

POINTS AND AUTHORITIES

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| May 2 2016 | Recent Cases on Major Participant for Felony Murder Special Circumstance; The Difference Between General and Specific Intent for Enhancements | Michelle Roberts | General |

I. Recent Cases Concluding the Defendant Was a Major Participant for Purposes of Felony Murder Special Circumstances

People v. Medina (2016) 245 Cal.App.4th 778

People v. Gonzalez (2016) 246 Cal.App.4th 35

● The Statute and Case Law on Major Participants

A. *The Applicable Statute (Pen. Code, §190.2, subd. (d).)*

1. The special circumstance statute applies not only to actual killers, but also to certain aiders and abettors of first degree murder. (Pen. Code, § 190.2, subds. (c) and (d).)

2. An aider and abettor who does not have the intent to kill may still be convicted of special circumstances murder where he “with reckless indifference to human life and as a major participant” aids and abets certain underlying felonies. (§ 190.2, subd. (d).) (hereafter 190.2(d).)

3. The statute thus imposes both a special actus reus requirement, i.e. major participation in the crime, and a specific mens rea requirement, i.e. reckless indifference to human life.

B. *People v. Banks*¹

1. In *People v. Banks* (2015) 61 Cal.4th 788, the California Supreme Court considered the question of when an accomplice who lacks intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty. The Supreme Court noted that its analysis applies equally to eligibility under section 190.2(d) for life imprisonment without parole.

2. Section 190.2(d) was added by Proposition 115, so it was intended to bring state law into conformity with federal authority. The statute was designed to codify the holding in a United States Supreme Court case, *Tison v. Arizona* (1987) 481 U.S. 137, and a prior decision on which *Tison* was based, *Enmund v. Florida* (1982) 458 U.S. 782.

3. The defendant in *Enmund v. Florida* was the getaway driver for an armed robbery. He drove two confederates to a home where the husband and wife were in the habit of keeping large amounts of cash and then waited nearby while the confederates entered. When the wife appeared with a gun, the confederates shot and killed both her and her husband. The defendant drove the confederates away from the scene. The defendant was convicted of robbery and murder and sentenced to death.

4. The United States Supreme Court found a broad consensus against imposing the death penalty “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.” (*Enmund v. Florida, supra*, 458 U.S. at p. 795.)

5. The Supreme Court said the Eighth Amendment prohibits the death penalty for one “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.) It reversed the death penalty for the defendant in *Edmund*.

6. By contrast in *Tison v. Arizona*, the defendants (*Tison* brothers) were involved in the kidnapping and murder of four family members. Although the defendants in *Tison* were not the actual killers, the Supreme Court nevertheless distinguished the *Tison* case from the *Enmund* case: “Far from merely sitting in a car away from the actual scene of the murders acting as a getaway driver to a robbery, each petitioner was actively involved in every element of the kidnapping-robbery and was physically present during the entire sequence of criminal activity, culminating in the murder of the family and the subsequent flight.” (*Tison, supra*, 481 U.S. at p. 158.) As the California Supreme Court said in *Banks*, “The Tisons did not assist in a garden-variety armed robbery, where death might be possible but not probable, but were substantially involved in a course of conduct that could be found to entail a likelihood of death.” (*Banks, supra*, 61 Cal.4th 788.)

7. Looking at *Enmunds* and *Tison*, the United States Supreme Court described the range of felony-murder participants eligible for the death penalty as a spectrum. At one extreme are people

¹ The case of *People v. Banks* (2015) 61 Cal.4th 788, was analyzed in detail in the P&A of July 20, 2015. For purposes of this P&A, its holding and analysis are presented in more summary fashion.

like *Enmund*, “a minor actor in armed robbery, not on the scene, who neither intended to kill nor was found to have any culpable mental state. (*Tison, supra*, at p. 150.) On the other end of the spectrum are actual killers, and those who attempted to kill or intended to kill. Death is disproportional and impermissible for those at the *Enmund* end of the spectrum, but not for those at the other end.

8. The Supreme Court said the defendants in *Tison* fell into the gray area in between, because they fit in neither of these categories. The Supreme Court then announced the rule that is codified in section 190.2(d): “Major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” (*Tison, supra*, at p. 158.) In other words, sufficient for a sentence of death or life without possibility of parole

C. The Banks Factors

1. The California Supreme Court in *Banks* set forth factors that distinguish *Enmund* and *Tison*, indicating these factors may be useful in determining whether a defendant qualifies as a major participant acting with a reckless disregard for life:

- a. “What role did the defendant have in planning the criminal enterprise that led to one or more deaths?
- b. What role did the defendant have in supplying or using lethal weapons?
- c. 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?
- d. 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?
- e. What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient.” (*Banks, supra*, 61 Cal.4th at p. 803.)

2. *Banks* said further as to these factors, no one of these consideration is necessary, nor is any one of them necessarily sufficient. All of them may be weighed in determining the ultimate question, i.e., whether the defendant’s participation “in criminal activities known to carry a grave risk of death” was sufficiently significant to be considered “major.” (*Ibid.*)

3. As to the mental element of culpability, the Supreme Court in *Banks* said that section 190.2(d) looks to whether the defendant has “ ‘knowingly engaged in criminal activities known to carry a grave risk of death.’ ”

a. The Supreme Court said that reckless indifference to human life requires the defendant be “ ‘subjectively aware that his or her participation in the felony involved a grave risk of death.’ ”

(*Banks, supra*, 61 Cal.4th at p. 807.)

b. Awareness of no more than foreseeable risk of death in any armed crime is insufficient. Only knowingly creating a “grave risk of death” satisfies the constitutional minimum. (*Id.* at p. 808.)

c. Thus, knowledge that certain felonies carry an inherent risk of death, e.g. armed robbery, is not sufficient. Otherwise, an accomplice in every felony-murder [like the getaway driver in *Enmunds*] would be eligible for the death penalty. (*Id.* at p. 808.)

D. Application of the Factors in the Banks Decision

1. Defendant Matthews was the getaway driver for an armed robbery of a medical marijuana dispensary by three confederates. The robbery resulted in the shooting of the dispensary’s security guard by co-defendant Banks. Matthews dropped his confederates off near the dispensary. Matthews then waited three blocks away for approximately 45 minutes. Moments after the shooting and a call from Banks, he drove toward the dispensary. One of the co-defendants flagged down Matthews and got in the SUV along with another co-defendant. (*Banks, supra*, 61 Cal.4th at pp. 804-805.)

2. The California Supreme Court said no evidence was introduced establishing Matthews’ role, if any, in planning the robbery. No evidence was introduced establishing his role, if any, in procuring weapons. During the robbery and murder, the defendant was absent from the scene, sitting in a car and waiting. There was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have prevented it. There was evidence from which the jury could infer that the defendant knew he was participating in an armed robbery. But nothing at trial supported the conclusion beyond a reasonable doubt that the defendant knew his own actions would involve a grave risk of death. (*Id.* at p. 805.)

3. There was no evidence the defendant intended to kill or knowingly conspired with accomplices known to have killed before. “Banks’s killing of the security guard was apparently a spontaneous response to armed resistance from the victim.” (*Id.* at p. 807)

● Application of Banks: *People v. Medina* (2016) 245 Cal.App.4th 778²

A. Factual and Procedural Background

The First Incident

1 On May 2, 2008, early morning, defendant Medina was driving with four other people, including co-defendants Morton and Whitehead who were in the rear seat. A Lexus, which was being

² This case, originally decided before *Banks*, was returned by the California Supreme Court for reconsideration in light of *Banks*.

driven erratically and appeared to be out of control, drove up close behind them.

2. Medina let the Lexus pass and then followed it, running a red light to catch up. He drove up next to the Lexus, reached across the front seat and fired several shots into the Lexus, wounding both men inside.

3. Medina's girlfriend had been sitting in the right front passenger seat of Medina's car. She originally told the police that co-defendant Morton, sitting in the back seat, handed Medina his gun. She later said that she did not actually see Morton hand over the gun, but she saw that Morton had his gun out and had heard Morton say, "If they pull up beside us, I'll get them."

The Second Incident

1. On May 5, 2008, Morton, who sold drugs for a living, gave his girlfriend money to buy a half-ounce of methamphetamine for him to resell. Morton's girlfriend went with her best friend Jennifer to purchase the drugs.

2. Morton's girlfriend gave the methamphetamine to Morton. Medina weighed the drugs and told Morton they were short. Morton told his girlfriend to arrange a meeting with Jennifer to "settle the matter." Jennifer said she would come with her boyfriend Fletcher to meet Morton. Morton asked Medina if he wanted to come.

3. After several phone discussions, a meeting was set up at a particular location around midnight. Fletcher drove Jennifer and they were accompanied by another friend of Fletcher who came along as "muscle."

4. Morton, who had arrived with his girlfriend in her car, got out and spoke to Fletcher. He then got in the backseat of Fletcher's car. Morton had a scale and he gave the methamphetamine to Jennifer to weigh. She told him it was short, but said the drugs appeared to be of a different consistency than those she gave to Jennifer. Morton and Fletcher's friend started arguing.

5. Medina and co-defendant Whitehead pulled up. Jennifer believed that all three men – Morton, Medina and Whitehead -- had guns. Morton ordered everyone out of Fletcher's car. Morton, Medina and Whitehead walked Fletcher and his friend across the street at gunpoint.

6. According to Jennifer, when Morton ordered them out of the car, Morton told Fletcher to leave the car keys. Morton returned to the car, but the steering column had been tampered with and Morton, apparently intending to steal the car, could not get it to start. He asked Jennifer how to start the car, but she would not tell him. Morton was angry. He yelled to his girlfriend to get in her car. Co-defendant Whitehead got in the car with Morton's girlfriend and the two drove away. Medina said he had returned to his car. Morton shot Fletcher twice. Fletcher died at the hospital. Medina and Morton drove away together. When Whitehead heard the shots, he returned and followed Medina and Morton away from the scene.

7. As to the events of May 5, all three defendants – Morton, Medina and Whitehead – were convicted of first degree murder with an attempted robbery special circumstance. Medina was also found guilty of attempted robbery. He was sentenced to life in prison without possibility of parole.

B. Court of Appeal's Analysis on Medina

1. The Court of Appeal said there was sufficient evidence that Medina shared Morton's intent to rob that night. The evidence showed Morton and Medina were prepared to " 'settle' " the dispute and recover drugs or money at gunpoint. Likewise there was evidence that Morton intended to steal Fletcher's car. Medina was not merely present when Morton tried to steal Fletcher's car, but actively assisted him.

2. Applying the *Banks* factors, the Court of Appeal concluded that Medina was a major participant and acted with reckless indifference to human life. There was evidence he was involved in setting up the attempted robbery. He alerted Morton to the shortage of the drugs and agreed to accompany Morton to confront the suppliers.

3. While Medina claimed the plan was simply to get Morton's money back, it was clear that Morton intended to use force, if necessary, and was preparing for an armed confrontation. There was evidence that Medina was armed and suspected others would be. Medina was involved in the actual attempted robbery, which did not begin until he and Whitehead arrived. There was evidence that Medina, as well as Morton and Whitehead, pulled out a gun and used it – first pointing it at the group and then walking Fletcher and his friend across the street at gunpoint. Medina remained at the scene throughout. He waited at Morton's direction and made no attempt to intervene or prevent the violence that followed.

4. As to the mental element, the Court of Appeal said there was evidence that Medina was subjectively aware his participation involved a grave risk of death. The shooting that occurred on May 2, showed that Morton, as well as Medina, was willing to employ potentially deadly violence. There was evidence that on May 2, Morton had a gun and threatened to "get them" and handed Medina the gun that Medina fired. Medina had known that Morton was a felon and a drug dealer. Medina told the police that on May 5, when Morton pulled his gun to shoot Fletcher, Medina went back to his car and did not know what was going to happen. But the record indicates that Medina was so close when the shots were fired that he thought he might get shot. After the shooting, Medina drove Morton away and made no attempt to aid the victim.

5. The Court of Appeal said that unlike Matthews in *Banks*, Medina was not simply a getaway driver. Borrowing language from *Tison*, supra, 481 U.S. at p. 158, the Court of Appeal said Medina was actively involved in every element of the attempted robbery and was physically present during the entire sequence of criminal activity culminating in the murder of Fletcher and the subsequent flight.

6. There was evidence Medina played a role both in planning and executing the criminal enterprise, had used a gun, and his prior experience with Morton, particularly the incident two days before, gave him an awareness of the danger and risk of death. He helped Morton escape and had no concern for the shooting victim.

7. Therefore, substantial evidence supported the special circumstance finding.

● **Application of *Banks*: *People v. Gonzalez* (2016) 246 Cal.App.4th 778**

A. *Factual and Procedural Background*

1. Three co-defendants, Gonzalez, Garcia and Estrada were looking to buy heroin. Estrada told Gonzalez and Garcia that she knew a dealer they could rob. The dealer was her ex-boyfriend who had gotten “physical” with her. Garcia knew the dealer also.

2. Estrada placed a call to the dealer and they agreed to meet at a particular laundromat in 30 minutes. Garcia and Gonzalez left for the laundromat. Garcia said he would act as a lookout.

3. The dealer asked a friend to drive him to the laundromat. During the drive, Estrada called the dealer again to find out when he would arrive. Cell phone records of both Estrada and Garcia showed they were speaking to the dealer in the time period between when Estrada placed the initial phone call and when the dealer arrived.

4. The friend who drove the dealer to the laundromat was unavailable for trial but his statements were admitted. The friend said he parked his car at the curb when they arrived at the laundromat. The friend knew Estrada and recognized her as she walked towards them. She was with two male Hispanics and she pointed to the dealer, who was sitting in the passenger seat.

5. Gonzalez walked up to the passenger side door and fired a single shot at the dealer, who died from his wounds. Gonzalez then walked around to the driver’s side and tried to pull the friend out of the car. But the friend hit the accelerator and sped away from the scene.

6. The jury found all defendants guilty of murder, and that the murder occurred during the commission of a robbery.

B. *Court of Appeal’s Analysis*

1. Estrada and Garcia argued there was insufficient evidence to support the robbery special circumstance finding. The Court of Appeal disagreed.

2. In addition to *Banks*, the Court of Appeal relied on two other pre-*Banks* Court of Appeal cases, which it discussed as follows:

a. In *People v. Smith* (2005) 135 Cal.App.4th 914, three men planned to rob a woman. Taffolla stayed outside of her hotel room as a lookout, Smith went inside the room, and Felix left to prepare the getaway car. An altercation occurred in the room, during which the victim was beaten and stabbed multiple times. After Smith ran out of the room, he and Taffolla ran to a nearby street where Felix picked them up. The appellate court held the evidence supported the jury’s finding that Taffolla was a major participant, as he was one of the three perpetrators and served as the only lookout to a “violent attempted robbery-turned murder.” Taffolla acted with reckless indifference to human life as he would have heard the victim being assaulted, and after seeing Smith leave the room covered in blood, he chose to flee with the assailant rather than come to the victim’s aid or summon help.

b. In *People v. Lopez* (2011) 198 Cal.App.4th 1106, overruled in part in *Banks, supra*, 61 Cal.4th at p. 809, fn. 8, appellant, a prostitute, along with several codefendants including Lopez, planned to rob some of her prospective customers. During the encounter, the victim was shot and killed by codefendant Lopez. The appellant did not challenge the jury's findings that she was a major participant, but argued there was insufficient evidence of reckless indifference to human life. The Court of Appeal in *Lopez* disagreed. It found that her act of luring the victim into the secluded alley was critical to the robbery's success. After hearing what she knew was a gunshot, the appellant failed to help the victim or call 911. She left with her codefendants and had sex with Lopez. The appellate court found her actions reflected an "utter indifference to the victim's life." (*Id.* at p. 1117.)

3. Here in this *Gonzalez* case, the Court of Appeal said Estrada was the person who first proposed robbing the dealer. When she did so, she informed Gonzalez and Garcia that the dealer had been physically violent in the past. "Thus, unlike in *Banks*, there was a substantial possibility that robbery would result in resistance and the need to meet that resistance with deadly force."

4. Estrada then set up the robbery by calling the dealer and asking him to meet her at the laundromat. As in the *Lopez* case (above), her act of luring the dealer to the laundromat was critical to the robbery's success.

5. Estrada was the person at the scene who pointed the dealer out to the shooter. After a shot was fired, she neither called 911 to assist the victim, nor called the police to report the shooting. Rather, like the appellant in *Lopez*, Estrada spent the afternoon with the shooter.

6. The Court of Appeal concluded on this record, there was sufficient evidence for the jury to find that Estrada was a major participant and acted with reckless indifference to human life.

7. As to Garcia, he was present when Estrada proposed robbing the dealer and when Estrada described his violent nature. There was evidence Garcia participated in the planning of the robbery with Estrada and Gonzalez and volunteered to assist as a lookout.

8. Garcia's phone records showed calls to the dealer shortly before the murder. Garcia was present at the scene, in a position to facilitate or prevent the shooting.

9. Garcia made no attempt to prevent the shooting or to notify authorities after the dealer was shot. Like Taffolla in the *Smith* case (above), Garcia chose to flee with the shooter, rather than come to the dealer's aid or summon help. He also accompanied Gonzalez when he disposed of the murder weapon.

10. The Court of Appeal concluded there was sufficient evidence to support the jury's findings that Garcia was a major participant and acted with reckless indifference to human life.

II. Section 12022.53(c) and (d) Firearm Enhancements are General Intent Enhancements and Therefore Voluntary Intoxication is Not Admissible in Determining Their Truth:

People v. Lucero (2016) 246 Cal.App.4th 750

A. Factual and Procedural Background

1. The defendant, in the course of a robbery, fired several shots at the victim, killing him. He was arrested shortly after.
2. The defendant said that he had been smoking methamphetamine the night before the killing, which occurred at 7 a.m.
3. The police officer who interviewed the defendant about six hours after the killing said the defendant appeared to be still “high” during the interview because he was having trouble speaking and had difficulty reading his own statement in which he wrote that he had been “heavy on drugs” when he shot the victim.
4. A jury found the defendant guilty of murder, robbery, possession of a firearm by a felon and assault with a firearm. In addition, the jury found true enhancements under sections 12022.53(c) and (d). The jury found true that defendant committed the murder during the course and commission of a robbery.

B. The Defendant’s Claim on Appeal

1. The defendant claimed the trial court erred in instructing the jury that it could not consider his voluntary intoxication for purposes of determining the truth of the section 12022.53 (c) and (d) firearm enhancements attached to three of the counts.
2. The defendant asserted that the mental state required for a true finding on these enhancements is specific intent and thus voluntary intoxication is admissible in determining the truth of such allegations.
3. The jury was instructed that “voluntary intoxication is not a defense to . . . any of the special allegations.”

C. The Court of Appeal’s Analysis

1. Section 12022.53, subdivision (c) provides a sentence enhancement for any person who, in the commission of specified felonies, “personally and intentionally discharges a firearm....” Section

12022.53, subdivision (d) provides a sentence enhancement for any person who, in the commission of certain specified felonies, “personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice....”

2. As the Court of Appeal here noted, evidence of voluntary intoxication is *admissible* on the issue of whether a defendant actually formed a required specific intent. However, evidence of voluntary intoxication is *inadmissible* to negate the existence of general criminal intent.

3. “The distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender’ and the availability of voluntary intoxication as a defense.” (*People v. Hering* (1999) 20 Cal.4th 440, 445.)

4. As the California Supreme Court set forth the rule: “When the definition of a crime [or an enhancement] consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.” (*People v. Hood* (1969) 1 Cal.3d 444, 456–457.)

5. In addition, “when the Legislature intends to require proof of a specific intent in connection with a sentence enhancement provision, it has done so explicitly by referring to the required intent in the statute.” (*In re Tameka C.* (2000) 22 Cal.4th 190, 198–199.)

6. Section 12022.53, subdivisions (c) and (d) both provide for additional punishment for a defendant who “personally and intentionally discharges a firearm” under specified circumstances. Both subdivisions refer only to the description of a particular act -- discharging a firearm -- without reference to the defendant’s intent to achieve any additional consequence.

7. Further, neither subdivision includes language typically denoting specific intent crimes, such as “with the intent” or “for the purpose of.” The Court of Appeal here said, “For instance, neither subdivision of section 12022.53 says that the discharge of the weapon must be done *with the intent to inflict injury.*”

8. By contrast, the Court of Appeal used Penal Code section 12022.55 as an example of an enhancement requiring specific intent, as evidenced by the express language in the statute: “any person who, *with the intent to inflict great bodily injury or death*, inflicts great bodily injury, as defined in Section 12022.7, or causes the death of a person, other than an occupant of a motor vehicle, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony, shall be punished. . . .”

9. The Court of Appeal rejected the defendant's argument that because section 12022.53 (c) and (d) use the word "intentionally," the statute necessarily specifies a specific intent. As stated in *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1494, "An intentional use of a firearm in the commission of a crime does not encompass any specific intent."

10. The Court of Appeal concluded its analysis by stating: "In short, because section 12022.53, subdivisions (c) and (d) "consist of only the description of a particular act," - i.e. discharging a firearm - "without reference to intent to do a further act or achieve a future consequence," the enhancements require only proof of the defendant's general intent." (citing *People v. Hood, supra*, 1 Cal.3d at pp. 456-457.)

11. Therefore, the trial court properly instructed the jury that it was not to consider evidence of the defendant's voluntary intoxication in determining the truth of the section 12022.53 firearm enhancement allegations.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.