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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re HECTOR AVILA, on Habeas Corpus.	B284118 (Los Angeles County Super. Ct. No. BA154760)

Petition for writ of habeas corpus. Robert J. Perry, Judge. Relief granted.

Jennifer Hansen, under appointment by the Court of Appeal, for Petitioner Hector Avila.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Respondent.

Petitioner Hector Avila participated in planning a robbery during which his accomplice killed Ernesto Flores. In 1998, a jury found Avila guilty of special circumstance felony murder, and the trial court sentenced him to life without the possibility of parole (LWOP). Thereafter, our California Supreme Court clarified under what circumstances an LWOP sentence for an aider and abettor of felony murder is constitutionally permissible. (*People v. Banks* (2015) 61 Cal.4th 788 (*Banks*).) *Banks* set forth factors to consider when determining whether a person has acted with reckless indifference to human life and as a major participant, under the special circumstance statute, Penal Code section 190.2, subdivision (d).[1] Relying on *Banks*, Avila petitioned this court for a writ of habeas corpus, but we summarily denied the petition. Our California Supreme Court then granted Avila's petition for review and directed us to issue an order to show cause why Avila is not entitled to relief. We now conclude that Avila is entitled to relief.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

On July 31, 1997, Avila, Victorino "Tony" Lopez, Daniel Valencia Leyva (Valencia), and several other men planned to rob Ernesto Flores. During the robbery, Flores was shot and killed. Lopez was also shot and died shortly thereafter. At Avila's trial for Flores's murder and robbery, Valencia was the prosecution's primary witness to the circumstances of the murder.

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[1] All further undesignated statutory references are to the Penal Code.

According to Valencia, he sold drugs, including cocaine. But, after meeting Avila, he and Avila ventured into robbing drug suppliers and buyers. Valencia would make "connections," and Avila would "help [Valencia] rob them and then give [Valencia] part of the money."

Valencia described robberies he and Avila committed together.[2] During one robbery, Avila and others (Valencia claimed not to know their names) stole heroin and two pounds of "crystal" from someone in Sylmar. Valencia's take was 10 pieces of heroin, which he sold for $4,000. During a second robbery, in Huntington Park, they stole two kilos of cocaine, and Valencia loaned someone a gun. Valencia also testified about an incident in which Avila and Lopez stole three or four pounds of "crystal" from a man from whom they had previously bought drugs.

Turning to the robbery at issue, on the morning of July 31, 1997, Avila and Valencia went to Lopez's house. Valencia had a nine-millimeter handgun. Lopez was with a friend who was never identified. Then, a man identified only as "Chon" arrived with a male friend, who was also never identified. Valencia overheard the men talking with Avila. Chon and his friend said that someone from Fresno, later identified as Flores, wanted to buy cocaine. The men planned to rob Flores. They would take Flores to the house of Lopez's cousin, Gregorio; show Flores a sample of cocaine; see if Flores had money; and then rob Flores. Chon and his friend were supposed to take a gun and be the ones to rob Flores. According to Valencia, "They were just going to rob

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[2] The record is unclear whether they committed two or three robberies before the one at issue.

him." Avila also directed Valencia to bring his (Valencia's) gun, and Avila provided a pistol for Lopez.

The men left for Gregorio's house. Avila, Lopez and Lopez's friend joined Valencia in Valencia's car. Chon and his friend drove separately in a car provided by Avila. Gregorio let them into the house, and they waited for Flores to arrive. At Avila's instruction, Valencia put two guns, a nine millimeter and a .45 caliber, on a bed inside the house.[3] Valencia thought the guns would be displayed during the robbery "just to scare people."

Because Flores had not arrived, Chon and Chon's friend drove around to look for him. Valencia and Avila waited in Valencia's car so that they could see when Flores arrived. Lopez and his friend stayed in the house.[4]

Before Chon and his friend returned, Flores arrived in a van with a woman, and Flores went into the house. Avila told Valencia to block the van's exit with Valencia's car, but Valencia was afraid that Flores had a gun, so instead they drove around the block and parked "further back" to wait for their accomplices. Suddenly, Lopez and his friend came out with money and the guns and got into Valencia's car. Lopez had been shot twice. Flores was inside the house, dead, having been shot six times.[5]

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[3] Detective Joseph Martinez, however, testified that Valencia told him that it was Lopez who instructed Valencia to bring the guns into the house.

[4] It is unclear where Gregorio was during the shooting.

[5] At least three guns were fired. Bullet casings or bullet fragments from three different caliber weapons—a .38 super, a nine millimeter, and a 10 millimeter—were in Gregorio's home, where Flores was killed. Law enforcement found ammunition cases, a gun

Avila told Valencia to drive to Lopez's house, where they left the money and guns. Avila then told Valencia to drive Lopez to another house where Avila tried to pay a woman to take Lopez to the hospital, but she refused. Meanwhile, Lopez died. Avila told Valencia to abandon the car and to "just blame the [cholos]." Valencia did as he was told: he abandoned the car with Lopez's body inside and told the police he had been carjacked. Avila and another man picked up Valencia after Valencia abandoned the car. Avila told Valencia that he would help Valencia go to Mexico.

Eduardo Verduzco testified that he was present during a conversation with Avila, Arturo Verduzco (Leonell), "Gustavo," and another person about the circumstances of Lopez's death. Leonell asked Avila what had happened, and Avila said that Lopez was inside the house with the buyer while the rest of the men waited outside. The men outside heard shooting. When Lopez came out, Avila asked him what had happened, and Lopez said he'd killed the man inside. Avila told Lopez they would take him to a hospital, but they instead went to Lopez's house to drop off the money. Avila took Lopez to "Augustina" and offered her $1,000 to take Lopez to the hospital. Lopez, however, was already dead.

II. Procedural background

On July 23, 1998, a jury found Avila guilty of count 1, first degree murder (§ 187, subd. (a)) and of count 2, first degree robbery (§ 211). As to both counts, the jury found true the allegation that a principal was armed during the commission of

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case, nine millimeter cartridge cases, a Colt gun case, and a .38 super magazine in Avila's house.

the crime (§ 12022, subd. (a)(1)). As to count 1, the jury found true the special circumstance allegation that the murder was committed while Avila was engaged in the attempted commission of a robbery (§ 190.2, subd. (a)(17)).

On September 10, 1998, the trial court, after rejecting the defense argument that Avila was not a major participant and did not act with reckless indifference to human life for the purposes of the special circumstance allegation, sentenced him to LWOP on count 1 plus one year for the firearm enhancement. The court stayed "any sentence" on count 2 under section 654.[6]

In 2017, Avila filed a petition for writ of habeas corpus in this court in which he argued that there was insufficient evidence he was a major participant who acted with reckless indifference within the meaning of the special circumstance statute, section 190.2, subdivision (d). We summarily denied his petition. But, on subsequent direction from the Supreme Court, we issued an order directing respondent to show cause why Avila is not entitled to relief.

DISCUSSION

The special circumstance statute, section 190.2, provides, among other things, that those who aid and abet first degree murder may be sentenced to death or to LWOP. (§ 190.2, subds. (c), (d); *Banks*, *supra*, 61 Cal.4th at pp. 797–798.) "In the case of first degree felony murder, 'every person, not the actual killer, who, with *reckless indifference to human life* and as a *major participant*' aids or abets the crime may be convicted of special circumstance murder." (*Banks*, at p. 798, citing § 190.2, subd. (d),

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[6] The trial court failed to impose a specific term on count 2.

italics added.)[7] Relying on two United States Supreme Court cases—*Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*) and *Tison v. Arizona* (1987) 481 U.S. 137, 158 (*Tison*)—our California Supreme Court, for the first time since section 190.2, subdivision (d) was added to the Penal Code in 1990, considered in *Banks* what it means to be a "major participant" and to act with "reckless indifference to human life" in the context of felony murder.

The court in *Enmund* found that the defendant was not a major participant and did not act with reckless indifference to human life. *Banks* summarized the facts in *Enmund*: " 'Earl Enmund purchased a calf from victim Thomas Kersey and in the process learned Kersey was in the habit of carrying large sums of cash on his person. A few weeks later, Enmund drove two armed confederates to Kersey's house and waited nearby while they entered. When Kersey's wife appeared with a gun, the confederates shot and killed both Kerseys. Enmund thereafter drove his confederates away from the scene and helped dispose of the murder weapons, which were never found. He was convicted of robbery and first degree murder and sentenced to death.' "

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[7] Section 190.2, subdivision (d) currently provides: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

(*Banks*, *supra*, 61 Cal.4th at p. 799.) *Enmund* held that where a defendant, like Enmund, did not commit the homicide, was not present when it took place, and did not participate in the plot to murder, the Eighth Amendment bars the death penalty. (*Enmund*, *supra*, 458 U.S. at p. 797.)

The facts in *Tison*, however, led to a different result. In that case, prisoner Gary Tison's sons Ricky, Raymond, and Donald conducted an armed breakout of Gary and his cellmate from prison." (*Tison*, *supra*, 481 U.S. at p. 139.) During their escape, their car broke down so they agreed to flag down a passing car. Raymond waved down a family of four, and the men captured them at gunpoint. Raymond and Donald drove the family into the desert, where Gary and his cellmate killed all four family members. (*Id.* at pp. 139–141.) The court noted that the Tison brothers planned their father's escape from prison, gave him and his cellmate (both convicted murderers) an arsenal of lethal weapons, participated in capturing the family, held the family at gunpoint while the two killers debated whether to shoot the family, and then stood by while the family was slain. The court therefore held that the brothers, although not the actual killers, were major participants in the felony and acted with reckless indifference to human life; hence, they were eligible for the death penalty. *Id.* at p. 158.)

Enmund and *Tison* thus "help define the constitutional limits for punishing accomplices to felony murder." (*In re Loza* (2017) 10 Cal.App.5th 38, 46.) Based on those cases, felony murder participants are placed on a continuum, with actual killers on one end and minor actors who were not on the scene and who did not intend to kill or have any culpable mental state on the other end. (*Banks*, *supra*, 61 Cal.4th at p. 800.)

Somewhere between those two extremes lies the constitutional minimum required for imposing death or LWOP. (*Id.* at p. 802.) To determine where on the continuum an accomplice to felony murder lies, *Banks* listed factors to consider: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? 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? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Id.* at p. 803, fn. omitted.) These factors are weighed to determine whether the defendant's participation in criminal activities known to carry a grave risk of death was sufficiently significant to be considered major. (*Ibid.*)

Applying those factors, *Banks* found there was insufficient evidence to sustain a section 190.2, subdivision (d), special circumstance finding as to a getaway driver who was not at the scene of a robbery and murder, and where there was no evidence of his role in planning the robbery and procuring weapons, that he or his accomplices had previously committed a violent crime or that he had the requisite mens rea, i.e., "reckless indifference to human life," which " 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' " (*Banks*, *supra*, 61 Cal.4th at p. 807; see also *People v. Perez* (2016) 243 Cal.App.4th 863, 882 [insufficient evidence to support special circumstance as to getaway driver during armed robbery].)

The court came to a similar conclusion in *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). Although *Clark* observed that overlap exists between the major participant and reckless indifference prongs of section 190.2, subdivision (d), *Clark* declined to decide whether the defendant was a major participant.[8] (*Clark*, at pp. 613–615; see also *Tison*, *supra*, 481 U.S. at p. 153.) The court instead concluded only that there was insufficient evidence the defendant acted with reckless indifference. Reckless indifference "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*, at p. 617.) *Clark* suggested that the requirement has subjective and objective elements. (*Ibid.*) "The subjective element is the defendant's conscious disregard of risks known to him or her" (*ibid.*), and "[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create" (*Banks*, *supra*, 61 Cal.4th at p. 801). The defendant must subjectively appreciate that his or her act will likely result in the taking of innocent life. (*Id.* at pp. 801–802.) The objective element considers "what 'a law-abiding person would observe in the actor's situation.' " (*Clark*, at p. 617.)

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[8] Although *Clark* declined to decide whether the defendant was a major participant, the court referred to his role in the armed robbery as "prominent," leaving it ambiguous as to whether "prominent" and "major" are interchangeable or different. (*Clark*, *supra*, 63 Cal.4th at p. 613.)

Clark also set forth factors to determine whether an aider and abettor has acted with reckless indifference: (1) the defendant's knowledge of weapons, and use and number of weapons; (2) his presence at the crime and opportunities to prevent the murder and help the victim; (3) the duration of the felony; (4) his knowledge of a cohort's likelihood of killing; and (5) his efforts to minimize the risks of violence in the commission of the felony. (*Clark*, *supra*, 63 Cal.4th at pp. 618–623.) Based on these factors, *Clark* concluded that the defendant—who did not have a gun, was not physically present during the murder and who tried to minimize the risk of violence by timing the robbery to occur after the store's closing and by planning to have the gun unloaded—did not act with reckless indifference to human life.

We now apply this law and the applicable sufficiency of the evidence standard of review— that is, whether there is evidence of reasonable, credible, and solid value, which when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation against Avila beyond a reasonable doubt. (*Clark*, *supra*, 63 Cal.4th at p. 610.) We, as did the court in *Clark*, conclude there is insufficient evidence Avila acted with reckless indifference. We therefore need not decide whether there was sufficient evidence he was a major participant.

We begin with the first factor *Clark* identified as pertinent to deciding the reckless indifference prong: Avila's connection to the weapons. Avila, although himself apparently unarmed, made sure his accomplices were armed. Avila supplied his own gun and directed Valencia to give Valencia's gun to Lopez. Thus, the robbers had at least two guns. Moreover, Avila and his

accomplices were planning to rob a drug buyer, someone likely to be armed, unlike, for example, employees of a computer store as in *Clark*. (See generally *Ybarra v. Illinois* (1979) 444 U.S. 85, 106; *People v. Glaser* (1995) 11 Cal.4th 354, 367.) In such a scenario, armed resistance was more than a hypothetical possibility.

Even so, *Banks* and *Clark* made it clear that a defendant's mere knowledge he or she is participating in an armed robbery is insufficient, by itself, to establish the requisite reckless indifference to human life. (*Banks*, *supra*, 61 Cal.4th at pp. 807–808; *Clark*, *supra*, 63 Cal.4th at p. 617 ["mere fact" robbery involves a gun "on its own and with nothing more presented, is not sufficient to support a finding of reckless indifference to human life for the felony-murder aider and abettor special circumstance"].) Thus, "[a]wareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum" to impose death or LWOP. (*Banks*, at p. 808; *Clark*, at p. 617.) *Banks*, for example, involved the armed robbery of a medical marijuana dispensary with a security guard. The security guard was armed that day, although he was usually unarmed. The source of the security guard's gun was never determined. (*Banks*, at p. 796 & fn. 2.) Nothing in the record showed that the defendant getaway driver "knew there would be a likelihood of resistance and the need to meet that resistance with lethal force." (*Id.* at p. 811.) Notwithstanding the absence of evidence about what the defendant knew in relationship to the security guard, it would have been reasonable to infer that the guard's presence heightened the risk of violence. Yet, *Banks* declined to draw any

inferences favorable to a finding of reckless indifference to human life from that fact.

Similarly here, although Avila's accomplices were armed, there is no evidence they intended to use lethal force or that Avila knew of any such intent. Instead, Valencia testified that the guns would be displayed to scare Flores. Also, it would have been reasonable for Avila and his accomplices to assume that Flores would be armed, but there is no evidence that they actually *knew* he would be armed or would resist the show of weaponry. Although we agree with the Attorney General that drugs and guns go hand in hand (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378), we are unpersuaded, based on *Banks* and *Clark*, that this truism is enough, on these facts, to elevate the risk otherwise inherent in an armed robbery. And, we decline to create a category of offenses—armed robberies during drug transactions—where the reckless indifference standard is established per se. Thus, we consider the remaining factors to see whether something else in Avila's actions elevated the risk otherwise inherent in any armed robbery.

The second *Clark* factor concerns whether a defendant who is present at the scene has an opportunity to act as a restraining influence on murderous cohorts and to assist victims. (*Clark*, *supra*, 63 Cal.4th at p. 619.) Here, Avila was not in the room where the shootings happened and therefore was not in a position to facilitate or to prevent them. (Compare *In re Miller* (2017) 14 Cal.App.5th 960, 975 [defendant absent from scene of killing had no opportunity to stop it or to help victim], with *In re Loza*, *supra*, 10 Cal.App.5th at p. 54 [while accomplice " 'counted' " down before shooting the victim, defendant did nothing to intercede or assist victim].) Indeed, other than that Flores and

Lopez were shot, there is no evidence about what happened inside the house—e.g., what was said, or what provoked the shooting by either side. We do not even know who was in the room where it happened, because Flores's female companion and Gregorio were unaccounted for.

Further, Avila's actions after the shooting are somewhat ambiguous. When Lopez came out of the house wounded, it is not clear what Avila thought had happened to Flores, although there was evidence that Lopez said he had killed Flores. In any event, Avila certainly took no action to check on Flores or otherwise to assist him. Avila's conduct toward his wounded compatriot can also be described as cavalier. Instead of taking Lopez to the hospital, Avila first secured the money and guns and then tried to pay a woman to take Lopez to the hospital. During this time, Lopez died, and Avila callously instructed Valencia to abandon Lopez's body and to cast blame on "cholos." Still, we cannot say that Avila's treatment of his wounded accomplice has a sufficient relationship to the armed robbery to show the requisite indifference to Flores's life.

The third *Clark* factor concerns the duration of the felony. Where, for example, "a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence.' " (*Clark*, *supra*, 63 Cal.4th at p. 620.) Here, it is unclear how long the robbery and murder took, although the evidence suggests that the shooting occurred shortly after Flores's arrival. Nothing otherwise connects the duration of the robbery to any exhibition of reckless indifference to human life on Avila's part.

Fourth, a defendant's willingness to engage in armed robbery with individuals he knows use lethal force may give rise

to an inference that the defendant disregarded a grave risk of death. (*Clark*, *supra*, 63 Cal.4th at p. 621.) *Tison* represents the more extreme example, where the Tison brothers gave an arsenal of lethal weapons to known convicted murderers. (*Tison*, *supra*, 481 U.S. at p. 139; see also *In re Loza*, *supra*, 10 Cal.App.5th at p. 53 [defendant gave gun to accomplice knowing that accomplice had just shot someone in the head]; *People v. Medina* (2016) 245 Cal.App.4th 778, 791–792 [defendant knew that his accomplice was a drug dealer and felon and intended to use force if necessary].) Here, Avila had committed armed robberies with Valencia and Lopez in the past, but there is no evidence that anybody was harmed during those prior robberies. And while it may be reasonable to infer that Avila's accomplices were, to say the least, unsavory characters with criminal pasts, the evidence does not show what those pasts were and what Avila specifically knew about his accomplices' criminal history.

Finally, in *Clark*, there was evidence the defendant tried to minimize the risk of violence. He timed the robbery so that it would occur after closing time, when most employees had left and the store was not open to the public. Also, the gun was supposed to be unloaded, although it was loaded with a single bullet. (*Clark*, *supra*, 63 Cal.4th at p. 622.) While there is no similar evidence that Avila minimized the risk of violence, there is also no evidence he heightened that risk, by, for example, instructing his accomplices to use lethal force should Flores resist. (Cf. *People v. Williams* (2015) 61 Cal.4th 1244, 1281 [defendant who was the "founder, ringleader, and mastermind" behind gang whose purpose was to commit robberies and carjackings and who instructed that resisting victims were to be shot was a major participant who acted with reckless indifference to human life].)

In sum, although we would not call this a "garden-variety armed robbery,"[9] nor can we say there is a factor beyond the fact that Avila knew he was participating in the armed robbery of a drug buyer that elevates his culpability to one that is closer to an actual killer and the Tison brothers at one end of the continuum rather than closer to Enmund at the other end. We therefore conclude that Avila is entitled to relief.

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[9] *Banks* said that the Tison brothers did not assist in a "garden-variety armed robbery." (*Banks*, *supra*, 61 Cal.4th at p. 802.) The court thereafter explained what it meant by this phrase: "A robbery in which the only factor supporting reckless indifference to human life is the fact of the use of a gun is what we meant by 'a garden-variety armed robbery[.]" (*Clark*, *supra*, 63 Cal.4th at p. 617, fn. 74.) The court did not otherwise propose to establish a judicial standard for what constitutes a "typical" armed robbery.

DISPOSITION

The true finding on the robbery-murder special circumstance allegation under section 190.2, subdivision (a)(17) is vacated. The matter is remanded with directions to resentence Avila consistent with the views expressed in this opinion.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.