out a gun and striking Cody were not sufficient to support the finding that Emanuel knew Whitley was willing to shoot. (1CT 205.) We agree that there is no evidence in the record demonstrating that Emanuel knew Whitley was likely to use lethal force prior to December 11, and even prior to Whitley pulling out a gun during his struggle with Cody. (OBM 23.)

But once Whitley pulled out a gun, struck Cody, continued to struggle with him, and then took aim at him, Emanuel became aware that there was a high likelihood that Whitley would use lethal force to take the marijuana from Cody. Emanuel's knowledge of Whitley's likelihood of using lethal force, even if discovered during the course of the robbery, supported the superior court's finding that Emanuel acted with reckless indifference to human life. (See *Scoggins*, *supra*, 9 Cal.5th at p. 681.)

Emanuel argues that statements he made after the shooting, which expressed surprise at Whitley's conduct, support the inference that Whitley's violent conduct exceeded what Emanuel had contemplated during the robbery. (OBM 24.) Once Whitley aimed at Cody, however, Emanuel should have known of Whitley's likelihood of using lethal force.

Emanuel also suggests his youth at the time of the crime—21 years old—undercuts any inference that he had knowledge of Whitley’s propensity to use violence. (OBM 23-24; see *People v. Oliver* (2023) 90 Cal.App.5th 466, 485-490 [23 year old]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091 [20 year old]; *In re Moore* (2021) 68 Cal.App.5th 434, 451 [16 year old]; *People v. Harris* (2021) 60 Cal.App.5th 939, 944, 959-961 [17 year old], abrogated on other grounds by *People v. Lewis, supra*, 11 Cal.5th 952.)¹¹ Although, as appellant notes, “Emanuel’s age was not a focal point at either the section 1172.6 hearing or in the Court of Appeal” (OBM 23), the court was aware of his age from the underlying trial record. The court presumably considered appellant’s youth in the balancing and did not find it determinative for relief. (See generally *People v. Oliver, supra*, 90 Cal.App.5th at pp. 489-490 [observing that “the presumption of immaturity weakens as a defendant approaches 26” and that “at bottom, age is just a proxy for maturity”].)

5. Efforts to minimize the risk of violence during the felony

The superior court here found that, “[a]lthough the commission of the crime during daylight hours in public view may have had the potential for minimizing violence, there is no evidence that the robbery was planned for that time or that it

¹¹ It is not clear how his youth would be a relevant consideration for evaluating his *knowledge* of Whitley’s propensity for violence. Rather, youth is a consideration in the overall assessment of the subjective component of reckless disregard.

was planned to occur at that time for the purpose of minimizing the risk of violence. Additionally, if, in fact, the plan did involve the use of a gun, the fact that innocent bystanders were present may have actually increased the risk of violence.” (1CT 207-208.)

The superior court’s conclusion that Emanuel made no effort to minimize the risk of violence on December 11 is supported by the record. Emanuel, who was “intimately involved in planning the robbery” and “integral in setting up the marijuana sale” could have called the robbery off at several points prior to December 11, yet he did not. (1CT 201, 202 [Emanuel had a “major role in the robbery”].) He was the one who had Amini’s phone number and who had contacted Amini repeatedly by phone after their encounter at De Anza College. (6ORT 486-489.) Whitley and Emanuel met with Amini alone once, and Amini and Cody twice, before December 11, all with an eye toward stealing the marijuana. (6ORT 480-482, 491, 513.) On one occasion, they tried to meet the supplier in person without having the money to complete the deal. (6ORT 513-517.) It is not unreasonable to conclude they intended to rob the supplier directly that day, and were only prevented from doing so by Cody, who refused to tell them where the supplier lived. (6ORT 515-516, 519-520.) Despite the extensive planning, Emanuel did nothing to prevent the robbery from occurring prior to December 11.

Then, on December 11, Emanuel and Whitley met Cody in the middle of the afternoon in a residential neighborhood adjacent to a public park. (4ORT 284, 289, 297-298, 307-308, 366-367; 5ORT 402.) As the superior court noted, there is no

evidence indicating whether this was part of the plan or just happenstance. Unlike *Clark*, where the mastermind incorporated elements into the planned robbery to minimize the risk of violence, e.g., conducting the robbery late at night when minimal people would be in the store and planned use of an unloaded gun, there is no evidence that Emanuel took similar steps here. (See *Clark, supra*, 63 Cal.4th at p. 623; see also *Scoggins, supra*, 9 Cal.5th at p. 683 [planning unarmed beating minimized likelihood of grave risk of death, especially when done in public during daytime when “possible presence of witnesses might reasonably be thought to keep his accomplices within the bounds of the plan”].) It was reasonable to conclude that Emanuel would have understood that robbing a drug dealer of drugs worth between \$1,800 and \$2,600, during a face to face meeting without even any pretense of payment, would require the use of force. Of course, robbing a drug dealer in broad daylight in a highly public place presented a much graver risk to life than an unarmed beating in public. (Compare *Scoggins*, at p. 683.)

Emanuel takes issue with the superior court “downplaying” the robbery’s daytime hours and public location as coincidental, arguing that the reasoning inverts the burden of proof. (OBM 28.) Not so. The court validly pointed out that Emanuel’s plan took no affirmative steps to minimize the risks to others. Rather, the plan paid no heed whatsoever to the risks inherent in the drug robbery. There was no attempt to manufacture a false payment to fool the victim or to use stealth to get the goods, nor

any design to minimize any potential reaction by the dealer. Indeed, the absence of any plan for financial subterfuge reflects that the plan depended on the use of force or violence to separate Cody from the pound of marijuana. Moreover, Emanuel had several opportunities to call off this robbery and did not take a single one. The superior court could reasonably infer from that evidence that Emanuel acted with reckless indifference, and that inference is entitled to deference. (*Tran, supra*, 13 Cal.5th at p. 1204; *Zamudio, supra*, 43 Cal.4th at pp. 357-358.)

C. Applying the *Clark* factors under the appropriate standard of review, the superior court's findings and conclusions should be affirmed

While this is undoubtedly a close case that falls in the middle zone of the *Enmund/Tison* spectrum, viewing the totality of the evidence in a light most favorable to the superior court's factual findings and ruling denying relief under section 1172.6, substantial evidence supports the superior court's finding that Emanuel acted with reckless indifference to human life in the robbery and murder of Cody. Emanuel was integral in planning to rob Amini and Cody, he took no steps in the planning or effectuating of the robbery to minimize the risk of violence, and he took no steps to withdraw from the robbery at any point. He was not merely present at the scene of the robbery and murder: he had the opportunity to observe Whitley's conduct and gun use and the opportunity to assist Cody after the shooting, but he did nothing to restrain Whitley or provide help to Cody. The superior court properly considered the factors weighing against reckless indifference, namely use of a single weapon, Emanuel's lack of

weapon use, Emanuel's lack of prior knowledge of Whitley's likelihood of using lethal force, and his lack of knowledge that Whitley was armed prior to the inception of the robbery. The court found that the former outweighed the latter in reaching its conclusion.

The court's balancing, based on the totality of the circumstances, is supported by substantial evidence. Even if this Court would weigh the factors differently, the superior court's decision is entitled to deference on review. (*People v. Njoku, supra*, 95 Cal.App.5th at pp. 41-43; accord, *People v. Perez, supra*, 4 Cal.5th at p. 1066.) Substantial evidence supports the superior court's assessment that Emanuel evinced reckless indifference to human life.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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February 22, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 10,789 words.

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February 22, 2024

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **People v. Emanuel**
No.: **S280551**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 22, 2024, at San Francisco, California.

B. Wong
Declarant

/s/ B. Wong
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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