Filed 8/31/17 In re Williams CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re TARA SHENEVA WILLIAMS, on Habeas Corpus.	B280379 (Los Angeles County Super. Ct. No. NA039425)

Petition for writ of habeas corpus. Superior Court of Los Angeles County, Richard R. Romero, Judge. Petition granted. The order to show cause is discharged and the matter is remanded to the trial court for resentencing.

Law Office of Kurt David Hermansen and Kurt David Hermansen; Kramon & Graham and Steven M. Klepper, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Stephanie C. Brenan, Deputy Attorneys General, for Respondent.

Petitioner Tara Sheneva Williams (Williams) has filed a petition for a writ of habeas corpus contending that this court's 2002 affirmance of her first-degree-murder special circumstance conviction must be reversed in view of the California Supreme Court's decision in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*). The *Banks* opinion provided an authoritative explanation for the "major participant" and "reckless indifference to human life" elements of Penal Code section 190.2, subdivision (d), in the context of a felony-murder special circumstance allegation against an aider and abettor who merely acted as a getaway driver in an armed robbery.[1]

The Attorney General contends Williams cannot raise a *Banks* claim by means of a habeas corpus petition and, even if she could, the facts shown at trial were sufficient to establish that she was both a major participant and that she exhibited a reckless indifference to human life.

We conclude the issue has been properly raised in this proceeding, and that there was insufficient evidence at trial to

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[1] Penal Code section 190.2, subdivision (d), provides: "[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 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."

All further statutory references are to the Penal Code unless otherwise specified.

sustain the special circumstance allegation. We will, therefore, grant Williams's petition for writ of habeas corpus and remand to the trial court for resentencing.

PROCEDURAL BACKGROUND

In 1999, a jury found Williams guilty of first degree murder and found true a felony-murder special circumstance allegation, as well as an allegation that a principal had been armed with a firearm. (§§ 187, 190.2, subd. (a)(17), 12022.) The trial court sentenced Williams to a prison term of life without possibility of parole. The murder occurred in 1993 at a Long Beach liquor store and the victim was the owner of the store. Two other persons were involved in the crime: Carde Keishon Taylor (Taylor), who shot the victim, and Schantel Williams (Schantel) who entered the store with Taylor but was apparently not in the store when the shooting occurred. Petitioner Williams, who acted as the getaway driver for the robbery, stayed in her car the entire time and drove Taylor to safety after the shooting.

Williams and Taylor were tried together before separate juries; Schantel was tried separately. In 2001, this court affirmed Williams's conviction in an unpublished opinion (B137365; Klein, P.J. with Croskey and Aldrich, JJ.). However, our Supreme Court granted review and transferred the case back to us for reconsideration in light of *People v. Cleveland* (2001) 25 Cal.4th 466, a case dealing with the discharge of a deliberating juror. In 2002, this court again affirmed Williams's conviction in an unpublished opinion (B137365; Klein, P.J. with Croskey and Aldrich, J.J.). This opinion rejected Williams's claims that the trial court had improperly discharged the

deliberating juror, and that there was insufficient evidence to sustain the special circumstance allegation.[2]

Williams pursued her juror discharge issue in the federal courts, resulting in the grant of habeas relief by the Ninth Circuit in *Williams v. Cavazos* (9th Cir. 2011) 646 F.3d 626, a decision that was subsequently reversed by a unanimous United States Supreme Court in *Johnson v. Williams* (2013) 568 U.S. 289 [133 S.Ct. 1088], and resulted in the Ninth Circuit issuing a second opinion which rejected Williams's habeas corpus claim about the discharged juror (see *Williams v. Johnson* (9th Cir. 2016) 840 F.3d 1006).

Williams filed the instant habeas corpus petition in our Supreme Court on April 18, 2016, claiming the jury's special circumstance finding was unsupported by the evidence in light of the *Banks* decision. After receiving an informal response to the petition, and an informal reply to that response, our Supreme Court issued an order to show cause returnable in this court. The order to show cause directed the Attorney General to file a formal return to Williams's petition. We have received and reviewed that return, as well as a formal traverse from Williams.

PRIOR OPINION

We adopt the relevant portion of the statement of facts from our 2002 unpublished opinion (B137365 [filed Jan. 18, 2002]) affirming Williams's conviction and sentence.

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[2] This same opinion affirmed Taylor's conviction, although it reversed in part and remanded for resentencing. Taylor was subsequently resentenced to a term of 25 years to life. Schantel's appeal was heard by Division Four of this district, which reversed (in an unpublished opinion, B146538) due to the erroneous admission of evidence.

"1. *Guilt phase – prosecution evidence.*

"a. *Evidence presented at both trials.*

"On October 17, 1993, Hung Mun Kim was working alone at his liquor store El Camino Liquors,[3] in Long Beach. Shortly before 4:00 p.m., [Schantel] entered the store and left a few seconds later. Defendant Taylor then entered the store, followed by Schantel, and they both left a few seconds later. Taylor re-entered the store, pointed a gun at Kim and, in the course of robbing the cash register, shot him twice in the head and killed him. No arrests were made until five years later.

"b. *Evidence presented at Williams's trial.*

"When Defendant Williams was interviewed by police, in December 1998, she initially denied any knowledge of the crime. After listening to a statement Taylor had given police, Williams said she had been at the scene of the crime, but that she was not involved and didn't know anything about it. Finally, Williams's story 'changed to: I was there. I went there with [Taylor] and [Schantel] to case the place to do a robbery. The robbery was not supposed to happen then. It was supposed to happen that night, and we were just looking to see if it was okay to rob that place.'

"Williams said the robbery had come about in the following way. Taylor had damaged Williams's car and agreed to pay for the repairs. Taylor asked Williams to drive her around to find a store she could rob. Williams, with her infant son in the car, picked up Taylor and Schantel. She knew that Taylor had a gun with her. They checked out two or three stores, looking for one that Taylor could rob after dark. The place they checked right before the liquor store was a video store, which was no good

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3 The store is also referred to in the record as "El Camino Liquor Store."

because it closed at 5:00 p.m. Williams then drove to El Camino Liquors and parked. Taylor and Schantel got out. Williams heard two gunshots and saw Taylor and Schantel running down the street. Williams drove over to Taylor and asked what happened. Taylor was hysterical and refused to answer. Williams drove Taylor and Schantel to the house of Schantel's aunt. Williams claimed there had never been a plan to rob the store during daylight hours.

"Williams and Taylor had committed a previous robbery in Culver City. In that robbery, Williams was the driver and Taylor was the robber. They had looked at 10 or 20 different stores before picking out one to rob. After the Culver City robbery, Williams and Taylor had a falling out. Williams said she broke off a sexual relationship they had been having, and Taylor was so upset she kidnapped Williams's son just to get Williams to pay attention to her. The only reason they got together for the liquor store robbery was so that Taylor could pay for the damage to Williams's car. Williams wanted Schantel present because Taylor was dangerous.

"c. *Evidence presented at Taylor's trial.*

"When she was initially questioned by police, Taylor denied any knowledge of or involvement in the robbery-murder and claimed she had never been to Long Beach. Shown pictures of herself taken by a surveillance camera in the liquor store, Taylor denied the pictures were of her. She said she had been working for the Job Corps in Utah on October 17, 1993. According to the Job Corps, however, Taylor didn't begin working there until November 30.

"Taylor then changed her story and gave the following statement. She and Williams had been having an affair. At the

same time, Williams was involved with Taylor's cousin, Kenny Lee. When Lee learned of the affair, he threatened to kill Taylor, so she was forced to move out of the house she had been sharing with Williams. She also bought a weapon for protection. Williams and Schantel called Taylor on the morning of the robbery, saying Schantel needed rent money. They came over in the afternoon and asked if Taylor wanted to participate in a robbery. Taylor said she didn't care. When they left, Taylor didn't bring her gun along because she didn't think they were planning to do the robbery right then. But Williams asked if Taylor had her gun with her, and they went back to get it. Williams's son was also in the car. Williams drove to Long Beach. Because Taylor was dressed for a party, she and Schantel exchanged clothing. Williams first stopped at a storage business. Taylor went in and concluded it wasn't a good place to rob. Williams drove around Long Beach some more and found a market. Taylor said the market wasn't a good place to rob because there were too many people inside. They continued driving, found a third store, and Taylor again said it was no good for a robbery.

"Williams was getting frustrated. They stopped at El Camino Liquors. Schantel went in and, when she returned to the car, she said this was a good place to rob. She explained the layout of the store. Taylor entered the store. She went up to the counter, pulled out the gun, and demanded money. She had a bag with her to put the money in. Kim opened the cash register. Taylor ordered him to get on the ground and she grabbed some money. Kim got on the ground, but he suddenly grabbed Taylor's leg. She fell and the gun accidentally went off. She continued to struggle with Kim, and the gun accidentally fired again. Kim

screamed and Taylor ran out of the store. Williams drove her to a friend's apartment. When Williams asked how much she had gotten from the cash register, Taylor said $6.00 and food stamps. Williams was upset.

"Taylor said she had been involved in five or six prior armed robberies with Williams, and two prior robberies with Schantel."

In determining that there was sufficient evidence to sustain the jury's true finding on the felony-murder special circumstance finding, our 2002 opinion provided the following analysis:

"Williams argues there was insufficient evidence to support a felony-murder special circumstance finding because she was neither a major participant in the underlying robbery, nor did she act with reckless indifference to human life. She is wrong. 'A felony-murder special circumstance is applicable to a defendant who is not the actual killer if the defendant, either with the "intent to kill" (§ 190.2, subd. (c)), or "*with reckless indifference to human life* and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies]." (§ 190.2, subd. (d) . . . .)' (*People v. Estrada* (1995) 11 Cal.4th 568, 572 [(*Estrada*)].)[4] ' "[R]eckless indifference to human life," ' as used in this context is a situation 'in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of

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[4] *Estrada* involved a home invasion robbery-murder in which both defendants were found inside the house along with the fatally injured occupant-victim. The opinion dealt with a trial court's sua sponte duty to define the phrase "reckless indifference to human life." (*Estrada*, *supra*, 11 Cal.4th at p. 573.)

death" [citation], . . .' (*Id.* at p. 577.) The phrase ' "reckless indifference to human life" ' will be 'commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.' " (*Ibid.*)

"Williams was a major participant because the evidence showed she planned the liquor store robbery and provided the transportation necessary to carry out the plan. (See *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [defendant and accomplice planned armed robbery at drug dealer's house].) The fact the robbery was carried out at a slightly different time than Williams may have contemplated does not change the result. Williams also acted with reckless indifference because she knew Taylor was armed and dangerous. Williams also left the crime scene without attempting to render aid or call for help for the victim. (See *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754 [defendant planned robbery, stood by as cohort stabbed victim and fled, leaving victim to die, thereby demonstrating reckless indifference to life].)"

CONTENTIONS

Williams contends: (1) our Supreme Court's decision in *Banks* is retroactively applicable to her earlier conviction for felony-murder special circumstance murder, and she has properly raised this claim in a habeas corpus petition; (2) under the reasoning of *Banks*, her special circumstance finding must be reversed for insufficient evidence.

DISCUSSION

1. Banks *is applicable and has been properly raised in Williams's habeas petition.*

Williams contends the *Banks* decision applies to her case and that this claim has been properly raised in her habeas corpus petition. We agree.

The Attorney General does not contest the general retroactivity of *Banks*, and with good reason. The well-settled rule is that California Supreme Court substantive decisions that do not establish new law are retroactive to cases that have already been closed. " 'To determine whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive . . . ; but if it does not, "no question of retroactivity arises," because there is no material change in the law. [Citations.]' [Citation.] An example of a decision which does not establish a new rule of law is one in which we give effect 'to a statutory rule that the courts had theretofore misconstrued (*People v. Mutch* (1971) 4 Cal.3d 389, 394) . . .' [Citations.] 'Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. [Citation.]' [Citation.]" (*Woosley v. State of California* (1992) 3 Cal.4th 758, 794.) As will be explained fully *post*, *Banks* precisely fits this definition and, therefore, it is clear that *Banks*'s interpretation of section 190.2, subdivision (d), did not establish a new rule of law,

but rather clarified the original meaning of a statutory provision.[5]

The Attorney General does, however, contest the propriety of Williams using the vehicle of a habeas corpus petition to raise the issue, asserting that to do so violates two fundamental principles of accepted habeas corpus practice: (1) claims previously raised and rejected on direct appeal may not be raised in a habeas corpus petition; and (2) claims based on insufficient evidence are not cognizable in a habeas corpus petition.

These are indeed two general rules of habeas practice. "There may be no more venerable a procedural rule with respect

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[5] The Attorney General acknowledges that, because *Banks* "did not create a new rule," he "does not assert that *Banks* poses any retroactivity issue." We would point out that *Banks* is also retroactive under the federal due process test set forth in *Fiore v. White* (2001) 531 U.S. 225, where the defendant had been "convicted of violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. After Fiore's conviction became final, the Pennsylvania Supreme Court interpreted the statute for the first time, and made clear that Fiore's conduct was not within its scope. However, the Pennsylvania courts refused to grant Fiore collateral relief." (*Id*. at p. 226.) Once the Pennsylvania Supreme Court confirmed that its new decision had not announced a new rule of law, but " 'merely clarified' the statute and was the law of Pennsylvania—as properly interpreted—at the time of Fiore's conviction," it became clear that the "case presents no issue of retroactivity. Rather, the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit. [¶] This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process." (*Id*. at p. 228.)

to habeas corpus than what has come to be known as the *Waltreus* rule[6]; that is, legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus." (*In re Reno* (2012) 55 Cal.4th 428, 476 (*Reno*).) In addition, "claims of the insufficiency of evidence to support a conviction are not cognizable in a habeas corpus proceeding. (*In re Lindley* [(1947) 29 Cal.2d 709 (*Lindley*)].) [¶] The rule of *Lindley* recognizes that the job of sifting the evidence and weighing the credibility of witnesses is for the trier of fact, usually the jury, at the time of trial [citation], and that claims of evidentiary insufficiency must be raised in either a motion for a new trial, on appeal, or both. Aside from a claim of newly discovered evidence, that is, evidence *not* presented at trial, which is itself subject to strict limits [citation], routine claims that the evidence presented at trial was insufficient are not cognizable in a habeas corpus petition." (*Id.* at p. 505, fn. omitted.)

But both of these rules have acknowledged exceptions. One of the recognized *Waltreus* exceptions is "where the [trial] court acted in excess of its jurisdiction." (*Reno*, *supra*, 55 Cal.4th at p. 478.) "Habeas corpus is available in cases where the court has acted in excess of its jurisdiction. [Citations.] . . . [T]he term 'jurisdiction' is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts. [Citations.] In accordance with these principles a defendant is

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6 *In re Waltreus* (1965) 62 Cal.2d 218.

entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. [Citations.]" (*In re Zerbe* (1964) 60 Cal.2d 666, 667–668; see also *In re Harris* (1993) 5 Cal.4th 813, 840, fn. omitted ["[W]here a habeas corpus petitioner raises a legitimate claim that the trial court acted in excess of its jurisdiction, the *Waltreus* rule will not operate as a bar to a full airing of the grievance in a collateral proceeding. [Citations.] 'Fundamental jurisdictional defects [i.e., acts in excess of jurisdiction], like constitutional defects, do not become irremediable when a judgment of conviction becomes final, *even after affirmance on appeal*.' [Citation.]"].)

And as Williams points out, the *Lindley* rule only applies to "routine" claims of insufficient evidence. (See *Reno*, *supra*, 55 Cal.4th at p. 505, italics added ["*routine* claims that the evidence presented at trial was insufficient are not cognizable in a habeas corpus petition"].) *Lindley* said: "[E]vidence which is uncertain, questionable or directly in conflict with other testimony does not afford a ground for relief upon habeas corpus, and the proceeding may not be used as a device for the correction of *mere errors or irregularities* committed within the exercise of an admitted jurisdiction. [Citation.] [¶] Upon habeas corpus, ordinarily it is not competent to retry issues of fact or the merits of a defense, such as insanity, and the sufficiency of the evidence to warrant the conviction of the petitioner is not a proper issue for consideration." (*Lindley*, *supra*, 29 Cal.2d at pp. 722–723.)

In contrast, the case at bar involves a fundamental issue of criminal culpability that did not come within the scope of either the jury's verdict or Williams's direct appeal from that verdict. The case at bar involves a situation in which, after Williams's

direct appeal was rejected, our Supreme Court clarified the meaning of the "major participant" and "reckless indifference to human life" elements of first degree murder on a theory of felony-murder special circumstances in precisely the situation at issue here: a getaway driver who was not at the crime scene.

The Attorney General complains that it was only in her "counsel-drafted informal reply" brief that Williams argued *Lindley* was "inapplicable because her *Banks* claim is not routine." Quoting *Reno*, the Attorney General asserts that this "attempted justification came too late. Rather, 'the petition, not the informal reply or traverse, must include specific allegations indicating why a seemingly applicable procedural bar does not apply, or why the case falls within an exception to the procedural bar.' "

But the Attorney General has improperly decontextualized this quotation. *Reno* involved a habeas petitioner who was guilty of "abusing the writ" by filing repetitive and successive habeas petitions. (See *People v. Trujeque* (2015) 61 Cal.4th 227, 251 ["*In re Reno* dealt with specific procedural issues when a habeas corpus petitioner collaterally attacks his final conviction and 'has reraised *all* prior appellate claims *en masse*.' "].) *Reno* involved a second habeas corpus petition that was more than 500 pages long and raised 143 separate claims, nearly all of which were "not cognizable or are procedurally barred in this renewed collateral attack." (*Reno*, *supra*, 55 Cal.4th at p. 443.)

It was in this context that *Reno* said: "When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues. *While the traverse may allege additional facts in support of the*

claim on which an order to show cause has issued, attempts to introduce additional claims or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief.' [Citations.] [¶] For similar reasons, belatedly raising new claims or theories for the first time in the informal reply brief [citation] is also improper." (*Reno*, *supra*, 55 Cal.4th at p. 459, fn. 15.) "The rule that a claim for relief must be supported by factual allegations in the petition itself, and not in the traverse, logically applies to a petitioner's contention that a particular procedural bar is inapplicable. . . . [T]he petition, not the informal reply or traverse, must include specific allegations indicating why a seemingly applicable procedural bar does not apply, or why the case falls within an exception to the procedural bar. . . . [N]ew theories addressing the applicability of various procedural bars are, in the usual case, improper when raised for the first time in the traverse. Moreover, by waiting until his traverse to raise new justifications for raising claims barred by various procedural rules, petitioner has deprived the People of any opportunity to respond to or rebut the argument." (*Ibid.*)

However, not only is Williams not guilty of abusing the writ, but the People clearly have not been deprived of the opportunity to challenge the applicability of the *Lindley* rule to her. The issue was first raised in the Attorney General's informal response in the Supreme Court, responded to by Williams's reply to the Attorney General's informal response, and then again raised in the formal briefing before this court.

Finally, the Attorney General argues in a footnote that "because *Banks* merely clarified a rule in existence long before

the crime and Williams's conviction, her sufficiency claim is untimely." But of course, *Banks* did more than "merely clarify" the meaning of section 190.2, subdivision (d); rather, it was the first time our highest court held that this statute was not intended to target getaway drivers in routine felony-murder commercial robberies. Moreover, *Banks* was filed on July 9, 2015, and Williams's habeas petition was filed less than a year later on April 18, 2016. "A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner. 'It has long been required that a petitioner explain and justify any *significant delay* in seeking habeas corpus relief.' [Citation.]" (*Reno*, *supra*, 55 Cal.4th at p. 459, italics added.) We do not believe Williams was guilty of a significant delay.

We conclude, therefore, that raising this issue in the context of a habeas corpus petition was not improper.

2. *Legal authority relevant to Williams's petition.*

As we explained *ante*, section 190.2, subdivision (d), was designed to codify the spectrum of felony-murder aiding and abetting culpability as set forth in the United States Supreme Court cases of *Tison*[7] and *Enmund*[8], with *Enmund* constituting a generic robbery getaway-driver situation, and *Tison* constituting far more serious misconduct.

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[7] *Tison v. Arizona* (1987) 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (*Tison*).

[8] *Enmund v. Florida* (1982) 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (*Enmund*).

We begin with a discussion of the United States Supreme Court's decisions in *Tison* and *Enmund*, followed by our own Supreme Court's decisions in *Banks*.

a. *The* Enmund *decision.*

In *Enmund*, the evidence showed that "Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. . . . Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, and took their money and fled." (*Enmund*, *supra*, 458 U.S. at p. 784.) Other evidence pointed to Earl Enmund as the getaway driver. Enmund was convicted of first degree murder on a felony-murder theory and sentenced to death. On appeal, "the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used." (*Id.* at p. 786, fn. 2.) In *Banks*, our Supreme Court added these details about Enmund's role in the crime: "[D]efendant 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." (*Banks*, *supra*, 61 Cal.4th at p. 799.)

The United States Supreme Court reversed and remanded for further proceedings, reasoning: "[T]he record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. . . . Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment." (*Enmund*, *supra*, 458 U.S. at p. 798.) "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. [Citation.]" (*Id*. at p. 799.) Hence, "[b]ecause the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion." (*Id*. at p. 801.)

b. *The* Tison *decision.*

Our Supreme Court described the facts in *Tison* as follows: "Prisoner Gary Tison's sons Ricky, Raymond, and Donald Tison conducted an armed breakout of Gary and his cellmate from

prison, holding guards and visitors at gunpoint. During the subsequent escape, their car, already down to its spare tire, suffered another flat, so the five men agreed to flag down a passing motorist in order to steal a replacement car. Raymond waved down a family of four; the others then emerged from hiding and captured the family at gunpoint. Raymond and Donald drove the family into the desert . . . [where] Gary and his cellmate then killed all four family members. When the Tisons were later apprehended at a roadblock, Donald was killed and Gary escaped into the desert, only to die of exposure. [Citation.] Ricky and Raymond Tison and the cellmate were tried and sentenced to death. The trial court made findings that Ricky and Raymond's role in the series of crimes was ' "very substantial" ' and they could have foreseen their actions would ' "create a grave risk of . . . death." ' [Citation.]" (*Banks*, *supra*, 61 Cal.4th at pp. 799–800.)

Relying on its analysis in *Enmund*, the United States Supreme Court in *Tison* reasoned: "*Enmund* explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment. *At one pole was 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*.[9] Only a small minority of States even authorized the death penalty in such circumstances and even within those jurisdictions the death penalty was almost never exacted for such a crime. The Court held that capital punishment was disproportional in these cases.

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9 We presume this last phrase was intended to mean any "homicidal culpable mental state."

Enmund *also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to kill, or intended to kill*. The Court clearly held that the equally small minority of jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted. *The Tison brothers' cases fall into neither of these neat categories*." (*Tison*, *supra*, 481 U.S. at pp. 149–150, italics added.)

The Tison brothers argued they should not be subject to capital punishment because they did not have any intent to kill. The United States Supreme Court agreed they lacked actual intent to kill, but reasoned the circumstances had nevertheless demonstrated a very severe form of culpability: "Participants in violent felonies like armed robberies can frequently 'anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony.' Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. . . . Petitioners do not fall within the 'intent to kill' category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment. [¶] On the other hand, it is equally clear that petitioners also fall outside the category of felony murderers for whom *Enmund* explicitly held the death penalty disproportional: their degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life." (*Tison*, *supra*, 481 U.S. at pp. 150–151.)

The United States Supreme Court explained its reasons for this conclusion in detail: "Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown. [¶] Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnaping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims. [¶] These facts not only indicate that the Tison brothers' participation in the crime was anything but minor; they also would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life. The issue raised by this case is whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of

reckless indifference to the value of human life." (*Tison*, *supra*, 481 U.S. at pp. 151–152.)

The court concluded that such a defendant could be executed: "[W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. [¶] The petitioners' own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial.' Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family . . . . [¶] [M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Tison*, *supra*, 481 U.S. at pp. 157–158, fn. omitted.)

c. *The* Banks *decision*.

In *Banks*, the California Supreme Court described the adoption of section 190.2, subdivision (d), as follows: "In 1990, the voters passed Proposition 115, which adopted a wide range of criminal justice reforms, including extending death penalty eligibility to 'major participant[s]' in felony murders. [Citations.] . . . [¶] Section 190.2(d) was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127, which articulates the constitutional limits on executing felony murderers who did not personally kill. *Tison* and a prior

decision on which it is based, *Enmund v. Florida* (1982) 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140, collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions. Section 190.2(d) must be accorded the same meaning." (*Banks*, *supra*, 61 Cal.4th at p. 794, fn. omitted.)

The issue before the court in *Banks* was under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty. *Banks* gleaned the following lessons from *Tison* and *Enmund*. "The defendants' actions in *Tison* . . . and *Enmund* . . . represent points on a continuum. [Citation.] Somewhere between them, at conduct less egregious than the Tisons' but more culpable than Earl Enmund's, lies the constitutional minimum for death eligibility." (*Banks*, *supra*, 61 Cal.4th at pp. 801–802.) "The Tisons did not assist in a garden-variety armed robbery, where death might be possible but not probable, but were substantially involved in a course of conduct that could be found to entail a likelihood of death," whereas "Enmund *was* just a getaway driver, sitting in a car away from the murders." (*Id*. at pp. 802–803.)

"Among those factors that distinguish the Tisons from Enmund . . . are these: 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? No 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' [citation] was sufficiently significant to be considered 'major' [citations]." (*Banks*, *supra*, 61 Cal.4th at p. 803, fn. omitted.) "In cases where lethal force is not part of the agreed-upon plan, absence from the scene may significantly diminish culpability for death. [Citation.] Those not present have no opportunity to dissuade the actual killer, nor to aid the victims, and thus no opportunity to prevent the loss of life. Nor, conversely, are they in a position to take steps that directly and immediately lead to death, as with the Tisons' capturing and standing guard over the victims. [Citation.]" (*Id*. at p. 803, fn. 5.)

Banks applied these factors to defendant Matthews, who had acted as a getaway driver for the armed robbery of a medical marijuana dispensary. Matthews's accomplices entered the dispensary, tied up employees, and searched the premises. Shots were fired and the accomplices tried to flee, but a security guard intervened. After one of the accomplices shot the guard, they fled and several of them were picked up by Matthews. (*Banks*, *supra*, 61 Cal.4th at p. 795.)

Matthews was convicted of first degree murder with a felony-murder special circumstance and sentenced to a term of life without possibility of parole. "On appeal, the Court of Appeal rejected Matthews's challenge to the sufficiency of the evidence supporting the special circumstance true finding. It held his

actions as a getaway driver in supporting the underlying robbery, with knowledge death was always a possibility in an armed robbery, were legally sufficient under section 190.2(d)." (*Banks*, *supra*, 61 Cal.4th at p. 797.)

Our Supreme Court reversed: "Because the record establishes Matthews was no more culpable than the getaway driver in *Enmund* . . . , the evidence was insufficient as a matter of law to support the special circumstance, and Matthews is statutorily ineligible for life imprisonment without parole." (*Banks*, *supra*, 61 Cal.4th at p. 794.)

As for the major-participant prong, *Banks* reasoned: "The evidence in the record places Matthews at the *Enmund* pole of the *Tison–Enmund* spectrum. Indeed, as Matthews argues, his conduct is virtually indistinguishable from Earl Enmund's. No evidence was introduced establishing Matthews's role, if any, in planning the robbery. No evidence was introduced establishing Matthews's role, if any, in procuring weapons. Matthews and two confederates—though not the shooter—were gang members, but, in contrast to the convicted murderers the Tison brothers chose to free and arm, no evidence was introduced that Matthews [or the two non-shooting accomplices] had themselves previously committed murder, attempted murder, or any other violent crime. The crime itself was an armed robbery; *Enmund* and *Tison* together demonstrate that participation in an armed robbery, without more, does not involve 'engaging in criminal activities known to carry a grave risk of death.' [Citation.] During the robbery and murder, Matthews was absent from the scene, sitting in a car and waiting. There was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or

could have prevented it. [¶] On this record, Matthews was, in short, no more than a getaway driver, guilty like Earl Enmund of 'felony murder *simpliciter*' [citations] but nothing greater." (*Banks*, *supra*, 61 Cal.4th at p. 805, fn. omitted.) "At most, there was evidence Matthews participated in the robbery, from which a jury might reasonably infer he had some role in planning it, but the nature of that role is, on the record before us, a matter of pure conjecture." (*Id*. at p. 805, fn. 6.) "Matthews, like Enmund and unlike the Tisons, did not see the shooting happen, did not have reason to know it was going to happen, and could not do anything to stop the shooting or render assistance." (*Id*. at p. 807.) Hence, "[i]t follows that Matthews . . . as a matter of law, cannot qualify as a major participant under section 190.2(d)." (*Ibid*.)

In addition, *Banks* held that the evidence was insufficient to show that Matthews had acted with reckless indifference to human life: "Consideration of Matthews's mens rea also leads us to conclude he is legally ineligible for a sentence of life imprisonment without parole. Reckless indifference to human life 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' [Citation.] There was evidence from which the jury could infer Matthews knew he was participating in an armed robbery. But nothing at trial supported the conclusion beyond a reasonable doubt that Matthews knew his own actions would involve a grave risk of death. There was no evidence Matthews intended to kill or, unlike the Tisons, knowingly conspired with accomplices known to have killed before. Instead, as in *Enmund,* Banks's killing of Gonzalez was apparently a spontaneous response to

armed resistance from the victim." (*Banks*, *supra*, 61 Cal.4th at p. 807.)

"If Enmund's actions represented the outer limit of conduct immune from death eligibility, *Tison* would have been an easy case. It was not. We do not view *Enmund* as defining a maximum for ineligibility for the death penalty, any more than we view the egregious actions of the Tison brothers as a constitutional minimum level of culpability for death eligibility. [¶] Because on the evidence in the record no rational trier of fact could have found Matthews' conduct supported a felony-murder special circumstance, the jury's special circumstance true finding cannot stand." (*Banks*, *supra*, 61 Cal.4th at p. 811.)

d. *The* Clark *decision*.

In *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), the evidence showed that Clark had planned the robbery of a CompUSA store after closing time, but while some employees remained on the premises. Clark's accomplice, Ervin, went into the store with a gun and herded three employees into a bathroom where he handcuffed them. Clark was waiting outside with other accomplices, ready to steal computers from the store. But the plan went awry when Kathy Lee, the mother of one of the employees, apparently arrived at the rear loading dock in order to pick up her son. Ervin shot and killed Lee. Ervin was apprehended immediately, but Clark and the other accomplices drove off. Following his convictions for this and an unrelated murder, Clark was sentenced to death on felony-murder special circumstance findings. On appeal, Clark contended the trial evidence was insufficient to establish that he had been both a major participant in the CompUSA robbery-murder and that he had acted with reckless indifference to human life. *Clark* held:

"We need not decide whether defendant was a major participant . . . because . . . the evidence was insufficient to uphold a finding that defendant acted with reckless indifference to human life." (*Id*. at p. 611.)[10]

Clark utilized several specific factors for measuring a getaway driver's degree of reckless indifference. *Clark* stated that while "[a] defendant's *use* of a firearm . . . can be significant to the analysis," the "mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life. [Citation.]" (*Clark*, *supra*, 63 Cal.4th at p. 618.) Another factor to be considered is the defendant's presence at the crime scene. While merely sitting in a getaway car is less culpable than being at the actual scene of the killing, "physical presence is not invariably a prerequisite to demonstrating reckless indifference to human life. Where, for example, a defendant instructs other members of a criminal gang carrying out carjackings at his behest to shoot any resisting victims, he need not be present when his subordinates carry out the instruction in order to be found to be recklessly indifferent to the lives of the victims. [Citation.]" (*Id*. at p. 619.)

Another factor is the duration of the crime. "Courts have looked to whether a murder came at the end of a prolonged period of restraint of the victims by defendant. The Tisons, the high court noted, 'guarded the victims at gunpoint while [the group of perpetrators] considered what next to do.' [Citation.] Where a victim is held at gunpoint, kidnapped, or otherwise restrained in

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10 Clark's death sentence was affirmed, however, because he had also been convicted of witness-killing and lying-in-wait special circumstance murders in connection with the second killing.

the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder." (*Clark*, *supra*, 63 Cal.4th at p. 620, fn. omitted.)

Another significant factor is the "defendant's knowledge of factors bearing on a cohort's likelihood of killing . . . . *Tison,* for example, emphasized the fact that the Tison brothers brought an arsenal of lethal weapons into the prison which they then handed over to two convicted murderers, one of whom the brothers knew had killed a prison guard in the course of a previous escape attempt. [Citation.] The Supreme Court of Arizona, in affirming that a defendant had acted with reckless indifference to human life, noted that he was aware that his cohort in a series of robberies 'had a violent and explosive temper.' [Citation.]" (*Clark*, *supra*, 63 Cal.4th at p. 621.) "A defendant's willingness to engage in an armed robbery with individuals known to him to use lethal force may give rise to the inference that the defendant disregarded a 'grave risk of death.' [Citation.]" (*Ibid*.)

Applying these factors, *Clark* concluded there was insufficient evidence of the defendant's reckless indifference to human life: "Defendant's culpability for Lee's murder resides in his role as planner and organizer, or as the one who set the crime in motion, rather than in his actions on the ground in the immediate events leading up to her murder. But also relevant to his culpability as planner, there is evidence supporting that defendant planned the crime with an eye to minimizing the possibilities for violence.[11] Such a factor does not, in itself,

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11 "[D]efendant planned the robbery for after closing time, when most of the store employees were gone. Defendant anticipated some employees would be present, but the plan was

necessarily preclude a finding of reckless indifference to human life. But here there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery. Given defendant's apparent efforts to minimize violence and the relative paucity of other evidence to support a finding of reckless indifference to human life, we conclude that insufficient evidence supports the robbery-murder and burglary-murder special-circumstance findings, and we therefore vacate them." (*Clark*, *supra*, 63 Cal.4th at p. 623.)

3. *Under* Banks, *Williams did not violate section 190.2, subdivision (d).*

a. *Standard of review*.

In *People v. Williams* (2015) 61 Cal.4th 1244, the California Supreme Court explained the appropriate standard of review in this situation: "Defendant contends insufficient evidence supported the robbery-murder special circumstance based on an aiding and abetting theory. According to defendant, the evidence failed to establish he was a major participant in the target offense or exhibited reckless indifference to human life as

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to handcuff them in a bathroom, while the robbery itself was conducted outside of their presence. Thus, although the planned robbery was to be of substantial duration, involving multiple individuals loading computers into a U-Haul van, the period of interaction between perpetrators and victims was designed to be limited. Because the robbery was planned for a public space and involved the prolonged detention of employees, the crime did involve the risk of interlopers, such as Lee, happening upon the scene. But overall, the evidence was insufficient to show that the duration of the felony under these circumstances supported the conclusion that defendant exhibited reckless indifference to human life." (*Clark*, *supra*, 63 Cal.4th at pp. 620–621.)

required by section 190.2, subdivision (d). [¶] In considering such a challenge ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]' [Citation.] 'The same standard applies to special circumstance allegations.' [Citation.]" (*Id.* at pp. 1280–1281.)

b. *What the jury knew about Williams's involvement in the robbery.*

In the case at bar, the jury heard only two items of evidence bearing on Williams's culpability under section 190.2, subdivision (d): forensic evidence relating to the state of the victim's body, and Williams's police statements.

Detective Dennis Robbins testified that when he responded to the liquor store he found the victim, Hung Mun Kim, lying behind the counter. Robbins said Kim had been shot in the head and that there was a gun in his right front pocket.

Williams was interviewed by the police twice. On December 16, 1998, she admitted having been the getaway driver for the robbery of Kim's liquor store. Although Williams's police statement is not always clear on details and chronology, the events leading up to the robbery appear to have been the following. She and Taylor had a short-lived sexual relationship.

Apparently during that time, Williams joined Taylor in carrying out a robbery "in the summer time" before the Kim robbery. After checking out a number of possibilities, they settled on a "mom and pop" market in Culver City. Williams waited in the car while Taylor went into the store and "took about a couple hundred of dollars." "[Q.]: Nothing happened in that one? No shots were fired? [¶] [Williams]: No. All she did was told the man to lay down. When she told me, she told me cuz I was not in the store and never went inside the store. She told me that she told the man to lay down."

After the Culver City robbery, Williams and Taylor went out one more time to look for other places to rob. They checked out "over ten, not more than twenty" possibilities, but never found the right place so they just went home. This happened about a month after the Culver City robbery.

Sometime thereafter, Williams ended their sexual relationship, which angered Taylor. In order to regain Williams's attention, Taylor kidnapped Williams's young son by going to his school and pretending to be his aunt. After getting her son back, Williams resumed an uneasy relationship with Taylor that was punctuated by fights. On one occasion, Taylor damaged Williams's car. Williams said Taylor "kidnapped my son from school . . . just so I could talk to her. She would do everything in her power to get my attention . . . . So after I got my son . . . we used to fight a lot . . . because I didn't want to be with her." "[Q]: So at some point you must have become friends again? [¶] [Williams]: We never became friends. The only reason why that happened that night [*sic*] it was because she said that she was willing to go out and do a robbery to pay for the damages on my car and that was the only reason why I was driving her around."

Williams told police her role in the Long Beach robbery was just to drive the car. Schantel was to be a lookout, and Taylor was the one who would do the actual robbery. The only one who was carrying a gun was Taylor. Williams said: "[E]arlier that day I knew she had a gun because she pulled it out and you know just playing with it. She always used to play with her guns. [¶] . . . [¶] She used to carry a gun everyday." Williams said she herself had never even fired a gun in her life and, so far as she knew, Schantel had never possessed a gun.

Williams said the "[o]nly reason why Schantel was being picked up that day, is because she knew that me and [Taylor] was having problems and I felt that my life was in danger because [Taylor] carr[ied] guns, I didn't. I could fight her, but . . . I cannot compete with no gun. So I wanted if anything happened, I wanted Schantel to be a witness . . . cuz me and [Taylor] got into it . . . a lot of times we get in the car together and she says she wants to talk and she'll pull a gun out on me and threaten me, or you know whatever and these are incidents that actually happened so . . . I ask Schantel to go . . . ." Williams said she "asked Schantel to go . . . because I wanted her to be with me as for protection wise . . . . I didn't trust [Taylor]. I didn't trust her because she was in to things that I really didn't know aware of [*sic*]." Williams was asked, "If you're concerned for your safety around her, why are you willing to go out and do robberies, and you know she's carrying a gun, why be with her at all?" Williams replied it was because Taylor had apologized about damaging Williams's car and said she'd get the car fixed: "I did it because she says she was going to take care of what she had committed [i.e., damaging the car] and that was just the chances I was taking to be around her under those conditions."

On the day that Kim was killed, Williams and Taylor picked up Schantel. Williams had her son in the car. They considered robbing a video store but decided against it because the store closed at 5:00 p.m., and they had intended to pull the robbery later that night or some other night. They drove around some more and then saw the liquor store on Cherry Street. Williams parked, "and Schantel and [Taylor] got out of the car together and . . . not [too] long I heard gunshots. I didn't know where the gunshots were coming from and the next thing I know I seen [Taylor] running down the street. I drove towards [her], asked her what's going on, she would not answer me, she would seem to be very hysterical, couldn't talk at the time. So I asked her to get in the car. At that point, after [she] got in the car, I drove her over to Schantel's Aunt's house . . . ." Schantel had disappeared, and Williams did not see her until later that night.

Williams insisted that "we didn't have the intentions from my understanding . . . to go into that store and rob that store during broad daylight." But she acknowledged believing that if they had found a good place to rob, all three of them would have taken part as planned: Williams driving, Schantel acting as a lookout, and Taylor doing the robbing.

Williams was subsequently interviewed by the police on January 28, 1999. She said Schantel's job had been to go into the liquor store, buy something, and look for surveillance cameras. Williams acknowledged she had told Schantel to look for surveillance cameras and to see if there was any money in the cash register:

"[Williams]: [A]nything I asked Schantel, she's willing to do.

"[Detective Robbins]: Okay. Did you tell her what to look for when she went into the store?

"[Williams]: Um, I did.

"[Detective Robbins]: Which was what?

"[Williams]: What I . . . stated before was the surveillance.

"[Detective Robbins]: The surveillance cameras and what, oh you said to see if there was any money in the cash register?

"[Williams]: Yes."

Detective Robbins also testified that when he interviewed Williams, he drew a diagram and Williams indicated "where she parked, on the north curb of Poppy" across the street from Kim's liquor store. Williams said she did not see what happened inside the liquor store and that although she heard two gunshots, she didn't know where they had come from. Robbins agreed that based on where Williams said she had been parked, she would have had to "turn to her left and look back over her shoulder" in order to see the front of the liquor store.

c. *There was insufficient evidence to prove reckless indifference to human life under section 190.2, subdivision (d).*

Although the "major participant" factor might be a close argument, given that Williams seemed to have been an equal partner with Taylor in scouting out places to rob and that they had committed at least one prior armed robbery together, we believe that—just as in *Clark*—there was insufficient evidence to sustain a finding that Williams engaged in criminal activity known to carry a grave risk of death.

The evidence showed Williams acted as the getaway driver in a routine armed robbery of a commercial establishment. Because she was not inside the liquor store herself, Williams was in no position to prevent Taylor from shooting Kim, or to come to

Kim's immediate aid. What they had planned was a very rapid stick-up, and the evidence tended to show that—had there been customers inside the store—Schantel would have waved off the robbery attempt.

Although there was evidence that Williams feared violence from Taylor, that same evidence showed that what Williams specifically feared was that Taylor—because of their personal history—might get violent with *her*, which is why Williams wanted Schantel along that day. This is far different from the kind of lethal accomplices that the Tison brothers knowingly embraced when they assisted their father and his cellmate in the prison escape, and then actively participated in the subsequent kidnapping of an entire family in order to commandeer their vehicle. The Tison brothers thus knowingly participated in, and watched without intervening in, the execution of an entire family by known killers. There was no evidence Taylor had previously killed anyone or, if she did, that Williams had any knowledge of it. The prior Culver City robbery committed by Williams and Taylor had also involved a gun, but no shooting.

In sum, the evidence showed only a garden-variety armed robbery where death was at most a known possibility, but nothing close to a probability. We conclude Williams's state of mind was far closer to that of the defendants in *Enmund, Banks*, and *Clark*, than to the brothers' state of mind in *Tison*, and that it did not constitute reckless indifference to human life. Therefore, the felony-murder special circumstance finding under section 190.2, subdivision (d), must be vacated.

DISPOSITION

The petition for writ of habeas corpus is granted. The order to show cause is discharged and the matter is remanded to the trial court for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, 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.