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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID EARL WALKER, Defendant and Appellant.	E078744 (Super.Ct.No. CR40606) OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sevidal, Lynne G. McGinnis and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

In 1992, a jury convicted defendant David Earl Walker of first degree murder and robbery and the trial court sentenced him to state prison for 25 years to life. Inter alia, Walker's jury had been instructed on felony murder and murder under the natural and probable consequences doctrine. Since then, the Legislature eliminated the natural and probable consequences doctrine as it applies to murder. (Pen. Code,[1] § 188, subd. (a)(3), added by Sen. Bill No. 1437 (2017–2018 Reg. Sess.); Stats. 2018, ch. 1015, § 2.) In addition, the Legislature narrowed the scope of felony murder for a defendant who is not the actual killer and did not have the intent to kill, to now require the defendant to have been a major participant in the underlying offense who acted with reckless disregard for human life. (§ 189, subd. (e)(3), added by Sen. Bill No. 1437 (2017–2018 Reg. Sess.); Stats. 2018, ch. 1015, § 3.) Walker petitioned for resentencing under former section 1170.95[2] and argued he could no longer be convicted of felony murder because he was not a major participant in the robbery who acted with reckless indifference for human life. The trial court denied the petition after conducting an evidentiary hearing.

On appeal, Walker argues the record of his conviction does not prove beyond a reasonable doubt that he was a major participant in the robbery who acted with reckless indifference for human life. In addition, although he did not argue the point below, Walker argues the fact he was only 20 years old at the time of the offense must be

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[1] All undesignated statutory references are to the Penal Code.

[2] Effective June 30, 2022, Assembly Bill No. 200 (2021-2022 Reg. Sess.) amended and renumbered section 1170.95 as section 1172.6. (Stats. 2022, ch. 58, § 10.)

considered when deciding whether he may still be convicted beyond a reasonable doubt of felony murder. We conclude substantial evidence supports the trial court's findings that Walker was a major participant in the robbery who acted with reckless indifference for the life of the victim. Even if the trial court was required to consider Walker's age, it would have made no difference. We affirm the order.

I.

FACTS

We take our summary of facts from this court's nonpublished decision in Walker's direct appeal in *People v. Collins et al*. (Dec. 7, 1993, E010796).[3]

According to the evidence presented at trial, on the evening of July 3, 1991, Walker and Collins, along with 15 to 20 other people, were in the front yard of a home in Banning where they were talking, drinking, and listening to music when the 77-year-old victim drove up and stopped his car in front of the house. Witnesses D.M., J.H., and A.H. lived together in the house (along with several other people, including D.M.'s

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[3] At the evidentiary hearing on a petition for resentencing under section 1172.6, the trial court "may . . . consider the procedural history of the case recited in any prior appellate opinion." (§ 1172.6, subd. (d)(3).) "[T]he Legislature has decided trial judges should not rely on the factual summaries contained in prior appellate decisions when a [former] section 1170.95 petition reaches the stage of a full-fledged evidentiary hearing." (*People v. Clements* (2022) 75 Cal.App.5th 276, 292 (*Clements*).)

When it conducted the hearing on Walker's petition, the trial court only considered the transcripts from his trial and an affidavit from his codefendant Brandon Tyrone Collins that the parties stipulated could be admitted into evidence. No other "new or additional evidence" was admitted. (§ 1172.6, subd. (d)(3).) We rely on the factual statement from our decision in the original appeal merely to provide context for the trial court's ruling and the parties' appellate arguments, and do not rely on the factual statement to resolve the issues presented in this appeal.

grandmother) and were in the front yard on the evening in question. All three women testified at trial and stated, in pertinent part, that the victim came by the house almost every day to see L., another woman who apparently also lived at the house.

According to D.M., after the victim stopped his car by the curb, he called her over and asked her whether L. was home. D.M. testified that she sat in the passenger seat of the victim's car, apparently with the door open, and told him L. was in jail. While D.M. was in the car talking to the victim, Collins and Walker walked up to the driver's side where Collins said to the victim "something like 'give me your money.'" According to D.M., the victim started his car and tried to drive away, but before he could do so, Collins reached into the car through the driver's side window and turned off the ignition. At the same time, Walker apparently also reached inside the car and "put it in park." D.M. testified Collins hit the victim more than once (although she did not know exactly how many times) and tried to take the victim's wallets, which apparently were in the victim's rear pants pockets. While D.M. was trying to help the victim, someone hit her and knocked her out of the car, onto the ground. She did not see who hit her. From where she was lying next to the passenger side of the car, D.M. could see the victim "up in the air," apparently held by someone. She did not see how the victim was taken out of the car or who held him. Then "they dropped" the victim and his head hit the ground. D.M.'s sister called the police who arrived a short time later, along with the paramedics. When interviewed by the police, D.M., and everyone else present at the time of the incident, identified Collins and Walker as the people "who did this" to the victim.

J.H. testified, in pertinent part, that she was at the house on the night in question. Before the victim drove up, J.H. was standing in the driveway near Collins and Walker when "they mentioned about robbing somebody, that somebody was going to give them some money . . . ." Specifically, she testified that she heard Collins say "he was going to get some money from somebody, if it had to be his mother, he was going to get some money." After the victim drove up to the house, J.H. saw Collins and Walker go over to the victim's car. Collins reached into the window and turned off the ignition. J.H. remembered seeing Collins lean in through the driver's side window and hit the victim while telling him to hand over his money. According to J.H., while Collins was hitting the victim, Walker "was standing there for a minute. At first he tried to pull Collins off, then he just stood there." J.H. "hollered" at them to stop hitting the victim because "he was too old . . . for them to be hitting him, jumping on him like that." According to J.H., Collins said, "Fuck him." When the victim told Collins that he did not have any money, Collins said the victim was lying and pulled him through the driver's side window and out of the car. Walker (whom J.H. referred to by the nickname "Papa") held the victim, apparently under the arms and up off the ground, while Collins went through the victim's pockets. Collins took two wallets out of the victim's pants pockets, removed the money, and threw the wallets on the street. After Collins got the wallets, J.H. heard Collins say "he had the money and then Collins said, 'Let him go.' So they dropped him. So he [the victim] just like hit, hit the ground." Collins and Walker then walked away together down the street. J.H. called the paramedics.

A.H. testified she was present on the night in question, along with J.H., D.M., and others. Just before the victim drove up to the house, A.H. heard Collins and Walker say they were going to rob somebody. A.H. said she saw Collins and Walker go over to the victim's car and she heard Collins tell the victim to give Collins his money. When the victim said he did not have any money, Collins started hitting him. Unlike J.H. and D.M. who testified that Walker initially stood there while Collins hit the victim, A.H. stated Walker "[w]as like trying to get the man's wallet out of his pants." She also testified Walker or Collins (she did not know which one) threw the victim's keys out of the car and she picked them up and held them until she gave them to the police. According to A.H., Walker and Collins both pulled the victim out of the car "and let him fall to the ground. And [the victim] hit his head real hard." A.H. both saw and heard the victim's head hit the ground. She also saw Collins or Walker kick the victim while he was on the ground but she did not know which one did the kicking. After Collins and Walker ran away, A.H. went to see if the victim was hurt. According to A.H., the victim "was making this little gurgling sound, and his eyes were all back in his head. He didn't say anything, just made a little sound."

When the police and paramedics arrived, they found the victim lying in the street next to his parked car. The victim's head was in a pool of blood. He died the next day. The forensic pathologist who performed the autopsy expressed the opinion that the victim died from blunt head injuries. The pathologist also testified that bruising around the victim's eyes as well as on his arms, chest, and neck, was consistent with the victim

having been beaten around the face and kicked in the neck. (*People v. Collins* et al., *supra*, E010796.)

II.

PROCEDURAL HISTORY

In 1992, a jury convicted Walker of one count of first degree murder and one count of robbery. The trial court sentenced Walker to state prison for 25 years to life for the murder and sentenced him to the middle term of three years in prison for the robbery but stayed the latter sentence pursuant to section 654. On direct appeal, this court directed the trial court to correct the amount of credit to which Walker was entitled for pretrial custody but otherwise affirmed the judgment (*People v. Collins et al.*, *supra*, E010796), and the California Supreme Court denied review on March 16, 1994, S037342.

On January 8, 2019, Walker, acting as his own attorney, filed a form petition for resentencing under former section 1170.95. Using a check-box form, he alleged he had been charged with and convicted of first degree felony murder but that he could no longer be convicted of murder under that theory. Relevant here, Walker checked the boxes that indicated: "I was not the actual killer"; "I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree"; and "I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony." He

requested the court appoint counsel for him. (*People v. Walker* (June 11, 2021, E074918) [nonpub. opn.].)

The district attorney filed an opposition requesting the trial court strike or deny the petition on the ground Senate Bill No. 1437 (2017-2018 Reg. Sess.) was unconstitutional. In the alternative, the district attorney argued the trial court should dismiss or summarily deny the petition and not issue an order to show cause because Walker could still be convicted of felony murder. According to the prosecutor, the trial court was not required to accept as true the mere allegations in the petition that were contradicted by facts in the record of conviction that demonstrate Walker was a major participant in the robbery who acted with reckless indifference to human life. (*People v. Walker*, *supra,* E074918.)

The trial court appointed counsel for Walker, and his attorney filed an opposition to the motion to strike and argued Senate Bill No. 1437 is constitutional. At the continued hearing on the petition, the district attorney argued the facts set forth in this court's prior opinion demonstrated the killing occurred during "a joint beating and a robbery." The prosecutor argued, "If he was not the actual killer, he was at least a major participant [who acted] with reckless indifference." According to the prosecutor, "The facts show it was a robbery of a 77-year-old man who was sitting in his car. Mr. Walker held the victim, while others went through his pockets, then dropped the victim to the ground, at which point he hit his head and died in a pool of blood." Because Walker was "one of two actual killers," the prosecutor argued, "he's not qualified for relief." The

trial court granted the district attorney's motion to dismiss the petition "for the reasons [the prosecutor] articulated for the record." (*People v. Walker, supra,* E074918.)

Walker appealed, and this court held the trial court exceeded the limited scope of the inquiry under former section 1170.95, subdivision (c), into whether a petitioner has made a prima facie case for relief. Therefore, we reversed and remanded for the trial court to issue an order to show cause and set an evidentiary hearing on Walker's petition. (*People v. Walker, supra,* E074918.) On remand, the trial court issued an order to show cause and set an evidentiary hearing.

In briefs submitted for the evidentiary hearing, the People responded that, notwithstanding the enactment of Senate Bill No. 1437, Walker was not entitled to be resentenced on his first degree murder conviction because he was either the actual killer or he was a major participant in the underlying robbery who acted with reckless indifference to human life. In addition, the People argued that an affidavit submitted by Collins supported a finding that Walker was a major participant in the robbery and that he acted with reckless indifference for the victim's life.

During the hearing, the prosecutor argued both Collins and Walker could be found guilty of first degree murder beyond a reasonable doubt because they both qualified "as an actual killer." In addition, the prosecutor argued Collins and Walker could be convicted of first degree murder because they were both major participants in the robbery who acted with reckless disregard for human life. According to the prosecutor, "both defendants agreed and participated in the robbery" and they purposefully targeted the 77-

year-old victim because "he was a[n] available[,] vulnerable victim." The prosecutor argued both Collins and Walker "used physical force" on the victim when "[t]hey both dragged the victim out of the car" and "they both dropped him on his head, causing him to die." Both Collins and Walker were present, willingly participated fully in the robbery, and were "aware of what's going on." Moreover, "at any point in time, either one of the defendants could have stopped this."

In response to the prosecutor's apparent position that Collins and Walker "had equal involvement" in the robbery, Walker's attorney stated his client continued to deny having been involved in the robbery and he "adamantly disagreed" with the statement in Collins's affidavit that they "both agreed to the robbery." Moreover, counsel stated that during and after the trial Collins and Walker were not treated as having equal involvement in the robbery. For instance, in closing argument the prosecutor "noted that Mr. Walker had less of a role in the offenses." Likewise, the presentencing report from the probation department said a mitigating factor was that Walker had played a lesser role in the robbery. In addition, counsel argued the three key witnesses gave inconsistent testimony about Walker's involvement. Therefore, counsel argued the People could not meet their burden of proving guilt beyond a reasonable doubt.

After hearing argument, the trial court stated it could not conclude beyond a reasonable doubt which of the two assailants, Walker or Collins, was the actual killer. However, the court found beyond a reasonable doubt that both were major participants in

the robbery and they acted with reckless indifference for human life. Therefore, the court denied Walker's petition. He filed his notice of appeal the same day.[4]

III.

DISCUSSION

A. *Substantial Evidence Supports the Trial Court's Findings That Walker Was a Major Participant in the Robbery and Acted with Reckless Disregard for Human Life.*

Walker argues the trial court erred by denying his resentencing petition because the record of conviction does not establish that he could be convicted today of felony murder beyond a reasonable doubt. We conclude otherwise.

1. Applicable law and standard of review.

Effective January 1, 2019, Senate Bill No. 1437 (Stats. 2018, ch. 1015, §§ 2-3) eliminated the natural and probable consequences doctrine as a basis for finding a defendant guilty of murder and narrowed the felony-murder exception to the malice requirement for murder. (§§ 188, subd. (a)(3), 189, subd. (e); *People v. Lewis* (2021) 11 Cal.5th 952, 957; see *People v. Strong* (2022) 13 Cal.5th 698, 707-708 (*Strong*); *People v. Gentile* (2020) 10 Cal.5th 830, 842-843.) Section 188, subdivision (a)(3), now prohibits imputing malice based solely on an individual's participation in a crime and requires proof of malice for a murder conviction, except under the revised felony-murder rule in section 189, subdivision (e).

[4] In a separate opinion, we address Collins's appeal from the simultaneous order denying his own resentencing petition. (*People v. Collins*, E078746.)

"Senate Bill [No.] 1437 also created a special procedural mechanism for those convicted under the former law to seek retroactive relief under the law as amended." (*Strong*, *supra*, 13 Cal.5th at p. 708.) Unless the parties stipulate that the defendant is eligible for resentencing, the court must "hold an evidentiary hearing at which the prosecution bears the burden of proving, 'beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder' under state law as amended by Senate Bill [No.] 1437. (§ 1172.6, subd. (d)(3).)" (*Strong*, at p. 709.)

At the hearing, the court may consider previously admitted evidence, so long as it remains "admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case recited in any prior appellate opinion." (§ 1172.6, subd. (d)(3).) The parties may offer new or additional evidence to meet their respective burdens. "'A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' [Citation.] 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.'" (*Strong*, *supra*, 13 Cal.5th at p. 709.)

"Defendants who were neither actual killers nor acted with the intent to kill can be held liable for murder only if they were 'major participant[s] in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of . . .

[s]ection 190.2'—that is, the statute defining the felony-murder special circumstance." (*Strong*, *supra*, 13 Cal.5th at p. 708; see § 189, subd. (e)(3).) By tethering the definition of "major participant" and "reckless indifference" to the felony-murder special circumstance (§ 190.2, subds. (a)(17), (d)), the felony-murder statute under section 189, subdivision (e)(3), now incorporates the clarification given to those concepts by *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*).

Section 190.2, subdivision (d), "'imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life.' (*Banks*, *supra*, 61 Cal.4th at p. 798.) '"These requirements significantly overlap . . . for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life."' (*Clark*, *supra*, 63 Cal.4th at p. 615.)" (*In re Harper* (2022) 76 Cal.App.5th 450, 458.) "[I]n *Banks*, *supra*, 61 Cal.4th 788 and *Clark*, *supra*, 63 Cal.4th 522 our Supreme Court 'clarified the meaning of the special circumstances statute.' (*In re Scoggins* (2020) 9 Cal.5th 667, 671.) In *Banks*, the court held a 'major participant' in a robbery is someone whose 'personal involvement' is 'substantial' and 'greater than the actions of an ordinary aider and abettor . . . .' (*Banks*, *supra*, 61 Cal.4th at p. 802.) However, he or she 'need not be the ringleader.' (*People v. Williams* (2015) 61 Cal.4th 1244, 1281, cited with approval in *Clark*, at pp. 614, 619.)" (*In re Harper*, at p. 459.)

"Determining whether a defendant was a major participant requires consideration of the totality of the circumstances. (*Banks*, supra, 61 Cal.4th at p. 802.) *Banks*

identified five nonexclusive factors for evaluating the extent of a defendant's participation: '[(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 inaction play a particular role in the death? [and (5)] What did the defendant do after lethal force was used?' (*Id*. at p. 803, fn. omitted.) None of the factors the court expressly articulated is necessary or necessarily sufficient, and all must be weighed in determining the ultimate question of 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major."' (*Id*. at p. 803.)" (*In re Harper*, *supra*, 76 Cal.App.5th at p. 459, fn. omitted.)

"In *Clark*, the court noted reckless indifference to human life 'may be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death."' (*Clark*, *supra*, 63 Cal.4th at p. 616.) '"[T]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed," and he or she must consciously disregard "the significant risk of death his or her actions create."' (*In re Scoggins*, *supra*, 9 Cal.5th at p. 677, quoting *Banks*, *supra*, 61 Cal.4th at p. 801 and citing *Clark*, at p. 617.) However, the court cautioned that merely participating in an armed

robbery is not enough to show reckless indifference to human life. (*Clark*, at pp. 615-616, 623; accord, *In re Scoggins*, at p. 677; *Banks*, at pp. 808, 810.)" (*In re Harper*, *supra*, 76 Cal.App.5th at p. 459.)

"Courts must view the totality of the circumstances to determine whether the defendant acted with reckless indifference to human life. (*In re Scoggins*, *supra*, 9 Cal.5th at p. 677.) *Clark* identified five relevant, but nonexclusive, factors for evaluating this subjective requirement: (1) the 'defendant's awareness that a gun [or other deadly weapon] will be used,' whether the defendant personally used a lethal weapon, and the number of lethal weapons used; (2) the defendant's '[p]roximity to the murder and the events leading up to it' and opportunity to either restrain the crime or aid the victim; (3) whether the murder took place[] 'at the end of a prolonged period of restraint of the victim[] by the defendant'; (4) the 'defendant's knowledge of . . . a cohort's likelihood of killing'; and (5) whether the defendant made an 'effort[] to minimize the risks of violence in the commission of a felony . . . .' (*Clark*, *supra*, 63 Cal.4th at pp. 618-622.) Again, no single factor is necessary, nor is any one necessarily sufficient. (*Id*. at p. 618.)" (*In re Harper*, *supra*, 76 Cal.App.5th at p. 460, fn. omitted.)

"Ordinarily, a trial court's denial of a section 1172.6 petition is reviewed for substantial evidence." (*People v. Reyes* (2023) 14 Cal.5th 981, 988; accord, *Clements*, *supra*, 75 Cal.App.5th at p. 298.) "Under this standard, we review the record '"'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'"'" (*Reyes*, at p. 988.) "[O]ur job is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support a rational fact finder's findings beyond a reasonable doubt." (*Clements*, at p. 298.) "'We presume, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial.'" (*In re Harper*, *supra*, 76 Cal.App.5th at p. 460, quoting *Clark*, *supra*, 63 Cal.4th at p. 610.) We do not resolve credibility issues or conflicts in the evidence. (*People v. Schell* (2022) 84 Cal.App.5th 437, 442.) "Moreover, '"[t]he uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable."'" (*People v. Oliver* (2023) 90 Cal.App.5th 466, 484, quoting *People v. Panah* (2005) 35 Cal.4th 395, 489.)

2. Substantial evidence supports the trial court's finding that Walker was a major participant in the robbery.

For the first *Banks* factor, the evidence supports a finding that Walker played some role in planning the robbery that resulted in the victim's death. (*Banks*, *supra*, 61 Cal.4th at p. 803.) In his affidavit, Collins admitted that he and Walker agreed to rob the victim and acted according to that agreement. Walker's attorney adamantly disagreed with Collins's statement and maintained that Walker had no (or little) involvement in the

robbery.[5] But the trial testimony independently supports the inference that Walker was to some degree involved in the planning of the robbery. Collins and Walker were overheard to say they wanted to rob "somebody."[6] And, as soon as the victim arrived in his vehicle, the two men approached the victim and Collins demanded his money.

The second factor considers what role Walker played in supplying or using deadly weapons. (*Banks*, *supra*, 61 Cal.4th at p. 803.) Consistent with the evidence presented at trial, Collins stated in his affidavit neither he nor Walker possessed or used any weapon during the robbery. At the hearing on Walker's petition, the district attorney conceded no weapons were used and that the second *Clark* factor is "a neutral factor." We agree.

For the third factor, the record tends to support the conclusion that Walker was aware of or should have been aware of the "particular dangers posed" by the robbery. (*Banks*, *supra*, 61 Cal.4th at p. 803.) As the district attorney argued below, Walker and Collins apparently chose an "elderly" and "frail" victim to rob, instead of a "young, strong, [and] healthy" victim "who could fight back." The victim was 77 years old, five feet four inches in height, and only weighed 149 pounds. Walker ignored A.H.'s plea "not to do it" and continued to walk toward the car. Although the record supports the

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[5] As indicated, Collins's affidavit was admitted during the hearing without objection. Although Walker's attorney stated his client disagreed with the assertion in the affidavit that both defendants planned and executed the robbery, counsel did not object that consideration of statements from the affidavit that further implicated Walker might violate the *Aranda*/*Bruton* rule. (See *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.)

[6] A.H. testified she heard Collins and Walker say they were going to rob "somebody." But, when asked by the prosecutor if the men said, "they were going to rob *that* man," A.H. answered, "Yes, yes." (Italics added.)

conclusion that Walker never demanded the victim's money and he never hit him,[7] D.H. testified Walker helped prevent the victim from driving away by reaching into the car and placing it in "park." J.H. testified Walker tried briefly to pull Collins away from the car window, but the record shows Walker mostly stood by as Collins punched the victim and tried to take the victim's wallets. Finally, Walker held the victim up in the air as Collins went through the victim's pockets. And, when Collins "said he had the money, . . . Let him go," or "Drop him," Walker let the victim fall to the ground where he hit his head.

Next, the evidence demonstrates Walker was present during the killing, he was "in a position to facilitate" the killing, and his actions played a role in the killing. (*Banks*, *supra*, 61 Cal.4th at p. 803.) As indicated, the record shows Walker did not hit the victim and the evidence supports the conclusion that it was Collins who dragged the victim from the car.[8] However, Walker held the victim up as Collins searched for the victim's wallets and, when Collins said, "Let him go," or "Drop him," Walker let the victim fall to the ground where he hit his head.

As for the last factor, Walker's actions after the use of lethal force do not strongly weigh in favor of finding he was a major participant in the robbery. (*Banks*, *supra*, 61 Cal.4th at p. 803.) The record is inconclusive whether it was Collins or Walker who kicked the victim after they dropped him. True, as the district attorney argued below,

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[7] A.H. testified inconsistently that (1) it was Collins who demanded the victim's money, (2) Walker said nothing to the victim, but (3) "[b]oth of them" asked for the victim's money.

[8] Only A.H. testified that both Collins and Walker dragged the victim from the car.

Walker did nothing to help the victim as he lay on the ground bleeding. But, unlike Collins—who warned J.H., "don't say nothing, that didn't nobody see who did it"—Walker said nothing as he walked away.

Although the record amply supports Walker's assertion that he played a much lesser role in the robbery and killing than Collins, we must conclude that on the whole substantial evidence supports the trial court's conclusion that Walker was a major participant.

3. Substantial evidence supports the trial court's finding that Walker acted with reckless disregard for human life.

The first factor under *Clark* considers Walker's awareness of and personal use of a lethal weapon, and the number of lethal weapons used. (*Clark*, *supra*, 63 Cal.4th at pp. 618-619.) To repeat, there is no evidence any weapons whatsoever were used during the robbery. Therefore, this too is a "neutral factor."

The second *Clark* factor—Walker's proximity to the killing and the events leading to it, and whether he had the opportunity to either restrain the crime or aid the victim (*Clark*, *supra*, 63 Cal.4th at pp. 619-620)—mostly supports a finding that Walker acted with reckless disregard for human life. As indicated, *ante*, the record supports the conclusion that Walker played some role in planning the robbery and he actively participated in it, though clearly to a lesser degree than Collins. Moreover, Walker ignored the pleas of bystanders not to rob the victim and he helped prevent the victim from driving away, though Walker did not strike the victim. Finally, although the record

demonstrates Walker tried, at least briefly, to pull Collins away from the victim, Walker held the victim up in the air as Collins riffled his pockets and dropped the victim onto the ground, where he hit his head, rather than set him down on his feet.

The third *Clark* factor considers "whether a murder came at the end of a prolonged period of restraint of the victims by defendant." (*Clark*, *supra*, 63 Cal.4th at p. 620, fn. omitted.) For example, "[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. The duration of the interaction between victims and perpetrators is therefore one consideration in assessing whether a defendant was recklessly indifferent to human life." (*Ibid.*) Neither party addressed this factor in their briefs, and we conclude it weighs strongly in neither direction.

The fourth *Clark* factor—Walker's knowledge of Collins's likelihood of killing (*Clark*, *supra*, 63 Cal.4th at p. 621)—also does not weigh in favor of a finding of reckless indifference. The record contains no evidence about what Walker may have known about Collins's predilection to violence, if any.

The last factor—whether Walker took any steps to minimize the risk of violence in the commission of the robbery—also supports a finding he acted with reckless disregard for human life. (*Clark*, *supra*, 63 Cal.4th at pp. 621-622.) True, unlike Collins, the evidence supports the conclusion that Walker did not reach inside the vehicle to punch the victim and he did not pull the victim out of the car (but see, *ante*, fn. 8). But, to

repeat, Walker held the victim up in the air as Collins searched for the wallets, and he let the victim fall to the ground where he hit his head.

Although not all the *Clark* factors are present in this case or do not heavily weigh one way or the other, no factor is necessary or necessarily sufficient. (*Clark, supra,* 63 Cal.4th at p. 618.) But the factors that are present, in conjunction with the evidence that Walker was a major participant in the robbery, support the trial court's finding that Walker acted with reckless indifference for human life.

B. *Walker's Age at The Time of the Offense Does Not Alter Our Conclusion.*

Defendant also contends the fact he was 20[9] years old at the time of the offense is a relevant consideration when determining whether he acted with reckless indifference to human life, and that his age and lack of maturity lessen his culpability. The Attorney General does not dispute that age and maturity are a factor a court may consider but argues it does not change the result in this case. We agree with the Attorney General.

1. Youth as a factor in the *Banks*/*Clark* analysis.

This court has previously addressed youth as a factor to be considered when determining whether a defendant was a major participant who acted with reckless disregard for human life. In *In re Harper*, *supra*, 76 Cal.App.5th 450, the defendant was sentenced to life without the possibility of parole (LWOP) after a jury convicted him of first degree murder and found true a robbery-homicide special circumstance, but he was subsequently resentenced to 25 years to life pursuant to *Miller v. Alabama* (2012) 567

[9] He was less than 1 month shy of his 21st birthday.

U.S. 460. (*In re Harper*, at pp. 456, 458.) In the context of a *Banks*/*Clark* challenge to the validity of the special circumstances finding, the defendant argued the fact he was only 16 years old at the time of his offense "decrease[d] his culpability." (*In re Harper*, at p. 466.) The Attorney General initially argued youth is irrelevant to the *Banks*/*Clark* analysis, but subsequently "conceded youth may be one of several factors to consider in an appropriate case" but "it [did] not change the result in this case." (*In re Harper*, at p. 466.)

We noted, "The Legislature has already made youth a factor that must be considered when determining whether a 16- or 17-year-old found guilty of special circumstance murder should be sentenced to LWOP or 25 years to life. (§ 190.5, subd. (b).) Youth must also be considered when, after having served 25 years, a minor defendant becomes eligible for parole at a youth offender parole hearing. (§ 3051, subd. (b)(3).) At that time, the Board of Parole Hearings is required to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' (§ 4801, subd. (c); see Cal. Code Regs., tit. 15, §§ 2445, subd. (b), 2446.)[10] *Banks, supra,* 61 Cal.4th 788 and *Clark, supra,* 63 Cal.4th 522 did

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10 In his brief, Walker states, "While in the eyes of the law an 18 year old is considered an adult, the Legislature recently recognized that immaturity and lack of brain development should be a mitigating factor." This is a slight overstatement.

Effective January 1, 2022, the fact a defendant is a "youth"—defined to mean "any person under 26 years of age on the date the offense was committed"—must be considered by a prosecutor during plea negotiations. (§ 1016.7, subds. (a)(1), (b), as added by Stats. 2021, ch. 695, § 4.) That definition of "youth" was incorporated into the

[footnote continued on next page]

not address youth, and nothing in those decisions indicates youth must be incorporated as a factor into the analysis of whether a special circumstance applies in the first place. However . . . those courts stated the factors they articulated were not exclusive or necessarily determinative. (See *Banks*, at p. 803; *Clark*, at p. 618.)" (*In re Harper*, *supra*, 76 Cal.App.5th at pp. 466-467, fn. omitted.) "Although youth would appear to be an obvious consideration when determining whether a defendant acted with reckless indifference to human life, the defendant in *Clark* was a grown man at the time of the murder, so the Supreme Court had no occasion to decide whether youth was a factor. (See *Clark*, *supra*, 63 Cal.4th at p. 545.)" (*In re Harper*, at p. 466, fn. 8.)

When we decided *In re Harper*, *supra*, 76 Cal.App.5th 450, three cases involving defendants who were minors at the time of their offenses had already held that a defendant's youth is an appropriate factor to consider when conducting the *Banks*/*Clark* analysis: *People v. Harris* (2021) 60 Cal.App.5th 939 (17-year-old) (*Harris*),[11] *In re*

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determinate sentencing scheme, which now provides a rebuttable presumption that youthful offenders should be sentenced to the low prison term. (§ 1170, subd. (b)(6)(B); Cal. Rules of Court, rule 4.420(e)(2); see *People v. Hilburn* (2023) 93 Cal.App.5th 189, 199-201.)

While perhaps suggestive of the Legislature's increasing awareness of the "psychological and neurological differences" between youth and adults over the age of 25 years (*Oliver*, *supra*, 90 Cal.App.5th at p. 486), the enactment of section 1016.7 does not suggest that a court must always consider a defendant's youthful age and maturity level when conducting the *Banks*/*Clark* analysis.

[11] The Supreme Court granted review in *Harris*, *supra*, 60 Cal.App.5th 939 pending resolution of *Strong*, *supra*, 13 Cal.5th 698 and *People v. Lewis*, *supra*, 11 Cal.5th 952. (*People v. Harris*, rev. granted, Apr. 28, 2021, S267802.) Although the Supreme Court later dismissed review, it ordered that the court of appeal's opinion remain "noncitable and nonprecedential 'to the extent it is inconsistent'" with *Lewis*.

[footnote continued on next page]

Moore (2021) 68 Cal.App.5th 434 (16-year-old), and *People v. Ramirez* (2021) 71 Cal.App.5th 970 (15-year-old). (See *In re Harper*, at pp. 467-470.) A similar decision was subsequently decided. (*People v. Keel* (2022) 84 Cal.App.5th 546 [15-year-old].)

This court expressly declined to decide whether youth is a factor that *must* be considered as a part of the *Banks*/*Clark* analysis. Instead, we assumed without deciding that youth is an appropriate factor a court *may* consider under the totality of the circumstances. (*In re Harper*, *supra*, 76 Cal.App.5th at p. 470.) And, after considering the evidence and findings from the earlier resentencing proceeding pursuant to *Miller v. Alabama*, *supra*, 567 U.S. 460, we held the fact the defendant was 16 years old at the time of his offense in no way undermined our conclusion he was a major participant who acted with reckless disregard for human life. "The evidence demonstrates petitioner willingly participated in the robbery despite knowing there was a very high risk—if not a certainty—the victim would die. His conduct during the robbery (giving the shotgun to [his codefendant] as they entered the store, telling [another confederate] where she could find knives, taking merchandise from the store), and his statements during and after the robbery that reflected his callousness or indifference to whether the victim lived or died, all show he did not act like an immature, naïve, or impulsive adolescent." (*In re Harper*, at p. 472.) We concluded by observing, "it is one thing to say petitioner should eventually be eligible for a parole hearing because he was a minor at the time of the

(*People v. Harris*, rev. dismissed Sept. 28, 2022, S267802; see Cal. Rules of Court, rule 8.1115(e)(2).)

offense, and quite another to say he did not have the maturity to have acted with reckless disregard for human life." (*Ibid*.)

Since then, several courts have considered young adulthood as a relevant factor. In *People v. Owens* (2022) 78 Cal.App.5th 1015, the defendant asked the trial court hearing his resentencing petition under former section 1170.95 to consider as relevant to the *Banks*/*Clark* analysis the fact he was only 19 years old at the time of the offense. (*Owens*, at p. 1020.) The trial court "expressly stated it had 'factored into the calculus' appellant's age of 19 years old when the crimes were committed," but denied resentencing after it found the defendant was a major participant who acted with reckless disregard. (*Owens*, at p. 1026.) The appellate court found substantial evidence supported the order and affirmed it. (*Ibid*.)

Similarly, the trial court in *People v. Mitchell* (2022) 81 Cal.App.5th 575 ruled that, "'despite the fact that he was only 18,'" the defendant acted with reckless disregard for human life when he did nothing to help the victim after a shooting. (*Id*. at p. 584-585.) The appellate court majority agreed. "We ascribe meaning to Mitchell's actions despite his age. Youth can distort risk calculations. Yet every 18 year old understands bullet wounds require attention. The fact of youth cannot overwhelm all other factors. [Citation.] Weight appropriate to Mitchell's youth is overborne here by the *Banks-Clark-Scoggins* factors that show Mitchell's indifference to his victim's life. As the trial court rightly concluded, 'Mr. Mitchell being young at the time is not a reason for this court to grant this petition because he was a major participant who acted with reckless

indifference to human life.'" (*Mitchell*, at p. 595; but see *id.* at pp. 601-604 (diss. opn. of Stratton, P.J.) [concluding, inter alia, defendant's age weighed against finding of reckless indifference to human life].)

The defendant in *People v. Jones* (2022) 86 Cal.App.5th 1076 (*Jones*) was 20 years old at the time of his offense. During the hearing on a resentencing petition under former section 1170.95—which took place less than one month after the decision in *Harris*, *supra*, 60 Cal.App.5th 939 had been issued—defense counsel expressly argued the trial court should consider youth when conducting the *Banks*/*Clark* analysis. (*Jones*, at pp. 1091-1092.) However, in its order denying the petition, "the court did not mention Jones's age or maturity level." (*Id.* at p. 1091.)

The appellate court agreed with the defendant that youth is necessarily a factor that must be considered as part of the totality of the circumstances.[12] (*Jones*, *supra*, 86 Cal.App.5th at pp. 1988, fn. 7, 1091.) After noting the trial court is presumed to have followed the law and considered all evidence properly presented, and the trial court's failure to specifically mention some evidence does not mean the court ignored it, the

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[12] *Jones* cited *In re Moore*, *supra*, 68 Cal.App.5th at pp. 454-455 for the proposition that "a defendant's youthful age *must* be considered." (*Jones*, *supra*, 86 Cal.App.5th at p. 1088, fn. 7, italics added.) *In re Moore* merely held that a defendant's youth at the time of the offense "is a relevant factor" in the *Banks*/*Clark* analysis but did not hold courts *must* consider it. (*In re Moore*, at p. 454; see also *Jones*, at p. 1092, fn. 8 [noting *In re Moore* "specifically stated that 'youth is *a* relevant factor'"].) To the extent footnote 7 from *Jones* represents an actual holding as opposed to nonbinding dictum, we once more decline to decide whether youth is a factor that must always be considered. (See *In re Harper*, *supra*, 76 Cal.App.5th at p. 470.) As explained, *post*, Walker's age at the time of the offense makes no difference here.

appellate said it was unlikely the trial court would have known to consider the defendant's age and maturity. (*Jones*, at p. 1092.) "Although defense counsel at the resentencing hearing had mentioned Jones's age and characterized him as immature, the court was not specifically directed to the sentencing report [for a prior hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261] or to *Harris*. Although counsel had cited *Miller* and [*Graham v. Florida* (2010) 560 U.S. 48], those cases were decided in the context of sentencing juveniles to life without possibility of parole." (*Ibid.*) And, while recognizing *Harris* and other prior decisions had addressed *adolescent* brain development as a consideration in the *Banks*/*Clark* analysis, "in the interest of justice" the appellate court reversed the order denying the petition and remanded "for the trial court to have a meaningful opportunity to consider Jones's youth as part of the totality of the circumstances germane to determining whether he was a major participant who acted with reckless indifference to human life." (*Jones*, at p. 1093.)

The defendant in *Oliver*, *supra*, 90 Cal.App.5th 466 did not address youthfulness at his resentencing hearing but for the first time on appeal argued the trial court erred by failing to consider the fact he was 23 years old at the time of his offense. (*Id*. at pp. 486, 488.) Because the resentencing hearing there took place before the decisions in *Harris*, *In re Moore*, or *Jones* had been issued, the appellate court concluded it was unlikely the trial court would have known to consider the defendant's age and maturity. (*Oliver*, at p. 488.) Unlike in *Jones*, however, the *Oliver* court did not decide whether the trial court was *required* to consider the defendant's age as part of the *Banks*/*Clark* analysis and it

did not remand for such consideration.[13] Instead, *Oliver* held that, "*even if* the trial court was required to expressly consider Oliver's youth, any such error in this regard is harmless under the specific circumstances of this case." (*Oliver*, at p. 489, italics added, fn. omitted; see *id*. at p. 489, fn. 8 [concluding the harmless error standard under *People v. Watson* (1956) 46 Cal.2d 818 applied].) "We note first that Oliver was 23 at the time of the crime. Presumably, the presumption of immaturity weakens as a defendant approaches 26. More importantly, however, the case law discussing the differences in brain development among youthful offenders (in contrast to their adult counterparts) stress two areas of divergence: (1) their relative impulsivity; and (2) their vulnerability to peer pressure. [Citation.] There is no evidence in this case that Oliver's criminal behavior was motivated by either of these two factors." (*Id*. at p. 489.)

The *Oliver* court further explained, "[W]e are not here presented with a situation where a youthful offender was swept up in circumstances beyond his or her control that led to an unintended death. Rather, the evidence discloses that Oliver was fully aware that [his confederate] intended to kill [the victim] if the opportunity arose and decided—after full consideration of the situation—that the risk was worth the reward. Thus, he knew the incident involved a '"grave risk of death."' [Citation.] Indeed, it is clear that Oliver was 'subjectively aware that his actions created a graver risk of death than any

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[13] *Oliver* declined to find the defendant forfeited his argument by not raising it below. (*Oliver*, *supra*, 90 Cal.App.5th at p. 488.) The court also declined to decide "the appropriate definition of 'youthful' in this context" (presumably referring to the distinction in this context between adolescence and young adulthood), and "whether it is incumbent upon a trial court to expressly consider youth as part of its *Banks*/*Clark* analysis even when age is not raised by the defense." (*Oliver*, at p. 488.)

other armed robbery.' [Citation.] Nevertheless, he actively participated." (*Oliver, supra,* 90 Cal.App.5th at p. 489.) "As for peer pressure, there is no evidence that Oliver felt compelled to assist in [the] murder. Rather, the record discloses that he and [his confederate] had been engaging in drug transactions as partners for a number of years. And there is no indication that Oliver could not have declined to participate in the murder . . . had he chosen to." (*Ibid.*) "Finally, Oliver has failed to present on appeal or in the court below any specific support for the proposition that his level of maturity somehow lessened his culpability for this murder." (*Id.* at p. 490.)

Finally, five days before we issued our tentative decision in this appeal, the First Appellate District decided *People v. Pittman* (2023) 96 Cal.App.5th 400 (*Pittman*). The defendant there, who was 21 years old at the time, attended a house party with a 16- and 17-year-old. (*Id.* at pp. 403-404.) "All three were drunk." (*Id.* at p. 404.) When one of the minors suggested they rob a nearby liquor store, the defendant went off to get a gun. The defendant saw the victim in a parked truck with a prostitute "shooting up dope," so the defendant returned to the party and suggested he and the minors "'go whip [the victim's] ass.'" (*Ibid.*) The defendant grabbed three chisels from a bucket on the porch of the house and handed one each to the minors. As the three walked toward the truck, one of the minors ran up the victim and stabbed him in the head with the chisel. (*Id.* at p. 405.) A jury convicted the defendant of second degree murder. (*Id.* at p. 409.)

The defendant unsuccessfully petitioned the trial court under former section 1170.95 to vacate his conviction for implied malice second degree murder. (*Pittman,*

supra, 96 Cal.App.5th at pp. 403-404, 411-413.) On appeal, he argued the case should be remanded for the trial court to consider how his youth at the time of the offense affected his ability to form the culpable mental state to support a conviction for implied malice second degree murder. (*Id*. at pp. 404, 416.) The appellate court agreed with the defendant that his age at the time of the offense was relevant. "The policy interests underlying the felony-murder cases—that youth is relevant to a criminal defendant's ability to perceive risk and consequences, and therefore to the level of culpability—apply equally in the context of implied malice murder." (*Id*. at p. 417.) Because the trial court did not address youth during the resentencing hearing, the appellate court inquired whether that omission was harmless under state law, i.e., "whether there is a reasonable possibility that the failure to consider Pittman's youth impacted the trial court's decision." (*Id*. at p. 417, citing *Oliver*, *supra*, 90 Cal.App.5th at p. 489, fn. 8.)

The appellate court concluded "[i]nferences of immaturity and peer pressure may be drawn" from the mere fact that Pittman committed his offense in the company of a 16- and 17-year-old. (*Pittman*, *supra*, 96 Cal.App.5th at p. 418.) In addition, the court noted the facts of the crime—quickly switching the plan from robbing a liquor store to an unprovoked attack on the victim—demonstrated the defendant "acted impulsively and under the influence of 'transient rashness.'" (*Id*. at p. 418.) Moreover, the court observed the selection of the weapons "appears to have been spontaneous," and the motive for the attack was the sheer "happenstance" that the defendant saw the victim "'shooting up dope with a prostitute in his truck.'" (*Ibid*.) Finally, the court agreed with

the defendant that the "material characteristics of youth" were exacerbated by his intoxication and "'negative emotional arousal.'" (*Ibid*.) Therefore, the court reversed and remanded for the trial court to consider what, if any, impact the defendant's youth had on his ability to form the requisite mental state for second degree murder. (*Id*. at pp. 418-419.)

2. Walker's age at the time of his offense does not alter our conclusion that he acted with reckless disregard for human life.

At the hearing on Walker's petition conducted March 25, 2022, Walker did not ask the trial court to consider his age and maturity at the time of the offense when performing the *Banks*/*Clark* analysis. And perhaps for good reason. *Harris*, *supra*, 60 Cal.App.5th 939 (decided Feb. 16, 2021), *In re Moore*, *supra*, 68 Cal.App.5th 434 (decided Aug. 31, 2021), *People v. Ramirez*, *supra*, 71 Cal.App.5th 970 (decided Nov. 23, 2021) and *In re Harper*, *supra*, 76 Cal.App.5th 450 (decided Mar. 17, 2022), had already been decided, but those decisions merely stood for the proposition that *adolescence* at the time of the offense is a relevant factor. *Jones*, *supra*, 86 Cal.App.5th 1076 (decided Dec. 23, 2022)—the first decision to indicate, if not actually hold (see *ante*, fn. 12), that the age and maturity level of a young adult is a factor a court *must* consider—had not yet been decided. Therefore, it is unlikely the trial court or the parties would have known to consider Walker's age and maturity level, and we decline to find he forfeited his claim on appeal. (See *Oliver*, *supra*, 90 Cal.App.5th at p. 488.)

Like the court in *Oliver*, however, we need not decide whether the trial court was required to consider Walker's age and maturity, because even if it was required to do so, the error was harmless. (*Oliver*, *supra*, 90 Cal.App.5th at p. 489.) As the People contend, defendant was an adult—less than a month short of his 21st birthday—"and thus significantly more mentally mature" than the minor defendants in cases such as *People v. Ramirez*, *supra*, 71 Cal.App.5th 970. "Presumably, the presumption of immaturity weakens as a defendant approaches 26." (*Oliver*, at p. 489.)

Moreover, there is no evidence in the record before us that Walker's actions or inactions in this case were motivated by "relative impulsivity," "vulnerability to peer pressure," that he was merely "swept up in circumstances beyond his . . . control that led to an unintended death," or that he "felt compelled" to assist in the robbery. (*Oliver*, *supra*, 90 Cal.App.5th at p. 489.) Unlike in *Pittman*, where merely acting in concert with two minors raised an inference of the defendant's immaturity and susceptibility to peer pressure (*Pittman*, *supra*, 96 Cal.App.5th at p. 418), Walker and Collins were both adults. Likewise, the facts here do not indicate the decision to rob the victim was spontaneous, that the motive to do so arose from a mere happenstance, or that Walker was intoxicated or acting under "'negative emotional arousal.'" (*Ibid*.) Nor does the extant record suggest Walker was prevented from backing out from taking part in the robbery had he wanted to. (*Oliver*, at p. 489.) To the contrary, Walker tried, at least briefly, to stop Collins from hitting the victim. Yet, Walker did not leave or cease to participate in the

robbery. In short, Walker points to nothing to suggest "his level of maturity somehow lessened his culpability for this murder." (*Id*. at p. 490.)

VI.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.