Filed 3/16/18 In re Thomas CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re OLIVER THOMAS, JR. III, on Habeas Corpus.	B283163 (Los Angeles County Super. Ct. No. SA008528)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Petition granted.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Petitioner.

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

Petitioner Oliver Thomas, Jr. III was convicted of special circumstance felony murder as an aider and abettor, and sentenced to life without the possibility of parole (LWOP). We affirmed the judgment of conviction in a nonpublished opinion, *People v. Thomas* (Sept. 28, 1995, B083574) [nonpub. opn.]. Thereafter, *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) held that an LWOP sentence based on liability as an aider and abettor of a felony murder is constitutionally permissible only if the aider and abettor was a "major participant" in the crime and acted with "reckless indifference to human life," as set forth in the special circumstance statute, Penal Code section 190.2, subdivision (d).[1] Petitioner filed a petition for writ of habeas corpus in this court, relying on *Banks*, seeking relief from the special circumstance finding that supports his LWOP sentence. We conclude there is insufficient evidence to support the special circumstance finding. The petition is granted.

STATEMENT OF FACTS

Donald Lee withdrew large amounts of cash on a regular basis for his cash checking businesses from Wells Fargo Bank located at 8949 South Sepulveda Boulevard in Los Angeles. Lee made his largest withdrawals on Friday mornings, in amounts between $45,000 and $65,000. He

[1] All further statutory references are to the Penal Code unless otherwise stated.

would typically arrive fifteen or twenty minutes before the bank opened at 9:00 a.m., and a bank employee would escort him inside. After withdrawing the cash, Lee would place it on his person or in a black bag on his shoulder. Lee's girlfriend testified that he sometimes carried a handgun to the bank, and on one occasion, a Wells Fargo employee observed a handgun in Lee's money bag.

Petitioner worked as a private security guard for a company that provided services to Wells Fargo. Petitioner was assigned to work at the Sepulveda Boulevard branch of Wells Fargo, Monday through Saturday, approximately one month before the robbery/murder. Petitioner's employment was terminated on November 1, 1991, a week before the crimes. Twice during his employment, petitioner had asked Michael Nicholas, a merchant teller at Wells Fargo, about specific customers. Petitioner inquired how often these customers would come in the bank and if they made large withdrawals. Petitioner had been at work on several occasions when Lee conducted business at the bank, and had observed Lee withdraw money from one of the bank tellers. Petitioner usually stood at the counter, "which is very close to the safe deposit area where [Lee's] transaction would take place . . . ."

Sri Moeljono, a Wells Fargo personal banking officer, arrived at the bank on Friday, November 8, 1991, at 8:30 a.m. She entered the bank through the front doors, and waited for other bank personnel to arrive. Moeljono soon saw Lee waiting by the front doors with petitioner, who was

dressed in plain clothes. When Moeljono let Lee into the bank, she asked if petitioner was working that day. Petitioner replied he was not working. When Nicholas arrived at the bank at 8:45 a.m., he saw petitioner standing at the front entrance looking through the glass doors and then peering around the corner of the bank. Nicholas saw petitioner do this two times. Nicholas told petitioner that he was running late for work and asked why he was not in uniform. Petitioner responded he was meeting a supervisor from the security guard company and he was not working that day. Nancy Amaya, a Wells Fargo customer service officer, arrived at the bank and saw petitioner "stretching his neck and leaning slightly forward in front of the door to the entrance of the bank." Pam Klinglian, a Wells Fargo operations officer, saw petitioner looking inside the bank as she arrived at 8:55 a.m. When petitioner saw Klinglian, he asked her asked if the branch manager was working that day. Petitioner disappeared from view after Nicholas, Amaya, and Klinglian entered the bank.

At around 8:45 a.m., Eric Murriel was standing outside General Rent-a-Car, which was located right across the street from Wells Fargo. Murriel wanted to use the telephone in the alley behind the bank, but had to wait for 15 to 20 minutes while two Black men were using the phone. As he was waiting, Murriel admired a red car idling at the curb nearest the bank, in the vicinity of the ATM machine.

Murriel later identified one of two men as Kevin Thomas,[2] petitioner's brother.

At approximately 9:00 a.m., Lee made a routine Friday morning withdrawal of $64,000 in cash from Wells Fargo. Lee placed some of the cash in a black bag and kept some directly on his person. Lee was armed with a handgun. Shortly after leaving the bank through the rear door, the bank employees heard several gunshots coming from the alley behind the bank. Lee was shot and robbed as he exited Wells Fargo. He died of multiple gunshot wounds shortly thereafter.

There were a number of witnesses to different portions of the robbery/murder. The testimony of these witnesses established that Kevin approached Lee just after he left the bank through the rear door. Kevin said two or three times, "Give it to me," and tried to grab something from Lee. Both men pulled out guns from their waistbands at the same time. Kevin got into a stance, squatted down, aimed right at Lee's chest, and started shooting. Lee tried to shoot back, "but he was getting hit." After Lee fell to the ground, Kevin grabbed the black bag from Lee and ran away towards Westchester Parkway. Lee rose to his feet, started to walk while holding his bleeding abdomen, and said, "It was a set up." Lee then fell to his knees and collapsed on the ground.

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[2] Because Kevin Thomas has the same last name as petitioner, he will be referred to by his first name for ease of reference.

Damon Walker[3] drove his red car around the corner and pulled up next to the parking structure that adjoined the bank. Murriel confirmed at trial this was the same red car that had been idling near the curb by the ATM machine. Kevin, holding the black bag with one hand and his wound with the other, entered the car. Petitioner was already sitting in the backseat when Kevin entered the car on the passenger side. Walker then drove to Daniel Freeman Hospital in Inglewood and helped Kevin into the emergency room, where Kevin was treated for a gunshot wound. Kevin's treating physician opined that a single bullet inflicted two wounds, one in the left forearm and the other in the chest. Walker left in his car after dropping Kevin off at the emergency room.

At 10:00 a.m., Devonna Mitchell, Walker's girlfriend, was driving with her cousin when she saw Walker and petitioner standing on Normandie Avenue, between 91st and 94th Street. Walker and petitioner got into Mitchell's car. They drove to a motel where she had rented a room. After entering the room, Walker pulled out money and stashed it under a dresser drawer. Everyone returned to the car. Mitchell dropped off petitioner before heading to the hospital to see Kevin around 11:00 a.m.

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[3] Walker was also charged in the information with Lee's murder and robbery. Walker was tried separately and was convicted of involuntary manslaughter and robbery. This court affirmed the judgment. (*People v. Walker* (Oct. 19, 1994, B077156) [nonpub. opn.].)

Petitioner's wife, Gloria Thomas, testified that petitioner told her that he was going to take care of some traffic tickets on the morning of November 8, 1991. Kevin came to their house between 7:00 and 8:00 a.m. Kevin told petitioner he's "ready," and both men left. Later that day, around 11:30 a.m., petitioner approached Gloria as she was getting off the bus and said, "What happens if I told you I had so much money." Petitioner then stated he had $6,000. When they got back to their house, petitioner gave Gloria the money and told her to hide it. After petitioner's arrest, the police recovered just under $4,000 in cash hidden throughout his house. Gloria told Los Angeles Police Department detectives that petitioner said he "was involved in a robbery," "somebody had got shot," and "[t]hat he got some money."

In his defense, petitioner testified that on November 8, 1991, he told his wife that he was going to check on his job at the bank, and he was also going to deal with his traffic tickets. Petitioner took a bus to Wells Fargo around 8:45 a.m., and saw Nicholas and Amaya. Petitioner asked Nicholas about the new security guard and inquired if the supervisor was at the bank. He then left the bank and returned home. Petitioner denied any involvement in the robbery/murder. Petitioner testified he had never seen Kevin with a gun and did not give his wife the money that the police recovered in his house. Petitioner further testified that Kevin told him after their arraignment that he had robbed and killed Lee. According to petitioner, Kevin told

him that he and Walker intended to rob Wells Fargo and that they randomly chose Lee instead. Kevin stated he approached Lee and started to talk to him. Lee suddenly pulled out a gun and started to shoot at Kevin, who returned fire. Kevin then took Lee's bag and ran to Walker's car. Kevin further stated Walker took him to the hospital and Walker stashed the money at a motel.

PROCEDURAL HISTORY

On November 19, 1993, a jury found petitioner guilty of special circumstance first degree murder (§§ 187, subd. (a), 190.2, subd. (a)(17) [count 1]) and second degree robbery (§ 211 [count 2]). As to both counts 1 and 2, the jury found true the allegation that a principal was armed with a firearm. (§ 12022, subd. (a)(1).)[4] The trial court sentenced petitioner to LWOP for the special circumstance first degree murder plus one year for the firearm enhancement in count 1. The trial court stayed the robbery conviction and firearm enhancement in count 2. (§ 654.) This court affirmed the

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[4] Petitioner and Kevin were tried jointly. The jury also found Kevin guilty of special circumstance first degree murder (count 1) and second degree robbery (count 2). As to both counts 1 and 2, the jury found true the allegations that Kevin personally used a firearm (§ 12022.5, subd. (a)) and a principal was armed with a firearm (§ 12022, subd. (a)(1)). The court sentenced Kevin to LWOP for the special circumstance first degree murder plus five years for the personal use enhancement.

judgment. (*People v. Thomas* (Sept. 28, 1995, B083574) [nonpub. opn.].)

In 2015, our Supreme Court issued its opinion in *Banks*. On June 16, 2017, petitioner filed a petition for writ of habeas corpus in this court on the ground that *Banks* required a reevaluation of his special circumstance finding. On June 29, 2017, we issued an order directing the California Appellate Project to appoint counsel to represent petitioner, and further directed counsel to file an amended petition. On August 29, 2017, petitioner's counsel filed an amended petition, and on October 10, 2017, counsel lodged the trial transcripts. On October 27, 2017, we issued an order directing the Secretary of the Department of Corrections and Rehabilitation to show cause in this court why the petition should not be granted, citing *Banks*.

DISCUSSION

I. Standard of Review

"The standard of review for a sufficiency of the evidence claim as to a special circumstance 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.]" (*People v. Clark* (2016) 63 Cal.4th 522, 610 (*Clark*).)

II. Special Circumstance Finding

Petitioner contends there is insufficient evidence to support the special circumstance finding in light of *Banks*. We agree.

The penalty for first degree special circumstances murder under section 190.2, subdivision (a), is either death or LWOP. One of the enumerated special circumstance categories is that the murder was carried out while the defendant was engaged in, or was an accomplice in, the commission of a felony, including robbery. (§ 190.2, subd. (a)(17)(A).) When the defendant was not the actual killer, but an aider and abettor, section 190.2 requires a further showing that the defendant was "a major participant in the crime" and acted "with reckless indifference to human life." (§ 190.2, subd. (d).)[5]

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[5] Alternatively, when the defendant was not the actual killer, but an aider and abettor, section 190.2 requires a further showing of "intent to kill." (§ 190.2, subd. (c).) Here, the prosecution did not argue petitioner had the intent to kill, and exclusively relied on the theory that petitioner was a major participant who acted with reckless indifference to human life. For that reason, we need not analyze subdivision (c)'s application to this case.

In *Banks*, our Supreme Court considered for the first time what it means to be a "major participant" and to act with "reckless indifference to human life" in the context of felony murder. (61 Cal.4th at p. 794.) *Banks* stated that the language of section 190.2, subdivision (d) "imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." (*Id.* at p. 798, fn. omitted.) The court explained that this special circumstance statute was designed to codify the constitutionally-based holdings of *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*), and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*), each representing opposite ends on a spectrum that describe an aider and abettor's personal role in the felony leading up to the murder. (*Banks, supra,* at pp. 794, 802.) Somewhere in the middle of these two authorities "lies the constitutional minimum for death eligibility." (*Id.* at p. 802.)[6]

To establish the major participant requirement, "a defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder, ..." (*Banks, supra,* 61 Cal.4th at p. 802.) As to the reckless indifference requirement, the defendant must "be aware of and willingly involved in the

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[6] Although developed in death penalty cases, the constitutional standards articulated by our Supreme Court apply equally to cases involving statutory eligibility for LWOP under section 190.2, subdivision (d). (*Banks, supra,* 61 Cal.4th at p. 804.)

violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Id.* at p. 801.) *Banks* identified the following factors that may play a role in determining whether a defendant is a "major participant" within the meaning of section 190.2, subdivision (d): "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Id.* at p. 803*,* fn. omitted; *Clark, supra,* 63 Cal.4th at p. 611.) *Banks* cautioned that "[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendants participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major[.]' [Citation.]" (*Banks, supra,* at p. 803.)

One year later, our Supreme Court in *Clark* addressed the factors that are relevant in determining whether a defendant acted "with reckless indifference to human life." Those factors are: (1) knowledge of weapons, and use and

number of weapons; (2) physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) duration of the felony; (4) defendant's knowledge of cohort's likelihood of killing; and (5) defendant's efforts to minimize the risks of the violence during the felony. (*Clark, supra,* 63 Cal.4th at pp. 618–622.) As was the case with "the factors concerning major participant status in *Banks*, '[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient.' [Citation.]" (*Id.* at p. 618.) *Clark* acknowledged that being a major participant and having reckless indifference to human life "'significantly overlap . . . for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.' (*Tison, supra,* 481 U.S. at p. 153.)" (*Clark, supra,* at p. 615.)

In light of *Banks* and *Clark,* we conclude that the jury's finding that the special circumstance was true is not supported by substantial evidence. The trial record demonstrates that petitioner was the mastermind in planning the robbery, based specifically on his knowledge he had gained as a security guard at Wells Fargo—a point petitioner concedes in his amended petition. However, "[t]he 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.' (*Tison*[,*supra*,] 481 U.S. at p. 157.)" (*Banks, supra,* 61 Cal.4th at p. 805.) In "a garden-variety armed robbery"

death might be possible but not probable. (*Id*. at p. 802.) No evidence was introduced establishing petitioner's role, if any, in procuring Kevin's handgun. No evidence was introduced that petitioner or Kevin had themselves previously committed murder, attempted murder, or any other violent crime. There was also no evidence that petitioner knew Lee was sometimes armed when he made his cash withdrawals. The prosecutor merely suggested in closing argument that it was reasonable that petitioner would know Lee had a gun because he often carried large amounts of money, but argument of counsel is not evidence. (See *People v. Breaux* (1991) 1 Cal.4th 281, 313.) Although petitioner was seen by Wells Fargo employees in the front of the bank minutes before the robbery/murder, he was absent from the scene when the shooting took place. Petitioner disappeared prior to the robbery and only reappeared in the getaway car driven by Walker.

There is nothing in the record to establish that petitioner knew Kevin intended to kill Lee. (See *Banks, supra,* 61 Cal.4th at p. 807.) Rather, it appears that Kevin's shooting of Lee was "a spontaneous response to armed resistance from [him]." (See *ibid.*) Witness accounts of the murder/robbery confirm that Kevin's initial attempt to get Lee's money did not involve a weapon. Kevin said, "Give it to me," two or three times before grabbing at the bag. It was not until Lee resisted that both Lee and Kevin drew their handguns. Because petitioner's plan did not elevate the risk beyond those inherent in any armed robbery, his role as an

aider and abettor was not reckless enough to support a special circumstance finding. (*Clark*, *supra*, 63 Cal.4th at pp. 617–618; *Banks*, *supra*, at p. 802.) Because there is insufficient evidence to support the special circumstance finding, the People are precluded from retrying the allegation. (U.S. Const., 5th & 14th Amends.; *Burks v. United States* (1978) 437 U.S. 1, 18.)

DISPOSITION

The petition for writ of habeas corpus is granted. The true finding on the special circumstance allegation under section 190.2, subdivision (a)(17)(A), is vacated. The matter is remanded to the superior court for resentencing.

KRIEGLER, Acting P.J.

We concur:

BAKER, J. KIM, J.*

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