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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 WILLIAM HODGSON on Habeas Corpus.	B283414 (Los Angeles County Super. Ct. No. BA211075)

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

Heidi L. Rummel and Michael J. Brennan, USC Gould School of Law, Post-Conviction Justice Project, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel Jr. and David A. Wildman, Deputy Attorneys General, for Respondent.

INTRODUCTION

A jury convicted William Hodgson of first degree felony murder for aiding and abetting the robbery and murder of Jee Nam and found true the special circumstance allegation that Hodgson committed the murder during the commission of a robbery. We affirmed the judgment in *People v. Hodgson* (2003) 111 Cal.App.4th 566, disapproved in part by *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*). Years later, Hodgson filed a petition for a writ of habeas corpus, challenging the special circumstance finding. A special circumstance finding for felony murder requires evidence the defendant was a major participant in the crime and exhibited reckless indifference to human life. (*People v. Clark* (2016) 63 Cal.4th 522, 615 (*Clark*); *Banks*, at p. 798.) Because there was insufficient evidence to support either finding, we grant relief.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Harvard Street*

Hodgson was a member of a criminal street gang known as the Harvard Street gang. Michael Bellows and Victor Salazar were founding members. The gang, which congregated in apartment buildings at 239 and 259 Harvard Street, had between 15 and 20 members. In January 2000 Hodgson participated in a robbery with Bellows where Bellows placed a screwdriver in the victim's side and stole his wallet while Hodgson acted as a lookout.

B. *Murder*

On December 12, 2000, at 11:00 p.m., Nam was driving home to her apartment, which was two blocks south of 239 South Harvard Street. As she opened the remote-controlled entry gate of her underground garage, Salazar approached her car and shot her through the driver's side window. Nam's car rolled into the garage and came to rest against a pillar and another vehicle. Salazar approached the car and shot Nam again. The gunshot wounds were fatal.

Jesse Wallis lived across the street. He heard a loud shot, looked out his window, and heard a second shot. He saw Hodgson holding open the gate to the garage of Nam's building. Hodgson had both hands wrapped around the gate in order to prevent it from closing. Wallis described Hodgson, who had just turned 16 years old, as a young Hispanic male in his late teens or early twenties, stocky, and wearing dark clothing.

After the second shot, Wallis heard Hodgson yell something, although Wallis could not make out the words. In response, a second young Hispanic male, Salazar, emerged from the garage. As he did, the closing electronic gate hit him, but he got free, and the gate remained open.

Wallis watched Hodgson and Salazar walk casually away. When Wallis lost sight of them, he went downstairs to the parking garage and discovered Nam's body. He could not feel a pulse, and yelled to his girlfriend to call the police.

C. *Arrest*

At 11:15 p.m., Officer Gustavo Gutierrez received a call that there had been an assault with a deadly weapon and that the suspects were two Hispanic men. Based on the call, Officer Gutierrez and his partner detained two Hispanic men walking

two blocks from the crime scene. After a field show-up eliminated these two individuals as suspects, they advised the officers they had recently seen two individuals walk past them, one of whom appeared to be concealing something under his jacket.

Police soon detained Salazar and Hodgson after a witness saw them running on Harvard Street. The two men Officer Gutierrez had previously questioned identified Salazar and Hodgson as the two men they saw earlier in the evening. When Wallis arrived, he said Hodgson and Salazar may have been the two individuals he saw earlier because of their physical appearance and dark clothing. Based on this information, and the presence of spots of blood on Salazar's shoes, officers took Hodgson and Salazar to the police station, where the police photographed them and took their shoes and clothes. DNA evidence later showed the blood on Salazar's shoes matched Nam's blood.

The next morning an officer went to Nam's apartment building and found Nam's purse and wallet in the laundry room. The purse had Nam's blood on it. Police also found a bullet casing and glass in the driveway of Nam's apartment building.

D. *Conviction and Sentencing*

The People charged Hodgson with one count of murder (Pen. Code, § 187, subd. (a)),[1] with the special circumstance allegation that he committed it in the commission of a robbery (§ 190.2, subd. (a)(17)(A)), and one count of robbery (§ 211). The People alleged Hodgson committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang,

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[1] Statutory references are to the Penal Code.

with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1). The People also alleged a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1), and a principal personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (d) and (e)(1).

The jury found Hodgson guilty of first degree murder and robbery and found true the special circumstance allegation that he committed the murder during the commission of a robbery. On the murder conviction, the court sentenced Hodgson to life without the possibility of parole plus 25 years to life under section 12022.53, subdivisions (d) and (e)(1). On the robbery conviction the court imposed and stayed under section 654 execution of a term of 29 years to life.

E. *Appeal and Habeas*

In Hodgson's direct appeal, we affirmed and modified the judgment to correct Hodgson's presentence custody credit. (*People v. Hodgson*, *supra*, 111 Cal.App.4th at p. 581.) We held Hodgson was a major participant in the murder because he "was the only person assisting Salazar in the robbery murder." (*Id.* at p. 580.) We also held Hodgson acted with reckless indifference to human life because, "instead of coming to the victim's aid after the first shot, he instead chose to assist Salazar in accomplishing the robbery by assuming his position at the garage gate and trying to keep it from closing until Salazar could escape from the

garage with the loot." (*Ibid.*) The Supreme Court denied Hodgson's petition for review.

On June 28, 2017, Hodgson filed this petition for writ of habeas corpus, seeking under *Banks* and *Clark* to vacate the special circumstance finding pursuant to which the trial court sentenced him to life without the possibility of parole. We issued an order to show cause.

DISCUSSION

"[A] conviction for first degree murder is generally punishable by 'imprisonment in the state prison for a term of 25 years to life.' (§ 190.) Only if at least one special circumstance allegation is found to be true may a punishment of either death or life in prison without the possibility of parole be imposed. (§ 190.2, subd. (a).)" (*People v. Homick* (2012) 55 Cal.4th 816, 907.) Section 190.2 lists the special circumstances that, if found true, qualify a defendant convicted of murder for life imprisonment without the possibility of parole or the death penalty.

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

Robbery is one of the felonies listed in paragraph (17) of subdivision (a). (See § 190.2, subd. (a)(17)(A).)

Hodgson argues his sentence of life without the possibility of parole must be vacated under *Banks* and *Clark* because he was not a major participant in the crime and his actions did not reflect a reckless indifference to human life. The People argue that Hodgson's petition is procedurally barred and that, on the merits, there was sufficient evidence Hodgson was an active participant and acted with reckless indifference to human life.

A. *Banks, Clark, and the Tison–Enmund Spectrum*

1. *Major Participation*

In *Banks* the California Supreme Court examined the "constitutional limits" of life imprisonment without the possibility of parole under section 190.2, subdivision (d), and considered "under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant." (*Banks*, *supra*, 61 Cal.4th at p. 794.) The defendant in *Banks* was the getaway driver in an armed robbery of a medical marijuana dispensary. During the robbery, one of the defendant's three accomplices shot and killed a security guard. (*Id.* at p. 795.) Although the defendant was not at the scene of the shooting, he picked up two of his codefendants a block away. (*Ibid.*) The jury ultimately convicted the defendant of first degree murder and found true the felony murder special circumstance, and the trial court sentenced the defendant to life imprisonment without the possibility of parole. (*Id.* at p. 797.)

In considering the constitutionality of the sentence, the California Supreme Court analyzed two United States Supreme Court decisions, *Enmund v. Florida* (1982) 458 U.S. 782

(*Enmund*) and *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). In *Enmund*, the defendant drove a getaway car after two of his accomplices robbed and murdered an elderly couple. The United States Supreme Court reversed the defendant's death sentence even though the defendant helped plan the armed robbery. (*Enmund*, at p. 803.) The Supreme Court held that the analysis had to focus on the defendant's "culpability, not on that of those who committed the robbery and shot the victims." (*Id.* at p. 798.) The Supreme Court concluded that, because the defendant "did not commit and had no intention of committing or causing" a murder (*id.* at p. 801), the sentence was unconstitutional under the Eighth Amendment.

In *Tison*, the United States Supreme Court held that two brothers could be sentenced to death for their role in helping their father and his cellmate, both of whom were serving prison terms for murder, escape from prison. (*Tison*, *supra*, 481 U.S. at p. 139.) During the escape, the brothers' car broke down, and one of the brothers waved down a car carrying a family of four. The others came out of hiding and captured the family at gunpoint. After removing the family's possessions from the car, the defendants drove the victims to the desert where the father and his cellmate killed all four family members. (*Id.* at pp. 140-141.) The Supreme Court held that the two brothers were eligible for the death penalty under the felony murder special circumstance because "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Id.* at p. 158.) The Supreme Court concluded the brothers were major participants because they brought an arsenal of weapons to the prison break, gave weapons to their father and his cellmate, participated in the kidnapping and robbery, and watched the killings. (*Ibid.*) The

Supreme Court stated: "These facts not only indicate that the . . . 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." (*Id.* at p. 152.)

Back to *Banks*, where the California Supreme Court reviewed *Enmund* and *Tison* and stated that courts should "examine the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his or her vicarious responsibility for the underlying crime." (*Banks*, *supra*, 61 Cal.4th at p. 803, italics in original.) The Supreme Court in *Banks* listed the factors courts should consider in determining whether a defendant was a "major participant" under 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? No one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Banks*, at p. 803, fn. omitted.)

Analyzing these factors, the Supreme Court in *Banks* held the getaway driver was not a major participant. "The evidence in the record places [the defendant] at the *Enmund* pole of the *Tison-Enmund* spectrum. Indeed, as [the defendant] argues, his conduct is virtually indistinguishable from [the defendant in

Enmund]. No evidence was introduced establishing [the defendant's] role, if any, in planning the robbery. No evidence was introduced establishing [the defendant's] role, if any, in procuring weapons. [The defendant] 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 [the defendant or either of his two 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, [the defendant] 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." (*Banks*, *supra*, 61 Cal.4th at p. 805, fn. omitted.)

2. *Reckless Indifference to Human Life*

The California Supreme Court in *Banks* also discussed the reckless indifference requirement under section 190.2, subdivision (d). The Supreme Court held that "nothing at trial supported the conclusion beyond a reasonable doubt that [the defendant] knew his own actions would involve a grave risk of death. There was no evidence [the defendant] intended to kill or, unlike the Tisons, knowingly conspired with accomplices known to have killed before. Instead, as in *Enmund*, [the defendant's] killing of [the victim] was apparently a spontaneous response to armed resistance from the victim." (*Banks*, *supra*, 61 Cal.4th at p. 807.)

A year later, the California Supreme Court in *Clark* returned to the circumstances in which a defendant acts in reckless indifference to human life. The defendant in *Clark* was convicted of first degree felony murder for having been the "mastermind who planned and organized the attempted robbery" of a computer store. (*Clark*, *supra*, 63 Cal.4th at p. 612.) During the robbery, one of Clark's accomplices shot and killed the mother of a store employee. Although Clark was not at the store during the shooting, he was convicted and sentenced to death.

The Supreme Court explained that recklessness "encompasses both subjective and objective elements. The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what 'a law-abiding person would observe in the actor's situation.'" (*Clark*, *supra*, 63 Cal.4th at p. 617.) The Supreme Court identified five case-specific factors for courts to consider in evaluating "reckless indifference to human life in cases involving nonshooter aiders and abettors to commercial armed robbery felony murders," again cautioning that "'no one of these considerations is necessary, nor is any one of them necessarily sufficient.'" (*Id.* at p. 618.) The factors are (1) the defendant's knowledge of the presence, use, and number of weapons, (2) the defendant's physical presence at the crime and opportunity to restrain the crime or aid the victim, (3) the duration of the crime, (4) the defendant's knowledge of his or her accomplice's likelihood of killing, and (5) the defendant's efforts to minimize the risk of violence during the crime. (*Id*. at pp. 618-622.)

Regarding the first factor, knowledge of weapons, the Supreme Court held that 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." (*Clark*, *supra*, 63 Cal.4th at p. 618.) Instead, courts should consider whether the defendant used a weapon and the total number of weapons involved in the commission of the crime. Discussing the second factor, the defendant's presence at the scene of the crime and opportunity to restrain the shooter or aid the victim, the Supreme Court stated: "Proximity to the murder and the events leading up to it may be particularly significant where, as in *Tison*, the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force." (*Id.* at p. 619.) Turning to the third factor, the duration of the crime, the Supreme Court stated that the likelihood of violence increases the longer the duration of the crime. (*Id.* at p. 620.) Concerning the fourth factor, defendant's knowledge of whether his or her accomplices were likely to kill, the Supreme Court stated: "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.'" (*Id.* at p. 621.) Finally, the court considered a new factor, the defendant's effort to minimize the risks of violence. (*Id.* at pp. 621-622.)

Considering these factors, the Supreme Court held the defendant in *Clark* did not show a reckless indifference to human life. The court concluded that the evidence showed only a "'garden-variety armed robbery'" (*Clark*, *supra*, 63 Cal.4th at p. 617, fn. 74) and that nothing he did "elevated the risk to human life beyond those risks inherent in any armed robbery." (*Id.* at p.

623.) Specifically, the court observed that only one gun was used in the crime, that it was used by an accomplice, and that there was no evidence Clark told his accomplice to use lethal force. In addition, Clark did not have an opportunity to observe his accomplice's response to the victim's unanticipated appearance or to intervene and prevent the killing. Clark also attempted to minimize the violence by planning the robbery to occur after hours and planning to handcuff any employees in a bathroom so that the robbery would occur outside their presence. The Supreme Court also found significant that the gun had only one bullet loaded in it and that there was no evidence Clark's accomplice had a propensity for violence. (*Id.* at pp. 619-622.)

B. *Hodgson's Petition Is Not Procedurally Barred*

As noted, the People contend we should not reach the merits of Hodgson's arguments and decide whether Hodgson's special circumstance finding can stand under *Banks* and *Clark* because the petition is procedurally barred on three grounds. First, the People argue that under the rule of *In re Lindley* (1947) 29 Cal.2d 709 Hodgson cannot bring a habeas petition to challenge the sufficiency of the evidence supporting his conviction. Second, the People argue the rule of *In re Waltreus* (1965) 62 Cal.2d 218 and *In re Dixon* (1953) 41 Cal.2d 756 bars Hodgson's petition because in his direct appeal Hodgson raised, and this court rejected, the arguments Hodgson makes in this proceeding. Finally, the People argue Hodgson's petition is untimely.

The People's procedural bar arguments lack merit.[2] The *Lindley* rule, which provides that "routine claims that the evidence presented at trial was insufficient are not cognizable in a habeas corpus petition" (*In re Reno* (2012) 55 Cal.4th 428, 505), applies when a party in a habeas proceeding argues the evidence the trier of fact considered was insufficient to support the judgment. (See *In re Lindley*, *supra*, 29 Cal.2d at p. 722.) The People argue the *Lindley* rule applies because Hodgson is not presenting any new facts, but asking this court to "re-sift, re-evaluate, and re-decide factual issues that were already decided." Hodgson's petition, however, raises a strictly legal issue that does not require a redetermination of the facts, only whether the special circumstance finding should be vacated under *Banks* and *Clark*. (See *In re Miller* (2017) 14 Cal.App.5th 960, 979-980 ["claim that the evidence presented against him failed to support the robbery-murder special circumstance (and therefore a sentence of life without the possibility of parole) is not a 'routine' claim of insufficient evidence as described in *Lindley*"].) Thus, the *Lindley* rule does not apply to Hodgson's petition.

Nor does the *Waltreus* rule. Under that rule, "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*, *supra*, 55 Cal.4th at p. 476; see *In re Harris* (1993) 5 Cal.4th 813, 829; *In re Preston* (2009) 176 Cal.App.4th 1109, 1114.) The People argue the *Waltreus* rule applies because in Hodgson's direct appeal we

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[2] In addition, the issuance of an order to show cause necessarily rejects the procedural arguments. (See *People v. Romero* (1994) 8 Cal.4th 728, 737; *In re Rhoades* (2017) 10 Cal.App.5th 896, 907.)

rejected the arguments Hodgson makes in this petition. The *Waltreus* rule, however, does not apply where there has been a change in the law. (*In re Reno*, *supra*, 55 Cal.4th at p. 1211; *In re Harris*, *supra*, 5 Cal.4th at p. 841; see *In re Coley* (2012) 55 Cal.4th 524, 537 ["California decisions have recognized an exception to [the *Waltreus*] rule in instances in which there has been a subsequent change in the law in petitioner's favor"]; *In re Saldana* (1997) 57 Cal.App.4th 620, 627-628 ["[a]n "exception to the *Waltreus* rule, established by case law, has permitted a petitioner to raise in a petition for writ of habeas corpus an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner"].) *Banks* and *Clark* were changes in the law for purposes of the *Waltreus* rule because they disapproved cases holding that "knowledge one's accomplice is armed can, by itself, establish reckless indifference to human life" and that "awareness a robbery accomplice is armed, without more, establishes the necessary subjective awareness of a grave risk of death." (See *Banks*, *supra*, 61 Cal.4th at p. 809, fn. 8, disapproving on this point *People v. Lopez* (2011) 198 Cal.App.4th 1106 and *People v. Hodgson*, *supra*, 111 Cal.App.4th 566.)

Finally, the petition is not untimely. (See *In re Sanders* (1999) 21 Cal.4th 697, 703 ["a litigant mounting a collateral challenge to a final criminal judgment [must] do so in a timely fashion"].) The People argue Hodgson did not promptly file his petition after the Supreme Court decided *Banks* and *Clark*. In fact, Hodgson filed his petition in the superior court 14 months after *Banks* and only three months after *Clark*. Under these circumstances, there was no substantial delay, and Hodgson's petition is not untimely. (See *In re Harris*, *supra*, 5 Cal.4th at p. 828; *In re Espinoza* (2011) 192 Cal.App.4th 97, 103 [two-year

delay was not unreasonable]; *In re Burdan* (2008) 169 Cal.App.4th 18, 31 [10-month delay was not unreasonable].)

B. *The Evidence Did Not Support Hodgson's Felony-murder Special Circumstance Conviction*

Hodgson contends his case is like *Banks* and *Clark*. He argues there was no evidence he planned the robbery, procured the weapon for Salazar, or knew Salazar was likely to commit a murder during the robbery. Hodgson argues he did not use a weapon during the crime, the crime's duration was short, he did not escalate the violence, and he had no opportunity to prevent the murder or aid the victim. Hodgson argues the facts that he acted as a lookout and helped Salazar escape from the garage were insufficient to support a first degree felony murder special circumstance finding.

1. *Standard of Review*

When a defendant seeks habeas corpus relief, the judgment is presumed valid. (*In re Bacigalupo* (2012) 55 Cal.4th 312, 332; *In re Clark* (1993) 5 Cal.4th 750, 764.) "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence.'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

2. *Hodgson Was Not a Major Participant*

In *People v. Hodgson*, *supra*, 111 Cal.App.4th 566 we concluded Hodgson's role was "'notable and conspicuous'" because he was only one of two people involved in the murder and because

he helped Salazar escape from the underground garage by holding open the automatic electric gate. (*Id.* at pp. 579-580.) That conclusion, like the validity of our original opinion, did not survive *Banks* and *Clark*.

As we observed in our original opinion, there was no evidence Hodgson "supplied the gun, or was armed, or personally took the loot, or the like." (*People v. Hodgson*, *supra*, 111 Cal.App.4th at p. 579.) There was also no evidence Hodgson planned the robbery or had any knowledge Salazar was planning to or might shoot someone during the course of the robbery. (See *Banks*, *supra*, 61 Cal.4th at p. 805.) Nor was there evidence anyone from the Harvard Street gang had been involved in a murder. Even Hodgson's conduct in helping Salazar escape by holding open the automatic electric gate was not active participation. As noted, the defendant in *Banks* helped his accomplices escape by picking them up in his car (*Banks*, at p. 795), and the defendant in *Enmund* waited in a car to help his two accomplices escape and later helped dispose of the murder weapons (*Banks*, at p. 799). Yet, neither defendant was a major participant. Like the defendant in *Banks*, Hodgson is "at the *Enmund* pole of the *Tison–Enmund* spectrum" (*Banks*, at p. 805) and therefore was not an active participant.

The People point to evidence that Hodgson was a member of a criminal street gang and, according to the prosecution's gang expert, committed the crimes to increase his reputation in the gang. The Supreme Court in *Banks*, however, held that such evidence does not show active participation, absent evidence the defendant and his accomplices had previously participated in shootings, murders, or attempted murders. (*Banks*, *supra*, 61 Cal.4th at p. 811; see *In re Miller*, *supra*, 14 Cal.App.5th at p. 976 ["[e]ven though defendant and [his accomplice] belonged to the

same gang and had committed follow-home robberies together in the past, '[n]o evidence indicated [the defendant and the accomplice] had ever participated in shootings, murder, or attempted murder'"].)

3. *Hodgson's Actions Did Not Show Reckless Indifference to Human Life*

Considering the factors the Supreme Court identified in *Clark*, there was also insufficient evidence Hodgson acted with reckless indifference to human life or "knew his own actions would involve a grave risk of death." (*Banks*, *supra*, 61 Cal.4th at p. 807.) First, Hodgson did not possess or use a weapon during the crime. (See *Clark*, *supra*, 63 Cal.4th at p. 618.) Even if he knew Salazar had a weapon, such knowledge would not be enough to show subjective awareness of a risk of death. (See *Banks*, at p. 809, fn. 8.) Second, although Hodgson was near Salazar when Salazar shot Nam, there was no evidence Hodgson had the opportunity to discourage Salazar from committing the murder or was able to come to Nam's aid during the 10-15 seconds between the first and second shots. (See *Clark*, at p. 619; cf. *Banks*, at p. 803, fn. 5 ["[t]hose 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"].) Third, the duration of the crime was brief. (See *Clark*, *supra*, 63 Cal.4th at p. 620 ["[c]ourts have looked to whether a murder came at the end of a prolonged period of restraint of the victims by defendant"].)

Fourth, there was no evidence Hodgson knew Salazar was going to shoot or kill Nam. (See *Clark*, *supra*, 63 Cal.4th at p. 621 ["[a] defendant's knowledge of factors bearing on a cohort's likelihood of killing are significant to the analysis of reckless indifference to human life"]; cf. *In re Loza* (2017) 10 Cal.App.5th 38, 50 [evidence "at the very least revealed that petitioner with eyes wide open embarked upon an armed robbery with the type of cohort who callously bragged about having shot another human being moments earlier"].) Even if Hodgson knew Salazar was carrying a firearm, there was no evidence Hodgson knew Salazar was going to kill. Unlike *Tison*, there was no evidence Hodgson was committing a robbery with an individual previously known to use lethal force. (See *Tison*, *supra*, 481 U.S. at p. 157; *Clark*, at p. 621.) Finally, where the defendant planned and organized the robbery, any effort to minimize the risk of violence during the felony is a relevant factor in determining culpability. Here, there was no evidence Hodgson played a role in planning or organizing the crime. Nor is there any evidence he did anything "that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Clark*, at p. 623.) Under *Banks* and *Clark*, there was insufficient evidence of reckless indifference to human life to support the special circumstance finding.

DISPOSITION

The true finding on the felony murder special circumstance is vacated, and the matter is remanded for resentencing.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.*

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