IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re WILLIE SCOGGINS, On Habeas Corpus,	No. S253155 Court of Appeal (Third District) No. C084358 Sacramento County Superior Court No. 08F04643

PETITIONER'S OPENING BRIEF ON THE MERITS

On Review from the Decision of the Court of Appeal
Third Appellate District

From a Judgment of the Superior Court
for the County of Sacramento

HONORABLE DAVID DE ALBA, JUDGE

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ISSUE FOR REVIEW

Is proof of a defendant's mere planning of an unarmed beating and robbery that unexpectedly results in death insufficient to establish the reckless indifference to human life essential to a robbery-murder special circumstance, when the evidence discloses that the risk of death was not a grave risk but merely a foreseeable risk?

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INTRODUCTION

Petitioner argued in this habeas corpus proceeding that under *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522, the evidence presented at his trial is insufficient to show that he acted with "reckless indifference to human life" as is required to prove the robbery-murder special circumstance when the defendant is

not the actual killer and does not intend to kill. (See *Banks, supra*, at pp. 797-798; *Clark, supra*, at p. 609, citing *Tison v. Arizona* (1987) 481 U.S. 137, 158 [95 L.Ed.2d 127].)

In a two-to-one decision, the Court of Appeal mistakenly rejected petitioner's contention. (Typed op'n., pp. 23-25.)[1/] The majority acknowledged that the evidence does not show that petitioner was armed or that he knew the actual killer was armed. (Typed op'n., pp. 23-24.) The majority also noted that petitioner was not present at the crime scene. (Typed op'n., p. 23.) But the majority reasoned that, "far from planning the robbery with an eye to minimizing the possibility of violence, the plan itself included a violent assault," insofar as the "hastily put together" plan involved the robbers meeting the victim "in order to rob and 'beat the shit out of him.'" (Typed op'n., p. 25.) Thus the majority found the evidence sufficient to prove that petitioner 'acted with reckless indifference to human life." (Typed op'n., p. 25.)

However, the concurring and dissenting opinion disagreed with the majority's view that petitioner acted with reckless indifference to human life. (Typed op'n., p. 1 (conc. & dis. opn. of Renner, J.).) The concurring and dissenting opinion relied on this Court's holding in *Banks, supra*, at p. 808 that "[a]wareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum." (Typed op'n., p. 4 (conc. & dis. opn. of

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1. "Typed op'n." refers to the Court of Appeal's typed opinion.

Renner, J.).) The concurring and dissenting opinion explained that the majority opinion improperly "turns *the planning* of an unarmed beating and robbery, that unexpectedly results in death, into a crime eligible for the death penalty or life without the possibility of parole." (Typed op'n., p. 1 (conc. & dis. opn. of Renner, J.), emphasis in original.)

This Court should clarify that a defendant's mere planning of an unarmed beating and robbery that unexpectedly results in death is insufficient to establish a reckless indifference to human life, when the evidence discloses that the risk of death was not grave but merely foreseeable, and grant the writ of habeas corpus to set aside the judgment that imposed the robbery murder special circumstance and sentenced petitioner to life imprisonment without possibility of parole.

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STATEMENT OF THE CASE

A complaint was deemed an information on April 9, 2010 in Sacramento County Superior Court case no. 08F04643. (1 CT 6.)[2/] It charged petitioner with crimes against Samuel Wilson on June 8, 2008: murder (§ 187, subd. (a))[3/] in count one, and attempted second degree robbery (§§ 664, 211) in count two. It alleged as a special

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2. CT, SCT, and RT refer respectively to the Clerk's Transcript, Supplemental Clerk's Transcript, and Reporter's Transcript in petitioner's appeal in No. C068971. Simultaneous with the filing of this brief, petitioner is filing in this Court a request for judicial notice of the record in No. C068971 pursuant to Evidence Code section 452, subdivision (d).

3. Section references are to the Penal Code unless otherwise specified.

circumstance (§ 190.2, subd. (a)(17)) that petitioner committed the murder while attempting to commit robbery, and alleged that he was vicariously armed (§ 12022, subd. (a)(1)) while committing the offenses. (1 CT 27-28.)

Jury trial began on April 12, 2011 but the jury deadlocked and a mistrial was declared on May 10, 2011. (2 CT 375, 400-401.) Jury trial began again on June 2, 2011. (2 CT 432.) The jury returned verdicts on June 2, 2011, finding petitioner guilty of first degree murder and attempted second degree robbery, and finding the special circumstance and arming enhancement allegations true. (2 CT 477-479, 529-531.)

Sentence was imposed on August 5, 2011. The court imposed a term of life imprisonment without possibility of parole for petitioner's conviction of first degree murder with a special circumstance, and stayed imposition of terms for his attempted robbery conviction and the arming enhancement. (2 CT 554-555, 559-560.)

In its opinion in No. C068971 filed March 12 and modified April 7, 2014, the Court of Appeal affirmed the judgment against petitioner, rejecting his claim that the felony murder special circumstance must be reversed due to insufficient evidence to prove that he acted with the intent to kill or reckless indifference to human life. This Court in No. S217481 denied review on June 18, 2014.

On May 27, 2016, petitioner filed a petition for writ of habeas corpus in this Court in No. S234842. On March 29, 2017, this Court issued an order to show cause returnable before the Court of Appeal. The Court of Appeal filed its opinion on December 17, 2018 in

No. C084358, discharging the order to show cause and denying the petition for writ of habeas corpus.

This Court granted petitioner's petition for review on April 10, 2019 in No. S253155.

STATEMENT OF FACTS

A. Introduction and Summary

Petitioner was tried and convicted of first degree murder for the shooting death of Samuel Wilson. The prosecution's evidence shows that Wilson was shot and killed by Randall Powell (1 RT 231, 237, 239, 288, 290; 2 RT 413, 418, 481, 487-488), who was assisted by Shaneil Cooks, Jennifer Kane, and James Howard. (1 RT 72-75, 135; 2 RT 534-539, 552-553, 556, 558-559.) The prosecution also presented evidence to show that the shooting occurred pursuant to a plan petitioner had devised with his accomplices to confront Wilson, beat him up, and recover money that petitioner had paid to Wilson in exchange for TVs that turned out to be fake. (2 RT 398-401, 407, 425-431, 582; 2 CT 590-591, 595.) However, the evidence further shows that petitioner did not participate in his accomplices' confrontation with Wilson in the parking lot of a strip mall, but only observed it from a Shell gas station adjacent to the parking lot. (3 CT 651, 654; 1 RT 65-66, 79-80, 82, 108, 129.) No evidence establishes that petitioner expected anyone to be armed.

B. Eyewitnesses to the Fatal Shooting of Samuel Wilson

On June 8, 2008 at about 6:30 p.m., Cindy Keller was driving on Florin Road near the Burlington Coat Factory in Sacramento

with passengers Pamela and Jessica Coleman when they observed a white van drive into the parking lot of a strip mall adjacent to a Shell gas station. (1 RT 65-66, 79-80, 82, 108, 129.) They observed two men standing and conversing in the parking lot near where the white van stopped. (1 RT 82, 88, 92, 111-112.) Samuel Wilson was one of the men. (1 RT 39.) Two women in the parking lot were talking to the driver of the van. (1 RT 122-124.) Other people were nearby. (1 RT 124.)

Soon thereafter, shots were fired. (1 RT 67, 81, 129.) Wilson ran, but the other man pursued him, holding a black semiautomatic handgun in his right hand and firing shots at Wilson. (1 RT 82-83, 85-86, 131.) The gunman was slender and wore no shirt but he wore a white do rag on his head. (1 RT 84-86.) When Wilson fell to the ground, the gunman got into the white van. (1 RT 87, 124, 132.)

The white van drove quickly out of the parking lot and onto Florin Road, swerved around Keller's car, and drove away. (1 RT 69, 71-72, 93, 96, 132.) The van's driver was a middle-aged white woman with strawberry blonde, reddish hair in a tight slicked back ponytail. (1 RT 70-72, 95.) Pamela Coleman wrote the van's license number. (1 RT 71, 96, 133.) Keller called 911. (1 RT 101; 2 CT 563, 567.)

Martesha Lewis was driving on Florin Road with passengers Latecia Lovelace and Lakesha Sherron when they saw Wilson lying on the ground in the parking lot. (1 RT 191-192, 255; 2 RT 496-497.) Lewis drove into the parking lot and stopped the car, then got out, checked on Wilson, and saw that he had been shot. (1 RT 194-195, 255; 2 RT 498-499.) Someone called 911. (1 RT 196.)

C. Petitioner's Conversation With Lakeesha Sherron at the Scene

As Marteesha Lewis, Latecia Lovelace, and Lakeesha Sherron were standing near Wilson's body, petitioner approached them. (1 RT 197, 256; 2 RT 499-500.) Petitioner talked to Sherron, whom he had previously dated. (1 RT 199, 252.) Although Lewis recalled hearing petitioner say something that led her to believe he knew the people who had shot Wilson, neither Sherron nor Lovelace recalled hearing petitioner say he knew who had done it. (1 RT 203-204, 261; 2 RT 503; 3 CT 885.) At trial, Sherron denied that she and petitioner had planned in advance to meet near the scene where Wilson was shot. (1 RT 256.)

Petitioner walked across the street from the scene of the shooting, but then he returned and talked to an officer who had arrived. (1 RT 210, 258; 2 RT 502, 523.) Petitioner was cooperative. (2 RT 531.)

D. Investigation at the Scene of the Shooting

Sheriff's deputies and medical personnel began to arrive on the scene at about 6:43 p.m. (1 RT 50, 53; 2 RT 521-522.) Cindy Keller provided a deputy with the license number of the white van. (2 RT 525.)

Wilson was transported to a hospital but he died as a result of two gunshot wounds to his back and one to the back of his arm. (1 RT 40-48, 54.) Wilson had $720 in his pocket and was wearing a watch and jewelry. (1 RT 62, 64; 2 RT 468.) Two expended .32 caliber semiautomatic bullets were recovered at the autopsy. (2 RT 508-509.)

A blue minivan parked in the parking lot had its engine running. (2 RT 469, 524, 546.) Six expended shell casings were found

in the parking lot by the rear of the blue minivan. (2 RT 469, 524, 545.)

A search of the blue minivan disclosed what appeared to be a large TV wrapped in bubble wrap in its original packaging. (1 RT 168-169; 2 RT 550.) But inside the packaging was only a piece of plywood and some two-by-fours. (1 RT 170.) There were also similar bogus packages that appeared to contain laptops and a PlayStation but actually contained phone books. (1 RT 171; 2 RT 479, 550.)

Samuel Wilson's phone was in the blue minivan. (2 RT 551.) Its call history included several recent calls to Jennifer Kane's and Shaneil Cooks's phones. (2 RT 552-553.) Wilson had used the star 67 function to block caller ID for his calls to their phones. (2 RT 552-553.) Also inside the minivan was a paper with Kane's phone number and the name Jenna. (1 RT 181, 226; 2 RT 478, 486, 555.) Kane was a close friend to Shaneil Cooks, who was petitioner's girlfriend and also drove a white van. (1 RT 177, 179, 278; 2 RT 487.)

E. Search of Petitioner's Residence

The morning after the fatal shooting, officers arrived at petitioner's residence on McGlashan Street. (1 RT 286; 2 RT 384-385, 533-534.) They took petitioner and other residents into custody. (1 RT 286-287.) One bedroom in the house contained identifying paperwork for petitioner, Shaneil Cooks, and Jennifer Kane. (2 RT 534-535.) A cell phone was found in the bedroom. (2 RT 535.)

Officers towed a white van from the house. (2 RT 477-478, 535.) The van had the license number that Pamela Coleman had written after the shooting. (1 RT 135; 2 RT 535.) Also in the van was paperwork

bearing the names of Jennifer Kane and Shaneil Cooks. (2 RT 536.) The papers with Cooks's name also had the number of the cell phone found in the bedroom in the McGlashan Street house. (2 RT 535, 538-539.)

At Kane's residence, a key was found that fit the white van. (2 RT 556.) It was on a ring with a photo of Cooks. (2 RT 556.)

F. Samuel Wilson's Phone Calls Immediately Prior to His Death

On June 8, the day of the shooting, Samuel Wilson drove a van from his home in Fairfield to Sacramento to earn money by fraudulently selling fake TVs to unsuspecting buyers. (1 RT 264-267.)

California Justice Department officers had just begun wiretapping Wilson's cell phone in their investigation of a criminal street gang. (2 RT 310-311.) Four calls were recorded on June 8. (2 RT 313.) In the first call at 5:47 p.m., Wilson said his name was Michael and talked to Jennifer Kane about planning to meet Kane's mother to sell her a TV. (1 RT 177, 181, 183, 226; 2 RT 313, 318, 486; 2 CT 582-584.) Kane told Wilson that her mother's name was Darla and gave Wilson a phone number that Kane said was her mother's number. (2 CT 584; 1 RT 182; 2 RT 313.) The number was actually Shaneil Cooks's number. (2 RT 534-535, 538-539.)

In the second call at 5:49 p.m., Wilson called Cooks's number and talked to a woman. (2 RT 318; 2 CT 584.) Wilson again said his name was Michael. (2 CT 584.) Wilson told the woman that he had just talked to her daughter, and he asked her to meet him near Florin Road. (2 CT 584-585.) In the third call at 6:03 p.m., the woman told

Wilson that she would be there within minutes. (2 RT 318; 2 CT 586-587.) In the fourth call at 6:16 p.m., the woman told Wilson that her daughter and friend were driving up toward Wilson's location in a van and that she was driving behind the van in a silver car. (2 RT 318; 2 CT 587.) Wilson said he was in a blue van. (2 CT 588.) Wilson told the woman to drive to the Shell gas station. (2 CT 589.)

According to Detective Robert Tracy, the voice heard on the first calls was that of Jennifer Kane and the voice heard on the subsequent calls was that of Shaneil Cooks. (2 RT 558-559.)

G. Petitioner's Friend Randall Powell's Behavior On the Evening of the Shooting

Randall Powell had two girlfriends, Latoya Tate and Jennifer Kane. (1 RT 177, 221, 224.) According to Tate, Powell considered petitioner (BJ or Baby James) and James Howard (Frankie) his brothers. (1 RT 219-221, 278; 2 RT 379, 474.) Powell and Howard were the closest of the three. (1 RT 234, 242.)

On the evening of June 8, Randall Powell was with Tate at her apartment when Kane called Tate and asked to speak with Powell. (1 RT 225-228.) Kane called Tate's phone, but it was a phone that both Powell and Tate used. (1 RT 222-223, 225, 232; 2 RT 486.) Tate told Kane that Powell would call her back. (1 RT 228.) When Kane called back five or ten minutes later, she talked to Powell. (1 RT 229.) Kane told Powell that she had a gas card and wanted to put gas in Tate's car, which Powell also used. (1 RT 229.) Powell left and told Tate he was going to the Shell station. (1 RT 230.) He returned 10 to 15 minutes

later. (1 RT 230.) Kane called again at about 6:00 p.m. (1 RT 230, 232.) Tate overheard Kane tell Powell, "We got the guys that ripped you off," and "We found the guy that sold you guys the TVs." (1 RT 231, 237, 239; 2 RT 487-488.) Powell left again, telling Tate that he was going to meet his friend James Howard and get some weed. (1 RT 231, 240-241.) Powell took Tate's cell phone. (1 RT 232.) Powell returned 40 to 45 minutes later. (1 RT 231.) The next day, Tate drove Powell to his family's house in Pittsburg. (1 RT 233.)

H. Events at Petitioner's Residence On the Evening of the Shooting

Petitioner lived at a house on McGlashan Street called "The Trap," which was both a residence and a crash pad for people who used drugs. (1 RT 275, 277, 279; 2 RT 384.) Herman Anthony Long, who had inherited the house from his father, also lived there with his wife Cheryl Long, a crack cocaine user. (1 RT 276, 279; 2 RT 384.) Other residents included Lorenzo McCoy (Youngster) and Lashana Ray. (1 RT 277; 2 RT 303, 381.) Petitioner and McCoy sold rock cocaine, and Ray was a prostitute. (2 RT 303, 385.) Visitors to the house included petitioner's girlfriend Shaneil Cooks, petitioner's friend Randall Powell, and Powell's girlfriend Jennifer Kane, a close friend of Cooks. (1 RT 177, 179, 278, 280; 2 RT 379-380, 415.)

On the evening of June 8, petitioner, Cooks, Powell, and Kane were all at the McGlashan Street house. (1 RT 279-281.) Kane appeared nervous and kept looking out the windows. (1 RT 280.) Powell was wearing no shirt, but had one with him. (1 RT 281.) McCoy, Ray,

Howard, Powell, and Kane were watching TV news. (1 RT 285.) The white van was parked down the street from the house. (1 RT 283.)

I. Petitioner's Spoken Intention to Get His Money Back After Someone Sold Him Fake TVs

According to Lorenzo McCoy, who sold cocaine and lived at petitioner's residence, petitioner came home with two or three TVs a couple of days before the shooting. (2 RT 303, 385, 395.) Petitioner said he bought the TVs for $300 each from "a dude off the street." (2 RT 398.) The next day, petitioner told McCoy that he had opened the packages and found the TVs were fake. (2 RT 399-400.) Petitioner was mad because he had paid $900 for them. (2 RT 400, 581.) He wanted to beat up the seller and get his money back. (2 RT 401, 407.)

On the day of the shooting, petitioner phoned McCoy and James Howard. (2 RT 407, 474; 2 CT 591.) Petitioner told them that Shaneil Cooks and Jennifer Kane had reported that the fake TV seller was at the Burlington Coat Factory. (2 CT 590-591; 2 RT 425-427.)

Petitioner devised a plan in which Cooks and Kane would arrange to meet the fake TV seller and pretend to buy a TV. (2 RT 427, 430-431, 582.) Petitioner planned to meet Powell and Howard at the Shell station, beat up the fake TV seller, and get back petitioner's money. (2 CT 595; 2 RT 425-426, 428-429, 582.) Specifically, the plan devised by petitioner was to "beat the shit out of" the victim and "get the fucking money back." (2 RT 428-429; 2 CT 593, 595.) Powell remarked to McCoy that he and "the girls" would get the money back. (2 RT 413.)

McCoy recalled that later in the day, petitioner, Powell,

Howard, Cooks, and Kane returned to the McGlashan Street house and talked about a shooting. (2 RT 414, 418, 427.) Powell said he was the shooter. (2 RT 418.) Petitioner said that they got into Cooks's van. (2 RT 584.) They watched the TV news. (2 RT 418.) McCoy told them they were "stupid motherfuckers." (2 RT 419.) Petitioner told Powell he needed to get out of town. (2 RT 420.)

When detectives first interviewed McCoy about the events, he was uncooperative and untruthful. (2 RT 388, 422.) But when they interviewed McCloy on a subsequent occasion, they offered to talk to the District Attorney about McCoy's pending misdemeanor warrant, and McCoy became more cooperative, although he claimed to have done so because the detectives were bothering him, not because the detectives offered to talk to the District Attorney about his case. (2 RT 393-394.)

McCoy testified at trial with use immunity. (2 RT 378.) According to Lashana Ray, who lived with him, McCoy lied all the time. (3 RT 624.)

J. Identification of Randall Powell and James Howard on a Surveillance Video

A few days after the shooting, police showed Cheryl Long a video from a surveillance camera. (1 RT 287-288.) Long identified the shooter as Randall Powell, based on the shooter's movements and mannerisms. (1 RT 288, 290; 2 RT 481.) Long also identified another man in the video as James Howard. (1 RT 289; 2 RT 481.) However, Long said she could not identify their faces. (2 RT 481.)

Long recanted her identification of Powell when she

testified twice before trial. (1 RT 290-292.) At petitioner's trial, Long first testified that she had truthfully identified Powell and Howard to police, but then testified that she had falsely identified them. (1 RT 289-294.) She explained that she recanted because she was nervous about being labeled a snitch and her identifications were false. (1 RT 192, 299.) Long explained that she had falsely identified Powell and Howard because she believed police would give her money. (1 RT 293, 300.) Although police had not promised her any money, they gave her fifty dollars for lodging and food after she identified Powell and Howard three days after the shooting. (1 RT 297; 2 RT 483-484, 487.)

K. Other Identification

Eyewitness Jessica Coleman viewed a lineup five days after the shooting and identified Cooks as the driver of the white van. (1 RT 72-75.) Coleman identified Cooks's photo at trial. (1 RT 72-73.)

L. Cell Phone Calls on the Evening of the Shooting

On June 8, the evening of the shooting, at 5:40 p.m., Jennifer Kane's phone called Randall Powell and Latoya Tate's phone. (2 RT 346.) At 5:41 p.m., Shaneil Cooks's phone called petitioner's phone but the call went to voice mail. (2 RT 346, 538, 581, 585, 588.) At 5:46 p.m., Powell and Tate's phone called Kane's phone and the call was answered. (2 RT 346.) From 5:50 to 6:45 p.m., numerous calls were made between Powell and Tate's phone and petitioner's phone. (2 RT 346-349, 581, 585, 588.) At 5:55 p.m., Cooks's phone sent this text message to petitioner's phone: "Man, you ain't answering the phone and the dude that sold you the TVs is in my face right now." (2 RT 339,

538, 581, 585, 588.) From 6:31 to 6:45 p.m., the calls to and from petitioner's phone connected through a cell tower near the scene of the shooting. (1 RT 245-246; 2 RT 348-352, 581, 585, 588.) Kane's phone called Powell and Tate's phone at 6:32 and 6:33 p.m. (2 RT 348-349.)

According to Lashana Ray, who lived with Lorenzo McCoy, McCoy often used petitioner's phone. (3 RT 621, 623.) Ray recalled exchanging texts that said, "I miss you," with McCoy when McCoy was using petitioner's phone on June 8, the day of the shooting. (3 RT 622.) Although McCoy said he was not skilled at reading and writing, he was a rapper who wrote out his songs. (2 RT 303, 376-377.)

M. Petitioner's Statements to Detectives on June 9

On June 9, 2008, the day after the shooting, Detective Alan Fukushima questioned petitioner. (2 RT 322.) Petitioner said that he had been at his residence at the McGlashan Street house most of the day of the shooting, although he had gone out a few times -- once to the Burlington Coat Factory on Florin Road at about 6:00 p.m., once to Angie Moreno's house with Lorenzo McCoy, and once to Walmart with Shaneil Cooks. (3 CT 617-620, 623, 626-627, 631, 633.) On his way to the Burlington Coat Factory, he stopped at the Shell station and saw Samuel Wilson lying on the ground. (3 CT 632, 637.) Petitioner explained that "Kesha" had called him before he left to drive to the Burlington Coat Factory, and that he talked to Kesha at the scene when he saw Wilson lying on the ground. (3 CT 631, 637.)

N. Petitioner's Statements to Detectives on June 11

On June 11, three days later, petitioner was questioned

again. (2 RT 573.) Petitioner reiterated that he heard gunshots when he stopped at a gas station on his way to meet Kesha and buy a shirt at the Burlington Coat Factory. (3 CT 651, 654.) Kesha had told him, "Meet me at Burlington's." (3 CT 660.) He got back in his car to leave without buying gas. (3 CT 663-665.) As petitioner began to drive away, he saw Kesha. (3 CT 652.) She was in a car with two friends and they were driving into a store. (3 CT 652.) He could see that Kesha saw him. (3 CT 652.) Petitioner drove in near the store and saw Wilson lying on the ground. (3 CT 653.) Bystanders who appeared to be talking on the phone with emergency personnel asked petitioner whether Wilson was breathing. (3 CT 653.) Petitioner approached Wilson and saw that he appeared to have died. (3 CT 653-654, 661.) After talking to Kesha, petitioner drove to Burlington Coat Factory but returned to the scene and talked to an officer. (3 CT 654, 661-662.) The officer told petitioner he was free to go after petitioner told the officer what he had seen, so petitioner drove away. (3 CT 663.)

Petitioner told detectives that Shaneil Cooks had explained to him that she had been at the scene of the shooting and had run to her van after the shots were fired. (3 CT 676, 734, 765.) A detective told petitioner that a surveillance video of the scene showed his brother James Howard at the scene, and suggested that petitioner tell them something that would make Howard a witness rather than a suspect. (3 CT 676, 692-694, 744,753.) When petitioner was left alone for a while, he remarked to himself, "Wow, my little brother, what the fuck did you get yourself into?" (3 CT 730-731.)

Petitioner further explained to the detectives that Cooks had said that she had been talking to a guy who was giving her a "good deal" for a laptop when some other guys ran up and shot Wilson. (3 CT 765-767.) A detective asked petitioner to provide them the "backstory" of why someone would want to shoot Wilson. (3 CT 779.) When a detective asked him about Randall Powell, petitioner said he did not know Randall's last name. (3 CT 790-795.) Petitioner denied that he had heard anyone complain about having bought "some bunk shit" such as phony TVs or laptops. (3 CT 811-812.) When petitioner was left alone again, he commented to himself, "They saying I'm the mastermind of this. Come on, man. I ain't no damn fool. I'm not crazy." (3 CT 807.)

O. Petitioner's Statements to Detectives on June 20

On June 20, almost two weeks after the shooting, detectives questioned petitioner again. (2 RT 575.) When a detective told petitioner that Lakeesha Sherron had denied that she had arranged to meet petitioner on the day of the shooting, petitioner said that Sherron was lying, and maintained that he and Sherron had made plans to meet at the Burlington Coat Factory. (SCT 5, 36.)

Petitioner repeatedly denied that he had purchased fake TVs. (SCT 7, 10, 13.) But petitioner acknowledged that he had been present when a person named Keif bought two TVs from someone at the park. (SCT 13-16, 23, 39, 69.) Petitioner said that Jennifer Kane, Shaneil Cooks, and James Howard were also present at the time of the sale. (SCT 21, 34.) Petitioner speculated that on the day of the shooting, Kane, Cooks, and Howard may have encountered Wilson, recognized

him as the fake TV seller, and tried to get Keif's money back from Wilson. (SCT 35, 82.) But petitioner maintained that he had nothing to do with going to see Wilson on the day of the shooting, and that he did not know whether Kane, Cooks, or Howard had anything to do with it. (SCT 44, 115, 117-118.) Petitioner acknowledged that he lied to an officer at the scene of the shooting when he said he had to leave to go to a birthday party at Chuck E. Cheese. (SCT 50-51.) Eventually petitioner acknowledged that he handed Wilson the money to pay for the TVs because he was loaning Keif the money for the TVs, but petitioner continued to maintain that he did not buy the TVs for himself. (SCT 92, 94.) Petitioner could not say how Keif could be located. (SCT 96.) Petitioner said Keif was mad about Wilson cheating him, but petitioner just thought it was funny. (SCT 131.) Petitioner expected to get his money back from Keif. (SCT 133.) Petitioner denied that he was the person who "started this ball rollin'" that led to the shooting. (SCT 129.)

P. Petitioner's Statements to Detectives on August 6

The detectives again interviewed petitioner on August 6. (2 RT 586.) Petitioner again insisted that Wilson's death was not the result of a plan devised by him. (3 CT 821-822, 846.) He repeated that he had nothing to do with the shooting. (3 CT 827.)

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ARGUMENT

I

THIS COURT'S DECISIONS IN *PEOPLE V. BANKS* (2015) 61 CAL.4TH 788 AND *PEOPLE V. CLARK* (2016) 63 CAL.4TH 522 MAKE IT CLEAR THAT THE EVIDENCE IN PETITIONER'S CASE IS INSUFFICIENT TO PROVE THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE, REGARDLESS WHETHER THE EVIDENCE ESTABLISHES THAT PETITIONER CREATED A FORESEEABLE RISK OF DEATH IN PLANNING AN UNARMED BEATING AND ROBBERY

A. Introduction

Under the authority of this Court's opinions in *People v. Banks, supra,* 61 Cal.4th 788 and *People v. Clark, supra*, 63 Cal.4th 522, the evidence presented at petitioner's trial is insufficient to show that he acted with "reckless indifference to human life," as is required to prove the robbery-murder special circumstance when the defendant is not the actual killer and does not intend to kill. (See *Banks, supra*, at pp. 797-798; *Clark, supra*, at p. 609.) Petitioner's planning of an unarmed beating and robbery that unexpectedly resulted in the victim's death by gunfire is insufficient to establish a reckless indifference to human life, as the evidence discloses that the risk of death from petitioner's plan was not grave but at most foreseeable. Thus the special circumstance must be reversed, as it is a violation of petitioner's constitutional right to due process. (See U.S. Const., Amend. XIV; *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [61 L.Ed.2d 560].)

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B. Governing Law Including *Banks* and *Clark*

The standard of review requires an appellate court to "'review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715, citation omitted.) The same standard applies to the sufficiency of evidence to prove a special circumstance. (*Ibid.*)

The special circumstance statute, section 190.2, extends eligibility for the death penalty or life imprisonment without possibility of parole not only to killers but also to certain aiders and abettors of first degree felony murder:

> 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 life 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.

(§ 190.2, subd. (d).)

The "reckless indifference to human life" and "major participant" requirements in the statutory provision are derived from the United States Supreme Court's decision in *Tison v. Arizona, supra*,

481 U.S. 137, which placed the culpability of felony murder participants on a spectrum for purposes of determining their eligibility for the death penalty, consistent with the constitutional ban on cruel and unusual punishment. (*People v. Estrada* (1995) 11 Cal.4th 568, 575, citing *Tison, supra,* at p. 158; accord, *People v. Medina* (2016) 245 Cal.App.4th 778, 788.) The High Court in *Tison* defined "reckless disregard for human life" as "knowingly engaging in criminal activities known to carry a grave risk of death." (*Tison, supra*, at p. 157.)

For the first time since section 190.2, subdivision (d) was enacted in 1990, this Court in *People v. Banks, supra,* 61 Cal.4th 788 considered what it means for a non-killing aider and abettor to be a "major participant" and to act with "reckless indifference to human life" in the commission of a felony murder. (*Id.* at p. 794.)

This Court in *Banks* found that felony-murder participants may be placed on a spectrum or continuum. (*Id.* at pp. 800, 802, 811.) At one end, for example, is the getaway driver who was "'not on the scene, who neither intended to kill nor was found to have any culpable mental state.'" (*Id.* at p. 800, citation omitted.) Such a person is ineligible for the death penalty or life imprisonment without the possibility of parole. At the other extreme is the actual killer and those who attempted or intended to kill, who may be eligible for such extreme punishment. (*Ibid.*)

This Court in *Banks* listed non-exclusive factors to be considered to evaluate a felony murder participant's culpability and determine where on the continuum such a participant belongs:

> 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?

(*Banks, supra*, at p. 803, fn. omitted.)

This Court in *Banks* reasoned that non-killing aiders and abettors who simply are aware that their confederates are armed and that armed robberies carry a risk of death "lack the requisite reckless indifference to human life." (*Banks, supra*, at p. 809.) This Court stated, "Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum." (*Id.* at p. 808, quoting *Tison v. Arizona, supra,* 481 U.S. 137, 157.)

This Court also noted that where there is evidence that the plan for the robbery did not include the use of lethal force, an aider and abettor's "absence from the scene may significantly diminish culpability for death." (*Id.* at p. 803, fn. 5.) This Court further found that an aider and abettor's continued participation in a robbery after he learns that a victim has been killed is insufficient to prove a reckless indifference to human life. (*Id.* at p. 807.)

Applying its interpretation of the special circumstance

statute, this Court in *Banks* found that the defendant's minimal role as the getaway driver for an armed robbery of a marijuana dispensary who was sitting in his car blocks away from the crime scene when the victim was shot and killed, could not support a finding that he was a major participant in the robbery. (*Banks, supra*, at pp. 795, 805.) Moreover, no evidence showed that any of his confederates had previously committed a violent crime such as murder or attempted murder. (*Ibid.*) The defendant's mere awareness that his confederates were armed and that armed robberies carry a risk of death was insufficient to prove reckless indifference to human life. (*Id.* at p. 809.) Finally, his gang membership did not establish his reckless indifference absent any evidence that he knew his confederates had previously committed violent crimes. (*Id.* at pp. 810-811.) Thus this Court found insufficient evidence to support the special circumstance finding as to the defendant. (*Id.* at p. 805.)

One year later, this Court in *People v. Clark, supra*, 63 Cal.4th 522 again considered what it means for a non-killing aider and abettor to act with "reckless indifference to human life" in the commission of a felony murder. (*Id.* at pp. 618-622.) This Court enumerated some "case-specific factors" pertinent to its analysis. (*Id.* at p. 618.) This Court began by reiterating, "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." (*Ibid.*, citing *Banks, supra*, at p. 809.) This Court also noted, "Proximity to the murder and the events leading up to it may be particularly significant," and

explained that "'the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts.'" (*Clark, supra*, at p. 619, citation omitted.) But this Court also reasoned that when "a defendant instructs other members of a criminal gang . . . to shoot any resisting victims [of their planned crimes], he need not be present . . . in order to be found to be recklessly indifferent to the lives of the victims." (*Ibid.*, citation omitted.) Additionally, this Court observed that "[c]ourts have looked to whether a murder came at the end of a prolonged period of restraint of the victims by defendant," and concluded that "[t]he duration of the interaction between victims and perpetrators is therefore one consideration in assessing whether a defendant was recklessly indifferent to human life." (*Id.* at p. 620.) This Court found that "[a] defendant's knowledge of factors bearing on a cohort's likelihood of killing" is another significant factor bearing on reckless indifference. (*Id.* at p. 621.) Finally, this Court recognized that "a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis." (*Id.* at p. 622.)

Applying its prescribed analysis to the facts in *Clark*, this Court determined that a defendant who had masterminded and organized a burglary and attempted robbery of a computer store and orchestrated the crime from a car in the store's parking lot was not subject to the felony murder special circumstance because the evidence was insufficient to establish reckless indifference to human life. (*Id.* at pp. 536-537, 612-614.)This Court noted that the defendant did not

carry a weapon, and there was no evidence the shooter had a propensity for violence, no evidence the defendant knew of any such propensity, and no evidence the defendant had the opportunity to observe the shooter's demeanor immediately before the shooting so as to ascertain he was likely to use deadly force. (*Id.* at pp. 618-619, 621.) The defendant was across the parking lot at the time of the shooting and had no chance to intervene or prevent the shooting of the victim. (*Id.* at pp. 619-620.) Moreover, there was no evidence that the defendant had instructed the shooter to use deadly force. (*Id.* at pp. 619-620.) Finally, the circumstances suggested that the crime was planned with an eye to minimizing the risk of lethal violence inasmuch as the robbery was planned for after the store's closing time, when most employees would be gone, and the defendant expected his accomplices to handcuff the remaining employees in a bathroom to minimize contact between the perpetrators and victims. (*Id.* at pp. 620-621, 623.) Thus this Court found insufficient evidence to support the special circumstance finding as to the defendant. (*Id.* at p. 623.)

C. The Evidence That Petitioner Planned an Unarmed Beating and Robbery and Observed the Ensuing Events From Afar Fails to Prove the Reckless Indifference to Life Essential to the Special Circumstance, Which Requires the Knowing Creation of a Grave Risk of Death

Analysis of the pertinent factors identified by this Court in *Banks* and *Clark* compel the conclusion that the evidence is insufficient to support a finding that petitioner had the requisite reckless indifference to human life for purposes of the robbery-murder special circumstance.

1. Petitioner did not kill or intend to kill

As a preliminary matter, the evidence establishes that petitioner was at most an aider and abettor to the shooting death of Samuel Wilson, not the actual killer. Eyewitnesses testified that the gunman got into a white van after the shooting and the white van drove away from the scene. (1 RT 69, 71-72, 87, 93, 96, 124, 132.) Eyewitnesses also testified that petitioner walked over to the location of Wilson's body soon after the shooting. (1 RT 197, 256; 2 RT 499-500.) Thus the eyewitnesses' testimony establishes that petitioner could not have been the shooter. In addition, Lorenzo McCoy testified that he heard petitioner's friend Randall Powell say he was the shooter. (2 RT 418.) Cheryl Long, one of the people who shared petitioner's residence, viewed a surveillance video and identified the shooter as Randall Powell, based on the shooter's movements and mannerisms. (1 RT 288, 290; 2 RT 481.) Based on this evidence, the prosecutor argued to the jury that the evidence established that petitioner did not pull the trigger (3 RT 658, 682), and that Randall Powell was the shooter (3 RT 658-660, 679-680, 693, 697, 700, 702).

Moreover, the evidence establishes that petitioner did not intend to kill Wilson. Lorenzo McCoy testified that petitioner disclosed that he wanted to find the person who had sold him fake TVs, beat him up, and take back the money petitioner had given him. (2 RT 401, 407.) McCoy also testified that petitioner planned to meet Randall Powell and James Howard at a Shell gas station, beat up the fake TV seller, and get back petitioner's money. (2 CT 595; 2 RT 425-426, 428-429, 582.)

Based on this evidence, the prosecutor conceded to the jury that no evidence showed that petitioner had the intent to kill. (3 RT 703.) The prosecutor argued that petitioner "set the ball in motion for what happened" (3 RT 658), that petitioner's plan was simply to beat up Wilson and take his money (3 RT 677, 680, 686-687, 692, 699), and that Powell shot Wilson only because Wilson ran from Powell's confrontation with him (3 RT 680-681).

2. Analysis with the *Banks* and *Clark* factors establishes a lack of evidence to prove reckless indifference to life

Furthermore, a thorough analysis of petitioner's case, employing the factors identified in *Banks* and *Clark*, discloses that the evidence is insufficient to prove that petitioner acted with reckless indifference to human life while aiding and abetting the murder.

First of all, not only is there no evidence that petitioner himself used a gun or was armed with a gun, there is no evidence that petitioner had any knowledge that the shooter, Randall Powell, or any other accomplice was armed with a gun. This Court in *Banks* held that an aider and abettor's knowledge that an accomplice was carrying a weapon would not suffice to prove reckless indifference to human life. (*Banks, supra*, 61 Cal.4th at p. 809; accord, *Clark, supra,* 63 Cal.4th at p. 618.) A logical corollary to this reasoning is that the lack of evidence to prove an aider and abettor's knowledge that a participant is armed strongly suggests an absence of reckless indifference. (See *In re Miller* (2017) 14 Cal.App.5th 960, 975 [proof of reckless indifference to life found to be insufficient in case in which prosecution

presented no evidence defendant knew any robber would be armed].) Here, there is no evidence that petitioner was armed when he went to the Shell gas station near to the scene of the shooting or when he walked over to the scene of the shooting shortly after it occurred. More importantly, there is no evidence to suggest that petitioner knew that Powell or any other accomplice would bring a gun to the planned robbery. Petitioner's comment in his post-arrest interview with a detective that the shooter's act of arming himself before confronting Samuel Wilson suggested his intent to kill (SCT 40-41) demonstrates only that petitioner was speculating the fact that the shooter may possibly have had a pre-existing intent to kill. Petitioner's comment does not imply that he knew before the crime that Powell would be armed and murderous at the time he confronted Wilson. The evidence at trial suggests only that petitioner contemplated an unarmed beating. (3 RT 677, 680, 686-687, 692, 699.)

Second, the evidence fails to show that petitioner knew that Powell or any other accomplice had a willingness to harm people. This Court in *Clark* explained that "[a] defendant's knowledge of factors bearing on a cohort's likelihood of killing" is a significant factor bearing on reckless indifference. (*Clark, supra,* at p. 621.) Here, there is no evidence that petitioner's "past experience or conduct of the other participants" (see *Banks, supra*, at p. 803) made him aware that Powell or any of the other accomplices had a history or propensity for using lethal or even non-lethal injurious violence. (See *In re Loza* (2017) 10 Cal.App.5th 38, 53 [proof of reckless indifference found to be

sufficient in case in which defendant provided gun to shooter before crime but after shooter told defendant he had once shot someone in the head].) Here, evidence shows that petitioner knew that Powell or any other accomplice had ever used, carried, or even possessed a gun, or that Powell or any other accomplice had ever harmed or even threatened to harm anyone. The record is simply devoid of evidence that petitioner knew any participant might be willing or eager to harm anyone.

Third, the evidence establishes that petitioner was a distance from the scene of the crime and therefore unable to exert any influence on the violent behavior of Powell or the other accomplices as the attempted robbery and murder were being committed. This Court in *Banks* encouraged courts to consider, "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?" (*Banks, supra*, at p. 803.) This Court explained that an aider and abettor's "absence from the scene may significantly diminish culpability for death." (*Id.* at p. 803, fn. 5.) Similarly, this Court in *Clark* explained, "Proximity to the murder and the events leading up to it may be particularly significant," and explained that "'the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts.'" (*Clark, supra*, at p. 619, citation omitted.) Here, the evidence shows that petitioner observed his accomplices' confrontation with the victim in the parking lot of a strip mall from his vantage point at a Shell gas station adjacent to the parking lot. (3 CT 651, 654; 1 RT 65-66, 79-80, 82, 108, 129.) Although petitioner

acknowledged to detectives that he was present at the Shell station not far from the scene of the shooting, he never told detectives that he was in the immediate presence of the shooter and victim at the time of the shooting. (3 CT 632, 637, 821-822, 827, 846; SCT 44, 115, 117-118, 129.) It is reasonable to infer that petitioner remained a distance from the confrontation so as to avoid being identified by Wilson, who might have deduced that he was about to be robbed by cohorts of the person whom Wilson had scammed by fraudulently selling him fake TVs. Therefore petitioner's distance from the scene deprived him of any ability to restrain Randall Powell when Powell pulled out a gun and fired shots at Wilson as he attempted to flee on foot. (1 RT 67, 81-83, 85-86, 129, 131.) No evidence shows that petitioner and his accomplices discussed shooting Wilson if he were to flee or resist their efforts to rob him. Rather the evidence shows that petitioner and the accomplices only discussed robbing Wilson and inflicting a beating to punish him for having fraudulently sold petitioner fake TVs. (2 CT 595; 2 RT 398, 401, 407, 425-426, 428-429, 582; 3 RT 677, 680, 686-687, 692, 699.) Thus petitioner's distance from the confrontation and shooting significantly diminishes his culpability. (See *People v. Clark, supra*, 63 Cal.4th at pp. 619-620 [proof of reckless indifference to life found to be insufficient in case in which evidence shows defendant was across parking lot at time of shooting and had no chance to intervene or prevent shooting].)

Fourth, there is no evidence that the victim was restrained for a period of time, giving petitioner an opportunity to intervene and prevent violence. This Court in *Clark* mentioned that "[c]ourts have

looked to whether a murder came at the end of a prolonged period of restraint of the victims by defendant," and stated that "[t]he duration of the interaction between victims and perpetrators is therefore one consideration in assessing whether a defendant was recklessly indifferent to human life." (*Clark, supra*, at p. 620.) An accomplice's impulsive shooting counsels against finding that a defendant had a reckless indifference to life. Here, there is no evidence that the confrontation between petitioner's accomplices and Wilson was prolonged so as to increase the likelihood of violence or to provide petitioner an opportunity to intervene to prevent any of his accomplices from resorting to lethal violence. Rather Powell's acts of drawing his gun and then shooting and killing Wilson appeared to be swift and impulsive in reaction to Wilson's unanticipated attempt to flee from the robbers. (See *Clark, supra*, at p. 539 [proof of non-shooting defendant's reckless indifference to life found to be insufficient in case in which evidence shows shooter fired when startled by arrival of store employee's mother]; *Banks, supra*, at pp. 795, 807 [proof of non-shooting defendant's reckless indifference to life found to be insufficient in case in which evidence shows shooter fired when security guard pushed on door to prevent robbers from exiting]; *In re Miller, supra,* 14 Cal.App.5th at pp. 965, 975 [proof of non-shooting defendant's reckless indifference to life found to be insufficient in case in which evidence shows shooter fired when victim moved toward him].)

Fifth, no evidence about petitioner's behavior after the shooting suggests a reckless indifference to human life. This Court in

Banks stated that relevant questions include, "What did the defendant do after lethal force was used?" (*Banks, supra*, at p. 803.) In this case, there is no evidence that petitioner neglected the well-being of the shooting victim by fleeing the scene. Rather the evidence shows that shortly after the shooting, petitioner walked over to the scene and talked to people standing near Wilson's body. (1 RT 197, 256; 2 RT 499-500.) By this time, bystanders had already called 911 (1 RT 101, 196; 2 CT 563, 567), so there was nothing else petitioner could have done to aid the victim.

Sixth and finally, the evidence suggests that the robbery of Wilson was planned in such a way as to minimize the risk of lethal violence. This Court in *Clark* instructed that "a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis." (*Clark, supra,* at p. 622.) For example, the robbery in *Clark* appeared to have been planned with effort to minimize the risk of lethal violence, inasmuch as it was planned to take place after the store's closing time, when most employees would be gone, and the defendant expected his accomplices to handcuff the remaining employees in a bathroom to minimize contact between the perpetrators and victims. (*Id.* at pp. 620-621, 623.) Here, the evidence shows that petitioner expected his accomplices to confront Wilson in broad daylight, in a very public place, namely, the parking lot of a strip mall on a busy road adjacent to a Shell gas station that was open for business to the public. (1 RT 65-66, 79-80, 82, 108, 129.) These circumstances suggest that petitioner could not have anticipated that Powell or any other accomplice might pull out a gun and fire shots.

3. Evidence that petitioner's plan involved beating the intended robbery victim does not establish reckless indifference to life

Although the prosecution presented evidence to show that petitioner planned for his accomplices to rob and "beat the shit out of" Samuel Wilson (2 RT 428-429; 2 CT 593, 595), the extremely sparse evidence concerning this plan fails to show that petitioner expected that Wilson would face a grave risk of death from petitioner's plan. (See *Banks, supra*, at p. 808 [knowing creation of grave risk of death is required to prove reckless indifference to human life].)

Preliminarily, it is important to note that Wilson's death resulted from an unplanned and unanticipated shooting by petitioner's accomplice, Randall Powell. The killing did not result from the unarmed petitioner planned but which was never inflicted. The fact that the planned beating never occurred resulted in a record at petitioner's trial from which no reasonable factfinder could draw an inference about the degree of risk to life posed by petitioner's plan.

Petitioner acknowledges that a robbery plan that involves even an unarmed beating of a victim must carry some risk of death. However, it would be unreasonable to assume that such a planned beating carries a "grave risk of death" (see *People v. Banks, supra,* 61 Cal.4th 788, 808; *Tison v. Arizona, supra,* 481 U.S. 137, 157) in the absence of specific circumstances that might aggravate the risk of death. For example, a grave risk of death could potentially be inferred from evidence that the intended victim of a planned beating was particularly frail or vulnerable to life-threatening injuries, such as a child, an elderly

adult, or a person with severe disabilities, or from evidence that the perpetrators' plan specified an intent to inflict life-threatening bodily injury, i.e., bone fractures or damage to vital organs, or from evidence that the plan involved abandoning a victim in a position unable or unlikely to obtain medical treatment for life-threatening serious injuries.

But in petitioner's case, no evidence was presented to suggest that Wilson, the intended victim of the planned beating, was particularly frail or vulnerable to suffering grievous injuries from a beating, or that the planned beating was intended to include the infliction of life-threatening bodily injury, or that the plan permitted abandoning the victim in a position unable to seek and unlikely to obtain medical treatment for life-threatening injuries. The evidence about the criminal design in this case is limited to petitioner's bare statements that the plan was to "beat the shit out of" the victim and "get [petitioner's] fucking money back." (2 RT 428-429; 2 CT 593, 595.) The evidence further shows that the robbery and beating was planned to take place in broad daylight in the parking lot of a shopping mall on a busy road adjacent to a Shell gas station that was open to the public for business. Nothing about the circumstances in this case suggests that the planned unarmed violence against the victim created a grave risk of death.

Thus the evidence about petitioner's spoken plan to rob and "beat the shit out of" the victim cannot establish the requisite reckless indifference to life.

In light of this Court's opinions in *People v. Banks, supra,* 61 Cal.4th 788 and *People v. Clark, supra*, 63 Cal.4th 522, the

circumstances in petitioner's case compel the conclusion that the evidence presented at trial fails to prove he had the reckless indifference to human life that is essential for a robbery-murder special circumstance.

D. No Procedural Bar to Relief Applies to Petitioner's Case

No procedural precludes petitioner from obtaining the relief he seeks from his invalid robbery-murder special circumstance.

1. Petitioner is entitled to retroactive application of *Banks* and *Clark*

This Court's holdings in *People v. Banks, supra,* 61 Cal.4th 788 and *People v. Clark, supra,* 63 Cal.4th 522 apply retroactively to petitioner's case even though the judgment against him became final prior to the publication of *Banks* and *Clark.*

Thus far, two published authorities have held that *Banks* and *Clark* must be applied retroactively in a habeas corpus proceeding to a judgment that is already final. (*In re Ramirez* (2019) 32 Cal.App.5th 384, 406-407; *In re Miller, supra,* 14 Cal.App.5th 960, 977-979.) These decisions are supported by state and federal authorities.

It is established that judicial decisions are generally given retroactive effect. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 793-794.) But two specific reasons require retroactive application of *Banks* and *Clark.*

First, *Banks* and *Clark* are retroactive under the "expansive theory of retroactivity" (see *In re Hansen* (2014) 227 Cal.App.4th 906, 917) set forth by this Court in *People v. Mutch* (1971) 4 Cal.3d 389. This Court in *Mutch* considered the retroactive effect of recent case law

interpreting and limiting the asportation requirement of kidnapping for robbery under section 209. The recent case neither redefined the crime nor changed any evidentiary or procedural rules, but instead "confirmed a substantive definition of [a] crime duly promulgated by the Legislature." (*Mutch, supra*, at p. 395.) Thus the finality of the defendant's conviction in *Mutch* did not preclude retroactive application of the rule set forth in the recent case. (*Id.* at p. 396.) The rationale applied in *Mutch* was explained by this Court in a later decision as follows: "Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim." (*Woosley, supra,* 3 Cal.4th 758, 794.)

The principles set forth in *Mutch* regarding retroactivity were subsequently applied in *In re Lopez* (2016) 246 Cal.App.4th 350, a habeas corpus action. The court in *Lopez* considered retroactive application of the recent case of *People v. Chiu* (2014) 59 Cal.4th 155 to a petitioner whose first degree murder conviction was final before the *Chiu* decision. (*Lopez, supra,* at pp. 353-354.) This Court had recently held in *Chiu* that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Chiu, supra*, at pp. 158-159.) The court in *Lopez* concluded that *Chiu* should be given retroactive effect, noting that the crime of murder, the degrees of murder, and aiding and abetting liability were all established by statute. (*Lopez, supra,* at p. 359.) The court in *Lopez* reasoned, "By limiting the scope of aider and abettor

liability in the commission of murder, the court in *Chiu* was, in effect, engaging in statutory interpretation and declaring the Legislature's intent just as the court in *Mutch* did for the aggravated kidnapping statute." (*Ibid.*, citing *Chiu, supra*, at p. 164.)

Under the reasoning set forth in *Mutch* and *Lopez*, the guidance provided by this Court in *Banks* and *Clark* should be applied retroactively to cases such as petitioner's that became final before *Banks* and *Clark* were decided. As in *Mutch*, where the recent case did not redefine the crime of kidnapping for robbery, and *Lopez*, where the recent case (*Chiu*) did not redefine the crime of first degree murder, petitioner's case involves recent cases (*Banks* and *Clark*) which did not redefine the robbery-murder special circumstance but simply confirmed or clarified the substantive meaning of section 190.2, subdivisions (a)(17) and (d), the statutory enactment of the robbery-murder special circumstance. Thus petitioner is entitled to retroactive application of *Banks* and *Clark* to his case under the expansive theory of retroactivity set forth in *Mutch*.

Retroactive application of *Banks* and *Clark* is compelled for the additional reason that it is required by petitioner's federal constitutional right to due process (see U.S. Const., Amend. XIV), pursuant to the United States Supreme Court's opinion in *Fiore v. White* (2001) 531 U.S. 225 [148 L.Ed.2d 629]. The defendant in *Fiore* was convicted of violating a state statute that prohibited operating a hazardous waste facility without a permit. After his conviction became final, the Pennsylvania Supreme Court interpreted the statute for the first

time, making clear that Fiore's conduct did not fall within its scope. When the High Court certified a question to the Pennsylvania Supreme Court, asking whether the interpretation was a new rule of law, the Pennsylvania court replied that its decision merely clarified the statute. (*Id.* at p. 228.) Thus the High Court concluded that the retroactivity of the Pennsylvania court case was not at issue. "Rather, the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit." (*Ibid.*) The High Court ruled in favor of the defendant, noting that due process forbids a state from convicting a person of a crime without proving beyond a reasonable doubt its essential elements. (*Id.* at pp. 228-229.)

Likewise, *Banks* and *Clark* must be given retroactive application in petitioner's case, because to do otherwise would violate petitioner's federal constitutional right to due process, in light of the insufficiency of evidence to prove the elements of the robbery-murder special circumstance beyond a reasonable doubt.

Accordingly, petitioner is entitled in his case to retroactive application of the law set forth in *Banks* and *Clark* concerning the requirements for proof of the robbery-murder special circumstance for non-killing aiders and abettors such as himself.

2. Petitioner is entitled to relief on habeas corpus even though he raised this argument in his direct appeal

Thus far, three published decisions have held that a petitioner who challenged on appeal the sufficiency of evidence to

support a felony-murder special circumstance may subsequently raise the same issue on habeas corpus based on the newly decided cases of *Banks* and *Clark*. (*In re Taylor* (2019) 34 Cal.App.4th 543, 554-555; *In re Ramirez, supra,* 32 Cal.App.5th 384, 407-408; *In re Miller, supra,* 14 Cal.App.5th 960, 978.) These decisions are supported by well-established state law governing habeas corpus proceedings.

It is generally true that a claim that was raised and rejected on appeal or could have been raised on appeal may not be raised in a subsequent petition for writ of habeas corpus. (*In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756, 769.) However, two exceptions to the *Waltreus/Dixon* principle apply to petitioner's case -- (1) the superior court acted in excess of its jurisdiction, and (2) the law has changed in favor of the petitioner. (See *In re Reno* (2012) 55 Cal.4th 428, 478, 490-491; *In re Harris* (1993) 5 Cal.4th 813, 825.)

This Court has explained that "'[h]abeas corpus is available in cases where the court has acted in excess of its jurisdiction.'" (*In re Harris*, *supra*, at p. 838, citation omitted; accord, § 1476; *In re Zerbe* (1964) 60 Cal.2d 666, 667.) A trial court acts in excess of its jurisdiction if "'what the defendant did was never proscribed'" under the pertinent statute. (*People v. Mutch, supra*, 4 Cal.3d 389, 396, citation omitted.) In *Mutch*, this Court reviewed on habeas corpus a claim that a defendant's conviction of kidnapping for robbery was based on insufficient evidence to satisfy the asportation element of that offense. (*Mutch, supra*, at pp. 392-395.) The defendant's conviction had been affirmed on appeal, but an intervening decision by this Court had

clarified that the essential asportation element of kidnapping for robbery could not be satisfied by movements that were merely incidental to the robbery and did not substantially increase the risk of harm over that necessarily present in the crime of robbery itself. (*Mutch, supra*, at pp. 393-394.) As a result, this Court in *Mutch* determined that habeas corpus relief was appropriate because the intervening decision by this Court had made it clear that the defendant's conviction based on insufficient evidence was in excess of the trial court's jurisdiction. (*Mutch, supra*, at pp. 396-399.)

Similarly, in petitioner's case, this Court's decisions in *Banks* and *Clark* have clarified the quantum of proof necessary for the essential element of reckless indifference to human life for the robbery-murder special circumstance to be applied to a non-killing aider and abettor, thereby making it clear that the special circumstance finding in petitioner's case was in excess of the trial court's jurisdiction. Thus this exception to the *Waltreus/Dixon* principle applies to petitioner's case, and habeas corpus relief is warranted.

Furthermore, this Court's decisions in *Banks* and *Clark* resulted in a change in the law that provides a second exception to the *Waltreus/Dixon* principle, thereby entitling petitioner to habeas corpus relief. This Court in *In re Coley* (2012) 55 Cal.4th 524 determined that the change of law exception to the *Waltreus/Dixon* principle applied to a defendant's claim on habeas corpus that his 25-year-to-life sentence for failing to register as a sex offender violated the prohibition against cruel and unusual punishment. (*Id.* at p. 537.) The defendant's

conviction had been affirmed on appeal, but an intervening appellate court decision had explained, based on evolving case law interpreting the constitutional provision, that such a sentence was cruel and unusual punishment in violation of the defendant's constitutional right. (*Ibid.*) Thus this Court found that the defendant's claim was not procedurally barred on habeas corpus. (*Ibid.*) Likewise, the court in *In re Saldana* (1997) 57 Cal.App.4th 620 determined that the change of law exception to the *Waltreus/Dixon* principle applied to a defendant's claim on habeas corpus that the trial court's imposition of his 25-year-to-life sentence was based on its erroneous belief that it had no power to strike a prior conviction to avoid imposing such a Three Strikes sentence. (*Id.* at p. 624.) The defendant's sentence had been affirmed on appeal, but an intervening decision by this Court had explained that the law permits a trial court to exercise discretion to strike a prior conviction to avoid imposing such a Three Strikes sentence. (*Ibid.*) Thus the defendant's claim concerning his sentence was not procedurally barred on habeas corpus. (*Ibid.*)

As in *Coley* and *Saldana*, petitioner is entitled to habeas corpus relief despite the *Waltreus/Dixon* prohibition against using habeas corpus as a second appeal, inasmuch as petitioner is relying on cases that changed the relevant law after the judgment against him was affirmed on appeal. Specifically, the *Banks* and *Clark* opinions altered the analysis to be applied to the robbery-murder special circumstance for non-killing aiders and abettors. First, *Banks* held that an aider and abettor's knowledge that a participant was carrying a weapon would no

longer suffice to prove reckless indifference to human life. (*Banks, supra*, 61 Cal.4th at p. 809, and footnote 8 [disapproving two cases to the extent they implied that knowledge one's accomplice is armed can by itself establish reckless indifference].) A logical corollary to this reasoning in *Banks* is that the lack of evidence to prove an aider and abettor's knowledge that a participant is armed strongly suggests an absence of reckless indifference. Second, *Banks* held that where there is evidence that the plan for a robbery did not include the use of lethal force, an aider and abettor's "absence from the scene may significantly diminish culpability for death." (*Id.* at p. 803, fn. 5.) Third, *Clark* held that the culpability of an aider and abettor who actually planned a crime may be mitigated by evidence that the steps he took to plan the crime suggest an effort to reduce the risk of violence. (*Clark, supra*, 63 Cal.4th at pp. 621-622 ["an issue of first impression"].)

Those changes in the pertinent legal analysis set forth in *Banks* and *Clark* are implicated in petitioner's case, insofar as the evidence fails to show that petitioner knew any participant in the robbery would be armed and fails to show that lethal force was planned, and also shows that petitioner was absent from the scene of the crime, but shows that the planned crime was a daytime robbery in a very public place, thereby suggesting an effort to reduce the risk of lethal violence. Thus habeas corpus relief is appropriate in petitioner's case because *Banks* and *Clark* changed the legal analysis applicable to the robbery-murder special circumstance after the judgment against petitioner was affirmed on appeal, and did so in several ways that favor petitioner.

Accordingly, petitioner is entitled to habeas corpus relief for his claim under both the excess of jurisdiction and change in the law exceptions to the *Waltreus/Dixon* prohibition against using habeas corpus as second appeal.

3. Petitioner is entitled to relief on habeas corpus even though his claim is based on the insufficiency of evidence at trial

Finally, three published decisions thus far have held that a petitioner who presents a claim based on *Banks* and *Clark* is not barred from obtaining relief on habeas corpus even though his claim is based on the insufficiency of evidence presented at trial. (*In re Taylor, supra,* 34 Cal.App.4th 543, 554-555; *In re Ramirez, supra,* 32 Cal.App.5th 384, 407-408; *In re Miller, supra,* 14 Cal.App.5th 960, 979-980.) These recent cases are supported by this Court's decisions governing the presentation of claims in habeas corpus proceedings.

The general rule that claims of insufficiency are not cognizable in a habeas corpus proceeding derives from *In re Lindley* (1947) 29 Cal.2d 709. The defendant in *Lindley* filed a petition for writ of habeas corpus after his conviction was affirmed on appeal to challenge the substantialness of the evidence on which his conviction was based. (*Id.* at p. 722.) But this Court stated, "Upon habeas corpus, ordinarily it is not competent to retry issues of fact or the merits of a defense, such as insanity, and the sufficiency of the evidence to warrant the conviction of the petitioner is not a proper issue for consideration." (*Id.* at pp. 722-723, citations omitted.) This rule was subsequently applied in *In re Reno, supra,* 55 Cal.4th 428, in which this Court

decided that the defendant's post-appeal challenges to the sufficiency of the evidence were not cognizable on habeas corpus where there "were no allegations [] justifying their presentation" or "plausibly justifying how the claims fall outside the *Lindley* rule." (*Id.* at pp. 505-506.)

However, the rule applied in *Lindley* and *Reno* does not bar petitioner's claim on habeas corpus. Neither *Lindley* nor *Reno* involved a sufficiency of the evidence claim in a case where the law had changed in favor of the defendant after an affirmance of the judgment on direct appeal. Nor did *Lindley* or *Reno* involve a petitioner who relied on a subsequent decision that "confirmed a substantive definition" of a criminal provision such that the conviction was in excess of the court's jurisdiction. (See *People v. Mutch, supra*, 4 Cal.3d 389, 395.)

While habeas corpus will not "ordinarily" provide a remedy for an insufficiency of the evidence claim (*Lindley, supra,* 29 Cal.2d at pp. 722-723), this Court has found an "excess of jurisdiction" in a sufficiency of the evidence claim on habeas corpus when a subsequent decision has clarified that the defendant was convicted under a statute that did not punish his particular conduct. (*Mutch, supra*, at pp. 395-396 [insufficiency of evidence to prove asportation element of kidnapping for robbery].) Where, as in petitioner's case, subsequent appellate court decisions, such as *Banks* and *Clark*, clarify that "what defendant did was never proscribed" under the pertinent statute, the trial court acted in excess of jurisdiction. (*Id.* at p. 396.) Therefore "finality for purposes of appeal is no bar to relief, and . . . habeas corpus or other extraordinary remedy will lie to rectify the error." (*Ibid.*) Thus the Court has made it

clear that "'a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he is convicted did not prohibit his conduct.'" (*Ibid.*, quoting *In re Zerbe, supra,* 60 Cal.2d 666, 668.)

In this case, there is a dispute as to petitioner's culpability based on the facts pertinent to the robbery-murder special circumstance, but there is no material dispute as to the facts themselves. Moreover, the subsequent decisions of *Banks* and *Clark* compel the conclusion that the robbery-murder special circumstance statute does not apply to petitioner's participation in the criminal incident in this case. Thus the trial court acted in excess of its jurisdiction in imposing the special circumstance on petitioner. As a result, the *Lindley* rule poses no procedural bar to petitioner's claim of insufficient evidence to support the robbery-murder special circumstance based on the clarification of the law set forth in *Banks* and *Clark*.

E. The Special Circumstance Must be Reversed

For all the foregoing reasons, the special circumstance must be reversed and petitioner's sentence to life imprisonment without the possibility of parole must be vacated.

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CONCLUSION

Petitioner is therefore entitled to the relief requested -- granting him a writ of habeas corpus to set aside the judgment that imposed the robbery murder special circumstance and sentenced him to life imprisonment without possibility of parole.

DATED: June 10, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel for petitioner WILLIE SCOGGINS hereby certifies that this opening brief on the merits consists of 11,700 words (excluding tables and proof of service), according to the word count of the computer word-processing program that produced this brief. (California Rules of Court, rule 8.520(c)(1).)

Dated: June 10, 2019

VICTOR J. MORSE

Attorney for Petitioner
WILLIE SCOGGINS

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

In re Willie Scoggins on Habeas Corpus Case No. S253155

I, VICTOR J. MORSE, declare that I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, State of California, and not a party to the subject cause. My business address is 3145 Geary Boulevard, PMB # 232, San Francisco, California 94118-3316. I served a true copy of the attached

PETITIONER'S OPENING BRIEF ON THE MERITS

on the following, by placing copies thereof in envelopes addressed as follows:

Mr. Willie Scoggins # AI 2379
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(Attn.: Judge David De Alba)

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Sacramento, CA 95814

Each said envelope was then, on June 10, 2019, sealed and deposited, in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

On June 10, 2019, I caused the TrueFiling website to transmit a PDF version of this document by electronic mail to each of the following using the email addresses indicated:

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Court of Appeal
Third Appellate District

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 10, 2019, at San Francisco, California.

VICTOR J. MORSE