

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS SANCHEZ EMANUEL,

Defendant and Appellant.

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**

APPELLANT'S REPLY 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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INTRODUCTION

Jacob Whitley and Louis Sanchez Emanuel planned a daytime robbery of a marijuana dealer named Cody S. at a San Jose park. Emanuel intended only an unarmed robbery but Whitley brought a gun. When Cody would not give up the pound of marijuana, Emanuel walked away and told Whitley, “let’s go.” (10 ORT 1078, 1081.) Instead, Whitley struck Cody with the gun and fatally shot him in the neck. (10 ORT 1081.) A jury convicted Emanuel of “first degree felony murder.” (3 OCT 821.) The trial court later rejected Emanuel’s petition for resentencing – finding him to be a major participant who acted with reckless indifference to human life. (1 CT 187-188.)

At issue in this case is whether there was substantial evidence to support the trial court’s reckless indifference finding. Respondent answers this question in the affirmative – relying largely on the same factors cited by the trial court: Emanuel’s presence at the robbery scene, his role in planning the robbery, and his failure to prevent the shooting or come to Cody’s aid. (See 1 CT 202-210.) Under the five-factor test of *People v. Clark* (2016)

63 Cal.4th 522, 618-622 (*Clark*), this Court should reject respondent's argument, reverse the Court of Appeal's decision, and order that Emanuel's petition for resentencing be granted.

ARGUMENT

I.

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

Respondent acknowledges that the case for reckless indifference to human life was a "close" one. (Answer, p. 47.) They nonetheless argue that substantial evidence supported the trial court's ruling. Citing the deferential nature of substantial evidence review, respondent contends that the trial court drew rational inferences about Emanuel's proximity to the scene and his ability to see the ongoing struggle which ended with Whitley's fatal shooting of Cody. As the trial court did, respondent emphasizes Emanuel's role in planning the offense and rebukes Emanuel for inadequate efforts to prevent the shooting or save Cody's life. Respondent's arguments are unavailing.

A. This Court granted review to address the sufficiency of the evidence on the issue of reckless indifference to human life.

Respondent begins the Argument portion of their brief by implying that this Court is an improper forum for a sufficiency of the evidence challenge. Specifically, they state:

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.

(Answer, p. 24.)

The problem with respondent's argument is that this Court has already granted review. And it did so to address the very

issue which respondent faults Emanuel for raising: whether “sufficient evidence support[s] the trial court’s finding that [Emanuel] acted with reckless indifference to human life.” (See Case Docket, Statement of Issue.) While this inquiry is necessarily case-specific, it potentially implicates broader questions of unsettled law – like whether a reckless indifference finding may rest solely on a defendant’s inaction at the scene or whether an unarmed aider and abettor must physically intervene against an armed accomplice. It will ultimately be up to this Court whether to reach these broader questions. For now, it is enough to say that Emanuel challenges the sufficiency of the evidence because this Court granted review on that issue.

B. Whereas major participation constitutes the actus reus required for an aider and abettor to felony-murder, reckless indifference to human life constitutes the required mental state.

Respondent points out that *Clark*’s five-factor test for reckless indifference to human life overlaps considerably with the multi-factor test used to determine major participation. (Answer, p. 12; *Clark, supra*, 63 Cal.4th at pp. 614-615; see also *People v. Banks* (2015) 61 Cal.4th 788, 803 (*Banks*) [setting forth factors considered for major participation].) Because Emanuel has not contested the trial court’s major participation finding, respondent argues that he has “set the stage” for a finding of sufficient evidence on the closely related element of reckless indifference. (Answer, pp. 27-28.)

To be clear, Emanuel has never conceded his major participation in the Cherry Park robbery. He simply chose not to contest the issue in the Court of Appeal. (See COA’s Decision, p. 11, fn. 14; AOB [H049147]: p. 24.) To do so would have added little, if anything, to his argument. If an appellate court finds no substantial evidence of reckless indifference to human life, it renders the major participation issue moot. Conversely, if the

appellate court does find substantial evidence of reckless indifference, it would be the rare case where it would not also find substantial evidence of major participation. Indeed, Emanuel knows of no published California case which has found substantial evidence of reckless indifference but not major participation.

The *Banks* and *Clark* tests do overlap to some extent since “the 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 pp. 614-615, quoting *Tison v. Arizona* (1987) 481 U.S. 137, 153.) At the same time, major participation and reckless indifference constitute separate requirements. The former embodies the actus reus necessary for an aider and abettor to felony-murder; the latter entails “a specific mens rea requirement.” (*Banks, supra*, 61 Cal.4th at p. 798.) Even the “mastermind who planned and organized” the underlying felony may nonetheless lack the mental state of reckless indifference to human life. (*Clark*, at pp. 612, 623.)¹

C. While the substantial evidence standard is deferential, it does not permit speculation.

Respondent devotes considerable ink to discussing the nature of substantial evidence review. (Answer, pp. 25-27.) In conducting substantial evidence analysis, the reviewing court construes the record “in the light most favorable to the prosecution.” (Answer, p. 26, citing *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) It does not make credibility determinations or resolve conflicts in the evidence. (*Ibid.*) When circumstantial evidence could reasonably support two competing inferences, the

¹ In *Clark*, this Court found no need to reach the question of whether the mastermind’s actions satisfied the major participation element of special circumstance felony-murder. (*Clark, supra*, 63 Cal.4th at p. 611.)

appellate court must draw all inferences in favor of the judgment. (*People v. Nieber* (2022) 82 Cal.App.5th 458, 476; *People v. Vargas* (2022) 84 Cal.App.5th 943, 951.)

To be reasonable, however, an inference “must be . . . drawn from evidence.” (*People v. Davis* (2013) 57 Cal.4th 353, 360 (*Davis*.) When such evidence exists, it is a question of fact “whether the inference *shall* be drawn.” (*Willis v. Gordon* (1978) 20 Cal.3d 629, 633, original italics.) But it is a question of law “[whether] a particular inference *can* be drawn from certain evidence.” (*Ibid.*, original brackets and italics.) An inference may not arise from mere guess work or “speculation as to probabilities without evidence.” (*Davis*, at p. 360.) This Court has stringently applied these principles when conducting substantial evidence review of reckless indifference findings.

For instance, in *Clark, supra*, 63 Cal.4th at pp. 534, 536-537, the jury returned a special circumstance felony-murder finding against the mastermind and getaway driver in a robbery. The evidence showed that Clark drove off immediately after the shooting, leaving Ervin, the actual killer, behind. (*Id.* at pp. 536-537.) This Court observed that such actions could reflect either a “rejection of Ervin’s actions” or a “desire to flee the scene as quickly as possible, without regard for Ervin’s welfare or that of the shooting victim.” (*Id.* at p. 620.) Yet, without further evidence on the point, this Court found the circumstances too “ambiguous” to warrant the latter, more adverse, inference. (*Ibid.*)

Similarly, *In re Scoggins* (2020) 9 Cal.5th 667, 671-672 (*Scoggins*), arose from a special circumstance felony-murder finding against a defendant who waited at a nearby gas station during the underlying robbery. After the shooting, the defendant approached the victim to check if he was breathing. (*Id.* at p. 672.) The evidence conflicted on how long after the shooting this happened. Some accounts said it took just two to five minutes;

others showed a much longer period of time. (*Id.* at p. 680.) The Attorney General asked this Court to credit the former accounts – an indication, in their view, that the defendant “had anticipated the use of lethal force.” (*Ibid.*) Again, this Court found the record too “ambiguous” to support an inference one way or the other. (*Id.* at pp. 679-680.)

In Emanuel’s case, respondent casts many of the trial court’s findings as reasonable inferences from conflicting evidence. (See Answer, pp. 33-38.) As will be seen, respondent confuses conflicting evidence with missing evidence and inference with speculation. Based on the evidence actually presented, no reasonable fact finder could conclude that Emanuel acted with reckless indifference to human life.

D. Under *Clark*’s five-factor test, there was no substantial evidence Emanuel acted with reckless indifference to human life.

In applying *Clark*’s five-factor test for reckless indifference, respondent concludes that the evidence, and the reasonable inferences to which it gave rise, sufficiently supported the trial court’s finding. (Answer, pp. 27-28.) The central premise behind respondent’s argument is that Emanuel actually saw the entire sequence of events between the time Whitley first produced the gun and the time he used it to shoot Cody. Respondent’s argument fails because it rests on speculation rather than reasonable inferences based on the evidence. But, even if the facts were exactly as the trial court found them to be, they still fell short of demonstrating reckless indifference to human life.

1. Knowledge and use of weapons

Respondent concedes, as they must, that the trial court found no evidence Emanuel had a gun or knew Whitley would bring one to the robbery. (Answer, p. 28.) Respondent additionally concedes that Emanuel’s lack of knowledge on this point weighs against a finding that he acted with reckless indifference to

human life. (Answer, p. 29.) Nonetheless, throughout their discussion of reckless indifference, respondent insists that, even if Emanuel did not initially know of the gun, he learned about it after Whitley produced that gun and used it to hit Cody. (Answer, p. 28.) Whitley's actions, respondent argues, alerted Emanuel of not only the gun's presence but of Whitley's willingness to use it in a way that endangered Cody's life. (Answer, p. 29.)

Respondent's argument rests on the same flawed reasoning employed by the trial court. (1 CT 205.) The evidence showed that Whitley struck Cody with the gun only after Emanuel had begun walking away. (10 ORT 1078, 1081.) There was no evidence at all which spoke to when Whitley first pulled out the gun. Without such evidence, the trial court had no way to know if Whitley produced the gun before or after Emanuel left. And, if Whitley produced the gun only after Emanuel left, the record provided no way to know whether Emanuel actually saw the gun – let alone, the ensuing bludgeoning and shooting.

To fill this gap in the evidence, respondent cites isolated portions of Emanuel and Whitley's conversation with Breanna Santos – which Santos later related to Sergeant Stewart Davies. (Answer, pp. 28-29.) For example, respondent points to Emanuel's statements that Cody "wasn't trying to give it up," and that Whitley "hit him with the gun." (10 ORT 1078, 1081.) They also cite Emanuel's statements that Cody began "fighting back," that "[Whitley] pointed the gun," and that Whitley "shot him." (10 ORT 1077, 1081.) In respondent's view, these statements supported an inference that, even if he had already walked away, Emanuel still saw Whitley strike Cody with the gun and shoot him. (Answer, pp. 28-29.)

In point of fact, most of the statements respondent attributes to Emanuel likely came from Whitley. After Santos gave her initial account to Sergeant Davies, Davies asked her to

repeat it – this time identifying “who told you, Jacob or Louis.” (10 ORT 1080.) Santos specifically identified Emanuel as the one who said that: Whitley set up a meeting at Cherry Park to obtain marijuana; “the dude” (Cody) would not give up the marijuana; Emanuel told Whitley, “let’s go;” and Whitley “wouldn’t come on.” (10 ORT 1080-1081.) From this point on in Santos’s account, it became unclear whether Whitley or Emanuel was doing the speaking. If it was Whitley, then the record provided no basis for inferring that Emanuel saw the events which Whitley described. If it was Emanuel, his comments suggested that he was merely reporting what Whitley had told him after the fact, as opposed to reporting events he had personally seen.

For instance, Santos told Sergeant Davies that Cody would not give up the marijuana “so Jacob hit him with the gun.” (10 ORT 1081.) Immediately afterwards, Santos added, “And Jacob said he hit him on the head with the gun.” (10 ORT 1081.) Taken together, Santos’s two sentences suggested either that this information came directly from Whitley or that it came from Emanuel, who was relating what Whitley had told him.

The same was true of several other quotations which respondent attributes to Emanuel. Santos said that Cody began “fighting back” and “Jacob pointed the gun.” (10 ORT 1081.) In the very next sentence she elaborated that, “Jacob said he pointing the gun down.” (10 ORT 1081.) Santos then added, “Jacob pulled the trigger and he said he shot him in his neck.” (10 ORT 1081.)

The substantial evidence standard “is not satisfied simply by pointing to isolated evidence torn from the context of the whole record.” (*In re I.C.* (2018) 4 Cal.5th 869, 892, internal quotations omitted.) Yet, that is exactly what respondent does by citing selected snippets of Emanuel and Whitley’s conversation with Santos and divorcing those snippets from the comments which

immediately followed them. At best, those follow-up comments created insoluble ambiguity as to whether the previous snippets came from Emanuel. At worst, they clarified that the preceding snippets actually came from Whitley.

Of the five statements quoted in respondent's argument, the only one which clearly came from Emanuel was the statement that Cody "wasn't trying to give it up" – a reference to the pound of marijuana. (10 ORT 1081.) Yet, in the very next sentence, Emanuel said, "So I just told Jacob, let's go, but he wouldn't come on." (10 ORT 1081.) Emanuel's other statements made clear that he, himself, also left when he saw that Cody "wasn't trying to give it up." (10 ORT 1078.) If Emanuel left as soon as Cody refused to give up the marijuana, it follows that the bludgeoning and shooting happened only after his departure.

Having rested their reckless indifference theory on Emanuel's inaction after Whitley produced the gun and shot Cody, the prosecution bore the burden of proving that Emanuel actually saw those events. Yet, nothing in the record supported an inference that he remained in position to see the ongoing robbery after leaving the scene. If anything, the evidence suggested just the opposite.

The bludgeoning and shooting both happened with Cody seated in the driver seat of his truck. (See 5 ORT 368-369; 6 ORT 461-462.) Even if Emanuel remained nearby, his view would likely have been blocked – either by Whitley's body (if Whitley was standing outside the truck's driver side window) or by the truck's exterior (if Whitley 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* (2021) 71 Cal.App.5th 970, 989 [defendant on one side of car had no way to intervene when accomplice pulled out a gun on the other side].) Respondent does not address the significance of Cody being inside

the truck and how that would have affected Emanuel's ability to see the ongoing struggle.

An inference, by definition, "is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) With no evidence that Emanuel remained in position to have an unobstructed view of the ongoing struggle, the trial court had no basis for inferring that he saw Whitley with the gun. A inference which has no evidence to support it is not a reasonable inference; it is speculation. (*People v. Morris* (1988) 46 Cal.3d 1, 20-21.)

2. Physical presence at the crime scene and opportunities to prevent the shooting or aid the victim

Respondent devotes the bulk of their argument to the second factor in *Clark's* five-factor test: physical presence at the crime scene and opportunities to prevent the shooting or aid the victim. (Answer, pp. 29-41.) In this regard, they contend that Emanuel admitted his presence at the time of the shooting and that his failure to restrain Whitley, or come to Cody's aid after the fact, weighed heavily in favor of the trial court's reckless indifference finding. (Answer, pp. 30-32.)

Respondent's argument rests on a series of erroneous premises. As discussed in the previous subsection, it was not at all clear whether Emanuel actually saw the shooting. Moreover, Emanuel did try to verbally restrain Whitley, telling him, "let's go." (10 ORT 1081.) Emanuel also ended his own involvement in the confrontation by walking away before Whitley struck Cody with the gun. (10 ORT 1078.) Far from showing reckless indifference to human life, Emanuel's actions demonstrated affirmative concern for the escalating risk to life and a desire to end the encounter before that risk grew worse.

In arguing that Emanuel remained present or within viewing distance at the time of the shooting, respondent again relies on select statements taken from Emanuel's conversation with Santos. (See Answer, pp. 30-31.) Insofar as these statements conflicted with other parts of Emanuel's account, respondent maintains that the trial court could reasonably have credited the statements which placed Emanuel within viewing distance of events. And insofar as some of Emanuel's statements gave rise to different and more inculpatory inferences than others, respondent argues that the trial court could reasonably draw those more inculpatory inferences. (Answer, pp. 26, 30 32, 34-35.)

As Emanuel pointed out in Argument (I)(A)(1), many of the statements which respondent attributes to him appear, when read in their full context, to have come from Whitley. That Whitley could describe the events which led up to the shooting does not mean Emanuel observed those same events.

Respondent asserts that Santos used the phrase "Jacob said" only three times. (Answer, p. 33.) Of course, she also used the phrase "he said" when referring to the act of pulling the trigger and shooting Cody in the neck. (10 ORT 1081.) The "he," in this context, could only have meant Whitley since he was the one to pull the trigger. Similarly, Emanuel, himself, used the phrase "I guess" – an implication that he did not actually see what he was describing. (10 ORT 1078.)

At any rate, what matters is not the number of times that Santos or Emanuel used the phrase "Jacob said" or "he said." What matters are the events they described when citing Whitley as their source of information. Respondent contends that Santos used the phrase "Jacob said" only when describing the types of "particular details best known to the shooter." (Answer, p. 33.) The record refutes this contention.

Santos used the phrase “Jacob said” when describing Whitley’s act of hitting Cody “on the head with the gun.” (10 ORT 1081.) She also used it when relating that Whitley had pointed the gun downward only for Cody to hit his hand so the shot struck him in the neck. (10 ORT 1081.) In addition, Emanuel used the phrase “I guess” when discussing Cody’s continued resistance after being struck with the gun. (10 ORT 1078.) None of these events pertained to fine details which only the shooter would know. Rather, the events would have been plainly visible to any onlooker.

Citing to pages 1073 and 1077 of the record, respondent asserts that Emanuel personally admitted his presence “when Whitley robbed, struck, and shot Cody.” (Answer, p. 30, citing 10 ORT 1073, 1077.) In actuality, Sergeant Davies never specifically asked Santos if Emanuel admitted his presence at the shooting scene. Davies merely asked Santos if Emanuel “said that he was there?” (10 ORT 1077.) Davies did not clarify if the word “there” referred to the actual shooting scene or just Cherry Park in general. Thus, when Santos answered “Uh-huh,” it was not clear which location she was referring to. (10 ORT 1077.)

Whitley’s conversation with Destinee Kindle suffered from the same problem. Whitley told Kindle that Emanuel “was with him when the shooting occurred.” (9 ORT 984-985; see Answer, p. 30.) Such comments could have meant either that Emanuel was with Whitley at the shooting scene or with him at the park. Emanuel, on the other hand, definitively told Santos that he left before the shooting happened, when Cody would not give up the marijuana. (10 ORT 1078.) If so, he would have been at Cherry Park but not necessarily anywhere near the shooting scene.

In a footnote, respondent argues that the trial court could reasonably have accepted the inculpatory parts of Santos and Emanuel’s statements, while rejecting the exculpatory ones.

(Answer, pp. 34-35, fn. 10, citing *People v. Crooker* (1956) 47 Cal.2d 348, 355.) Respondent posits that Santos, who was Emanuel's ex-girlfriend (8 ORT 749), may have tried to shift blame to Whitley by lying about which party was doing the speaking. Alternatively, Emanuel may have falsely told Santos that his information about the shooting came only from Whitley. (Answer, pp. 34-35, fn. 10.)

The flaw in respondent's argument is that there was no other account in evidence except the one related by Santos. That does not mean the trial court had to accept every part of Santos's account. But doubts about which participant was doing the speaking did not constitute affirmative evidence that it was Emanuel and that he spoke from personal knowledge. "An absence of evidence is not the equivalent of substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655.)

As the trial court did, respondent downplays the weight of Emanuel's exhortation for Whitley to leave. (See 1 CT 207.) In doing so, they point to the lack of evidence about why Emanuel told Whitley "let's go" or about the "tone or urgency" with which he spoke. (Answer, p. 35.) Their argument is unconvincing. It requires no additional detail about the speaker's "tone or urgency" in order to know what "let's go" means. Respondent offers no hypothesis for why a robbery participant would suddenly walk away and tell his cohort to leave if he were willing to kill, or assist in killing, to achieve the robbery's aim. (*Clark, supra*, 63 Cal.4th at p. 617.)

It, likewise, makes no difference why Emanuel left and urged Whitley to do the same. The trial court speculated that Emanuel may have taken such actions out of a desire "to avoid criminal liability." (1 CT 207.) Even if true, so what? The reason penal statutes exist in the first place is to deter those not already deterred by their own conscience. If this state's felony-murder

statute performed its deterrent function, and induced Emanuel to abstain from a potentially homicidal enterprise, then he did not act with a willingness to kill or assist another in killing. It does not matter why he was unwilling to kill.

Respondent next argues that the trial court reasonably found ambiguity as to the timing of Emanuel's call for Whitley to leave. (Answer, pp. 35-36.) In respondent's view, the comment did not necessarily coincide with Emanuel's own departure from the scene but may have occurred either before he left or after he had begun walking away. (Answer, pp. 35-36.) Again, even if true, it would not change the analysis. Moreover, the trial court did not merely find ambiguity about whether Emanuel said "let's go" before or after he left the scene. It found ambiguity as to whether Emanuel made this statement "before or after the shooting occurred." (1 CT 207.) On this point, there was no ambiguity: he said it before the shooting happened. (See 10 ORT 1081.)

Respondent suggests that, if Emanuel made his comment before Whitley produced the gun, he could not have been trying to restrain the crime since he did not yet know that Whitley possessed a deadly weapon. (Answer, p. 36.) Respondent's argument defies logic. If a defendant reveals an unwillingness to participate in even an unarmed robbery, how can that same defendant have been willing to participate in an armed robbery – let alone one in which he must kill or assist in killing to achieve the robbery's aims? (*Clark, supra*, 63 Cal.4th at p. 617.)

On the other hand, if Emanuel urged Whitley to leave only after learning of the gun, respondent characterizes his attempts to restrain the crime as "paltry." (Answer, p. 36.) Unlike the prosecutor and Court of Appeal, respondent stops short of proposing that Emanuel should have charged into the line of fire and tried to disarm Whitley. (Aug. RT 39; COA's Decision, p. 12.) But they do contend that Emanuel could have asserted himself to

a greater degree. Citing *In re Loza* (2017) 10 Cal.App.5th 38, 54, respondent puts forth the possibilities of banging on Cody's truck, yelling at or distracting Whitley, or telling him "to let go of the marijuana and leave Cody alone." (Answer, p. 36.)

As discussed in his opening brief, Emanuel took some of the very steps suggested in *Loza* – and in other cases such as *People v. Bradley* (2021) 65 Cal.App.5th 1022, 1034, and *People v. Mitchell* (2022) 81 Cal.App.5th 575, 581, 593. Those steps included fleeing the scene and telling Whitley, "let's go." (10 ORT 1078, 1081.) A reasonable onlooker would understand the words "let's go" to mean exactly the same thing as "let go of the marijuana and leave Cody alone." (Answer, p. 36.)

With the advantage of hindsight, it comes as no surprise that respondent can conceive of additional and more effective measures which Emanuel might have taken to try to end the ongoing skirmish. But reckless indifference to human life constitutes a subjective mental state. Emanuel was a 21-year old young man in the midst of a quickly escalating encounter in which one participant had a loaded gun. The fact that he tried to stop the crime was far more probative of his mental state than whether he chose the best, most effective, means for doing so.

Like the two lower courts, respondent faults Emanuel for failing to come to Cody's aid after the shooting. (Answer, pp. 37-39; see also 1 CT 209-210; COA's Opn., pp. 12-13.) This argument again presupposes that Emanuel actually saw what had happened. For reasons already discussed, that was not at all clear from the evidence. (See Arguments (I)(D)(1), *supra*, pp. 13-16; (I)(D)(2), *supra*, pp. 17-19.)

Respondent submits that, even if Emanuel had already walked away, he "could not have been so far away from the scene that he could not see what had happened to Cody." (Answer, p. 37.) The record provides no way to know if this is true. Besides,

Emanuel could have been nearby and still unable to see if, as the evidence suggested, the events all occurred inside Cody's truck.

In his opening brief, Emanuel cited numerous cases – including two from this Court – which found no substantial evidence of reckless indifference despite the aider and abettor's failure to come to the victim's aid. (*Clark, supra*, 63 Cal.4th at pp. 619-620; *Scoggins, supra*, 9 Cal.5th at pp. 679-680; see also *In re Bennett* (2018) 26 Cal.App.5th 1002, 1025-1026; *In re Ramirez* (2019) 32 Cal.App.5th 384, 390-391, 405; *In re Taylor* (2019) 34 Cal.App.5th 543, 546-547 (*Taylor*); *People v. Ramirez, supra*, 71 Cal.App.5th at pp. 975, 989; *In re Moore* (2021) 68 Cal.App.5th 434, 451-452; *People v. Guiffreda* (2023) 87 Cal.App.5th 112, 127, 129.) The court in *Taylor* went one step further, holding that even the most callous post-crime actions cannot, standing alone, establish reckless indifference to human life. (*Taylor*, at pp. 546-547, 560.) Instead, "there must also be evidence that the defendant's participation in planning or carrying out the crime contributed to a heightened risk to human life." (*Id.* at p. 560.)

Respondent states that "comparison with other cases is of limited utility," given the fact-specific nature of the reckless indifference inquiry. (Answer, p. 38.) The case law is still instructive though, since it sheds light on the types of facts this state's courts have found indicative of reckless indifference. Without spilling needless ink, there was nothing about Emanuel's conduct which made it more egregious than what happened in the cases cited above.

Respondent distinguishes Emanuel's case from *Taylor* on at least three grounds. (Answer, p. 39.) First, in *Taylor*, there was no evidence the defendant knew how badly the victim was injured. (Answer, p. 39; *Taylor, supra*, 34 Cal.App.5th at p. 559.) The same was true in Emanuel's case. (See Arguments (I)(D)(1), *supra*, pp. 13-16; (I)(D)(2), *supra*, pp. 17-19.)

Second, respondent points out that the defendant in *Taylor* knew help was on the way. (Answer, p. 39; *Taylor, supra*, 34 Cal.App.5th at p. 559.) In this case, Emanuel would also have known, as sirens could be heard soon after the shooting. (4 ORT 299; 5 ORT 372, 380.) In addition, if Emanuel could see the events at all, he would have seen Kimberly Salmon approach Cody with a cell phone to her ear. (5 ORT 371-372, 405.) A reasonable observer would construe her actions to mean she was on the phone with the 911 dispatcher.

Respondent's third basis for distinguishing this case from *Taylor* is that, in *Taylor*, there was no evidence the victim could have survived with a quicker response. (Answer, p. 39; *Taylor, supra*, 34 Cal.App.5th at p. 559.) Respondent contrasts that with Emanuel's case, where they maintain – as the trial court did – that a quicker response may have saved Cody's life. (Answer, pp. 32, 37-38; 1 CT 210.) The record does not support this claim.

Dr. Joseph O'Hara, the autopsy pathologist, testified that Cody would have remained conscious for only "a matter of minutes" after the shooting. (4 ORT 235, 256.) Dr. O'Hara did not say that something could have been done during those minutes to save Cody's life following a "close-range gunshot wound of the neck" which severed both his jugular vein and carotid artery. (4 ORT 256.) Quite conversely, the prosecutor did not ask – and Dr. O'Hara did not testify – whether Cody's life could have been saved with quicker medical intervention. And even if it could, that simply had no bearing on whether Emanuel subjectively possessed the mental state of reckless indifference to human life.

3. Duration of the robbery

Respondent concedes that the robbery must have occurred after Cody texted Emanuel to say he was at the park, but before 3:20 p.m. when the police dispatch went out. (Answer, p. 41; see 5 ORT 414, 423; 12 ORT 1307-1308, 1312.) In their Statement of

Facts, respondent mistakenly identifies the time of Cody's text as 2:37 p.m. (Answer, p. 17.) In their argument, they correctly give the time as 3:06 p.m. (Answer, p. 41.) The 2:37 p.m. text was a different one, sent from Santos's phone to Cody's. (See 12 ORT 1312-1313, 1325.)

The time of Cody's text is important because the later the text went out, the shorter the window of opportunity to commit the robbery. In this case, respondent accepts that the window lasted no more than 14 minutes – and probably more like 12 minutes since it would have taken Kimberly Salmon a couple minutes to return to her house, retrieve her phone, and call 911. (Answer, p. 41; 5 ORT 402-405.) Nonetheless, respondent again argues that the robbery lasted long enough to alert Emanuel that Whitley had a gun and that the situation had become fraught with danger. (Answer, p. 41.) As Emanuel has addressed that contention in the previous two subsections, it is not necessary to do so again.

4. Knowledge that Whitley would likely use lethal force

Respondent concedes there was no evidence that Emanuel had advance knowledge of Whitley's intent to bring a gun or other lethal force to the Cherry Park robbery. (Answer, p. 43.)

In his opening brief, Emanuel additionally pointed out that he was only 21 years old at the time of the crime and that his youth made him less likely to appreciate the risk that lethal force might be used during the robbery. (OBM, pp. 23-24; see 4 CT 1001.) In a footnote, respondent questions why Emanuel's "youth would be a relevant consideration for evaluating his *knowledge* of Whitley's propensity for violence." (Answer, p. 44, fn. 11, original italics.) Emanuel's point was not that his youth made him less likely to know of Whitley's propensity for violence. Rather, his

youth made him less likely to comprehend that the entire undertaking created a high risk of violence.

Respondent maintains that the trial court “presumably considered Emanuel’s youth” in reaching its decision. (Answer, p. 44.) The record provides no basis for this presumption. The trial court did not mention Emanuel’s youth in its written decision and the topic did not come up during the December 16, 2020 oral argument on the petition. (See 1 CT 187-211; Aug. RT 3-64.)

Moreover, the December 16, 2020 hearing took place before published California case law had recognized the significance of youth to the reckless indifference analysis. (*People v. Harris* (2021) 60 Cal.App.5th 939, 960 [youth relevant to assessing if defendant was “actually aware ‘of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants’”]; *In re Moore* (2021) 68 Cal.App.5th 434, 454 [youth relevant to reckless indifference analysis]; *People v. Ramirez, supra*, 71 Cal.App.5th 970, 990-991 [considering defendant’s youth in finding no substantial evidence of reckless indifference].)

In *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091, the trial court denied a petition for resentencing without mentioning that the petitioner was just 20 years old at the time of the crime. The trial court’s ruling came down in March, 2021 – just a few weeks after the decision in *Harris* and several months before *Moore*. (*Jones*, at p. 1092.) On appeal, respondent invoked the presumption that the trial court knew and followed the law with regard to the petitioner’s youth. (*Id.* at pp. 1091-1092.) The Court of Appeal found the presumption inapplicable because, at the time of the lower court’s ruling, this state’s case law had not yet established the importance of youth to the analysis. (*Ibid.*; see also *People v. Chambers* (1982) 136 Cal.App.3d 444, 457 [presumption the trial court knew and exercised its discretion

“can have no logical application” when case law had not yet recognized the existence of such discretion].)

The ruling in Emanuel’s case came down some two months earlier than the one in *Jones* – even before the February, 2021 decision in *Harris*. (1 CT 187.) Hence, the rationale of *Jones* applies to an even greater degree in this case. Had the trial court considered Emanuel’s youth, it could only have concluded that this factor weighed against a finding that he acted with reckless indifference to human life.

5. Emanuel’s attempts to minimize the risk of violence

Clark’s fifth factor looks to the aider and abettor’s attempts to minimize the risk of violence during the planning and commission of the underlying felony. (*Clark, supra*, 63 Cal.4th at p. 621.) In *Clark*, this Court found such efforts present because the defendant robbed a computer store after hours, when few people would be there, and planned for the gun to be unloaded. (*Id.* at pp. 621-622.) Likewise, in *Scoggins*, this Court concluded that the defendant tried to minimize violence by planning only an “unarmed beating” and arranging it for a public place during daytime hours. (*Scoggins, supra*, 9 Cal.5th at p. 683.)

Emanuel also planned an unarmed robbery at a public place during daytime hours. The trial court dismissed these facts – speculating that the hour and location of the robbery may have been the product of coincidence rather than design. (1 CT 207-208.) The court further observed that, if the plan involved the use of a gun, the likely presence of “innocent bystanders” would only increase the risk to human life. (1 CT 207-208.)

In respondent’s view, the trial court reasonably concluded that Emanuel made inadequate efforts to minimize violence. (Answer, p. 45.) Respondent distinguishes this case from *Clark* and *Scoggins* on the ground that the defendants in those cases

“incorporated elements into the planned robbery to minimize the risk of violence.” (Answer, p. 46.) Emanuel, they argue, did not do so. (Answer, p. 46.) This argument lacks merit.

In *Clark* and *Scoggins*, there was no specific evidence that the defendants selected the time and place of the robbery with an eye toward reducing the risk of violence. This Court simply inferred that purpose from the very nature of the plan. The same inference arises here.

A plan to commit an unarmed robbery is, almost by definition, a plan which “incorporate[s] elements . . . to minimize the risk of violence.” (Answer, p. 46.) The same is true of the time and place of the Cherry Park robbery. Nobody forced Emanuel and Whitley to commit this robbery in the middle of the afternoon at or near a public park. And, contrary to the trial court’s suggestion, it was no mere coincidence that the robbery occurred during daylight hours. (1 CT 208.) Mansour Amini told police that Whitley and Emanuel insisted on conducting the would-be sale during the daytime. (6 ORT 570; 12 ORT 1308-1309.) Had Emanuel envisioned the possibility of deadly violence, it stands to reason he would have chosen a less conspicuous location with less likelihood of encountering onlookers.

Respondent takes note of an earlier occasion when Whitley and Emanuel met Cody and Amini after dark and asked for an audience with Cody’s supplier. (Answer, p. 45; 6 ORT 513-517, 569-570.) Respondent calls it a reasonable inference that, had the meeting with the supplier gone forward, Whitley and Emanuel would have carried out the robbery at that time. (Answer, p. 45.)

This court can only speculate about what would have happened – or what Emanuel intended to happen – if Cody’s supplier had agreed to meet with Emanuel and Whitley. The record does, however, show that Emanuel and Whitley did not foresee they would end up driving to the supplier’s house. They

originally met Cody and Amini at a Panda Express restaurant or the parking lot to that restaurant. (6 ORT 513-514; see also 6 ORT 503-504.) From there, the group drove to the supplier's house at Cody's initiative. (6 ORT 515-516.) Such facts suggested that, if Emanuel and Whitley planned to commit the robbery that day, they intended to do it at the very public location of Panda Express or the parking lot to Panda Express.

Respondent places considerable emphasis on Emanuel's role in planning the robbery and setting up the would-be sale. (Answer, p. 45.) In addition, they note that, at the time this plan went into effect, a pound of marijuana had a market value between \$1,800 and \$2,600. (Answer, p. 46; see 6 ORT 502, 565.) Respondent argues that, with no scheme or artifice to trick Cody out of his marijuana, Emanuel would have understood that a theft of this magnitude "would require the use of force." (Answer, pp. 46-47.)

While respondent's argument refers only to force or violence, the implication behind the argument is that Emanuel must have foreseen the use of deadly force. After all, robbery, by definition, requires the use of force or fear. (Pen. Code, § 211.) But it does not require that the force be potentially lethal. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 207.) Even the snatching of property from another's person may constitute robbery if the assailant employs enough force "to overcome the victim's resistance." (*People v. Lescallett* (1981) 123 Cal.App.3d 487, 491.)

Emanuel could not have acted with reckless indifference to human life if he foresaw only the possibility that non-lethal force might be employed. Hence, when respondent speaks of Emanuel's knowledge that force would be used, they must be referring to deadly force. Yet, the trial court specifically found that Emanuel had no weapon of his own and no knowledge that Whitley intended to use one. (1 CT 204-205.)

The trial court's finding forecloses any argument that Emanuel foresaw a scenario involving the use of a weapon. It also forecloses the trial court's own ruminations about the risk to innocent bystanders which would have existed if Emanuel had planned for the use of a gun in a public park. (1 CT 207-208.) Emanuel manifestly did not plan for the use of a gun in a public park. As such, it is immaterial what his mental state would have been if he **had** planned for it.

E. Because all five of *Clark*'s factors weighed against a finding of reckless indifference, the trial court erred by denying Emanuel's petition for resentencing.

As shown in subsection (I)(D), all five of *Clark*'s factors – as well as Emanuel's youth – weighed against a finding that he acted with reckless indifference to human life. This is true regardless which party's characterization of the facts this Court accepts.

Under Emanuel's view, the evidence was too ambiguous to support an inference that he saw Whitley produce the gun, strike Cody in the face with it, and fatally shoot him. By contrast, respondent acknowledges "this is undoubtedly a close case" (Answer, p. 47), but argues that the evidence gave rise to a reasonable inference that Emanuel saw the shooting and knew Cody had been badly injured.

No reasonable inference, however, could refute what the evidence indisputably showed: that Emanuel walked away from the scene, and told Whitley "let's go," before Whitley struck and shot Cody. (10 ORT 1078, 1081.) Such actions cannot possibly coexist with a willingness to kill or assist in killing, in order to achieve the robbery's aim. (*Clark, supra*, 63 Cal.4th at p. 617.) To expect Emanuel to do more, during a fast-developing situation and in the face of an armed accomplice, is to demand a level of intervention that even few law-abiding citizens would attempt.

Once the shooting happened, Emanuel suddenly found himself facing possible first degree murder liability for a killing he did not commit and had never even contemplated. It would, no doubt, have been admirable for him to cast aside those concerns and incriminate himself by calling 911 or coming to Cody's aid. But if a participant must incriminate himself on murder charges to defeat a finding of reckless indifference, few aiders and abettors would ever escape a felony-murder conviction. Had the Legislature intended such a result, it would have just left the old felony-murder statute in place.

As there was no substantial evidence that Emanuel acted with reckless indifference to human life, the trial court erred by denying Emanuel's petition for resentencing.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Emanuel's opening brief on the merits, this Court should reverse the Court of Appeal's decision upholding the 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: April 12, 2024

Respectfully Submitted,

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

WORD COUNT CERTIFICATE
(Cal. Rules of Court, rule 8.520(c)(1))

I, Solomon Wollack, counsel for appellant Louis Sanchez Emanuel certify pursuant to the California Rules of Court, that the word count for this document is 7,128 words, excluding the tables and this certificate. This document was prepared in Wordperfect 21, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Pleasant Hill, California on this 12th day of April, 2024.

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

PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am over the age of 18, an active member of the State Bar of California, and not a party to this action. My business address is P.O. Box 23933, Pleasant Hill, California 94523. On the date shown below, I served the within

APPELLANT'S REPLY BRIEF ON THE MERITS

to the parties on the attached service list by:

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X **BY MAIL** – Placing a true copy of the foregoing, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed to:

Mr. Louis Sanchez Emanuel
(Defendant/Appellant)

I declare under penalty of perjury the foregoing is true and correct.
Executed this 12th day of April, 2024 at Pleasant Hill, California.

/s/ Solomon Wollack