In the Supreme Court of the State of California

In re

WILLIE SCOGGINS,

On Habeas Corpus

Case No. S253155

Third Appellate District, Case No. C084358
Sacramento County Superior Court, Case No. 08F04643
The Honorable David De Alba, Judge

ANSWERING BRIEF ON THE MERITS

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ISSUE PRESENTED

Was the evidence at trial—that petitioner had ordered two cohorts to severely beat the victim and that he had been in constant contact with them shortly before one of them shot the victim—sufficient to support the robbery-murder special circumstance under *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*)?

INTRODUCTION

Samuel Wilson was murdered during an attempted robbery that was masterminded by petitioner Willie Scoggins. Wilson had swindled Scoggins into purchasing boxes purportedly containing 50-inch flat-screen televisions, but which turned out to be boxes containing plywood and two-by-fours. A few days later, Scoggins's girlfriend encountered Wilson and immediately notified Scoggins. Scoggins devised a plan to exact revenge. According to that plan, Scoggins's cohorts, including Randall Powell and James Howard, would lure Wilson to a location under the guise of purchasing a television, ambush him, "beat the shit" out of him in a two-on-one confrontation, and take his money. Over the course of an hour before the ambush, Scoggins was in constant contact with Powell and Howard. During the confrontation, while Scoggins watched the events unfold from a nearby location, Powell shot and killed Wilson. Scoggins, unfazed by the shooting, walked up to Wilson to see if he was breathing. He then removed his vehicle from the area before officers arrived but returned to learn information from a witness and to speak to an officer in an attempt to absolve himself of liability.

Scoggins appealed following his conviction for first degree murder with an attempted robbery-murder special circumstance finding. He claimed that the conviction was unsupported by substantial evidence that he acted with a reckless indifference to human life. The claim was rejected on

direct appeal. The claim was also rejected on state habeas by the Third District Court of Appeal after this Court decided *Banks* and *Clark*, which cited a list of nonexclusive circumstances to consider when analyzing whether a defendant acted as a major participant and with reckless indifference to human life. (*Banks*, *supra*, 61 Cal.4th at p. 803; *Clark*, *supra*, 63 Cal.4th at pp. 618-623.) Scoggins now brings the same claim before this Court. His claim should again be denied.

STATEMENT OF THE CASE

A. Evidence at Trial

1. Events leading up to the shooting of Wilson

In June 2008, in Sacramento, Scoggins purchased what he believed to be two or three flat-screen televisions from Wilson. (2 RT 379, 395, 398.) Scoggins later discovered the boxes contained nothing but packaging, plywood, and two-by-fours. (1 RT 169-170; 2 RT 399-400.)

A few days later, Scoggins's girlfriend, Shaneil Cooks, and her friend, Jennifer Ella Kane, inadvertently met Wilson. (2 CT 582; 3 CT 820-821.) Shortly thereafter, numerous calls were made between Kane and Powell, Scoggins and Powell, Cooks and Scoggins, and Wilson and Cooks. (1 RT 181, 222-232; 2 RT 311, 313, 337, 346-349, 486, 538-539, 581, 585, 588; 2 CT 582-589; 3 CT 850.) During one of the calls, Kane told Powell that they had found the person who sold the fake televisions. (1 RT 226, 230-231; 2 RT 346, 486-487.) Powell, who was with Latoya Tate at the time he received the call from Kane, told Tate that he was going to meet Howard. (1 RT 231; 2 RT 474-475.) At 5:55 p.m., Cooks texted Scoggins, "Man you ain't answering the phone and the dude that sold you the TVs is in my face right now." (2 RT 339.) Around the same time, Scoggins called Lorenzo McCoy, who was with Howard and Powell at a house on McGlashan Way. (2 RT 402, 404-405; 2 CT 590-591, 595.) Scoggins told

McCoy that they had found Wilson. (*Ibid.*) Scoggins also told McCoy that the plan was to meet Wilson; Kane and Cooks would pretend to want to purchase a television, Powell and Howard would hide in Cooks's van, and Powell and Howard would "beat the shit" out of Wilson and take his money. (2 RT 407, 425-431, 463-464, 581-582; 2 CT 590-593, 595.) Scoggins then spoke to Howard and Powell. (2 RT 404-406, 413, 425.) McCoy overheard Scoggins tell Howard and Powell the plan.

Between 5:47 p.m. and 6:28 p.m., Wilson spoke to Cooks and Kane numerous times. (2 RT 318; 2 CT 582-589.) Cooks pretended to be Kane's mother, Darla, and told Wilson that she wanted to purchase a television. (2 CT 583-585.) Initially, Wilson told Cooks and Kane to meet him at Burlington Coat Factory on Florin Road. (2 CT 585-586.) Wilson later called Cooks and said he was leaving the Burlington Coat Factory parking lot because the police were nearby. (2 CT 586-587.) He told Cooks to meet him across the street near the Shell gas station. (2 CT 589.)

During this same time, a torrent of calls was made between Scoggins and Powell. (2 RT 346-349.) Between 5:50 p.m. and 6:37 p.m., Scoggins and Powell called each other 15 times. Eleven of those calls went to voicemail. (*Ibid.*) Four of those calls were answered. Over the course of those four calls—at 5:53 p.m., 5:59 p.m., 6:27 p.m., and 6:37 p.m.—Scoggins and Powell spoke to each other for a total of two minutes and 40 seconds. (*Ibid.*)

Scoggins and Howard also spoke to each other. At 6:29 p.m., Howard called Scoggins and spoke to him for 32 seconds. (2 RT 348.) At 6:31 p.m., Scoggins called Howard and spoke to him for two minutes and 30 seconds. (*Ibid.*)

2. The shooting and its aftermath

A minute after Powell last spoke to Scoggins at 6:37 p.m., and shortly after Cooks's white van pulled into the parking lot near the Shell gas

station, a shirtless Powell opened the sliding door to the van, got out, had a brief conversation with Wilson, pulled out a gun, and fired several shots. (1 RT 82-86, 107-108, 112-113, 130; 2 RT 480-481; 2 CT 568-569.) When Wilson ran, Powell followed and fired additional shots. (1 RT 82-86, 130-132; 2 RT 480-481; 2 CT 563, 568-569; People's Exhibit 153.) As Wilson attempted to run away, he was shot twice in the back and once in the arm before falling to the ground. (1 RT 41-45, 48, 132; People's Exhibit 153.) Howard and Powell then got into Cooks's white van, and Kane hurriedly drove away. (1 RT 71-72, 87-88, 94-96, 100, 132-133, 135; 2 RT 480-481; 2 CT 565-568.)

Bystanders immediately surrounded Wilson. (1 RT 194-197, 254-255; 2 RT 497.) Scoggins was in that group of bystanders.[1] (1 RT 197, 256; 2 RT 499-500.) While standing there, Scoggins made a statement to one of the bystanders indicating that he knew the people who had committed the shooting. (1 RT 203-204, 209; 3 CT 885.) Also while on the scene, Scoggins learned that a witness had taken down the van's license plate number. (3 CT 738.) Before officers arrived, Scoggins moved his car from the area and then returned. (1 RT 208-209; 2 RT 502.) Scoggins briefly spoke to an officer before leaving again. (2 RT 258, 529-531.)

Scoggins also spoke to Powell shortly after the shooting. (2 RT 349.) At 6:45 p.m., Scoggins twice called Powell and spoke to him for 19 seconds and 10 seconds. (*Ibid.*) Powell also called Scoggins and spoke to him for four seconds. (*Ibid.*)

A short time later, Howard, Scoggins, Kane, Cooks, and Powell all made their way to the house on McGlashan Way. (1 RT 279-281; 2 RT

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[1] According to Scoggins, he was at the Shell gas station when the shooting occurred. (3 CT 651.) He could hear gunshots but could not see the parking lot where the shooting occurred. (3 CT 651, 658; Supp. CT 60.)

414.) The van was not parked in front of the house, as it usually was, but was parked down the street near a park. (1 RT 282-283.) Later that evening, the group watched the news and saw a story about a man being shot. (1 RT 285-286; 2 RT 418-419.) Scoggins and Powell both stated that Powell was the shooter, and Scoggins counseled Powell to get out of town. (2 RT 418, 430, 450.)

Officers subsequently searched Wilson's vehicle. Officers found television and laptop computer boxes. (1 RT 168-169, 171.) The boxes contained plywood and telephone books rather than televisions and laptops. (1 RT 170, 172-173.)

3. Corroboration of Powell's identity as the shooter

The day after the murder, officers interviewed Cheryl Long, who lived at the McGlashan Way house. (1 RT 275, 287.) Long was familiar with Howard, Powell, Scoggins, Cooks, and Kane. (1 RT 274-275.) According to Long, Powell, Howard, and Scoggins were close friends, as if they were brothers.[2] (1 RT 278.)

On June 11, 2008, officers showed Long the surveillance video that captured the shooting. (1 RT 287; 2 RT 480.) Long identified Powell as the shooter and Howard as the person in the background near the van. (1 RT 288-289; 2 RT 481.) Long explained that she could not identify Powell and Howard by their faces because the video was of poor quality, but recognized their mannerisms, movements, and body types. (1 RT 288; 2 RT 481.)

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[2] Long testified to the same at trial. (1 RT 278.) Also at trial, Tate testified that Powell, Howard, and Scoggins were very close with one another and called each other brothers. (1 RT 221-222.)

4. Scoggins's changing statements

Officers interviewed Scoggins several times. The day after the murder, Scoggins stated that McCoy had called him on the day of the shooting around 6:00 p.m. and woke him up from a nap. (3 CT 631.) Then, Lakesha Sherron called Scoggins and they made plans to meet at Burlington Coat Factory.[3] (3 CT 631-632.) On his way to Burlington Coat Factory, Scoggins saw Sherron at the Shell gas station. (3 CT 632.) Scoggins stopped, checked to see if Wilson was breathing, talked to Sherron and to officers, and then went to the McGlashan Way house. (3 CT 632, 637.) Around 7:30 p.m. or 8:00 p.m., he went to the store to get water. (3 CT 618-619, 633.) Around 9:00 p.m., he and Cooks went to Wal-Mart to receive money his mother had sent him through a money transfer service. (3 CT 623-625, 633.) Later that night, he and McCoy went to a woman's house to get food and then returned to the McGlashan Way house around 10:30 p.m. (3 CT 634.) Scoggins went to bed around 11:00 p.m. (*Ibid.*) During the interview, Scoggins wondered why officers had come to his house that morning. (3 CT 634.) According to Scoggins, he was not a suspect because he had talked to an officer at the scene after the shooting. (3 CT 635.)

Scoggins's statement changed when he was interviewed again three days after the murder. Scoggins stated that he was on his way to

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[3] Sherron, who used to date Scoggins, testified at trial that she had not made plans to meet Scoggins on the day of the shooting. (1 RT 251, 254.) When the shooting occurred, she was with her friends Martesha Lewis and Latecia Lovelace. (1 RT 191, 252; 2 RT 496.) The three women had just returned from Reno and were driving on Florin Road when they saw Wilson lying on the ground in the parking lot. (1 RT 191; 2 RT 254-255, 497-498.) They decided to stop and check on him. While in the parking lot, Lewis overheard Scoggins indicate that he knew the people who had committed the shooting. (1 RT 199, 203-204; 3 CT 885.)

Burlington Coat Factory to meet Sherron, but had stopped at the gas station. (3 CT 651.) He heard gunshots but could not see where the shooting had occurred. (3 CT 651, 658, 663.) As he was leaving, he saw Sherron pull into the gas station. (3 CT 652.) Scoggins pulled back into the gas station. (3 CT 653.) Once out of his vehicle, men in a nearby store asked if the victim of the shooting was breathing. (*Ibid.*) Scoggins walked toward the victim, noticed a hole in the victim's side, and told the men in the store that the victim was not breathing. (3 CT 653-654.) Scoggins then drove across the street to Burlington Coat Factory and walked back to the gas station to talk to Sherron. (3 CT 654, 661.)

During the interview, when a detective told Scoggins that Cooks had been in the parking lot at the time of the shooting, Scoggins stated that Cooks had not told him anything, even though she had stayed with him on the night of the shooting. (3 CT 671.) Scoggins believed that Cooks did not trust him. (3 CT 775.) Scoggins denied receiving Cooks's text on the day of the shooting and claimed he was using McCoy's phone that day. (3 CT 672-673.) Scoggins also stated that everyone was at the McGlashan Way house when he returned there after the shooting. (3 CT 690.) He told them about the shooting, but nobody said anything. (3 CT 690, 773-774.) Scoggins then admitted that Cooks had told him later that she had been talking to someone about purchasing a laptop when a man ran up and tried to grab her. (3 CT 734, 765, 767.)

Scoggins was shown the surveillance video that had captured the shooting. (3 CT 741.) Scoggins claimed that he did not recognize the people in the video but admitted that the white van looked like Cooks's van. (3 CT 741, 744, 748.) He also admitted that he and Howard were half-brothers. (3 CT 744.)

Scoggins denied purchasing fake televisions from Wilson. (3 CT 770.) He explained that he would have had to see the merchandise first before negotiating a price. (3 CT 768.)

Scoggins repeated this denial in his third interview days later but admitted that he had been present when the fake televisions were purchased. (Supp. CT 7, 10, 13.) Scoggins explained that he, Cooks, Kane, and a man named Keith, had been at the park when the televisions had been purchased. (Supp. CT 14.) Scoggins and Cooks were playing with Scoggins's children, and Kane was sitting in a car in front of Wilson's vehicle. (Supp. CT 20, 35.) Keith purchased two televisions for $800 or $850. (Supp. CT 14-15, 23, 81.) Howard put the televisions in his car, and everyone went to the McGlashan Way house. (Supp. CT 24, 26.) Then, Howard and Keith took the televisions somewhere else. (Supp. CT 26.) Later, Scoggins met Howard and Keith near Franklin Boulevard. (Supp. CT 27.) A Hispanic male wanted to purchase the televisions. (*Ibid.*) When they opened the boxes, they discovered there were no televisions inside. (Supp. CT 27, 31.) Scoggins told Cooks about the fake televisions. (Supp. CT 31.) Scoggins then took Keith to the train station, and Keith went back to Oakland. (Supp. CT 16, 110.)

Scoggins denied coming up with the plan to rob Wilson. (Supp. CT 43.) He maintained that on the day of the shooting he had been in the area only to meet Sherron and did not see Cooks's van or the shooting because he had been on the side of the gas station and could not see the parking lot where the shooting had occurred. (Supp. CT 36-37, 48, 60.) Scoggins admitted that he had lied when he told an officer at the scene that he needed to leave to go to a birthday party. (Supp. CT 50.) Scoggins further stated that, when he returned to the McGlashan Way house, he told everyone about the shooting, but they did not mention that they were present. (Supp. CT 54-55, 57.)

Later in the interview, Scoggins stated that he had loaned Keith $400 to purchase the televisions. (Supp. CT 92-95.) He also claimed that he was not concerned with the loss of money because Keith would pay him back. (Supp. CT 92, 108.) Scoggins believed that Kane, Cooks, Howard, and Powell may have been trying to get Wilson's money for themselves. (Supp. CT 82, 115, 117.)

Scoggins made several admissions in his fourth and final interview with detectives. Scoggins admitted that he had received a text from Cooks about the televisions. (3 CT 849.) Initially, Scoggins denied either calling or receiving a call from Cooks or Kane, even though they called numerous times. (3 CT 838, 849.) He then admitted that he had talked to Cooks but stated that it had been about Cooks being upset that Scoggins had been with another woman. (3 CT 851.) He also admitted speaking to either Cooks or Kane around 5:00 p.m., but claimed that they had called the phone of the girl he was with at the time. (3 CT 852, 854.)

Scoggins continued to deny that robbing Wilson had been his plan or that anyone had called and told him of the plan. (3 CT 821, 825, 859.) Scoggins maintained that he had loaned Keith money to purchase the televisions, and Keith would pay him back. (3 CT 827.) Scoggins had no way of getting in contact with Keith. (3 CT 828.) Scoggins further maintained that he had told everyone about the shooting after it had occurred, but they had not responded or indicated that they had also been at the scene. (3 CT 868, 867.)

B. Verdict, Sentencing, and Appeal

In 2011, a jury convicted Scoggins of first degree murder (Pen. Code[4], § 187, subd. (a)) and attempted robbery (§§ 664/211), found true that the murder was committed during an attempted robbery (§ 190.2, subd.

[4] All further undesignated section references are to the Penal Code.

(a)(17)), and found true that a principal was armed during the commission of the offenses (§ 12022, subd. (a)(1)). (2 CT 477-479, 529-531.)

The trial court sentenced Scoggins to state prison for an indeterminate term of life without the possibility of parole (LWOP) for first degree murder with a special circumstance. (2 CT 554-555, 559-560.) Pursuant to section 654, the trial court stayed imposition of sentence as to the attempted robbery conviction and the gun use enhancement. (*Ibid.*)

In 2014, the Third District Court of Appeal affirmed the judgment. The court rejected Scoggins's claim that the robbery-murder special circumstance finding was unsupported by substantial evidence that he had acted with reckless indifference to human life. (*People v. Kane et al., Howard, & Scoggins* (Apr. 7, 2014, C068209, C068210, C068971) [nonpub. opn.].) This Court denied Scoggins's petition for review. (S217481.)

C. Petitions for Writ of Habeas Corpus and Petition for Review

In 2015 and 2016, Scoggins filed several petitions for writ of habeas corpus challenging the sufficiency of the evidence as to the robbery-murder special circumstance in the Sacramento County Superior Court and Third District Court of Appeal. All petitions were denied.[5]

On May 27, 2016, Scoggins filed a petition for writ of habeas corpus in this Court (S234842), again challenging the sufficiency of the evidence to support the robbery-murder special circumstance. On March 29, 2017, after the parties had submitted informal briefs, this Court ordered

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[5] Sacramento County Superior Court Case No. 15HC00101, filed February 13, 2015; Third District Court of Appeal Case No. C080454, filed October 19, 2015; Sacramento County Superior Court Case No. 16HC00151, filed April 1, 2016; Third District Court of Appeal Case No. C082446, filed July 18, 2016.

Respondent to show cause before the Third District Court of Appeal why Scoggins was not entitled to relief in light of *Banks* and *Clark*.

On December 17, 2018, the Third District Court of Appeal ruled that the evidence supported the conclusion that Scoggins had acted with reckless indifference to human life. It thus discharged the order to show cause, and denied Scoggins's petition for writ of habeas corpus. (*In re Willie Scoggins* (Dec. 17, 2018, C084358) [nonpub. opn.].)

On January 17, 2019, Scoggins filed a petition for review in this Court. On April 10, 2019, this Court granted review. Scoggins filed his opening brief on the merits on June 11, 2019.

ARGUMENT

SUFFICIENT EVIDENCE ESTABLISHES THAT SCOGGINS WAS A MAJOR PARTICIPANT AND SHOWED RECKLESS INDIFFERENCE TO HUMAN LIFE TO SUPPORT THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

The evidence presented at trial was sufficient to support the jury's finding that Scoggins, while acting with reckless indifference to human life, was a major participant in the attempted robbery that resulted in Wilson's death. Even in light of *Banks* and *Clark*—which cited a list of nonexclusive circumstances to consider when analyzing whether a defendant acted as a major participant and with reckless indifference to human life—Scoggins is not entitled to relief. (*Banks*, *supra*, 61 Cal.4th at p. 803; *Clark*, *supra*, 63 Cal.4th at pp. 618-623.)

A. Standard of Review

In reviewing a challenge to the sufficiency of the evidence for a special circumstance, as for a conviction, "the relevant inquiry is ' "whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt." ' " (*People v. Lindberg* (2008)

45 Cal.4th 1, 27, original italics; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

When applying the "deferential substantial evidence test" (*People v. Lindberg, supra*, 45 Cal.4th at p. 37), the reviewing court must "presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence" (*id.* at p. 27). If the jury's finding is supported by substantial evidence, due deference must be accorded the trier of fact, and the reviewing court will not substitute its evaluation of a witness's credibility for that of the factfinder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "It is the jury, not the appellate court, that must be convinced beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment." (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 574, internal citations and quotation marks omitted, disapproved of on other grounds by *Banks, supra*, 61 Cal.4th at p. 809, fn. 8.)

B. Constitutional Limitation on Punishing Accomplices to Felony Murder: *Enmund* and *Tison*

Tison v. Arizona (1987) 481 U.S. 137 (*Tison*), and the Supreme Court's earlier decision in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*), involved Eighth Amendment challenges to death sentences

imposed on defendants who had been convicted of felony murder but who had not been the actual killers. *Banks* examined the two cases and held that *Tison* and *Enmund* "represent points on a continuum. [Citation.] Somewhere between them, at conduct less egregious than the Tisons' but more culpable than Earl Enmund's, lies the constitutional minimum for death eligibility." (*Banks*, *supra*, 61 Cal.4th at pp. 801-802.)

In *Enmund*, *supra*, 458 U.S. 782, the Supreme Court reversed the death sentence of Earl Enmund, who had been convicted under Florida's felony-murder rule. In that case, Enmund's accomplices murdered an elderly couple during a residential armed robbery. (*Id.* at p. 784.) Enmund drove the getaway car, but he had not participated in the actual killing. (*Ibid.*) *Enmund* held that death was a disproportionate sentence where the defendant "did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder." (*Id.* at pp. 795, 800-801.) *Enmund* observed that Florida was among a minority of jurisdictions that permitted the death penalty for felony murder simpliciter. (*Id.* at pp. 789, 792.) Yet, the Eighth Amendment prohibited the death penalty for a felony-murder aider and abettor "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (*Id.* at p. 797.)

Five years later in *Tison*, *supra*, 481 U.S. 137, the Supreme Court considered whether imposition of the death penalty on accomplices to a felony murder who neither killed nor intended to kill violated the Eighth and Fourteenth Amendments. The defendants in that case orchestrated the prison escape of their father and his cellmate. (*Id.* at p. 139.) Inside the prison, the defendants armed themselves, another brother, and two convicted murderers, with guns. (*Ibid.*) The defendants assisted the prison escape, and one of the brothers flagged down a family of four for help after the getaway car got a flat tire. (*Id.* at pp. 139-140.) Both defendants

participated in the kidnapping and robbery of the four family members. (*Id.* at p. 140.) They then stood by as their father and his cellmate shot and killed the four victims. (*Id.* at p. 141.)

Tison found that, unlike Enmund, who had not taken part in the murder and had not been present at the murder site, the Tison brothers' "participation in the crime was anything but minor" (*Tison*, *supra*, 481 U.S. at p. 152), and the facts "clearly supported a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life" (*id.* at p. 158). *Tison* stated that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state." (*Id.* at p. 157.) *Tison* held that "major participation in the felony committed, combined with reckless indifference to human life, [was] sufficient to satisfy the *Enmund* culpability requirement" and upheld the defendants' death sentences. (*Id.* at p. 158.)

C. Felony-Murder Special Circumstance under California Law

Section 190.2, subdivision (d) sets forth the requirements for death or LWOP eligibility for aiders and abettors convicted of first degree murder who had neither killed nor intended to kill. Section 190.2, subdivision (d) states:

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

Five years after section 190.2, subdivision (d) was amended by voter initiative Proposition 115 in 1990,[6] and 20 years before *Banks* was decided, this Court recognized in *People v. Estrada* (1995) 11 Cal.4th 568, 575, that California had incorporated the rule of *Tison* in section 190.2, subdivision (d) to bring "state capital sentencing law into conformity with prevailing Eighth Amendment doctrine." For this reason, *Estrada* looked to *Tison* for the meaning of the phrase "reckless indifference to human life." (*Id.* at p. 576.) *Estrada* found that "reckless indifference to human life" was "commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death." (*Id.* at p. 577.)

Seventeen years prior to this Court's decision in *Banks*, the Court of Appeal, in *People v. Proby* (1998) 60 Cal.App.4th 922, found that "the phrase 'major participant' is commonly understood and is not used in a technical sense peculiar to the law." (*Id.* at p. 933.) *Proby* stated that "[t]he common meaning of 'major' includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.'" (*Id.* at pp. 933-934.) *Proby* rejected the definition that a "major participant" was limited to a " 'ringleader' 'whose participation was greater in importance than that of other participants.' " (*Id.* at p. 934.)

D. *People v. Banks*

Against this backdrop, *Banks* considered "under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty." (*Banks*, *supra*, 61 Cal.4th at p. 794.) Like *Estrada*, *Banks* found in the legislative history that section 190.2, subdivision (d) was meant to codify the holding

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[6] With some minor modifications, current section 190.2, subdivision (d) is the same as the 1990 version.

in *Tison*. (*Banks*, at p. 794.) Thus, section 190.2, subdivision (d) must be interpreted in light of *Tison* and the Supreme Court's earlier decision in *Enmund*, which "collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions." (*Banks*, at p. 794.) At one end of the spectrum was *Enmund*, " 'the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state.' " (*Banks*, at p. 800, quoting *Tison*, *supra*, 418 U.S. at p. 149.) In those cases, death was disproportional and unconstitutional. (*Banks*, at p. 800; *Tison*, at p. 150.) At the other end of the spectrum were "actual killers and those who attempted or intended to kill." (*Banks*, at p. 800.) In those cases, death was permissible. (*Ibid.*)

Regarding the mental aspect of culpability, *Banks* explained that *Tison*, and in turn section 190.2, subdivision (d), look to whether a defendant has " ' "knowingly engag[ed] in criminal activities known to carry a grave risk of death." ' " (*Banks*, *supra*, 61 Cal.4th at p. 801, quoting *Estrada*, *supra*, 11 Cal.4th at p. 577, which quoted *Tison*, *supra*, 481 U.S. at p. 157.) In other words, "[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Banks*, at p. 801.)

Regarding the conduct aspect of culpability, *Banks* agreed with *Proby* that the phrase "major participant" had no "specialized or technical meaning" but that a closer examination of *Tison* and *Enmund* was needed "[t]o gain a deeper understanding of the governing test and offer further guidance[.]" (*Banks*, *supra*, 61 Cal.4th at pp. 800-801.) *Banks* explained that "*Tison* and *Enmund* establish that a defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor

to an ordinary felony murder such as Earl Enmund," and that somewhere between the actions of the Tison brothers and Enmund "lies the constitutional minimum for death eligibility." (*Banks*, at p. 802.)

Banks explained that a jury "must consider the totality of the circumstances" to determine whether a defendant's culpability is sufficient to make him or her death or LWOP eligible. (*Banks*, *supra*, 61 Cal.4th at p. 802.) To assist juries with this inquiry, *Banks* set forth factors that distinguish the Tison brothers from Enmund. (*Id.* at p. 803.) These factors include:

> [(1)] What role did the defendant have in planning the criminal enterprise that led to one or more deaths? [(2)] What role did the defendant have in supplying or using lethal weapons? [(3)] 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? [(4)] 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 inactions play a particular role in the death? [(5)] What did the defendant do after lethal force was used?

(*Ibid.*, fn. omitted.)

Applying these principles, *Banks* found that defendant Lovie Troy Matthews's conduct did not amount to major participation in the offense that led to the victim's death because he was "no more than a getaway driver." (*Banks*, *supra*, 61 Cal.4th at p. 805.) There was no evidence that Matthews played a role in planning the robbery or obtaining weapons; there was no evidence that he or the other participants had previously committed murder, attempted murder, or another violent crime; he was not at the scene; and there was no evidence he saw or heard the shooting, had a role in instigating it or that he could have prevented it. (*Ibid.*) *Banks* held that Matthews did not qualify as a major participant under section 190.2, subdivision (d). (*Id.* at p. 807.)

Banks also found there was insufficient evidence that Matthews possessed the requisite mental state to make him death eligible. (*Banks*, *supra*, 61 Cal.4th at p. 807.) *Banks* reiterated that "[r]eckless indifference to human life 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' " (*Ibid.*, original italics, quoting *People v. Mil* (2012) 53 Cal.4th 400, 417, quoting *Estrada*, *supra*, 11 Cal.4th at p. 577.) *Banks* acknowledged there was evidence from which a jury could find that "Matthews knew he was participating in an armed robbery," "[b]ut nothing at trial supported the conclusion beyond a reasonable doubt that Matthews knew his own actions would involve a grave risk of death." (*Banks*, at p. 807.) *Banks* rejected the Court of Appeal's reasoning that reckless indifference to human life could be shown by evidence from which a jury could infer that Matthews knew that participation in an armed robbery and burglary posed a grave risk of death. (*Id.* at p. 808.)

E. *People v. Clark*

One year after *Banks*, this Court again, in *Clark*, *supra*, 63 Cal.4th 522, addressed the quantum of evidence required to support a felony-murder special circumstance when the defendant was convicted as an aider and abettor. Unlike Matthews, the defendant in *Clark* was more than just a getaway driver. Clark masterminded and organized the after-hours burglary and attempted robbery of a computer store and orchestrated the crime itself from a car in the store's parking lot. (*Id.* at pp. 536-537, 612-614.) An accomplice who entered the store and handcuffed three employees inside the men's restroom fatally shot the mother of one of the employees, who had arrived at the store to pick up her son from work. (*Id.* at pp. 537, 613.)

This Court in *Clark* noted it had "previously upheld a finding that a defendant was a major participant and showed reckless indifference to

human life when the defendant, although not present at the murder, was 'the founder, ringleader, and mastermind behind' a criminal gang engaged in carjacking' " who had instructed his accomplices " 'that a resisting victim was to be shot.' " (*Clark*, *supra*, 63 Cal.4th at p. 614, citing *People v. Williams* (2015) 61 Cal.4th 1244, 1281-1282.) However, it was unnecessary to decide whether the defendant in *Clark* was a "major participant" because the evidence was insufficient to show the defendant had acted with reckless indifference to human life. (*Clark*, at p. 614.)

In assessing the defendant's mens rea, *Clark* restated and applied a version of the factors enumerated in *Banks*, including (1) a defendant's knowledge that weapons would be used; (2) his physical presence at the crime and opportunity to restrain his accomplices or aid the victim; (3) the duration of the felony; and (4) the defendant's knowledge of his cohorts' likelihood of killing. (*Clark*, *supra*, 63 Cal.4th at pp. 618-621.) Additionally, the Court considered the defendant's efforts to minimize the risk of violence in the commission of the felony, concluding such evidence "can be relevant to the reckless indifference to human life analysis" though it would not "in itself, necessarily foreclose" such a finding. (*Id.* at pp. 621-622.)

Applying these factors to the case before it, *Clark* found the evidence of reckless indifference to be insufficient to support the burglary-murder and robbery-murder special circumstances. It noted that the defendant did not carry a weapon and the sole weapon carried by an accomplice was a gun loaded with only one bullet. (*Clark*, *supra*, 63 Cal.4th at pp. 618-619.) 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 an opportunity to observe the shooter's demeanor immediately before the shooting so as to ascertain that he was likely to use lethal force. (*Id.* at p. 621.) The defendant was across the parking lot at the

time of the shooting and there was no evidence he had instructed his accomplice to use lethal force; to the contrary, the victim was a woman who had arrived unexpectedly on the scene and the defendant had no chance to intervene or prevent her killing. (*Id.* at pp. 619-620.) The robbery had been planned for after closing time, when most employees would be gone, and the defendant expected his accomplices to handcuff the remaining employees in a bathroom, thus minimizing the contact between the perpetrators and victims. (*Id.* at pp. 620-621.)

Finally, this Court considered the effect of the defendant's efforts to minimize the risk to human life when planning the robbery:

> Defendant's culpability for [the victim's] murder resides in his role as planner and organizer, or as the one who set the crime in motion, rather than in his actions on the ground in the immediate events leading up to her murder. But also relevant to his culpability as planner, there is evidence supporting that defendant planned the crime with an eye to minimizing the possibilities for violence. Such a factor does not, in itself, necessarily preclude a finding of reckless indifference to human life. But here there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery. Given defendant's apparent efforts to minimize violence and the relative paucity of other evidence to support a finding of reckless indifference to human life, we conclude that insufficient evidence supports the robbery-murder and burglary-murder special circumstance findings. . . .

(*Clark*, *supra*, 63 Cal.4th at p. 623.)

F. Sufficient Evidence Establishes That Scoggins Was a Major Participant and Showed a Reckless Indifference to Human Life

Scoggins does not challenge that he was a "major participant" to the attempted robbery.[7] Scoggins discusses only the evidence he believes is relevant to whether he acted with reckless indifference to human life. (POB 33-43.) Based on the factors Scoggins finds relevant, he states: (1) the evidence does not show he was armed with a gun or knew Powell was armed (POB 35-36); (2) the evidence does not show that he knew Powell or Howard "had a willingness to harm people" (POB 36-37); (3) the evidence shows he was a distance from the scene and unable to exert any influence on his cohorts (POB 37-38); (4) the evidence does not show that Wilson was restrained for a period of time (POB 38-39); (5) his behavior after the shooting does not suggest a reckless indifference to human life (POB 39-40); and (6) the evidence shows the robbery was planned to minimize the risk of lethal violence (POB 40). Finally, Scoggins argues that the plan to " 'beat the shit out of' " Wilson fails to show that he expected Wilson to face a grave risk of death. (POB 41-43.)

Scoggins takes an unduly narrow view of the evidence and disregards the governing standard of review. The testimony established that Scoggins had been the person swindled by Wilson and that he had masterminded the violent plan to get revenge and to get his money back by having his friends rob and "beat the shit" out of Wilson. (2 RT 379, 395, 398-400, 425-427, 429, 457, 459-460, 463.) The jurors could reject Scoggins's repeated claims made during his interviews with detectives that he had not been the

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[7] Although Scoggins does not appear to contest that he was a major participant, as the court observed in *Tison* and *Clark*, the same evidence establishing that the defendant was a major participant in the crime can provide evidence of reckless indifference to human life. (*Tison*, *supra*, 481 U.S. at p. 158, fn. 12; *Clark*, *supra*, 63 Cal.4th at pp. 614-615.)

person who had purchased the fake televisions, had not known about the plan to attack Wilson, and that he just happened to have been at the same location (which changed minutes before the fatal events), at the same time, when his friends, brother, and girlfriend ambushed the victim. (3 CT 651, 705, 707, 770, 811, 821, 825; Supp. CT 7, 10, 13-15, 43, 48, 129.) Applying the nonexclusive list of factors set forth in *Banks* and *Clark* to the facts in this case, there is sufficient evidence that Scoggins was a major participant and acted with reckless indifference to human life.

1. Scoggins was a major participant

Substantial evidence supports a finding that Scoggins was a "major participant" in the felony murder to which he was an aider and abettor, supporting the robbery special circumstance finding. Scoggins does not dispute that he was a major participant, nor could he. Scoggins was the mastermind behind the criminal enterprise that led to Wilson's death. Without Scoggins, the attempted robbery and murder simply would not have happened. Scoggins was swindled by Wilson into purchasing what he believed to be two or three flat-screen televisions. (2 RT 379, 395, 398.) When Scoggins discovered that the boxes did not contain televisions, he vowed to beat up Wilson and get his money back. (2 RT 399-401.)

Scoggins's opportunity came a few days later when Cooks and Kane came across Wilson. (3 CT 767, 821.) Cooks immediately notified Scoggins by texting him: "Man you ain't answering the phone and the dude that sold you the TVs is in my face right now." (2 RT 339.) Kane and Powell also spoke to each other twice. (2 RT 346.) Kane told Powell that they had found Wilson. (1 RT 230-231.) Powell then went to meet Howard at the McGlashan Way house. (1 RT 231-232; 2 RT 402, 404-405.) McCoy was also at the house. (2 RT 402.)

Scoggins called and spoke to Powell, Howard, and McCoy while they were at the McGlashan Way house. (2 RT 402, 404-405, 413.) When

Scoggins spoke to McCoy, he told him they had found Wilson. (2 CT 590-591, 595.) Scoggins also told McCoy that the plan was to meet Wilson; Kane and Cooks would pretend to want to purchase a television, Powell and Howard would hide in Cooks's van, and then they would "beat the shit" out of Wilson and take his money. (2 RT 407, 425-431, 459, 463-464, 581-582; 2 CT 590-593, 595.) Scoggins then spoke to Howard and Powell about the plan; McCoy overheard the conversations. (2 RT 405, 413, 425; 2 CT 590-591.) Scoggins maintained constant phone contact with Powell and Howard leading up to the meeting with Wilson. (2 RT 346-349.)

Wilson originally planned to meet Cooks and Kane at Burlington Coat Factory. (2 RT 425; 2 CT 586, 590-591.) Shortly before they arrived, Wilson called Cooks and told her that police were in the area and to meet across the street at the Shell gas station. (2 CT 586-589.) Minutes before the shooting, both Powell and Howard spoke to Scoggins, and Cooks's van pulled into a parking lot near the Shell gas station. (2 RT 348-349, 519-520.) Scoggins was at the gas station. (1 RT 256; 3 CT 651, 658; Supp. CT 60.)

As the mastermind of the plan, Scoggins was a major participant.

2. Scoggins's plan to ambush, violently assault, and Rob Wilson establishes reckless indifference to human life

Scoggins acknowledges that a planned robbery that involves a beating carries a foreseeable risk of death. (POB 41.) However, he claims that because Wilson's death did not come as a result of the actual plan, and a beating never occurred, there is not enough evidence to show that the plan involved a grave risk of death. (*Ibid.*) According to Scoggins, it is unreasonable to assume a planned ambush and beating carried a grave risk of death without specific circumstances that aggravated the risk of death. (POB 41-42.) He suggests that evidence must show the intended victim

was particularly vulnerable because he was a child, elderly, or severely disabled, or that the plan involved an intent to inflict life threatening injuries, such as bone fractures or damage to vital organs. (*Ibid.*) Scoggins's plan to deceive and violently attack an unsuspecting and outnumbered victim establishes a reckless indifference to human life.

The circumstances of the planned attack reveal that Scoggins had knowledge of a "grave risk of death" and had a willingness to kill, even if he did not specifically desire death to occur. (*Clark, supra*, 63 Cal.4th at p. 617.) Under Scoggins's plan, death was not merely foreseeable. This was not a run-of-the-mill or garden-variety robbery; Scoggins's plan was not simply to rough up Wilson or to exert just enough force or fear to effectuate the robbery. The circumstances reveal a far more sinister plan. According to Scoggins's plan, Kane and Cooks would pretend to purchase a television from Wilson. Powell and Howard would hide in Cooks's van, launch a surprise attack on Wilson, "beat the shit" out of him, and take his money. (2 RT 407, 425-431, 459, 463-464, 581-582; 2 CT 590-593, 595.) Scoggins could not do it because he could not risk ruining the surprise attack; Scoggins was the person swindled, and Wilson would likely recognize him.

Scoggins's plan included no effort to minimize the risk of violence. Rather, Scoggins planned an ambush and violent attack on an unsuspecting victim by two cohorts he knew would be willing to assist him. Scoggins knew that Powell was an aggressive "hot head" and that Howard would not be "punk[ed]" by anyone and would always have his back. (3 CT 839; Supp. CT 84, 88, 115.)

Although Scoggins tasked others with exacting his revenge, Scoggins kept a watchful eye over his plan. He kept in constant contact with Powell and Howard prior to the meeting with Wilson. (2 RT 346-349.) He spoke to Powell on the phone about a minute before Powell shot and killed

Wilson. (2 RT 349.) He even watched the events unfold from a short distance away. (1 RT 256; 3 CT 651, 658; Supp. CT 60.)

After the shooting, unfazed that Powell had shot and killed Wilson instead of violently beating him, Scoggins walked over to Wilson's body only to see if he was breathing and not to seek or to render aid. He then moved his car from the area to avoid it from being trapped behind yellow police tape and returned on foot. (1 RT 208; 2 RT 502; 3 CT 637, 653-654, 661-662.) While on the scene, Scoggins learned that a witness had taken down the van's license plate number, and he spoke to an officer. (1 RT 258; 2 RT 529; 3 CT 738; Supp. CT 50.) He did not tell the officer he knew anything about the events that had just occurred. (Supp. CT 50.)

Scoggins's actions and statements before, during, and after the shooting are extremely telling of his subjective awareness of the risk of violence. Respondent addresses the issue *post*, in light of the factors provided in *Banks* and *Clark*, with the recognition that "[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Banks*, *supra*, 61 Cal.4th at p. 803.) Considering the totality of the circumstances, jurors could have reasonably concluded that Scoggins's plan was a " 'gross deviation' " from what a law-abiding person would have done under the circumstances, that Scoggins acted as major participant in the attempted robbery and murder, and that he did so with reckless indifference to human life. (*Clark*, *supra*, 63 Cal.4th at p. 617.)

a. Scoggins's knowledge of Powell's likelihood of killing

As set forth in *Clark*, and relevant here, is whether the defendant had knowledge of a cohort's likelihood of killing. (*Clark*, *supra*, 63 Cal.4th at p. 621 ["A defendant's willingness to engage in an armed robbery with individuals known to him to use lethal force may give rise to the inference that the defendant disregarded a 'grave risk of death.' "].) As to this factor,

Scoggins claims that there was no evidence "that petitioner knew that Powell or any other accomplice had a willingness to harm people." (POB 36-37.) But this is exactly what Scoggins's plan called for. Scoggins's plan was for Powell and Howard to "beat the shit" out of Wilson. Violence was the cornerstone of the plan; Scoggins did not just want to rob Wilson of money, he wanted Wilson to physically suffer at the hands of two individuals he knew would carry out his plan.

According to McCoy, Scoggins stated that the plan was for Powell and Howard to hide in the van and then "beat the shit" out of Wilson and take his money. (2 RT 407, 425-431, 463-464, 581-582; 2 CT 590-593, 595.) Scoggins spoke with both Powell and Howard numerous times leading up to the meeting with Wilson, and they were the two men who arrived along with Kane and Cooks. (2 RT 346-349.) Scoggins chose Powell and Howard to exact his revenge for a reason.

Scoggins statements after the murder reveal why he chose Powell and Howard, as well as his knowledge of Powell's and Howard's propensity for violence. According to Scoggins, Powell was "more aggressive" and "more of a street guy" than Howard and someone who was a "hot head." (3 CT 839; Supp. CT 84, 88.) Howard was not "street-wise," but he was "real firm" and not one to be "punk[ed]." (Supp. CT 84.) And, because Howard and Scoggins were brothers, Howard would "have [his] back through whatever." (Supp. CT 115.)

Knowingly using an aggressive person who is also a "hot head" and a person who would have Scoggins's "back through whatever" to "beat the shit" out of a robbery victim makes a resulting death more likely than using someone with a more even disposition. Under these circumstances, it was reasonable for the jury to conclude that Scoggins not only knew that Powell and Howard had a willingness to harm Wilson (because that was Scoggins's plan), but also that he knew Howard would support Scoggins in

any way possible and that Powell was an aggressive individual who would not hesitate to use lethal force.

b. Scoggins's efforts to minimize the risk of violence during the robbery

Clark looked at the defendant's efforts to minimize the risks of the robbery. (*Clark, supra*, 63 Cal.4th at p. 621-623.) Scoggins claims that "the evidence suggests that the robbery of Wilson was planned in such a way as to minimize the risk of lethal violence" because it was planned during the day in the parking lot of a strip mall. (POB 40.) This is simply not true. Violence was at the heart of Scoggins's plan.

In *Clark*, the court concluded "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*, 63 Cal.4th at p. 622.) Applying these principles, *Clark* found there was insufficient evidence that defendant was recklessly indifferent to human life. Although there was evidence Clark had planned, organized, and set the robbery in motion, there was also evidence supporting a finding that "defendant planned the crime with an eye to minimizing the possibilities for violence." (*Clark*, at p. 623.) More importantly, nothing in the plan "elevated the risk to human life beyond those risks inherent in any armed robbery." (*Ibid.*)

Scoggins is unlike the defendant in *Clark*. Scoggins made no effort to minimize the risk of violence. In fact, Scoggins's plan "elevated the risk to human life beyond those risks inherent" in a robbery or even an armed robbery. (*Clark, supra*, 63 Cal.4th at p. 623.) Scoggins did more than simply plan, organize, and set the robbery in motion. Scoggins planned the robbery to include actual violence, not just the possibility of violence. Scoggins planned an ambush on Wilson. His plan did not contemplate a one-on-one attack and robbery or the use of just enough force to effectuate

the robbery. Rather, Scoggins planned a two-on-one ambush on an unsuspecting victim who had been lured into a sense of security.

Scoggins in no way tried to minimize the harm to Wilson. Scoggins directed Powell and Howard to "beat the shit" out of Wilson before robbing him. (2 RT 404, 407, 459.) When Cooks and Kane located Wilson, Scoggins could have confronted Wilson himself, but he did not. Scoggins could have contacted the police, but he did not. Scoggins could have decided not to confront Wilson at all, but he did not. Instead, Scoggins devised a deceptive and violent attack on an unsuspecting and outnumbered victim. Scoggins's plan directed violence.

Scoggins's plan also anticipated violence above and beyond a two-on-one beating. The evidence shows that Scoggins believed that Wilson might be armed. In an interview with detectives after the shooting, Scoggins reasoned that, if he had been the one to lose money, he would have confronted Wilson himself by "[t]aking a chance and not knowing if he got a pistol that's gonna shoot me first." (Supp. CT 106.) A reasonable inference could be drawn that Scoggins had this belief prior to the incident and that he had shared this belief with Powell. It is reasonable to infer either that Scoggins encouraged Powell to arm himself or could suppose that Powell, whom he knew very well and knew to be aggressive and a "hot head," would arm himself after Scoggins conveyed his belief. (1 RT 221-222, 278; 3 CT 839; Supp. CT 84, 88, 115.) Scoggins and Powell spoke to each other numerous times prior to the shooting, and Powell in fact took a gun. Under the circumstances created by Scoggins, there can be no doubt he was "subjectively aware" that his violent plan "involved a grave risk of death." (*Banks*, *supra*, 61 Cal.4th at p. 807.) Unlike the plan in *Clark*, where the robbery did not include any plan for violence and actually took steps to minimize the risk of violence of any kind, Scoggins's plan called

for violence and contained no effort to minimize the risk that the planned violence would result in death.

c. The duration of the felony

Scoggins claims that "there is no evidence that the victim was restrained for a period of time, giving petitioner an opportunity to intervene and prevent violence." (POB 38-39.) *Clark* explained this factor is relevant because "[w]here a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder." (*Clark*, *supra*, 63 Cal.4th at p. 620.) But Scoggins's plan contemplated a prolonged period of contact with Wilson and included actual violence.

It called for Powell and Howard to ambush Wilson, restrain him, and "beat the shit" out of him. It takes longer to "beat the shit" out of someone than to just assault enough to effectuate robbery. And, during this prolonged period of contact, Scoggins's plan contemplated the actual use of violence, not just the opportunity for violence.

A number of cases have distinguished situations where "the struggle and ensuing shooting happened almost immediately" and have overturned "special circumstances, including *Banks* and *Clark*, [where] the evidence tended to show that the shooting was a 'somewhat impulsive' response to the victim's unexpected resistance, as opposed to the culmination of a prolonged interaction that increased the opportunity for violence." (*In re Taylor* (2019) 34 Cal.App.5th 543, 558 [shooting occurred as a " 'somewhat impulsive' response to the victim's unexpected resistance" and struggle with the perpetrator]; *In re Ramirez* (2019) 32 Cal.App.5th 384, 404 [shooting occurred in response to the victim resisting and striking one of the perpetrators]; *In re Miller* (2017) 14 Cal.App.5th 960, 975 [shooting occurred when perpetrator got scared when the victim came

toward him]; *Clark*, *supra*, 63 Cal.4th at p. 539 [shooter surprised by arrival of a store employee's mother]; *Banks*, *supra*, 61 Cal.4th at p. 795 [victim shot when he pushed the door from the outside in an attempt to keep the perpetrators inside].) This case does not fall neatly into this category of cases.

The violence in this case, whether considering the stated and planned ambush and violent beating or the shooting that actually occurred, was not the result of an impulsive reaction to meeting unexpected resistance or being pursued. Under Scoggins's plan, Cooks and Kane lured Wilson into a trap. The plan called for Powell and Howard to ambush Wilson by jumping out of Cooks's van in order to "beat the shit" out of him and take his money. (2 RT 407, 425-431, 463-464, 581-582; 2 CT 590-593, 595.) Scoggins's plan necessarily anticipated that Wilson would run; it is the reason Powell and Howard hid in the van. Nothing in Scoggins's plan, or the resulting shooting, shows an impulsive response to the victim's unexpected resistance. The attack and robbery were planned as an ambush with anticipated flight by the victim. Because the plan included a severe beating and anticipated flight, it is reasonable to infer that Scoggins's plan included a means to ensure Wilson suffered injury even if he fled the scene. As a result, the short duration of the attack in this case does not undermine a finding of reckless indifference.

d. Scoggins's presence at the crime and his opportunity to restrain the crime or aid the victim

Scoggins claims that "the evidence establishes that [he] 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." (POB 37.) However, it was Scoggins's plan not to be directly present; Scoggins was the person

swindled, and it would have ruined the element of surprise if Wilson recognized him. Scoggins's absence from Powell's and Howard's immediate presence and his lurking nearby reveals a callous desire to watch his plan being put into action. Unlike in *Clark*, Scoggins's presence was not necessary to coordinate or mastermind his robbery attempt. (See *Clark*, *supra*, 63 Cal.4th at p. 612 [Clark "was the mastermind who planned and organized the attempted robbery and who was orchestrating the events at the scene of the crime."].) In addition, Scoggins's constant contact with his cohorts, his failure to act as a restraining influence even though he could have, and his failure to aid Wilson after the shooting shows he shared in his cohorts' actions and mental state. (*Clark*, *supra*, 63 Cal.4th at p. 619 [" 'the defendant's presence allows him to observe his cohorts so that it is fair to conclude that he shared in their actions and mental state . . . . [Moreover,] the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts.' [Citation.]".)

Scoggins was present near the scene to watch his plan unfold. Scoggins admitted that he was at the Shell gas station but attempted to downplay his presence by telling detectives he was meeting an old girlfriend. (3 CT 635, 637, 651-656; Supp. CT 36-37.) Scoggins's claim was refuted by that old girlfriend (1 RT 254), and his presence was not coincidental. Cooks and Kane were initially going to meet Wilson at Burlington Coat Factory, and Scoggins was aware of the original location. (2 RT 311, 318; 2 CT 584-591.) Plans changed approximately ten minutes before the shooting. Wilson called Cooks and told her that police were near Burlington Coat Factory and to meet him across the street near the Shell gas station. (2 RT 311, 318; 2 CT 584-589.) Immediately thereafter, Scoggins spoke to both Howard and Powell on the phone. (2 RT 348-349; 2 RT 519-520.) A reasonable inference could be made that they advised

Scoggins of the change in location because Scoggins arrived at the Shell gas station before the shooting. (3 CT 651.)

Scoggins had no desire to act as a restraining influence. Any restraining influence would have been contrary to Scoggins's stated plan for Powell and Howard to ambush Wilson and "beat the shit" out of him. (2 RT 407, 425-431, 463-464, 581-582; 2 CT 590-593, 595.)

Scoggins had ample opportunity to act as a restraining influence. Scoggins was in constant contact with Powell and Howard leading up to the incident. (2 RT 346-349.) Scoggins even spoke to Powell a minute before the shooting and at about the same time Cooks's van pulled into the parking area to meet Wilson. (2 RT 349; People's Exhibit 153.) Given the torrent of calls, and because it was Scoggins's plan that was being put into action, it appears Powell and Howard did not make a move without Scoggins knowing. Thus, if Scoggins had wanted to act as a restraining influence on Powell and Howard, he could have.

Also given the constant contact between Scoggins and Powell, Scoggins could have acted as a restraining influence on Powell using a gun. In an interview with detectives following the shooting, Scoggins stated that, if he had been the person swindled out of money, he would have confronted Wilson and taken the chance that Wilson was armed. (Supp. CT 106.) Indirectly, and because it was Scoggins's plan to confront Wilson, Scoggins revealed that he had anticipated that Wilson might be armed. A reasonable inference could be drawn that Scoggins also knew that Powell would be armed. But again, even though Scoggins could have acted as a restraining influence, there was no reason for him to do so. Such action would have been contrary to his plan.

Scoggins could have prevented the crime or aided the victim. (*Clark*, *supra*, 63 Cal.4th at p. 619.) He could have confronted Wilson himself. He could have intervened when Cooks's van pulled into the parking lot shortly

before the shooting. He could have made it explicit to his aggressive "hot head" close friend not to bring any weapons. (1 RT 221-222, 278; 3 CT 839; Supp. CT 84, 88, 115.) He could have told Powell to call off the confrontation. He could have intervened when Powell got out of the van and confronted Wilson. He could have intervened when Powell pulled out a gun and shot at Wilson. But he did not do any of those things.

He also did not offer assistance to Wilson or summon help. (See *Tison*, *supra*, 481 U.S. at pp. 151-152 [fact that defendant "stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting" and "[i]nstead ... chose to assist the killers in their continuing criminal endeavors" would support a finding that he "subjectively appreciated that [his] acts were likely to result in the taking of an innocent life"].) After the shooting, Scoggins was unfazed by what had occurred and walked over to Wilson's body. (1 RT 197; 3 CT 653, 661.) He checked to see if Wilson was breathing, moved his car from area, and returned on foot, all before officers arrived. (1 RT 197, 208-209, 256; 2 RT 499-500, 502; 3 CT 637, 653-654, 661.) He then remained on scene, learned that a witness had taken down the van's license plate number, and talked to an officer. (2 RT 523, 529; 3 CT 738.) He did not reveal that he knew anything about the shooting.

Scoggins claims, however, that "there is no evidence that [he] neglected the well-being of the shooting victim by fleeing the scene." (POB 40.) It appears that Scoggins argues that, because he stayed at the scene and because someone else may have already called 911, this factor works in his favor. Scoggins ignores that his plan called for an attack on Wilson, a plan that inherently neglected Wilson's well-being. He also ignores the reason he stayed on scene after the shooting. Scoggins stayed in an apparent attempt to shield himself from liability for a plan he had masterminded and set in motion. Scoggins believed that because he stayed

and spoke to an officer, it proved that he was not involved and not a suspect to the crime. (3 CT 635.) In fact, he used the information he gained at the scene to assist his cohorts in an effort to avoid consequences for the killing. Scoggins learned that a witness had obtained the van's license plate number. (3 CT 738.) Prior to leaving the scene, Scoggins spoke to Powell in three separate phone calls. (2 RT 349.) Given that Cooks's van was not parked in front of the McGlashan Way house shortly after the shooting, but parked down the street near a park (1 RT 282-283), a reasonable inference could be made that Scoggins had informed Powell not to park the van at the house because officers had information to identify it. Scoggins gets no credit for remaining at the scene.

Under the circumstances, Scoggins's absence from Powell's and Howard's immediate presence, his lurking nearby, his constant contact with his cohorts, his failure to act as a restraining influence, and his failure to aid Wilson after the attack, shows that Scoggins shared in his cohorts' actions and mental state.

e. Scoggins's lack of personal participation in the actual attempted robbery and murder

Scoggins's lack of personal participation in the actual attempted robbery and murder does not absolve him of liability. In this respect, Scoggins is unlike the defendant in *Banks*. *Banks* recognized "there was evidence Matthews participated in the robbery, from which a jury might reasonably infer he had some role in planning it, but the nature of that role is, on the record before us, a matter of pure conjecture." (*Banks*, *supra*, 61 Cal.4th at p. 805, fn. 6.) "No evidence was introduced establishing Matthews's role, if any, in procuring weapons." (*Id.* at p. 805.) There was no evidence that Matthews and his accomplices had previously committed any violent crimes together. (*Ibid.*, see also *id.* at pp. 810-811.) "There was no evidence [Matthews] 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." (*Id.* at p. 805.) The evidence showed that during the armed robbery Matthews had been parked three blocks away. (*Id.* at p. 796.)

Unlike Matthews, who was a getaway driver parked three blocks away when the shooting occurred, Scoggins was close enough to hear the gunshots and to check if Wilson was breathing immediately afterward. Additionally, unlike the robbery in *Banks*, where no evidence was presented that Matthews had been involved in planning the robbery, Scoggins was the mastermind of the plan to severely assault and rob Wilson. And, Scoggins knew that he would have ruined the element of surprise if he had been present and Wilson had recognized him. The fact that Scoggins did not directly participate in the attack on Wilson was part of the plan to ensure that Wilson would be subject to violence; it does not undermine a finding of reckless indifference.

f. Scoggins's behavior after the shooting

Scoggins claims that there is "no evidence about petitioner's behavior after the shooting [that] suggests a reckless indifference to human life." (POB 39-40.) He is mistaken.

In this respect, Scoggins is unlike Clark. In *Clark*, *supra*, 63 Cal.4th at page 620, this Court reasoned that Clark's "failure to help Ervin enter [the] car and [Clark's] subsequent abandonment of Ervin can be interpreted either as [Clark's] rejection of Ervin's actions in committing the shooting or as [Clark's] desire to flee the scene as quickly as possible." But here, Scoggins did not flee the scene.

Scoggins was unfazed by the shooting. Instead of immediately leaving the scene and being shocked that a shooting (rather than a beating) had just occurred, he walked over to Wilson's body to see if he was breathing. (1 RT 197; 3 CT 637, 653, 661.) Before officers arrived,

Scoggins moved his car and returned on foot. (1 RT 208; 2 RT 502; 3 CT 661.) Scoggins then spoke to an officer. (2 RT 523, 529.) His actions show that he anticipated the outcome. If he had not, he would have panicked and left.

But Scoggins remained calm, and his continued presence afforded him the opportunity to learn critical information that aided himself and his cohorts. Scoggins learned that a witness had obtained the van's license plate number. (3 CT 738.) Prior to leaving the scene, Scoggins spoke to Powell in three separate phone calls. (2 RT 349.) Given that Cooks's van was not parked in front of the McGlashan Way house shortly after the shooting (1 RT 282-283), a reasonable inference could be made that Scoggins had informed Powell not to park the van at the house because officers had information to identify it.

Scoggins did more than stay on the scene to learn information from witnesses. When he spoke to an officer, he failed to reveal the identity of the people involved. In this respect, Scoggins withheld critical information that would have allowed officers to immediately locate Powell, Howard, Kane, and Cooks. (1 RT 214, 258; 2 RT 502, 529-530). (*People v. Hodgson*, *supra*, 111 Cal.App.4th at pp. 578-580 [defendant facilitating escape of fellow gang members, who had just shot and robbed victim, would support a finding that he acted with "reckless indifference to human life"], disapproved of on other grounds by *Banks*, *supra*, 61 Cal.4th at p. 809, fn. 8.)

Scoggins's callousness and indifference to Wilson's life was further shown by his belief that his presence cleared him of liability. During an interview with detectives, Scoggins repeatedly stated that he knew he was not a suspect because he had stayed after the shooting and talked to an officer. (3 CT 635-636.) Scoggins maintained that he "just happened to be at the scene." (3 CT 637.) However, given that Scoggins was the

mastermind of the attack on Wilson, his presence at the scene and his insistence that he had not been involved only reveals a more sinister motive behind his actions. Even though Scoggins was not physically involved in the altercation leading to Wilson's death, his participation was nothing less than major, and his actions revealed a reckless indifference to Wilson's life in preservation of his own.

3. Circumstantial evidence supports a finding that Scoggins knew Powell was armed and that Powell intended to use the gun

Scoggins claims that "there [is] no evidence that petitioner himself used a gun or was armed with a gun, [and] there is no evidence that petitioner had any knowledge that Powell, or any other accomplice, was armed with a gun." (POB 35-36.) Reckless indifference is not established by a defendant's subjective awareness that a gun will be used in a felony, but it is a factor to be considered. (*Clark*, *supra*, 63 Cal.4th at p. 618.) Here, Powell had a gun and immediately opened fire on Wilson when he arrived on the scene. The jury could have reasonably inferred that Scoggins had known Powell was armed with a gun and had intended to use it based on: (1) Scoggins's constant communication with Powell before the incident; (2) Powell's immediate action of shooting Wilson rather than beating him up; (3) Scoggins's actions after the shooting; and (4) Scoggins's subsequent statements to police.

Scoggins was in constant communication with Powell and Howard before the shooting. Although many of the calls went unanswered, it can be inferred that Powell and Howard kept Scoggins informed of their every move. Powell first spoke to Scoggins at 5:53 p.m. for 34 seconds. (2 RT 347.) For the next five minutes, Powell attempted to call Scoggins seven times before finally speaking to him again at 5:59 p.m. for 52 seconds. (2 RT 347.) Seven minutes later, Scoggins attempted to call Powell twice.

(*Ibid.*) Scoggins finally spoke to Powell at 6:27 p.m. for 42 seconds. (*Ibid.*) A couple minutes later, Powell again tried to call Scoggins, but his call went to voicemail, most likely because Scoggins was talking to Howard in a 32-second conversation at 6:29 p.m. (2 RT 348.) At 6:31 p.m., Scoggins again talked to Howard, this time for two minutes and 30 seconds. (*Ibid.*) Finally, at 6;37 p.m.—approximately one minute before Powell shot Wilson—Powell called Scoggins and spoke to him for 32 seconds. (2 RT 349; 2 CT 563.) The calls reveal that Powell and Howard kept Scoggins fully apprised and did not make a move without telling him or getting his approval.

Powell's act of immediately running after and shooting Wilson, instead of beating him up, together with the constant communications between Powell and Scoggins, provides further support that Scoggins knew Powell was armed and intended to use the gun. At 6:37 p.m., only a minute before the shooting, Powell spoke to Scoggins for 32 seconds. (2 RT 349.) At that same time, Cooks's van pulled into the parking area to meet Wilson. (1 RT 107; 2 RT 519; People's Exhibit 153.) Powell then opened the sliding door to Cooks's van, got out, and had a brief conversation with Wilson before firing several shots. When Wilson ran, Powell followed and fired additional shots. (1 RT 50-51, 82-86, 107-108, 112-113, 130-132, 159; 2 RT 480-481, 519-520; 2 CT 563, 568-569; People's Exhibit 153.) From all appearances, Powell shot at Wilson immediately after getting out of the van and without any resistance from or confrontation by Wilson. These circumstances support a finding that the actual plan involved more than "beat[ing] the shit" out of Wilson.

Scoggins's actions after the shooting provide further support for a finding that Scoggins knew Powell was armed with a gun and intended to use it. Scoggins was unfazed by the shooting. Instead of immediately leaving the scene and being shocked that a shooting (rather than a beating)

had just occurred, he walked over to Wilson's body to see if he was breathing. (1 RT 197; 3 CT 637, 653, 661.) Before officers arrived, Scoggins moved his car and returned on foot. (1 RT 208; 2 RT 502; 3 CT 661.) Scoggins then spoke to an officer. (2 RT 523, 529.) Scoggins did not reveal that he knew anything about the shooting but learned that a witness had obtained the van's license plate number. (Supp. CT 50; 3 CT 738.)

Finally, Scoggins's statements to detectives provide support for a finding that Scoggins knew Powell was armed. Scoggins had numerous interviews with detectives. Although Scoggins's statements are littered with denials, the interviews provide insight into Scoggins's knowledge regarding the extent of force that would or could be used by Powell and Howard in confronting Wilson.

Scoggins let his guard down during his second interview and revealed telling information. During that interview, detectives discussed with Scoggins the fact that Kane and Cooks located Wilson by happenstance and called Scoggins to let him know. (Supp. CT 40.) A detective then stated that he did not think that "anybody there – I don't think anybody went into it with the intent for that dude to die." (*Ibid.*) Maintaining that he was not involved, yet feeling the need to disagree with the detective, Scoggins stated: "I'm gonna be honest with you. I can't say that, because somebody had a gun . . . anything could've happened." (Supp. CT 40-41.) One possible interpretation of Scoggins's statement could be that he came to this conclusion from the mere fact that Powell had shot and killed Wilson. However, it was also Scoggins's plan to have Powell and Howard "beat the shit" out of Wilson before robbing him, and Scoggins was in constant contact with Powell shortly before the shooting. Under these circumstances, the jury could have reasonably interpreted Scoggins's

statement as reflecting knowledge that Powell had been armed and that he had anticipated the possibility that Powell would use the gun.

The same reasonable conclusion can be drawn from Scoggins's admissions during his third interview with detectives. During that interview, Scoggins maintained that he did not know who had committed the shooting but offered what he would have done if he had been the one who lost money:

> I would of pulled right up, probably tried to block him in with my car or whatever. That's me, you know. Taking a chance and not knowing if he got a pistol that's gonna shoot me first. Would've had to find out, you know what I'm sayin'?

(Supp. CT 106.) Indirectly, Scoggins revealed that he had anticipated that Wilson might be armed. A reasonable inference could be drawn that Scoggins had this belief prior to the incident and that he had shared this belief with Powell, who consequently armed himself.

Given the circumstances—the constant calls between Powell and Scoggins, Powell immediately shooting Wilson, Scoggins's actions after the shooting, and his statements to officers—jurors could have drawn a reasonable inference that Scoggins was aware that Powell had brought a gun to the ambush and had intended to use it. As a result, substantial evidence supports the jury's finding that Scoggins acted with reckless indifference to human life.

CONCLUSION

For the foregoing reasons, this Court should deny Scoggins's habeas petition.

Dated: August 7, 2019

Respectfully submitted,

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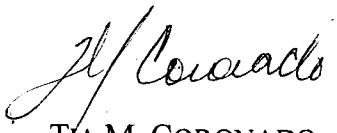

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 12,535 words.

Dated: August 7, 2019

XAVIER BECERRA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Scoggins on Habeas Corpus*** No.: **S253155**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 8, 2019, I served the attached **ANSWERING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 8, 2019, at Sacramento, California.

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