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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 SUPPLEMENTAL BRIEF RE *People v. Pineda* (2021) 66 Cal.App.4th 792 (RULES 8.630(d) and 8.520(d)

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INTRODUCTION

The decision of the Sixth District Court of Appeal in *People v. Pineda* (2021) 66 Cal.App.5th 792 is helpful to a determination of the standard for "major participant" and "reckless indifference" in Penal Code section 189, subdivision (e)(3). *Pineda* recognizes that pre-*Banks* and *Clark* petitioners are not precluded from stating a prima facie case under section 1170.95, subdivision (a) because they have not been convicted under the current section 189, subdivision (e)(3) standards for those two elements of the offense.

Appellant, however, disagrees with that portion of *Pineda* which deems *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*) only "clarifications" and not changes in the law. The term "clarification" comes from the *Mutch* retroactivity doctrine heretofore used in habeas proceedings to make *Banks* and *Clark* retroactive for the benefit of habeas petitioners. (*People v Mutch* (1971) 4 Cal.3d 389, 393-394.) Section 1170.95 is not a habeas proceeding, and retroactive application of section 189, subdivision (e)(3) relies on legislative intent for retroactive application of *Banks* and *Clark* instead of on *Mutch*. *Mutch* is thus inapplicable and not controlling on the question of whether *Banks* and *Clark* changed the law or were mere "clarifications" in section 1170.95 proceedings. The *Mutch* "clarification" rule is also inapplicable in section 1170.95 proceedings because it defeats the legislative purpose of making the *Banks* and *Clark* changes available to previously convicted defendants who have never been convicted under the changed *Banks* and *Clark* standards. (See *People v. York* (2020) 54 Cal.App.5th 250, 262 (*York*).) Whereas *Mutch* benefits previously convicted habeas petitioners to

give them the benefit of *Banks* and *Clark,* the *Mutch* "clarification" fiction defeats the interests of previously convicted resentencing petitioners, contrary to Legislative intent. The *Banks* opinion demonstrates that the opinion is a substantive change in the law of aggravated felony murder.

ARGUMENT

I. THE COURT OF APPEAL'S DECISION IN *PINEDA* IS HELPFUL IN ANSWERING A CENTRAL QUESTION IN THIS PROCEEDING: WHAT IS THE STANDARD FOR "MAJOR PARTICIPANT" AND "RECKLESS INDIFFERENCE" IN PENAL CODE SECTION 189, SUBDIVISION (e)(3)

The Sixth District Court of appeal decided *Pineda*, *supra*, 66 Cal.App. 5th at p. 792 on July 19, 2021, after appellant's Opening Brief on the Merits was filed on May 17, 2021. *Pineda* is helpful because it recognizes that the narrower *Banks* and *Clark* standard is the substantive law standard in Penal Code section 189, subdivision (e)(3). As appellant will explain, its holding is not identical to appellant's position in this case, but it is similar, and it is helpful in determining the meaning of Penal Code section 189, subdivision (e)(3).

Caleb James Harris filed a petition for resentencing under section 1170.95 in February 2019. (*Id*. at p. 944.) Harris had been convicted on two counts of first degree murder under a felony murder theory with special circumstance findings including murder while engaged in arson and by a destructive device, and multiple murder special circumstances. (Pen. Code § 190.2, subd. (a)(17), (a)(6), and (a)(13). The court denied his petition on among other grounds, his arson-murder special circumstances finding. (*Ibid*.)

The Sixth District Court of Appeal found that the trial court had erred in denying the petition based on the true special circumstances findings. (*Id*. at p. 957.) The court explained,

> "To be sure, section 189, subdivision (e)(3), as amended by Senate Bill 1437, is now "the same as the standard for finding a special circumstance under section 190.2,

> [subdivision] (d) as the former provision expressly incorporates the latter." (*In re Taylor* (2019) 34 Cal.App.5th 543, 561 [246 Cal. Rptr. 3d 342]; accord, *People v. York, supra,* 54 Cal.App.5th at p. 258, review granted ["[t]he language of section 189, subdivision (e)(3), as amended by Senate Bill 1437, tracks the language of the special circumstance provision"].) But "[w]hat permits a defendant convicted of felony murder to challenge his or her murder conviction based on the contention that he or she was not a major participant in the underlying felony who acted with reckless indifference to human life, are the changes Senate Bill 1437 made to sections 188 and 189, and in particular the addition of section 189, subdivision (e)(3), not the rulings in *Banks* and *Clark*." (*York*, at p. 261.) Thus, Harris's petition is made possible by the changes made to section 189, not because of the clarifications made in *Banks* and *Clark*. (See § 1170.95, subd. (a)(3) [allowing petition if "[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"].)

(*Id*. at p. 957.)

The Sixth District went on to explain that Harris' current conviction did not preclude his ability to state a prima facie case for a resentencing hearing because the findings from his prior trial were not made under the standard that is now the law of "major participant" and "reckless indifference" in section 189, subdivision (e)(3).

> "Similarly, although Harris's jury was instructed that to find true the special circumstance allegation under section 190.2, subdivisions (a)(17) and (d), it had to find he aided and abetted the arson that led to the victims' deaths while acting as a major participant with reckless indifference to human life, *the same elements now found in section 189, subdivision (e)(3), that pre-Banks/Clark finding, without more, does not*

> *preclude relief under section 1170.95.* (See *In re Scoggins, supra, 9 Cal.5th at pp. 673–674 . . . .* "

(*Id*. at p. 958.)

Appellant's position in this case is similar, but not identical to *Pineda*. Appellant contends that *Banks* and *Clark* are not "clarifications" to the law of aggravated felony murder but changes in that law. Appellant contends that the Legislature understood *Banks* and *Clark* as changes, and appellant contends that the Legislature codified those changes in section 189, subdivision (e)(3). Although appellant's contention differs from *Pineda*, appellant's position is also similar, and *Pineda* is helpful in that it agrees that section 189, subdivision (e)(3) was a change in the law that permits pre-*Banks* and *Clark* petitioners to state a prima facie case. (*York*, *supra*, 54 Cal.App.5th at p. 262.)

The position that *Banks* and *Clark* are "clarifications," not changes to the law, is based upon the use of the retroactivity rule of *Mutch* in habeas proceedings. However, this Court is not bound by the "clarification" language used in *Mutch* in determining the statutory meaning of section 189, subdivision (e)(3) and section 1170.95. This is because *Mutch* has a limited application only as a retroactivity doctrine and because it is inapplicable to section 1170.95 proceedings.

For a new law to be retroactive, there must be two elements: (1) the new law and (2) some settled doctrine of retroactivity that makes the new law retroactive. (See e.g. *In re Miller* (2017) 14 Cal.App.960 (*Miller*); *In re Lopez* (2016) 246 Cal.App.4th 350 (*Lopez*).) California law recognizes several types of retroactivity

doctrines which are employed in different contexts to make new law retroactive. For example, the *Estrada* rule makes sentence ameliorating legislation retroactive in pending cases when the legislature has been silent on the subject of retroactivity. (*In re Estrada* (1965) 63 Cal.2d 740 *,* 742.)

Similarly, the New Rule of Law retroactivity doctrine asks whether a new rule of law is "substantive or procedural." A change in the criminal law

> "will be given retroactive effect when a rule is substantive rather than procedural (i.e., it alters the range of conduct or the class of persons that the law punishes, or it modifies the elements of the offense) or when a judicial decision undertakes to vindicate the original meaning of the statute. "

In re Martinez (2017) 3 Cal. 5th 1216, 1222, citing *Lopez, supra*, 246 Cal.App.4th at pp. 357–359 .)

The retroactivity doctrine that has caused the *Banks* decision to be labeled repeatedly as a "clarification" is the doctrine developed in *Mutch*, *supra*, 4 Cal.3d at pp. 393-394. *Mutch* held that a reinterpretation of the law is not a "new law" but is a discovery of a meaning that already existed" thereby giving retroactive effect to the "clarification." (*Miller, supra,* 14 Cal.App.4th at pp. 978-979.) In *Miller*, the court relied on the *Mutch* rule to make the *Banks* decision retroactive in that habeas proceeding. Because *Banks* did not state that it was retroactive, the *Miller* court had to find some recognized doctrinal way to make *Banks* retroactive in habeas. Similarly, this Court, in another habeas, *In re Scoggins* (2020) 9 Cal.5th 667, 676, relied on the *Mutch* rule to give retroactive application of *Banks* and *Clark* in that proceeding, deeming *Banks* as a "clarification," for

retroactivity purposes.

However, the *Mutch* rule has limited application. It is only an accepted doctrinal way to make a new law retroactive. It is not meant to determine the actual meaning or effect of a new law. As *Miller* explained*, Mutch* is a legal fiction whose purpose is only to fulfill one of the requirements necessary to support a finding that a law operates retroactively. (*Miller, supra*, at 14 Cal.App.4th at p. 978.) *Miller* also said that, when applied to the *Banks* and *Clark* opinions, the *Mutch* doctrine is not an accurate assessment of the meaning of those opinions. (*Ibid*.) Thus, the use of *Mutch* in habeas practice does not mean that *Banks* and *Clark,* as a matter of substantive law, are merely "clarifications." *Mutch* is not authority for the proposition that *Banks* did not change the standard for a true finding on the elements of aggravated felony murder. (See *People v Allison* (2020) 55 Cal.App.5th 449, 460-461.)

For these reasons, appellant disagrees with Pin*eda's* statement that *Banks* and *Clark* are only "clarifications" and not changes in the law. While the *Mutch* rule has been useful in habeas proceedings to give petitioners the retroactive benefit of *Banks* and *Clark*, section 1170.95 is not a habeas proceeding and relies on a different doctrine of retroactivity: legislative intent. *Banks* and *Clark* are retroactive in section 1170.95 because they were codified by the Legislature in section 189, subdivision (e)(3) and given retroactivity by virtue of legislative intent in section 1170.95. The *Mutch* "clarification" fiction is unnecessary in section 1170.95 to supply the retroactivity requirement. Importing the *Mutch* retroactivity fiction for *Banks* and *Clark* used in habeas into section 1170.95 defeats the Legislature's intent to create a hearing right for pre-*Banks* and *Clark* petitioners.

(*People v. Lewis* (2021) 11 Cal.5th 952, 961 [the purpose of statutory interpretation is to give effect to legislative intent].

In *Banks*, this Court made substantial changes to the law of aggravated felony murder that went beyond mere "clarification." In *Banks*, Justice Werdegar recognized that California courts had only once before "elaborated on the test for death eligibility for nonkillers." (*Banks*, *supra*, 61 Cal.4th at p. 800 citing *People v. Proby* (1998) 60 Cal.App.4th 922.) The purpose then of *Banks*, was to "gain a deeper understanding of the governing test and offer further guidance." (Id. *at* p. 801.) The result of the *Banks* "deeper understanding of the governing test" was a new and narrower standard for two elements of felony murder, "major participant" and "reckless disregard." It was thus perfectly reasonable for the Legislature to conclude that the *Banks* opinion changed the law of aggravated felony murder. That legislative conclusion cannot be undermined with the *Mutch* rule which was formerly used to make *Banks* and *Clark* retroactive in habeas proceedings.

Appellant thus disagrees with the *Pineda* court's suggestion that section 189, subdivision (e)(3) was a product of Legislative intent unconnected to *Banks* and *Clark*. (*Pineda, supra*, 66 Cal.App.5th at p. 958.) However, appellant agrees with *Pineda's* reasoning that pre-*Banks* and *Clark* petitioners can state a prima facie case under section 1170.95 , subdivision (a) because their record of conviction does not contain any findings based upon the standard for "major participant" and "reckless indifference" contained in section 189, subdivision (e)(3). (*York, supra,* 54 Cal.App.5th at p. 262.)

CONCLUSION

Appellant submits that the decision in *Pineda*, decided after appellant's Opening Brief on the Merits was filed, is helpful in deciding a central issue in this case: what is the standard for "major participant" and "reckless indifference" in Penal code section 189, subdivision (e)(3).)

Respectfully submitted,

Dated: May 13, 2022

Deborah Hawkins
Deborah L. Hawkins
Counsel for Appellant
Christopher Strong

CERTIFICATE OF WORD COUNT

California Rules of Court, rule 8.630(d) and rule 8.520(d) provide that a supplemental brief produced on a computer must not exceed 2,800 words. Word Perfect states that the foregoing Appellant's Supplemental Brief contains 2,238 words.

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

Executed on May 13, 2022, at Escondido, California.

Deborah Hawkins
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Case Name: People v. Strong Case No. S266606

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