IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTOPHER STRONG, Defendant and Appellant.	Supreme Court No. S266606

Third Appellate District No. C091162
Sacramento County Superior Court No. 11F06729

The Honorable Patrick Marlette, Judge

APPELLANT'S ANSWER BRIEF TO AMICI CURIAE

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ISSUE PRESENTED FOR REVIEW

Does a felony-murder special circumstance finding (Pen. Code, § 190.2, subd. (a)(17)) made before *People v. Banks* (2015) 61 Cal.4th 788 () and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*) preclude a defendant from making a prima facie showing of eligibility for relief under Penal Code section 1170.95?

A defendant with pre-*Banks* and *Clark* special circumstance findings can make a prima facie showing of eligibility for relief under section 1170.95 because of this Court's decision in *Banks* and not because of the doctrine collateral estoppel. The Legislature relied on the decision in *Banks* when it amended the law of murder in Senate Bill 1437. The Legislature did not rely upon the doctrine of collateral estoppel.

Collateral estoppel does not resolve the split between the legislative understanding of *Banks* and the judicial understanding of *Banks,* which is the answer to the issue in this case. Resolving the question of whether the Legislature or the judiciary has misunderstood *Banks* is crucial to the interpretation and application of Penal Code sections 189, subdivision (e)(3) and 1170.95. Collateral estoppel is not a basis for deciding the issue framed by this Court of the parties in this case.

ARGUMENT

I. A PRE-*BANKS* AND PETITIONER'S STATEMENT OF A PRIMA FACIE CASE RESTS UPON THIS COURT'S DECISION IN *BANKS* AND DOES NOT REST UPON THE DOCTRINE OF COLLATERAL ESTOPPEL

The answer to the issue framed by this Court rests upon this Court's decision in *People v. Banks* (2015) 61 Cal.4th 788. A pre-*Banks* and *Clark* petitioner's statement of a prima facie case under Penal Code section 1170.95 does not rest upon the doctrine of collateral estoppel. Three amicus briefs have been filed stating otherwise: one by Attorney Jonathan E. Demson; one by the Office of the Santa Clara County Independent Defense Counsel; and one by the Office of the State Public Defender. All three briefs ignore two important components of the record in this case. First, the trial court never ruled that appellant was barred from stating a prima facie case by the doctrine of collateral estoppel nor did the Third District Court of Appeal affirm such a decision on appeal. (*People v. Strong* (December 18, 2020) C091162 2020 Cal.App.Unpub. LEXIS 8505, 2020 WL 7417057 (hereinafter "Slip opn.," pp. 8-9.) Second, the Legislative history of section 1170.95 specifically states that the Legislature's understanding of the substance of the *Banks* decision was its basis for amending Penal Code section 189, subdivision (e)(3) and for creating the procedure in section 1170.95. (Sen. Conc. Res. No. 48, Stats. 2017-2018 Reg. Sess.) res. ch 175, p. 1.) The Legislative history of section 1170.95 and of section 189, subdivision (e)(3) does not support an inference that the Legislature relied on the doctrine of collateral estoppel rather than on this Court's decision in *Banks* in amending the law of murder. In this case, this Court must resolve a

question that impacts not only section 1170.95 but section 189, subdivision (e)(3) as well: did the Legislature misunderstand the *Banks* decision? The doctrine of collateral estoppel does not answer this important question of law.

II. THE SPLIT BETWEEN THE LEGISLATURE'S UNDERSTANDING OF THE *BANKS* DECISION AND THE VIEW OF *BANKS* BY THE COURTS OF APPEAL

The Legislature and the courts of appeal are not in harmony in their understanding of *Banks*. The Legislature understands the decision to change the law of aggravated felony murder to focus criminal liability on individual culpability.

> "WHEREAS, *Criminal liability and sentencing should comport with individual culpability*, thereby making conviction under a felony murder theory inconsistent with basic principles of law and equity; and
>
> " WHEREAS, In California, to be liable for special circumstance felony murder and sentenced to death or to life without the possibility of parole, pursuant to Section 190.2 of the Penal Code, the prosecution must prove the defendant intended to commit the underlying felony and also prove two additional elements: *that the person who did not commit the homicidal act acted as a major participant in the felony and acted with reckless indifference to human life*; (see *People v. Banks* (2015) 61 Cal.4th 788); and
>
> " WHEREAS, The California Supreme Court in the *Banks* decision stated that imposing these two statutory additional requirements—required to impose either life without the possibility of parole or a death sentence—comports with the United States Supreme Court Eighth Amendment jurisprudence proscribing cruel and unusual punishment."

(Sen. Conc. Res. No. 48, Stats. 2017-2018 Reg. Sess.) res. ch 175, p.

1.) (emphasis added.)

The courts of appeal view the matter differently. According to the courts of appeal, the law of aggravated felony murder was exactly the same before and after *Banks*. Thus, the *Strong* court cited with approval the *Allison* court's finding that the "requirements for a finding of felony murder under the newly amended version of section 189 were *identical* to the requirements of the felony-murder special circumstance that had been in effect at the time of the challenged murder conviction (in the *Allison's* case 1997; in the instant case, 2014)." (Slip opn. at pp. 8-9, citing *Allison* (2020) 55 Cal.App.5th 449, 456) (*original emphasis*.)

To resolve the question of whether pre-*Banks* and *Clark* special circumstances bar a petitioner from stating a prima facie case under section 1170.95, this Court must correct either the Legislature's misunderstanding of *Banks* or the misunderstanding of the courts of appeal. The resolution of which entity has been mistaken will define the meaning of Penal Code section 189, subdivision (e)(3). Did this statute incorporate an important change in the law of aggravated felony murder, as the Legislature believed, or is this provision merely a restatement of the law that existed prior to *Banks*? The doctrine of collateral estoppel does not and cannot resolve this crucial legal question.

III. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT RESOLVE THE SPLIT BETWEEN THE LEGISLATIVE UNDERSTANDING OF *BANKS* AND THE JUDICIAL VIEW OF THAT DECISION

A. THE DOCTRINE OF COLLATERAL ESTOPPEL

Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form, res judicata " 'precludes parties or their privies from relitigating a cause of action [finally resolved in a prior proceeding].' " (*Teitelbaum Furs, Inc. v. Dominion* (1962) 58 Cal. 2d 601, 604.) Res judicata also includes a broader principle, commonly termed collateral estoppel, under which an issue " 'necessarily decided in [prior] litigation [may be] conclusively determined as [against] the parties [thereto] or their privies . . . in a subsequent lawsuit on a different cause of action.' " (*Ibid.*) Res judicata bars relitigation of identical claims or causes of action. (*Ibid.*) Collateral estoppel precludes a party to prior litigation from redisputing issues decided against him in prior litigation, even when those issues bear on different claims raised in later case. (*Ibid.*) Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341 (*Lucido*).)

The collateral estoppel doctrine may thus allow one who was not a party to prior litigation to take advantage in a later unrelated matter of findings made against his current adversary in the earlier proceeding. (*Ibid.*) Thus, the loss of a particular dispute against a particular opponent in a particular forum may impose adverse and

unforeseeable litigation consequences far beyond the parameters of the original case. (See *Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 Cal. App. 3d 195, 202.) Clearly, the doctrine of collateral estoppel has a more limited application in criminal proceedings where the Sixth Amendment guarantees each individual accused the right to trial by jury.

The party asserting collateral estoppel has the burden of establishing the doctrine's prerequisites. (*Lucido, supra*, 51 Cal.3d at p. 341.) First, "the issue sought to be precluded from relitigation must be identical to that decided in the former proceeding." (*Ibid*.) Second, the issue "must have been actually litigated in the former proceeding." (*Ibid*.) Third, the issue must "necessarily have been decided in the former proceeding." (*Ibid*.) Fourth, the decision in the former proceeding "must be final and on the merits." (*Ibid*.) Fifth, the party to be precluded must "be the same as, or in privity with, the party to the former proceeding." (*Ibid*.)

However, the doctrine of collateral estoppel has an equitable component. Even after the prerequisites have been established, in both criminal and civil proceedings, "policy considerations may limit its use where the . . . underpinnings of the doctrine are outweighed by other factors." *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 828-829.) Courts look to public policy to decide if collateral estoppel should be applied in any given case. (*Lucido, supra*, 51 Cal.3d at p. 343.) "[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality." (*Ashe v. Swenson* (1970) 397 U.S. 436, 444 [90 S. Ct. 1189, 25 L. Ed. 2d 469].)

B. COLLATERAL ESTOPPEL DOES NOT ANSWER THE QUESTION OF LAW IN THIS CASE

(1) ISSUE IDENTITY

The party asserting the doctrine of collateral estoppel must first show that "the issue sought to be precluded from litigation" is "identical to that decided at the former proceeding." (*Lucido, supra*, 51 Cal.3d at p. 341.) An issue is "identical" when "identical factual allegations" are at stake in the two proceedings . . . ." (*Id.* at p. 342.) The court of appeals' position is that before and after *Banks* the elements of aggravated felony murder, "major participant" and "reckless indifference to human life," were decided by juries according to the same standard. Thus, at the prima facie stage of section 1170.95, the petitioner's allegation that"I cannot now be convicted under the amendments to section 189, subdivision (e)(3)" must be treated as not true. (Pen. Code § 1170.95, subd. (a)(3).)

On the other hand, the Legislature, in Resolution 48, indicated its belief that after *Banks,* juries decided these elements under a narrower standard. (Sen. Conc. Res. No. 48, Stats. 2017-2018 Reg. Sess.) res. ch 175, p. 1.) The Legislature believed that it had incorporated this new, narrower standard into the amendments to the law of murder, including section 189, enacted by Senate Bill 1437. Under the Legislative view, a pre-*Banks* petitioner can state a prima facie case because he can truthfully alleged that he cannot now be convicted under section 189, subdivision (e)(3).

The doctrine of collateral estoppel does not answer the identity of issue question which is the first prerequisite for application of the doctrine: is the law of "major participant" and "reckless indifference"

the same before and after *Banks*?

(2) "ACTUALLY LITIGATED"

The Santa Clara County Independent Defense Counsel asserts that *People v. Gonzalez* (2021) 65 Cal.App.5th 420 has the answer. (Brief of Santa Clara County Independent Defense Counsel, at p. 59 (*Gonzalez)*.) *Gonzalez* ignored the identity prong and resolved the issue under the "actually litigated" prong of the doctrine of collateral estoppel.

In *Gonzalez*, the court of appeal held that at trial, Gonzalez "did not challenge the prosecution's cause of action on the special circumstance." (*Id*. at p. 433.) According to *Gonzalez,* "defense counsel did not 'actually litigate' the robbery special circumstance. Instead, he argued Gonzalez was not guilty of murder at all." (*Id*. at p. 434.) But the special circumstance allegations are elements of aggravated felony murder. (*People v. Superrior Court (Engert)* (1982) 31 Cal.3d 797, 803.) According to *Gonzalez*, if defense counsel withholds evidence on two elements of the crime and argues that his client was not guilty of the crime at all, he has set his client up for a second opportunity to litigate those elements. This view is incorrect. A party's claim that he did not present his entire case in the first proceeding does not give that party a second bite at the apple.[1] (*People v. Sims* (1982) 32 Cal.3d 468, 481-482.) The relevant

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[1]In criminal cases, withholding exculpatory evidence would implicate effective assistance of counsel issues under the federal Sixth Amendment. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 80 L.Ed.2d 674.) In civil cases, apart from malpractice issues, it would undermine the finality policy of res judicata and invite civil plaintiffs to withhold evidence to obtain multiple trials or hearings on the same cause of action.

question is whether the party had a fair opportunity to present his entire case at the prior proceeding even if he did not avail himself of that opportunity. (*Ibid*., See *Lucido, supra*, 51 Cal.3d at p. 340 fn. 2.) In the case of pre-*Banks* and *Clark* petitioners, jeopardy attached when their juries were sworn, and all of the elements of the offense of aggravated felony murder were put at issue by the "not guilty" plea. (*People v. Booker* (2011) 51 Cal.4th 141, 170-171.) They had the full and fair opportunity to litigate the elements of "major participant" and "reckless indifference" as those terms were understood before the decision in *Banks*. Moreover, the *Gonzalez* opinion does not answer the question that this case presents: is the judicial view of *Banks* or the Legislative view of *Banks* the correct view? Rather, *Gonzalez* states that *Banks* is not the authority for pre-*Banks* and *Clark* petitioners to state a prima facie case under section 1170.95 despite the Legislature's understanding that it is. (*Gonzalez, supra*, 65 Cal.App.5th at pp. 431-432; Sen. Conc. Res. No. 48, Stats. 2017-2018 Reg. Sess.) res. ch 175, p. 1.) *Gonzalez* does not answer the question posed by the instant case.

C. WHY THE LEGISLATIVE VIEW OF *BANKS* IS THE CORRECT VIEW: *BANKS* CHANGED THE LAW OF AGGRAVATED FELONY MURDER

The now oft repeated judicial view that *Banks* did not change the law of aggravated felony murder but merely "clarified it" is set forth in the *Allison* decision, which was adopted by the *Strong* court. The *Allison* court said,

> "Allison's argument exaggerates the effect of *Banks* and *Clark*. *Those opinions did not change the law, but "merely clarified the 'major participant' and 'reckless*

> *indifference to human life' principles that existed when defendant's conviction became final.*" (*In re Miller* (2017) 14 Cal.App.5th 960, 978 [222 Cal. Rptr. 3d 691].)"

(Allison, *supra*, 55 Cal.App.5th at p. 458) (emphasis added.) But did *In re Miller* (2017) 14 Cal.App.5th 960 (*Miller*) actually say that *Banks* "did not change the law of murder" and does "clarification" of a statute mean that there is, by definition, no change in the law? The answer to both questions is no.

Following the decisions in *Banks* and *Clark,* multiple defendants whose adjudications for aggravated felony murder were already final filed petitions for writs of habeas corpus and were granted relief based on findings that *Banks* applied retroactively. Obviously, if *Banks* did not change the law, none of the petitioners would have prevailed. The decision in *Miller* by Division Five of the Second Appellate District, cited by the *Allison* court, is one of those post-*Banks* proceedings. *Miller* was decided in 2017 and therefore predates the Legislature's amendments to sections 188 and 189 and the procedure created in section 1170.95.

The court of appeal in *Miller* decided that Tyrone Miller, who was convicted of aggravated felony murder in 2002 and who filed a writ of habeas corpus in 2016, should have his conviction vacated because the evidence did not establish his individual culpability according to the standards of *Banks* and *Clark*. (*Id*. p. 976-977.) Among other things, the Attorney General argued that this relief was procedurally barred because the *Banks* decision was not retroactive. (*Id*. at p. 977.) The *Miller* court rejected the retroactivity procedural bar argument citing *Fiore v. White* (2001) 531 U.S. 225 [121 S.Ct. 712,

148 L.Ed.2d 629] which held that when a court does not "announce a new rule of law" but merely "clarifies the plain meaning of a statute," no issue of retroactivity arises. (*Ibid.*) Under that view, the reinterpretation of the law placed Miller's conduct outside the prohibition of the statute for purposes of federal due process. (*Ibid.*) Thus, because *Banks'* "clarification" had narrowed the class of people who could violate the statute and because Miller now fell outside that class, he simply was not guilty of violating the statute, not as a matter of retroactivity, but as a matter of due process because the state could no longer prove him guilty under federal due process principals.

The Attorney General's second procedural bar in *Miller* invoked the rule of *In re Waltreus* (1965) 62 Cal.2d 218. The Attorney General argued that Miller was not entitled to habeas relief because claims raised and rejected on appeal cannot be reraised in a petition for a writ of habeas corpus and sufficiency of the evidence is not cognizable in habeas. (*Id.* at p. 978.) The *Miller* court rejected this procedural bar relying on this Court's opinion in *People v. Mutch* (1971) 4 Cal.3d 389, 393-394, 399. The *Mutch* approach is similar to *Fiore*. *Mutch* held that a reinterpretation of a law is not a "new law" but is a discovery of a meaning that already existed. (*Miller*, *supra,* at p. 978-979.) The relief granted upon discovery of an existing, but otherwise undiscovered part of a law, is not given "retroactive effect and the court is not ruling on the sufficiency of the evidence. Rather, the conviction obtained based on the newly discovered legal error cannot stand because it is in excess of the court's jurisdiction." (*Id.*) The dissent in *Mutch* criticized this approach as "fiction or myth," and the *Miller* court recognized that, substantively, the *Mutch* rule is exactly that.

> "We concede this view of *Banks* and *Clark* is subject to the criticism that it relies on what some have called a legal fiction, namely, that our Supreme Court's recent decisions declared (or, more colorfully, unearthed) the always existing meaning of the statute."

(*Id*. at p. 978 citing *Mutch, supra*, 4 Cal.3d at p. 394.) Both the *Fiore* approach ("new meaning of an existing statute") and the *Mutch* approach ("clarification of pre-existing statutory knowledge") were created to give retroactive effect to a decision that changed statutory law without calling the change "a new rule of law."

But these doctrines are, as *Miller* recognized, fictions because, in fact, a change in the law has taken place. The word "clarification" is defined as "[t]he action of making clear or plain to the understanding, removal of complexity, ambiguity or obscurity." (New Oxford English Dictionary (1993 ed.) p. 411, col. 1.) Under this definition, the standard for finding "major participant" and "reckless indifference" in aggravated felony murder prosecutions is not "identical" before and after the "clarification" because the standard for finding these elements has been "made plain to the understanding" in a new way and a "complexity" that exited regarding the meaning of these elements has been removed, leaving a different meaning in its place. (Cf. *Allison, supra*, 55 Cal.App.5th at p. 457; *Banks, supra*, 61 Cal. 4th at pp. 801-802.) In short, the law has changed. The *Allison* court's assertion that a "clarification" means a legal standard remains the same is error.

In re Lopez (2016) 246 Cal.App.4th 350 demonstrates that a changes in the interpretation of a criminal statute may be construed both as a new rule of law, subject to retroactivity analysis, and as a "clarification" under *Mutch*, not subject to retroactivity analysis. In

that case, the issue was whether this Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) applied retroactively. *Chiu* held that "an aider and abettor may not be convicted of first-degree premeditated murder under the natural and probable consequences doctrine." *(Id.* at pp. 356-367.) An aider and abettor's liability for premeditated first-degree murder must be based upon direct aiding and abetting principles. (*Ibid.*) Clearly, *Chiu* is a decision like *Banks* which narrowed the class of individuals who could be convicted of first-degree murder.

The *Lopez* court found that the *Chiu* decision could be construed as a new rule of law under the federal approach in *Schriro v. Summerlin* (2004) 542 U.S. 348 [124 S.Ct. 2519, 159 L.Ed. 2d 442 (*Schriro*).) (*Id.* at p. 353.) The key issue on collateral review under *Schriro* is whether the new rule is "substantive or procedural." (*Ibid.* citing *Schriro, supra*, at pp. 351-352.) The *Schriro* court explained,"'A rule of law is substantive rather than procedural if it alters the range of conduct or class of persons that the law punishes (*id.* at p. 353) or 'modifies the elements of an offense' (*id.* at p. 354).'" (*Lopez, supra*, citing *Schriro* at pp. 357-358.) The *Lopez* court concluded that the decision in *Chiu* was a new rule of substantive law because it altered the class of persons who could be punished for first-degree murder. (*Id.* at p. 358.) The *Lopez* court found that under the *Schriro* test, *Chiu* was retroactive to judgments final on appeal.

However, although the elements of the *Schriro* test were met, the *Lopez* court chose to decide the issue under this Court's decision in *Mutch, supra*. (*Lopez, supra*, at p. 359.) The *Lopez* court chose to treat the new rule in *Chiu* as a "statutory interpretation" of an

existing statute rather than as a "new rule of law." (*Ibid*.) Based on *Mutch*, *Chiu*'s new statutory interpretation of the law of murder must be given retroactive effect because "[w]henever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim."

The *Lopez* case, then, illustrates the fallacy that underlies *Allison* and all of the cases that have insisted *Banks* was a "mere clarification" that did not change the law. (*Allison, supra,* 55 Cal.App.5th at p. 457.) A "clarification" is a change in the law that can be construed either as a "new rule of law" or as an interpretation of a statute that "existed" but was hitherto undiscovered. Whether labeled one or the other, in actuality, the law has changed. The *Banks* decision is just like the *Chiu* decision in that regard. The *Banks* decision can be applied retroactively under the *Mutch* rule because in *Banks,* through statutory interpretation, this Court narrowed the class of individuals who could be convicted of aggravated felony murder. But, as *Lopez* demonstrates, even if a decision is called a "clarification," that label does not mean the law is the same before and after the decision that "clarified" it.

Banks can also be called a "new substantive rule of law" and given retroactive effect under the *Schriro* rule because, under the federal retroactivity test, "a rule of law is substantive rather than procedural if it alters the range of conduct or class of persons that the law punishes (*id*. at p. 353) or 'modifies the elements of an offense' (*id*. at p. 354).'" (*Lopez, supra*, citing *Schriro* at pp. 357-358.) Here, *Banks* does both. It "modifies" two elements of aggravated felony murder, "major participant" and "reckless indifference," and it

narrows the class of persons who can be punished. In short, the *Allison* court's view that the law of aggravated felony murder was identical before and after the *Banks* "clarification" as that term is used in *Miller,* is simply wrong as a matter of law. In answer to the question, which should prevail, the judicial view of the *Banks* decision stated in *Allison* or the Legislature's view as evidenced in Resolution 48, the answer is the Legislature's view. *Banks* changed the law of aggravated felony murder by modifying the elements of "major participation" and "reckless indifference," to narrow the class of persons who could be convicted. Appellant has thus demonstrated that the doctrine of collateral estoppel does not decide the issue framed by this Court for the parties in the instant case.

IV. THE LANGUAGE OF SECTION 1170.95, NOT THE DOCTRINE OF COLLATERAL ESTOPPEL, IS THE AUTHORITY FOR TRIAL COURT DETERMINATIONS OF THE EXISTENCE OF A PRIMA FACIE CASE UNDER SUBDIVISION (C)

The Office of the State Public Defender insists that the authority to find a prima facie case under section 1170.95 rests upon the doctrine of collateral estoppel. The Public Defender asks, "Where is the *legal authority* for relying on a determination made in a prior proceeding to preclude these litigants from pursuing relief in the current proceeding?" (Amicus Curiae Brief of the Office of the State Public Defender, p. 12) (original emphasis.) The "legal authority" for "relying on the determination made in the prior proceeding" is conferred by the language of the statute, not by collateral estoppel. The Legislature would not have rested prima facie determinations upon the doctrine of collateral estoppel because, as the *Lucido* case demonstrates, even when all of the technical prerequisites are met,

the court may as a matter of public policy decide not to apply it. (*Lucido, supra*, 51 Cal.3d at p. 343.) The Legislature would not be likely to create a lenity procedure and then leave it to the trial courts to decide when it "should be applied in a particular setting" based upon public policy. (*Lucido, supra,* 51 Cal.3d at p. 343.)

Penal Code section 1170.95 creates a procedure that extends the changes in the law of murder to defendants whose cases are final on appeal.[2] At Step One, the petitioner must demonstrate that he is eligible for the procedure in Step Two, i.e., a hearing. The instant case is concerned with establishing eligibility at Step One. The bar is set quite low at Step One in keeping with the Legislative intent that the procedures established by section 1170.95 shall be widely available to previously convicted defendants. (*People v. Lewis* (2020) 11 Cal.5th 952, 970-972. (*Lewis*); Stats. 2021, ch. 551, § 1(a)(2).)

To establish eligibility, the statute requires the petitioner to allege all of the allegations set forth in Penal Code section 1170.95,

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[2]The statute effectively suspends the final claim preclusion branch of res judicata in order to allow the petitioner to state a prima facie case. The Public Defender's collateral estoppel argument contains a logical contradiction, i.e. the Legislature suspended the finality aspect of res judicata to allow a petition to be filed, but then expected the trial court's prima facie determination to be based upon a related branch of the doctrine, a collateral estoppel inquiry. Based upon this theory, the Santa Clara County Independent Defense Counsel advocates an evidentiary inquiry into the evidence presented at the prior trial that would go far beyond *Lewis*' holding that the inquiry at this stage is limited and does not involve discretionary fact finding or weighing of evidence. (Brief of Santa Clara County Independent Defense Counsel, pp. 35-59.) This review of evidence from the prior trial would invite courts to treat a section 1170.95 proceeding as a second appeal, which it is not. (Pen. Code § 1170.95, subd. (d)(3).)

subdivision (a)(1) - (3). (*Lewis*, *supra,* at pp. 970-971.) The statute then requires the trial court to determine whether the petitioner has made a prima facie case and therefore is eligible for the hearing in Step Two. (Pen. Code § 1170.95, subd. (c).) To find a prima facie case, the trial court must find all of the allegations in Penal Code section 1170.95, subdivision (a)(1) - (3) to be true. (*Ibid*.) This court held in *Lewis* that the trial court must initially regard these allegations as true at Step One, but the court may assess the credibility of these allegations based upon the record of conviction.[3] (*Ibid*.)

A careful reading of section 1170.95 demonstrates that the Legislature intended for the trial court to consider prior jury findings at the prima facie stage. In Penal Code section 1170.95, subdivision (d)(2), the Legislature stated that a prior exculpatory finding on major participation or reckless indifference must be given effect. Thus, a court must give effect to prior exculpatory findings.

But the Legislature also intended for courts to give effect to prior inculpatory findings at the prima facie stage as evidenced by the Legislature's decision not to open the section 1170.95 procedure to all previously convicted defendants. Rather, defendants must qualify for Step Two by, among other allegations, being able to make a true allegation that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." To determine whether the petitioner could not be convicted under the changes, it follows that

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[3]The court may rely on "facts refuting" the allegations but cannot "engage in factfinding involving the weighing of evidence or the exercise of discretion." (*Id*. at p. 972.)

the court must examine the prior jury findings in the record of conviction. If inculpatory findings show that the "could not now be convicted" allegation is not true, the court may find the petitioner has not stated a prima facie case. Taken together, these two aspects of the statute demonstrate that the Legislature intended for trial courts to give effect to the jury findings of previously convicted petitioners at Step One to determine eligibility for Step Two, where the proceedings are no longer bound by the prior jury findings.[4] Thus, the trial court's authority to give effect to the jury's prior findings at Step One is based upon the authority created by the statute, not upon the application of the doctrine of collateral estoppel as the Public Defender asserts. It is not necessary to go beyond the language of the statute to ascertain the Legislative intent for effect to be given to a "determination made in a prior proceeding." (Amicus Curiae Brief of the Office of the State Public Defender, p. 12)

What this means for pre-*Banks* and *Clark* petitioners is that their prior jury findings on the elements of "major participation" and "reckless indifference" do not bar them, as a matter of law, from making a truthful allegation that they cannot "be convicted of first or second degree murder because of the changes to section 188 or 189." Their allegation is truthful because their prior findings were made before the standards of *Banks* and *Clark* were articulated, therefore their jury findings are not based upon the narrower individual

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[4]Step Two is not a second appellate review to determine if "substantial evidence" supports the prior jury findings. (Stats. 2021 ch. 551, § 2 subd. (d)(3).) Step Two is a de novo hearing on a record created by the parties who may introduce any evidence admissible under the Evidence Code. (*Ibid.*)

culpability standard. As a matter of law, nothing in their prior jury findings contradicts their allegation that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." These petitioners are, therefore, eligible to go on to Step Two, the hearing step.

V. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT ELUCIDATE THE SUBSTANCE OF THE ELEMENTS OF AGGRAVATED FELONY MURDER UNDER SECTION 189, SUBDIVISION (E)(3)

The issue in this case not only raises the question of what is the substance of pre-*Banks* and *Clark* jury findings, it also asks what is the substance of the findings that a court or a jury must make under Penal Code section 189, subdivision (e)(3), as amended by the Legislature. The collateral estoppel doctrine does not answer this question since, as appellant observed previously, the doctrine sheds no light on the substance of the *Banks* decision.

In Appellant's Brief on the Merits at page 31, appellant noted that by citing *Banks* in Resolution 48, the Legislature indicated that it understood the terms "major participant" and "acted with reckless indifference to human life" to be defined by the standards set out in *Banks*. (Sen. Conc. Res. No. 48. Stats. 2017 (2017-2018 Reg. Sess.) res. ch. 175, p. 1.) Thus, the language of section 189, subdivision (e)(3), "as described in subdivision (d) of Section 190.2," must mean that the *Banks* decision defines "major participant' and "acted with reckless indifference."

However, as appellant also noted previously, the courts do not understand "major participant" and "acted with reckless

indifference" as the Legislature understands them. Thus, according to the *Allison* court and the court in *People v. Price* (2017) 8 Cal.App.5th 409, 452 (*Price*), "Jury instructions regarding the mental state required for felony-murder special circumstances are not defective if they do not include *Banks* and *Clark* factors." (*Allison, supra*, 55 Cal.App.5gh at p. 457.) The *Price* and *Allison* courts can only be correct if section 189, subdivision (e)(3) does not incorporate the standard for finding "major participant" and "reckless indifference" set out in *Banks* and if, therefore, the Legislature did not intend for juries to be instructed on the principles of *Banks*.

In addition, according to respondent, the *Banks* standard consists, not of mandatory principles defining two of the elements of felony murder, but only of a "non-exclusive list of factors" which "did not modify the elements of felony murder special circumstance." (Answer Brief on the Merits, pp. 41, 45.) If respondent is correct, despite the statement in *Banks* that individual culpability, as defined in that opinion, is the standard that should guide juries in making true findings under section 190.2(d), section 189, subdivision (e)(3) does not incorporate the individual culpability standard for finding "major participant' and "reckless indifference" set out in *Banks*. (*Banks, supra,* 61 Cal.4th at p. 804.) Rather, despite reference to *Banks* in Resolution 48, respondent's position asserts that the Legislature did not incorporate the *Banks* standard into section 189, subdivision(e)(3).

Once again, the collateral estoppel doctrine, which focuses on the substance of prior litigation, has nothing to offer on the question of which standard the Legislature intended to adopt in section 189,

subdivision (e)(3). Collateral estoppel also has nothing to offer on the question of whether the prosecution must prove "major participant" and "reckless indifference" beyond a reasonable doubt according to the *Banks* standard at a Penal Code section 1170.95, subdivision (d)(3) hearing. And collateral estoppel does not answer the question: do juries have to be instructed on the *Banks* standard in prosecutions under the amended statute for aggravated felony murder?

To answer these questions, one must first ascertain the substance of the *Banks* standard. Is it only a set of non-exclusive factors, as respondent asserts, or it is a set of principles that must be applied to ascertain individual culpability? The answer is the latter, rather than the former. At page 22 of Appellant's Brief on the Merits, appellant identified the principles that *Banks* held juries should apply in making findings on the "major participant" element and "reckless indifference" element of felony murder. (*Banks, supra*, 61 Cal.4th at p. 804.) These three principles focus on individual culpability.

First, juries must engage in an individualized inquiry which examines "the defendant's *personal* role in the crimes leading to the victim's death and weigh the defendant's individual responsibility for the loss of life, not just his vicarious responsibility for the underlying crime." (*Banks, supra*, p. 801, citing *Tison v. Arizona* (1987) 481 U.S. 137, 158 [107 S.Ct. 1676, 95 L.Ed.2d 127] (*Tison*).)

Second, juries must ask "'whether a defendant has knowingly engage[ed] in criminal activities known to carry a grave risk of death.'" (*Ibid.*) "The 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." (*Ibid*.)

Third, " . . . a defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder . . . ." (*Id*. at pp. 801-802.)

Senate Resolution No. 48 answers the question of Legislative intent: the Legislature intended for triers of fact to be instructed on the foregoing principles in prosecutions for aggravated felony murder. The Legislature specifically found that it is fundamentally unfair to convict defendants of a greater crime "when their actual involvement was limited to a lesser crime." (Sen. Conc. Res. No. 48. Stats. 2017 (2017-2018 Reg. Sess.) res. ch. 175, p. 3.) The Legislature found that "judges and jurors" should be allowed to "apportion degrees of culpability." (*Ibid*.) The Legislature also recognized that prior to *Banks* "defendants in felony murder cases are not judged based on their level of intention or culpability . . . ." (*Id*. at p. 1.) The Legislature recognized that this Court held in *Banks* that the purpose of the "major participant" and "reckless indifference" elements of aggravated felony murder are meant to identify and punish more severely those defendants whose personal conduct in the commission of the underlying felony is more culpable than simply commission of the felony. (*Id*. at p. 2.) Resolution 48 supports the inference that the Legislature intended for these three *Banks* principles of individual culpability to be the law of section 189, subdivision (e)(3). Thus, juries should be instructed on these principles, and that judges should apply them in subdivision(d)(3) hearings.

VI. THE PUBLIC POLICY UNDERLYING SECTION 1170.95 DEMONSTRATES THAT THE LEGISLATURE INTENDED FOR *PRE-BANKS* AND *CLARK* PETITIONERS TO HAVE THE BENEFIT OF THE HEARING STEP

As appellant has demonstrated, the answer to whether pre-*Banks* and *Clark* special circumstances findings preclude a petitioner from stating a prima facie case can only be answered by this Court on the basis of the substance of the *Banks* opinion. The doctrine of collateral estoppel, a form of res judicata, does not answer this question as appellant has demonstrated. Moreover, the court's reluctance to give effect to *Banks* is grounded on res judicata principles which conflict with the Legislative policy that underlies section 1170.95.

The court's view that *Banks* did not change the law rests upon the finality and stability of judgments policy. The judicial view that *Banks* did not change the law of aggravated felony murder allows the courts to continue to preserve the existing judgments in these cases. Preserving the existing judgments implements stability and finality of judgments. This is the important and beneficial public policy which underlies most appellate rules and doctrines and which, for the most part, makes it difficult to overturn judgments on appeal in both civil and criminal law. This finality of judgments policy prevents inconsistent verdicts, allows for stability of verdicts, and preserves public confidence in the fact finding procedures of our legal system.[5] (See e.g., *Fireman's Fund Ins. Co. v. Workers' Comp.*

[5]Appellant's observations about the stability of judgments policy recognizes its importance in our legal system and is not intended as a criticism of that policy in any way.

Appeals Bd. (2010) 181 Cal. App. 4th 752, 771 [importance of deferring to prior judgments and preserving finality of judicial proceedings].)

However, section 1170.95 is grounded on different, but also very important public policies, that conflict with the stability of judgments policy. The Legislature enacted section 1170.95 to promote three policies: punishment based upon individual culpability, easing prison overcrowding, and saving taxpayer dollars on overlong incarcerations. (Sen. Conc. Res. No. 48. Stats. 2017 (2017-2018 Reg. Sess.) res. ch. 175, p. 1.) The stability of judgments policy, which the courts of appeal are implementing in their approach to *Banks*, is fundamentally at odds with the Legislature's objectives. All of these public policies are important in their respective contexts, judicial and legislative. But here, the judicial approach, which appellant has demonstrated is based upon a misunderstanding of the term "clarification," should not prevail because it removes a class of petitioners from the opportunity for a hearing which the Legislature intended for them to have. As this Court stated in *Lewis*, "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Lewis, supra,* 11 Cal.5th at p. 969, quoting *Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53.) Pre-*Banks* and *Clark* special circumstances findings were not made under the narrow standard of personal culpability that is now the standard for "major participant" and "reckless indifference." These petitioners can truthfully allege that they "could

not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code § 1170.95, subd. (a)(3).) These petitioners are entitled to the hearing step created by Penal Code section 1170.95, subdivision (d)(3). The doctrine of collateral estoppel does not answer any of these important questions and should not be the basis for this Court's decision in this case.

CONCLUSION

The trial court improperly dismissed appellant's section 1170.95 petition based upon his 2014 pre-*Banks* and *Clark* special circumstances findings. When the Legislature amended Penal Code section 189, subdivision (e)(3), it incorporated into the statute the narrower application of the elements of special-circumstances felony murder "as described in subdivision (d) of Penal Code section 190.2" which incorporates the *Tison-Enmund* continuum standard as explained in *Banks* and applied in *Clark*. Appellant correctly alleged pursuant to Penal Code section 1170.95, subdivision (a) that he could not be convicted of first or second degree murder because of changes to section 188 or 189 made effective January 1, 2019. His petition should be reinstated, an order to show cause issued, and a hearing set within sixty days. (Pen. Code § 1170.95, subds. (c) and (d).)

Respectfully submitted,

Dated: December 10, 2021

Deborah Hawkins

Deborah L. Hawkins
Counsel for Appellant
Christopher Strong

CERTIFICATE OF WORD COUNT

California Rules of Court, rule 8.204(c)(1) and rule 8.520(b)(1) states that a reply brief produced on a computer must not exceed 8,400 words Word Perfect states that the foregoing Appellant's Answer Brief to Amici Curiae contains 7,375 words.

I declare under penalty of perjury and the laws of the state of California that the foregoing is true and correct.

Executed on December 10, 2021, at Escondido, California.

Deborah Hawkins

Deborah L. Hawkins

Case Name: People v. Strong Case No. S266606

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I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and not a party to the subject cause. My business address is 1637 E. Valley Parkway PMB 135, Escondido, California 92027.

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Appellant's Rely Brief to Amici Curiae

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DEBORAH L. HAWKINS Deborah Hawkins

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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