Filed 1/24/18 In re Brown CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KAREEM JAMAL BROWN, on Habeas Corpus.	B280819 (Los Angeles County Super. Ct. No. KA028967)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Robert W. Armstrong, Judge. Relief granted.

Kareem Jamal Brown, in pro. per., and James M. Crawford, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The question before us is whether petitioner Kareem Jamal Brown is entitled to habeas corpus relief based on his claim that the evidence is insufficient to support a felony-murder special circumstance finding in light of the California Supreme Court's rulings in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522, 609-623 (*Clark*).

On April 11, 1996, a jury convicted Brown of first degree felony murder for aiding and abetting the attempted robbery of the Chino Valley Bank, during which codefendant Bobby White shot and killed Theresa Hernandez, a teller at the bank. Brown was waiting outside the bank with the getaway cars when the attempted robbery and shooting occurred. There was no evidence from which the jury could find Brown intended to kill Hernandez. Brown was sentenced to life without the possibility of parole.

Long after Brown's conviction, the California Supreme Court decided *Banks* and *Clark*. In these cases, the California Supreme Court discussed and clarified when a life without parole sentence can be imposed upon a defendant convicted of felony murder as an aider and abettor. As the court explained, "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*, *supra*, 61 Cal.4th at p. 798.) As we discuss below, the evidence was insufficient to support a finding that Brown acted with reckless indifference to human life. Consequently, we grant the habeas petition.

FACTUAL BACKGROUND[1]

A. *Introduction*

On August 22, 1995 the Chino Valley Bank in Pomona was robbed by three masked men, later identified as Brown's codefendants, Bobby Cortez White, Jamon Donte Carr, and Derrick Lynn Wilson.[2] Two of the men were armed. Before entering the bank one of the men shot at the bank's security guard, Eddie Scott, who managed to flee through the parking lot to a nearby gas station, where he called the police. White, Carr and Wilson entered the bank and told the customers to "hit the deck." Wilson and Carr jumped over the teller counter, grabbed Theresa Hernandez, a bank employee, and ordered her to open the safe. Hernandez dropped her keys, and White shot her in the back, killing her. White, Carr and Wilson then ran out of the bank and fled. The three, along with Brown, who was outside the bank in one of the getaway cars, were ultimately apprehended.

B. *Eyewitness Accounts*

That morning Jeri Burns, who lived in a house located across a vacant lot from the bank, was playing in her backyard with her puppies. She looked up and saw a blue car, either a Buick or an Oldsmobile, pull into the vacant lot, followed by a brown Toyota Celica. The blue car had two occupants: Brown

---

1 The factual background comes from our decision in the direct appeal. (*People v. White* (July 20, 1998, B104556) [nonpub. opn.].)

2 At the time of the robbery, Wilson, White and Carr were 17 years old. They were tried as adults.

and Quentin Smith.[3] Burns asked the driver of the brown car, Brown's wife Thea, to move her car out of the way so Burns could exit her driveway. When Burns returned to her house 15 minutes later, both cars were gone. Later, while Burns was in her backyard with her sister Joyce playing with the puppies, the blue car returned, minus its passenger, pulled into the lot, circled around, and parked next to a nearby medical building.

Five or ten minutes later, Burns and Joyce saw three men, who appeared to be teenagers, dressed in dark sweatshirts and baggy pants with blue bandannas around their necks, approach the bank through an opening in a wall along the alleyway next to the vacant lot. The men were walking together, shoulder to shoulder, and Burns observed the handle of a shotgun sticking out of the pants of one of the men, later identified as Wilson. The three then pulled the bandannas over their faces; one looked at Burns and then quickly looked away. Burns was frightened, and she and Joyce ran to Joyce's house, which was next door to Burn's house. While in the kitchen, they heard two gunshots coming from the direction of the bank.

Scott, on duty that morning as the bank's security guard, was near the bank's outdoor teller machine when he saw the three men approaching from the alleyway. They were dressed in dark clothing and hooded sweatshirts, which he thought was odd considering it was summertime. One of the men pulled out a silver handgun and began firing at Scott from a very close range. As Scott ran zig-zag through the parking lot to escape, several

---

[3] Smith participated in the planning and execution of the robbery, but he died prior to trial.

more shots were fired at him.[4] Scott ran to a nearby gas station where he called the police.

Inside the bank, Mark Flannery, the service manager, heard gunshots coming from outside the bank. The two tellers at the drive-through window told him the bank was "going to be robbed" and ran towards him. Flannery activated the silent alarm. He saw that two men, who were masked, had entered the bank and jumped over the teller counter. One of them ordered everyone in the bank to "hit the deck." As Flannery complied, he saw Hernandez crouched under the teller counter. One of the men who had jumped over the counter grabbed Hernandez, pulled her up, and demanded that she "[g]ive us the money," pointing to the counter. When Hernandez told the man the money was not there, he knocked her to the floor. He then pulled her up again and shot her.

Christopher Grasso was at one of the teller windows cashing a check when he heard two gunshots fired outside the bank. Three men then entered the bank. They appeared to be in their late teens, were wearing dark clothing and gloves, and were armed. They ordered everyone to get down. Two of the men jumped over the counter and ordered a teller to open the safe. Grasso heard the teller tell the two men she did not have the key. Grasso then heard a gunshot, and a shell casing landed near him. Immediately after the gunshot, the three men left the bank. Several bank employees testified to a virtually identical sequence of events.

---

[4] The evidence was unclear as to which of the three shot at Scott.

C. *The Police Investigation*

Officers from the Pomona Police Department arrived on the scene at about 10:45 a.m. Hernandez was lying on the floor in a pool of blood. A subsequent autopsy revealed that she died from a single gunshot wound to the chest, which pierced one of her lungs. The trajectory of the bullet indicated that it had been fired while she was bent over. The autopsy also showed hemorrhages on the side of her brain consistent with a pistol whipping.

Police found two .9-millimeter cartridges at the scene, one inside the bank and one outside, and an expended cartridge inside the bank. They obtained a tennis shoe imprint from the top of the teller counter. They also recovered a latex glove from inside the bank.[5]

The bank had five video surveillance cameras, and one still camera located at the entrance. The videos showed one of the men on the customer's side of the counter holding a silver semi-automatic weapon consistent with the shell casings found at the scene. They also showed one of the men on the teller's side of the counter holding a revolver pointed at Hernandez's head.

D. *The Arrests and Statements to Police*

Brown was arrested on September 3, 1995 in Fontana near his apartment. At the time of his arrest, Brown tried to hide behind a fence near his apartment. When an officer pointed a gun in his direction, Brown stood up and said, "I'm him." The next day, Detective Kono of the Pomona Police Department

---

[5] Charles Ingram, who was married to Smith's mother, testified he worked for a company that used latex gloves identical to the ones worn by the robbers. He kept a supply of the gloves in his house, and Smith had access to them.

interviewed Brown. In the videotaped interview Brown said that he gave the 9-millimeter semi-automatic handgun to Smith to use in some robberies. Brown was to receive payment for the use of the handgun from the proceeds of the robberies; afterwards, the gun would be sold. Brown claimed he did not know which bank was going to be robbed, nor did he receive the gun back after the robbery. Brown stated that the night before the robbery, he and some of the other participants in the robbery sat in a hot tub and smoked marijuana. They stayed overnight at his apartment, and in the morning, the other participants changed into sweat clothes. They went to Smith's house, picked up Smith and obtained a .38 caliber revolver.

Brown told Detective Kono the group then left for Pomona in two cars: Smith's blue Buick Regal and Brown's brown Toyota Celica, which Brown's wife Thea drove. They parked in the vacant lot next to Burn's house. Brown became concerned when he saw Burns watching them, telling Thea that Burns saw the others putting on their masks. They moved the car behind a market located near the bank and then heard two gunshots. Brown instructed Thea to drive away; they saw Smith speeding by with the other three in his car. Brown went back to his apartment in Fontana to find Smith and the others already there. When the police showed Brown a videotape of the robbery, he identified his gun. He also identified White, Carr and Wilson as the participants in the robbery.

Carr voluntarily surrendered to the police on September 7, 1995. In his videotaped interview Carr admitted being at the bank and participating in the robbery. He stated the plan was to rob the bank, but there was not supposed to be any shooting. He agreed to participate because he was offered part of the proceeds

of the robbery, and he did not have money or a car. He denied carrying a gun and said his role was to be the lookout. Carr acknowledged he was one of the men who jumped over the teller counter. He stated that Hernandez dropped her keys and was picking them up when he heard a gunshot. He became frightened, jumped back over the teller counter and ran out of the bank. He identified himself, White and Wilson in the bank surveillance photographs.

At the time of the robbery, White was dating Jennifer Massingale. Massingale was living at the Magic Carpet Motel in Los Angeles with Kisha Kelly, who was engaged to Wilson. Massingale saw White two days before the robbery and did not see him again until the day after the robbery. She had been watching television news, saw a broadcast of the bank's video, and recognized White as one of the robbers holding a gun. Later that day, White and Massingale had a conversation in the bathroom of a motel, and White confessed to her his participation in the robbery. White admitted shooting Hernandez but said he did so because he thought she was activating an alarm; he claimed he shot to wound, not to kill. Wilson, who was also at the motel at the time, admitted to Massingale and Kelly that he had pistol whipped Hernandez. Wilson spoke with Kelly two or three days after the robbery and again admitted his participation in the robbery but would disclose nothing further.

E. *Verdict and Sentencing*

Brown, White, Carr and Wilson were tried jointly before a jury and convicted. As relevant here, Brown was convicted in

count 1 of first degree felony murder (Pen. Code, § 187, subd. (a))[6] with a robbery special circumstance (§ 190.2, subd. (a)(17)); in count 2 of attempted robbery (§§ 211, 664) in which a principal personally used a firearm (§ 12022.5, subd. (a)); and in count 3 of attempted premeditated murder (§§ 187, 664) in which a principal was armed with a firearm (§ 12022, subd. (a)).

The trial court sentenced Brown on count 1 to life without the possibility of parole and imposed a concurrent life term plus one year for the attempted murder in count 3. As to count 2, the court stayed a four-year term for the attempted robbery.

COLLATERAL PROCEEDINGS

A. *Petition for Writ of Habeas Corpus in the Trial Court*

On June 2, 2014, the Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). The court held that "an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (*Id.* at p. 158, italics omitted.)[7] On September 3, 2015, Brown filed a petition for writ of habeas corpus in the trial court. Based on *Chiu*, he claimed the jury was improperly instructed on the

---

6 All further statutory references are to the Penal Code.

7 *Chiu* held that aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. (*Chiu*, *supra*, 59 Cal.4th at p. 166.) "Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*Id.* at p. 167)

natural and probable consequences doctrine, and his first degree felony murder conviction must be reversed.

On January 29, 2016, the trial court denied Brown's petition. The court found Brown "failed to explain and justify the significant delay in seeking habeas relief" and found Brown failed to establish a prima facie case for relief. It noted that, according to the jury instructions in the case file and our opinion on appeal, the jury was instructed on both aiding and abetting and natural and probable consequences. It pointed out that even after *Chiu*, direct aiders and abettors may be convicted of first degree murder, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118. The court did not address the question whether the evidence supported a finding Brown was a direct aider and abettor, however. It resolved the petition on procedural grounds, finding the petition raised issues that were raised and rejected on appeal or which could have been raised on appeal, thereby precluding habeas relief.

B. *Petition in the Court of Appeal*

On July 9, 2015, shortly before Brown filed his petition in the trial court, the Supreme Court decided *Banks*, *supra*, 61 Cal.4th 788. *Banks* held that the felony-murder special circumstance applies to aiders and abettors who are "'major participant[s]'" in the crime and who "demonstrate a reckless indifference to the grave risk of death created by their actions." (*Id*. at p. 794.)

On March 7, 2016, Brown filed a petition for writ of habeas corpus in this court. He relied on *Chiu* and *Banks* to argue that the jury was erroneously instructed on the natural and probable consequences doctrine, and there was insufficient evidence to

support the felony-murder special circumstance. On March 9, we summarily denied Brown's petition.

C. *Petition in the Supreme Court*

Brown filed a petition for writ of habeas corpus in the Supreme Court on March 18, 2016, raising the same grounds for relief raised in this court.

On June 27, 2016, the Supreme Court decided *Clark*, *supra*, 63 Cal.4th 522. *Clark* expanded on the concepts of "major participant" and "reckless indifference to human life." (*Id.* at pp. 611-623.)

On February 15, 2017, the Supreme Court issued an order to show cause, returnable before this court, why Brown "is not entitled to relief based on his claim there was insufficient evidence to support the special circumstance finding," citing *Banks* and *Clark*. It otherwise denied the petition on its merits without explanation. (*Harrington v. Richter* (2011) 562 U.S. 86, 99-100 [131 S.Ct. 770, 178 L.Ed.2d 624] [state court not required to give reasons for denying habeas petition on the merits].) We issued our order to show cause why Brown is not entitled to such relief on March 1, 2017.

DISCUSSION

In response to our order to show cause, the People argue Brown is not entitled to relief for three reasons. Two are procedural and one substantive. As for the procedural arguments, the People contend the petition is untimely and barred by Brown's failure to have raised the issue on appeal. On the merits, the People argue the evidence supports the finding

Brown was a major participant in the crimes and acted with reckless indifference to human life, making the felony-murder special circumstance conviction appropriate under *Banks*. Because, to a certain extent, our resolution of the procedural issues depends upon our resolution on the merits, we consider the merits of the petition first.

A. *The Evidence Is Insufficient To Support Brown's Conviction on the Felony-murder Special Circumstance*

1. *Standard of Review*

In a habeas challenge to the sufficiency of the evidence to support a special circumstance finding, the issue "is whether, when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.' [Citations.] The standard is the same under the state and federal due process clauses. [Citation.] We presume, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial. [Citation.]" (*Clark*, *supra*, 63 Cal.4th at p. 610; see *In re Loza* (2017) 10 Cal.App.5th 38, 46.)

2. *Applicable Law*

a. *Banks*

Banks examined two United States Supreme Court decisions, *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] (*Enmund*) and *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127] (*Tison*), which addressed "the constitutional limits to punishment of felony-

murder accomplices." (*Banks*, *supra*, 61 Cal.4th at p. 806.) These decisions recognize a "spectrum of culpable felony-murder behavior." (*Ibid.*) At one end of the spectrum "were people like '[defendant Earl] 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.' [Citation.]" (*Id.* at p. 800.) At the other end "were actual killers and those who attempted or intended to kill. [Citation.] . . . [D]eath was disproportional and impermissible for those at the former pole, but permissible for those at the latter. [Citation.]" (*Ibid.*) For those falling between the two ends of the spectrum, "the court announced, 'major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.' [Citation.]" (*Ibid.*)[8]

---

[8] The court explained that this holding was codified in section 190.2, subdivision (d). (*Banks*, *supra*, 61 Cal.4th at p. 800.) Under subdivision (c) of section 190.2, "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true . . . ." Subdivision (d) 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

In *Enmund,* defendant Enmund purchased a calf from victim Thomas Kersey and, as a result, learned Kersey carried large sums of money. A few weeks later, Enmund drove two confederates to Kersey's home and waited nearby while they entered. Kersey's wife appeared with a gun, and the robbers shot and killed both Kerseys. Enmund drove the assailants away from the scene and helped dispose of the murder weapons, which were never found. Enmund was convicted of robbery and first degree murder and sentenced to death. (*Banks*, *supra*, 61 Cal.4th at p. 799.)

Overturning his death sentence, the United States Supreme Court "held the Eighth Amendment bars the death penalty for any felony-murder aider and abettor 'who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.' [Citation.] The intent to commit an armed robbery is insufficient; absent the further 'intention of participating in or facilitating a murder' [citation], a defendant who acts as 'the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape' [citation] cannot constitutionally be sentenced to death." (*Banks*, *supra*, 61 Cal.4th at p. 799.)

By contrast, the Tison brothers, Ricky, Raymond, and Donald, planned, participated and succeeded in the prison breakout of their father, Gary, and his cellmate from an Arizona State Prison. In the course of the breakout, they held guards and prisoners at gunpoint. They "brought an arsenal of lethal weapons into the Arizona State Prison." (*Tison*, *supra*, 481 U.S.

---

circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true . . . ."

at p. 151.) "During the . . . 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 in the Tison's original car with the others following. Ricky and the cellmate removed the family's possessions from their car and transferred the Tison gang's possessions to it; Gary and his cellmate then killed all four family members." (*Banks*, *supra*, 61 Cal.4th at p. 799.)[9] The trial court found the Tison brothers'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.]" (*Id.* at p. 800.) The *Tison* court concluded the Tisons's major participation in the crimes and reckless indifference to human life satisfied the *Enmund* culpability requirement. (*Banks*, *supra*, at p. 800.)

The California Supreme Court in *Banks*, after examining the two cases, concluded that "[s]omewhere between them, at conduct less egregious than the Tisons' but more culpable than . . . Enmund's, lies the constitutional minimum" required for the imposition of death or life without the possibility of parole. (*Banks*, *supra*, 61 Cal.4th at p. 802.) To help guide the analysis for when a defendant may be considered a major participant in a felony murder, the court listed the following questions to help "distinguish the Tisons from Edmund" (*id.* at p. 803), noting no

---

[9] Donald was killed at a roadblock, and Gary escaped into the desert and died of exposure. (*Banks, supra*, 61 Cal.4th at p. 799.)

individual factor was necessary nor was any one of them necessarily sufficient: "'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?'" (*Clark*, *supra*, 63 Cal.4th at p. 611, quoting *Banks*, *supra*, at p. 803.)

The facts in *Banks* are quickly stated. Banks, Gardiner and Daniels attempted to rob a medical marijuana dispensary. During the course of the attempted robbery, shots were fired and the three fled. When the security guard attempted to stop them, Banks shot him twice, killing him. (*Banks*, *supra*, 61 Cal.4th at p. 795.) Matthews served as the getaway driver, dropping the other three off near the dispensary, waiting for them, then picking up Gardiner and Daniels after the failed robbery and driving them away. (*Id*. at p. 805.)

The court found Matthews was not a major participant in the robbery.[10] There was no evidence "establishing Mathew's role, if any, in planning the robbery" or "procuring weapons."

---

[10] The court noted "Matthews's culpability for first degree felony murder is not in dispute," and it was "address[ing] only those facts relevant to the narrow issue on which we granted review, whether Matthews can be found guilty of special circumstance murder and sentenced to life imprisonment without parole." (*Banks*, *supra*, 61 Cal.4th at pp. 794-795.)

(*Banks*, *supra*, 61 Cal.4th at p. 805) There was no evidence he, Gardiner or Daniels "had themselves previously committed murder, attempted murder, or any other violent crime." (*Ibid*.) Mathews was not present when the shooting took place, and there was no evidence he instigated or could have prevented the shooting. "On this record, Matthews was, in short, no more than a getaway driver, guilty like . . . Enmund of 'felony murder *simpliciter*.' (*Ibid*., quoting *Tison*, *supra*, 481 U.S. at p. 147.)

Also finding Matthews did not act with reckless indifference to human life, the court noted that while Matthews knew he was participating in an armed robbery, there was no evidence he "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 [the security guard] was apparently a spontaneous response to armed resistance from the victim." (*Banks*, *supra*, 61 Cal.4th at p. 807.)

b. *Clark*

In *Clark* the court expanded upon its discussion of major participant and reckless indifference to human life. *Clark* involved the attempted robbery of a computer store. William Clinton Clark "was the mastermind who planned and organized the attempted robbery and who was orchestrating the events at the scene of the crime." (*Clark*, *supra*, 63 Cal.4th at p. 612.) During the robbery, one of Clark's accomplices, Nokkuwa Ervin, shot and killed the mother of a store employee who arrived at the store to pick up her son. At the time of the shooting, Clark was not at the store, but he drove to the location shortly thereafter

and fled when he saw a woman lying on the ground, police approaching, and Ervin running towards his car. Clark was convicted of first degree felony murder as well as special-circumstance robbery murder and burglary murder based upon his aiding and abetting liability in the computer store shooting. But "[t]here was no evidence presented from which the jury could find that [Clark] intended to kill [the employee's mother]." (*Id*. at pp. 610-611.)

To decide whether Clark was a major participant in the computer store robbery, the Supreme Court reviewed the factors set forth in *Banks*. The court had no trouble finding Clark "had a prominent, if not the most prominent, role in planning the criminal enterprise that led to the death of [the mother of the employee]." (*Clark*, *supra*, 63 Cal.4th at p. 613.) With respect to the use of weapons, the court found there was no evidence Clark supplied the weapon that killed the victim, although it was reasonably inferable that he knew a weapon was to be used. (*Ibid*.) "No evidence was presented about [Clark's] awareness of the particular dangers posed by the crime, beyond his concern to schedule the robbery after the store's closing time. No evidence was presented about his awareness of the past experience or conduct of . . . the shooter. [Clark] was in the area during the robbery, orchestrating the second wave of the burglary after [the shooter] secured the store, but [Clark] was not in the immediate area where [the shooter] shot [the victim]." (*Id*. at pp. 613-614.)

After consideration of the *Banks* factors, the court questioned "the amount of culpability that should be assessed for a planner of a felony leading to a murder who is not present during the immediate circumstances leading to the murder." (*Clark*, *supra*, 63 Cal.4th at p. 614.) Ultimately, the court did not

decide whether Clark was a major participant in the crime because the evidence, in any event, was insufficient to support a finding Clark acted with reckless indifference to human life. (*Ibid.*)

The court observed there is significant overlap between the "two elements, being a major participant, and having reckless indifference to human life," "'for 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*, *supra*, 481 U.S. at p. 153.) "The high court [in *Tison*] also noted: 'Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.' ([*Tison*, *supra*,] at p. 158, fn. 12.) In *Banks,* [the court] observed that *Tison* did not specify 'those few felonies for which any major participation would "necessarily exhibit[] reckless indifference to the value of human life."' (*Banks*, *supra*, 61 Cal.4th at p. 810, fn. 9.) [The court] surmised a possible example would be 'the manufacture and planting of a live bomb.' (*Ibid.*) Yet [it] also concluded that armed robbery, by itself, did not qualify. (*Ibid.*)" (*Clark*, *supra*, at p. 615.)

The court stated that "while the fact that a robbery involves a gun is a factor beyond the bare statutory requirements for first degree robbery felony murder, this mere fact, 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." (*Clark*, *supra*, 63 Cal.4th at p. 617, fn. omitted.) As noted in *Banks*, "[a] robbery in which the only factor supporting reckless indifference to human life is the fact of the use of a gun is . . . 'a garden-variety armed robbery . . . .'" (*Clark*, *supra*, at p. 617, fn. 74, quoting *Banks*, *supra*, 61 Cal.4th at p. 802.) "'The Supreme Court thus made clear felony murderers like Enmund, who simply had awareness their confederates were armed and armed robberies carried a risk of death, lack the requisite reckless indifference to human life.'" (*Clark*, *supra*, at p. 618, quoting *Banks*, *supra*, at p. 809.)

Analyzing whether Clark acted with reckless indifference to human life, the court pointed to the *Banks* factors, reiterating that no single factor was necessary or necessarily sufficient. (*Clark*, *supra*, 63 Cal.4th at pp. 618-623.) Reviewing the evidence in light of these factors, the court noted that while Clark was present at the scene of the computer store robbery, he did not carry the weapon that killed the victim. (*Id*. at p. 618.) Clark was in a car across the parking lot when the shooting took place, and there was no evidence he instructed the shooter to use lethal force or had the opportunity to prevent the shooting. (*Id*. at pp. 619-620.)

The court next looked at the duration of the interaction between the perpetrators and the victim, noting that "[w]here 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' [citation], possibly culminating in murder." (*Clark*, *supra*, 63 Cal.4th at p. 620.) The robbery was planned for a time when the store was closed,

with only a few employees present. However, the robbers planned to detain those employees in a bathroom while they loaded items onto a truck. "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 [the victim], happening upon the scene. But overall, [the court concluded] the evidence was insufficient to show that the duration of the felony under these circumstances supported the conclusion that [Clark] exhibited reckless indifference to human life." (*Id*. at pp. 620-621.)

As to whether the defendant was aware of the likelihood of a killing, the court pointed out that in *Tison*, "the Tison brothers brought an arsenal of lethal weapons into the prison which they then handed over to two convicted murders, one of whom the brothers knew had killed a prison guard in the course of a previous escape attempt. (*Tison*, *supra*, 481 U.S. 137, 151.)" (*Clark*, *supra*, 63 Cal.4th at p. 621.) Additionally, "the Tison brothers had advance notice of the possibility that their father would shoot the [victims] because, in response to one of the victim's plea not to be killed, the father stated that he 'was "thinking about it."' (*Tison*, *supra*, [at p.] 140.)" (*Clark*, *supra*, at p. 621.) In *Clark*, by contrast, there was no evidence the shooter "was known to have a propensity for violence, let alone evidence indicating that [Clark] was aware of such a propensity. Because [Clark] was across the parking lot while [the shooter] carried out the first phase of the robbery, [Clark] had no opportunity to observe anything in [the shooter's] actions just before the shooting that would have indicated that [he] was likely to engage in lethal violence. This factor thus does not increase [Clark's] culpability." (*Ibid*.)

Finally, the court looked at Clark's efforts to minimize the risks of violence during the commission of the crime. The court found that although he "was the principal planner and instigator of the robbery," his "apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis." In this regard, the court noted in Clark's favor that he planned the robbery for a time when the store was closed, when most of the employees would be gone, and the gun to be used was supposed to be unloaded, although it did, in fact, have one bullet in it. (*Clark*, *supra*, 63 Cal.4th at pp. 621-622.)

The court concluded, "after considering those aspects of the present felony that provide insight into both the magnitude of the objective risk of lethal violence and a defendant's subjective awareness of that risk, we conclude that there is insufficient evidence to support the inference that [Clark] was recklessly indifferent to human life. [Clark's] culpability for [the victim'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 that [Clark] planned the crime with an eye to minimizing the possibilities for violence. Such a factor does not, in itself, 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 [Clark'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 . . . ." (*Clark*, *supra*, 73 Cal.4th at p. 623.)

3. *Analysis—Major Participant*

Here, the People contend Brown was a major participant in the bank robbery. They claim he "had a significant role in planning the robbery," citing the trial court's comments at the original sentencing hearing: "Obviously, you planned this. You located this site. You provided the weapons and the only thing you didn't do was go in and pull the trigger, but you are just as responsible under the laws . . . as a person who did pull the trigger . . . ."

While the trial court's sentiments are understandable, they are both factually and legally wrong. There was no evidence Brown located or planned the Chino Valley Bank robbery.[11] Whether Brown is "just as responsible under the laws . . . as [the]

---

[11] The People's citations to the record do not support their contention that Brown "cased the robbery scene." The People point to Burns's testimony regarding Brown's actions on the morning of the robbery, and to the detective's testimony that Brown told him that on the night before the robbery, he and the people staying at his apartment drove to San Bernardino "to visit some women and . . . to look at a Wells Fargo bank that they intended to rob." Viewed together or separately, these statements do not support the conclusion Brown cased the robbery scene or planned the robbery of the Chino Valley Bank in Pomona. Burns's testimony points to Brown's participation in the robbery as a getaway driver but sheds no light on his involvement in planning or casing the bank. Brown's own statement talks about the potential robbery of a Wells Fargo bank in San Bernardino, but nothing about the robbery of the Chino Valley Bank robbery.

person who did pull[] the trigger" for purposes of the special circumstance finding turns on whether Brown was a major participant in the robbery and acted with reckless indifference to human life. The trial court's summary statement is not evidence, does not cite to any evidence and, consequently, the People's reliance thereon is misplaced.

The facts demonstrate: Brown sold Smith a gun to be used in an unspecified robbery, the proceeds of which would pay for the gun; the night before the Chino Valley Bank robbery, the other participants spent the night at Brown's apartment; Brown did not know ahead of time which bank was going to be robbed; Brown and his wife drove along with his confederates to the Chino Valley Bank location; Brown and his wife waited with the cars near the bank while the others went inside the bank; Brown drove away with his wife when he heard the shots; the gun Brown sold Smith was used in the robbery of the Chino Valley Bank.

The People cite additional evidence in support of their contention Brown was a major participant who acted with reckless disregard for human life. They point out that Brown, along with Thea and with their small children in the car, followed the others to the bank to make sure they got to the bank safely. Thea accompanied them in a separate car so she could tailgate Smith's car making it difficult for the police to identify the car and its occupants. On the way to the bank, they stopped at Smith's mother's home where Smith got a gun. When they arrived at the bank, Brown knew his accomplices had guns. After they pulled into the vacant lot and Smith started to change his clothes, Brown approached Smith to see if he was going to go through with the robbery in light of the fact Burns had seen his

blue car. After Brown and Thea had moved their cars from the vacant lot and while he or Thea was changing their baby's diaper, Brown heard a gunshot and they left.

While the People contend Brown played a "significant" role in planning the robbery, no evidence was presented about his role in planning the robbery. No one identified Brown as the ringleader or mastermind of the Chino Valley Bank robbery. Smith's decision to go forward with the robbery notwithstanding Brown's concerns over being spotted by Burns suggests Brown played a lesser authoritative role than Smith, the reasonable inference being that Brown lacked the authority to call off the robbery and deferred to Smith. Brown also told the police that while he knew the day before that a bank was supposed to be robbed, he did not know ahead of time which bank was going to be robbed. Moreover, the robbers enlisted Brown to act as the getaway driver by asking him if he would drive Smith's car. There is minimal evidence demonstrating Brown's role was anything other than a getaway driver.

Like Enmund, Matthews and Clark, Brown was not present when the shot was fired nor was he in a position to prevent the actual murder. At the time of the shooting, he was across the street with the cars changing his child's diaper with his wife. He did not see or know if anyone was shot or hurt. After hearing the shot fired, Brown fled with his family. Nothing about his flight supports a finding he was a major participant in the crimes.

What differentiates Brown's case from those of Enmund, Matthews and Clark, however, is the fact Brown supplied Smith with a gun that was used in the robbery. We need not decide whether this fact alone alters the equation sufficiently to elevate

Brown's role to that of a major participant because, as in *Clark*, we conclude that, in any event, the evidence was insufficient to support a finding Brown acted with reckless indifference to human life.[12] (*Clark*, *supra*, 63 Cal.4th at p. 614.)

4. *Reckless Indifference*

As the Supreme Court pointed out in *Clark*, "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.] At the same time, the high court in *Tison* found significant the fact that Ricky and Raymond Tison 'brought an arsenal of lethal weapons into the Arizona State Prison,' and Raymond 'guarded the victims at gunpoint while they considered what next to do.'" (*Clark, supra*, 63 Cal.4th at p. 618, citing *Tison, supra*, 481 U.S. at p. 151.) In the present case, Brown did not have a weapon at the bank nor did he use one. Two weapons were brought to the bank; Brown supplied one of them, and he was aware his codefendants were armed. The number of weapons, however, was far from the "arsenal" as described in *Tison*. Moreover, "the fact that a robbery involves a gun . . . is not sufficient to support a finding of reckless indifference to human life for the felony-murder aider and abettor special circumstance." (*Clark*, *supra*, at p. 617, fn. omitted.)

While supplying a gun may make a felony murderer somewhat more culpable than one who is merely aware a gun will be used, this fact, standing alone, is insufficient to establish

---

12 The People have not cited any authority that an aider and abettor who supplied a firearm to his or her accomplices, but who was not present during the killing, is merely by virtue of supplying the firearm, considered a major participant.

reckless indifference to human life. As the United States and California Supreme Courts have made clear, "[t]he intent to commit an armed robbery is insufficient; absent the further 'intention of participating in or facilitating a murder' [citation], a defendant who acts as 'the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape' [citation] cannot constitutionally be sentenced to death." (*Banks*, *supra*, 61 Cal.4th at p. 799; accord, *Enmund*, *supra*, 458 U.S. at p. 795, 798 [broad consensus against the penalty of death "where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder"].)[13] Supplying a gun for use in an armed robbery does not establish the intent to participate in or facilitate a murder.

"In *Tison*, the high court stressed the importance of presence to culpability." (*Clark*, *supra*, 63 Cal.4th at p. 619.) Brown was outside the bank when White, Wilson and Carr went inside to rob the bank. Brown stayed with the cars and was changing diapers when he heard the shots. After hearing the shots, he fled with his wife and children. Brown did not have an

---

[13] The same standards and considerations apply equally to death penalty cases and cases involving life without the possibility of parole. (See *Banks*, *supra*, 61 Cal.4th at p. 804 ["we note the standards we articulate, although developed in death penalty cases, apply equally to cases like this one involving statutory eligibility under [§] 190.2[, subd.] (d) for life imprisonment without parole. . . . As a matter of state statute, then, the *Tison-Enmund* standard is 'applicable to *all* allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole'"].)

opportunity to restrain White nor was he aware anyone had been shot. (See *id*. at pp. 619-620 [Clark was across the parking lot, did not instruct Ervin to use lethal force, and did not "have an opportunity to observe Ervin's response to [the victim's] unanticipated appearance or to intervene to prevent her killing"]; *Banks*, *supra*, 61 Cal.4th at p. 807 ["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"].) Moreover, Hernandez was shot suddenly, without any apparent warning or provocation. She bent down to pick up her keys; White believed she was reaching for the alarm, and he shot her. There was little anyone could have done to intervene, let alone Brown who was not present inside the bank. This factor weighs heavily against finding Brown acted with reckless indifference to human life.

"Courts have looked to whether a murder came at the end of a prolonged period of restraint of the victims by [the] defendant. The Tisons, the high court noted, 'guarded the victims at gun point while [the group of perpetrators] considered what next to do.'" (*Clark*, *supra*, 63 Cal.4th at p. 620, fn. omitted, quoting *Tison*, *supra*, 481 U.S. at p. 151.) No evidence was presented that the duration of the bank robbery presented heightened risks or exhibited reckless indifference to human life beyond that associated with the crime itself.

"A defendant's knowledge of factors bearing on a cohort's likelihood of killing [is] significant to the analysis of reckless indifference to human life." (*Clark*, *supra*, 63 Cal.4th at p. 621.) No evidence was presented that White, Carr or Wilson "was known to have a propensity for violence, let alone evidence indicating that [Brown] was aware of such a propensity." (*Ibid*.)

There was also no evidence presented that Brown observed anything prior to the events that would have indicated any of his other codefendants were likely to engage in lethal violence. No evidence was presented the codefendants discussed shooting anyone or engaging in violence. In fact, the opposite appears to have been true. Carr told the police that while the plan was to rob the bank, there was not supposed to be any shooting.

In those cases where the defendant is the "mastermind who planned and organized the attempted robbery and . . . orchestrat[ed] the events at the scene of the crime," the defendant's efforts to minimize the risks of violence during the felony may be particularly important, because the organizer has the ability to shape the events and the concomitant opportunity to minimize the risks. (*Clark*, *supra*, 63 Cal.4th at p. 612.)[14] As discussed previously, Brown did not play such a role.

As in *Clark* we conclude, "after considering those aspects of the present felony that provide insight into both the magnitude of the objective risk of lethal violence and a defendant's subjective awareness of that risk, . . . there is insufficient evidence to support the inference that [Brown] was recklessly indifferent to human life." (*Clark*, *supra*, 63 Cal.4th at p. 623.) His culpability is based mainly on his role as a getaway driver who supplied a gun for use in an armed robbery, "rather than in his actions on the ground in the immediate events leading up to [the] murder."

---

[14] As an example, *Clark* discussed *People v. Williams* (2015) 61 Cal.4th 1244, 1282, in which the defendant, who planned a carjacking but was not present when his subordinates carried out the plan, gave them "'a carjacking tutorial and instructed them that a resisting victim was to be shot.'" (*Clark*, *supra*, 63 Cal.4th at p. 614.)

(*Ibid*.) There was nothing he did, or did not do, "that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Ibid*.) The evidence showed only a "'garden-variety armed robbery'" (*id*. at p. 617, fn. 74) where death was at most a known possibility, but nothing close to a probability. Apart from supplying the gun, there is little in this case to distinguish it from the crimes in *Edmund* and *Banks*. We conclude the evidence is insufficient to support a finding Brown acted with reckless indifference to human life.[15]

B. *The People's Procedural Arguments Do Not Preclude Relief*

1. *Failure To Raise the Issue on Appeal Does Not Bar the Claim*

It is a longstanding rule that a claim that reasonably could have been raised at an earlier time, but was not, may not be raised subsequently in a petition for writ of habeas corpus. (*In re Reno* (2012) 55 Cal.4th 428, 452; see *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756.) There are four exceptions to this rule, known as the *Waltreus/Dixon* rule: "(1) where the issue constitutes a fundamental constitutional

---

[15] Recently, the court in *In re Miller* (2017) 14 Cal.App.5th 960, after carefully applying the *Banks* and *Clark* factors concluded the evidence did not support a finding of reckless indifference to human life. The court concluded "[o]n the continuum of culpability for felony-murder defendants, [the] defendant (who was not the actual killer and was not shown to have harbored an intent to kill) is decidedly closer to Enmund, Matthews, and Clark than he is to the Tison brothers." (*Id*. at p. 974, fn. omitted.) Brown is similarly situated on that continuum.

error; that is, 'where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process' [citation]; (2) where the judgment of conviction was rendered by a court lacking fundamental jurisdiction, described as 'an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties' [citations]; (3) where the court acted in excess of its jurisdiction, such as when it imposes an illegal sentence [citation]; and (4) 'when there has been a change in the law affecting the petitioner' [citation]." (*In re Reno*, *supra*, at p. 478, fn. omitted.) Brown contends his claim is cognizable under the fourth of these exceptions—a change in the law.

The People take the position that *Banks* and *Clark* did not change the law. First, the People argue these two cases were based on *Enmund* and *Tison*, both of which were decided long before the trial in this case. Second, in *People v. Estrada* (1995) 11 Cal.4th 568, the court concluded that "the phrase 'reckless indifference to human life'" is commonly understood to mean a subjective understanding "of the grave risk to human life created by [the defendant's] participation in the underlying felony," and it has no "technical meaning peculiar to the law." (*Id*. at p. 578.) Therefore, a trial court has no duty to instruct the jury sua sponte on the meaning of the phrase. (*Id*. at p. 581.)

What *Banks* and *Clark* changed was the interpretation and application of the law. As Brown points out, prior to *Banks*, courts had interpreted reckless indifference, within the meaning of section 190.2, subdivision (d), to include situations where a defendant knew an accomplice was armed in the course of the target felony. In *People v. Hodgson* (2003) 111 Cal.App.4th 566, we observed that the phrase "'reckless indifference to human

life[]' . . . 'is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.'" (*Id*. at p. 580, fn. omitted, quoting *People v. Estrada*, *supra*, 11 Cal.4th at p. 577.) We found reckless indifference, in part, because the defendant "had to be aware use of a gun to effect the robbery presented a grave risk of death." (*Hodgson*, *supra*, at p. 580.) Similarly, in *People v. Lopez* (2011) 198 Cal.App.4th 1106, the court held the fact the defendant knew her accomplice "had a gun shows that she acted with reckless indifference" to human life. (*Id*. at p. 1116.) The Supreme Court in *Banks* disapproved *Hodgson* and *Lopez* to the extent they held "the knowledge one's accomplice is armed can, by itself, establish reckless indifference to human life under section 190.2[, subdivision] (d)." (*Banks*, *supra*, 61 Cal.4th at p. 809, fn. 8.)

Under similar circumstances, the Supreme Court has found the change-in-law exception to the *Waltreus/Dixon* rule applies. In *In re Coley* (2012) 55 Cal.4th 524, the defendant was convicted of failing to register as a sex offender. He requested that the trial court strike his prior convictions, arguing that under the circumstances, a three strikes sentence would constitute cruel and unusual punishment. The trial court refused, and the judgment was affirmed on appeal. (*Id*. at pp. 535-536.) Subsequently, *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1079-1084, concluded that imposition of a three strikes sentence under the circumstances at issue in *Coley* constituted cruel and unusual punishment. (*Coley*, *supra*, at p. 536.) The defendant in *Coley* filed a habeas corpus petition based on a change in the law, challenging the constitutionality of his sentence. (*Id*. at pp. 536-537.) The Supreme Court concluded that notwithstanding that

Carmony was decided after the judgment became final, his challenge was not procedurally barred based upon the change-in-law exception to the *Waltreus/Dixon* rule. (See *Coley*, *supra*, at p. 537.)

Similarly, in *In re Saldana* (1997) 57 Cal.App.4th 620, the trial court imposed a three strikes sentence, believing it did not have the authority to strike one of the petitioner's prior convictions, and the judgment was affirmed on appeal. (*Id*. at pp. 623-624.) Thereafter, the Supreme Court held in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 that trial courts have the authority under section 1385 to strike a prior conviction under the three strikes law. (*Saldana*, *supra*, at p. 624.) The defendant filed a habeas petition in the trial court, which then struck one of his prior convictions. (*Ibid*.) The People appealed, claiming the defendant was barred from raising the issue on habeas corpus. (*Id*. at p. 623.) The court disagreed, finding the change-in-law exception applicable. (*Id*. at pp. 627-628.)

Carmony and *Romero*, like *Banks* and *Clark*, changed the law sufficiently to fit within the change-in-law exception. All four examined the statutory and decisional law and reached a conclusion as to the meaning of existing law that differed from previous interpretations. We therefore conclude that *Banks* and *Clark* constitute a change in the law sufficient to meet the exception to the *Waltreus/Dixon* rule. Consequently, Brown is not barred from raising his claim due to the failure to raise it on direct appeal. (*In re Reno*, *supra*, 55 Cal.4th at p. 478.)

We note that in *In re Miller*, *supra*, 14 Cal.App.5th 960, the court reached the same conclusion that the *Waltreus/Dixon* rule posed no barrier to relief, but did so based upon different grounds. It held that "*Banks* and *Clark* did not create new law;

they simply state what section 190.2, subdivision (d) has always meant," and therefore the "defendant's life without parole sentence was not authorized by section 190.2 and the *Waltreus* rule does not bar defendant's habeas corpus claim." (*Id*. at p. 979.)

Reaching this conclusion, the court began by discussing the United States Supreme Court's decision in *Fiore v. White* (2001) 531 U.S. 225 [121 S.Ct. 712, 148 L.Ed.2d 629]. In *Fiore*, the Pennsylvania Supreme Court interpreted the relevant penal statute in a manner that made it clear the defendant's conduct was not within the scope of the statute. The United States Supreme Court held the issue was not retroactivity but whether the due process clause permitted the state to convict the defendant of "'conduct that its criminal statute, as properly interpreted, does not prohibit.'" (*In re Miller*, *supra*, 14 Cal.App.5th at p. 977, quoting *Fiore*, *supra*, at p. 228.) The *Miller* court concluded, "The parallels to our case are exact, and the result must be identical. Like the Pennsylvania Supreme Court's opinion at issue in *Fiore*, our Supreme Court's opinions in *Banks* and *Clark* merely clarified the meaning of section 190.2—*Banks* and *Clark* merely clarified the 'major participant' and 'reckless indifference to human life' principles that existed when defendant's conviction became final. [Citation.] The federal Constitution therefore requires reversal of the special circumstance finding against defendant, and the Attorney General's procedural arguments can be no match for the United States Constitution's demands." (*Miller*, *supra*, at pp. 977-978; see also *People v. Mutch* (1971) 4 Cal.3d 389, 396 [habeas corpus relief available to correct sentence where subsequent Supreme

Court decision elucidated a previously misunderstood legal standard and revealed the sentence to be improper].)

We need not decide the preferable basis for reaching the same conclusion. Whether under the change-in-law exception to the *Waltreus/Dixon* rule or the due process principles applied in *Fiore* and *Miller*, the result is the same: Brown's claim is not procedurally barred and, on the merits, his sentence of life without parole was not authorized. Brown is entitled to habeas corpus relief to correct his sentence.

2. *In Light of the Rulings in* Banks *and* Clark*, the Petition Is Timely*

"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.]" (*In re Reno*, *supra*, 55 Cal.4th at p. 459.) The court has established "a three-level analysis for assessing whether claims in a petition for a writ of habeas corpus have been timely filed. First, a claim must be presented without *substantial delay*. Second, if a petitioner raises a claim after a substantial delay, we will nevertheless consider it on its merits if the petitioner can demonstrate *good cause* for the delay. Third, we will consider the merits of a claim presented after a substantial delay without good cause if it falls under one of *four narrow exceptions*: '(i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by

a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.' [Citation.] The petitioner bears the burden to plead and then prove all of the relevant allegations. [Citation.]" (*Id*. at p. 460.)

Thus, we require that a habeas corpus petition "'"be filed as promptly as the circumstances allow . . . ."' [Citation.]" (*In re Reno*, *supra*, 55 Cal.4th at p. 460.) Whether the petitioner acted promptly or whether there was substantial delay is "'"measured from the time the petitioner or [his or her] counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim" [citation].' [Citations.]" (*Id*. at pp. 460-461, quoting *In re Robbins* (1998) 18 Cal.4th 770, 780.)

Brown could not have known the legal basis for his claim until *Banks* was decided. Brown filed his petition for writ of habeas corpus in this court roughly eight months after *Banks* was decided but only a month and a half after the trial court denied his earlier petition. We conclude the claim was presented without substantial delay.

DISPOSITION

The petition for writ of habeas corpus is granted. The true finding on the felony murder special circumstance (§ 190.2, subd. (a)(17)) is vacated, and Brown's sentence is modified to a term of 25 years to life for his conviction of first degree murder (§ 190, subd. (a)). The trial court is directed to amend the

abstract of judgment to reflect this modification and to forward a copy to the Department of Corrections and Rehabilitation.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

---

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