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 OPENING BRIEF ON THE MERITS

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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 (*Banks*) 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?

Appellant's special circumstance findings do not preclude him from making a prima facie showing of eligibility for relief under section 1170.95. When the Legislature amended Penal Code section 189, subdivision (e)(3), it narrowed the liability for special-circumstances felony murder by incorporating the *Tison-Enmund* continuum standard, as explained in *Banks* and applied in *Clark*, into the definition of the elements of felony murder, "major participation" and "acted with reckless indifference to human life." 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. He has never had the opportunity litigate the "major participant" and "acted with reckless indifference to human life" elements of special-circumstances felony murder under the *Tison-Enmund* continuum standard defined in *Banks*. 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).

STATEMENT OF THE CASE

In 2014, a jury found appellant guilty of two counts of first-degree murder with three special circumstances, robbery murder, burglary murder, and multiple murder. (Pen. Code § 187, subd. (a); § 190.2, subd. (a)(17) and § 190.2, subd. (a)(3) and the judgment was affirmed in *People v. Ortez-Lucero et al.* (December 27, 2017) C076606 [non publ opn.] 2017 Cal.App. Unpub. LEXIS 8823; 2017 WL 6603535 (hereinafter *Strong I*).

On February 4, 2019, appellant filed a petition for resentencing pursuant to Penal Code section 1170.95 alleging that, in 2014, he had been convicted of two counts of first-degree murder based on the felony-murder rule, he was not the actual shooter, he was not a major participant in the underlying felony, and he could not now be convicted under amended Penal Code sections 188 and 189. (C.T. pp. 8-10, 12.) The District Attorney filed an opposition to appellant's petition alleging that it should be dismissed because appellant was "a major participant" who acted with reckless indifference to human life." (C.T. p. 94.) In response, counsel for appellant replied that he was not the shooter, he was only a participant in the robbery, and his gun was not the murder weapon. (C.T. p. 106.)

On October 21, 2019, the trial court found that appellant had failed to make a prima facie showing of eligibility because, in 2014, the jury had found appellant guilty of three special circumstances. (C.T. p. 110.) On November 18, 2020, the court of appeal affirmed the judgment of the trial court, holding that the true findings on the three special circumstances barred appellant from relief under section 1170.95. (*People v Strong* (December 18, 2020) C091162 2020 Cal. App. Unpub. LEXIS 8505, 2020 WL 7417057 (hereinafter,

Slip opn. at pp. 8-9.)

Appellant filed a petition for review on January 20, 2021. This court granted review on March 10, 2021.

STATEMENT OF FACTS

In 2007, appellant and Donald Ortez-Lucero set out to rob Frederick Gill, a drug dealer. (*Strong I, supra*, at p. 2.) Gill's friend, Sean Aquitania, drove up to visit Gill with his infant son in a carseat at the same time that appellant and Ortez-Lucero arrived to rob Gill. (*Ibid.*) When Ortez-Lucero approached Aquitania and hit him with his gun to force him to help the robbers enter Gill's house, the gun accidentally discharged. (*Ibid.*)

Ortez-Lucero and appellant entered the house where appellant, wearing a mask, threw Gill and his friend Palmer to the ground and tied them with zip ties. (*Id.* at p. 2.) Aquitania, who had gone back to the car to look after his child, returned to the house and attacked Ortez-Lucero because he had discovered that his son had been shot in the head when Ortez-Lucero's gun accidentally discharged. (*Id.* at p. 3.) Appellant went to help Ortez-Lucero with Aquitania. (*Ibid.*) The opinion in *Strong I stated, "*When Aquitania went after appellant's gun, appellant told Ortez-Lucero to shoot him." (*Ibid.*) However, contrary to the appellate opinion, counsel for appellant pointed out that the prosecutor conceded that both deaths were accidental. (C.T. p. 106.) Both of Ortez-Lucero's shots hit Aquitania, and one of them hit appellant in the leg. (*Ibid.*) Aquitania and his son died as result of their injuries. (*Id. at p. 4.)*

ARGUMENT

I. A FELONY-MURDER SPECIAL CIRCUMSTANCE FINDING (PEN. CODE, § 190.2, SUBDIVISION (A)(17)) MADE BEFORE *PEOPLE V. BANKS* (2015) 61 CAL.4TH 788 AND *PEOPLE V. CLARK* (2016) 63 CAL.4TH 522 DOES NOT PRECLUDE A DEFENDANT FROM MAKING A PRIMA FACIE SHOWING OF ELIGIBILITY FOR RELIEF UNDER PENAL CODE SECTION 1170.95

A. THE COURT OF APPEAL ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF APPELLANT'S PETITION BASED UPON HIS PRE-*BANKS* AND *CLARK* SPECIAL CIRCUMSTANCE FINDINGS

The court of appeal has upheld the trial court's denial of appellant's petition for resentencing without a Penal Code section 1170.95, subdivision (d) hearing on the basis of the three special circumstances which the jury found true in 2014. (Slip opn. pp. 8-9.) The court of appeal has erred because these special circumstances were not found according to the standards set forth by this court's subsequent decisions in *Banks*, *supra*, 61 Cal.4th at p. 788 and *Clark*, 63 Cal.4th at p. 522. As the decisions by the Second District Court of Appeal, Division Five recognized in *People v. Smith* (2020) 49 Cal.App.5th 85, *People v. Torres* (2020) 46 Cal.App.5th 1168, and *People v. York* (2020) 54 Cal.App.4th 250, review granted November 18, 2020, S264954 (*York*), *Banks* and *Clark* changed the standard for a special circumstance finding by narrowing the inquiry necessary to make a finding of "major participation with reckless indifference to human life," and the Legislature incorporated that standard into amended Penal Code section 189, subdivision (e)(3) made applicable to appellant by Penal Code section 1170.95, subdivision (a).

B. REFORM: THE LEGISLATIVE INTENT TO SENTENCE OFFENDERS IN ACCORD WITH THEIR INDIVIDUAL INVOLVEMENT

On September 19, 2017, the Senate passed Senate Concurrent Resolution No. 48 which set forth the Legislature's recognition of the "need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime." (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175, p. 1 .) In addition, the resolution recognized that California prisons are overpopulated and that overpopulation "has been the main contributing factor to inhumane and poor living conditions." (*Ibid*.)

Resolution No. 48 also affirmed that "it is a bedrock principle of law and equity that a person should be punished for his or her actions according to their own level of individual culpability." (*Ibid*.) The resolution further noted that "defendants in felony murder cases are not judged based upon their level of intention or culpability." (*Ibid*.) A felony murder defendant does not "have to intend to kill anyone." (*Ibid*.)

With respect to special-circumstances felony murder, Resolution No. 48 also recognized that individual culpability must be the key to imposing criminal liability:

> "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."

(*Ibid.*) (emphasis added.)

C. IMPLEMENTATION OF REFORM: SENATE BILL 1437

The following year, the Legislature passed Senate Bill No. 1437 to implement the reforms that had been outlined in Resolution No. 48. The purpose of the new bill, among others, was to make statutory changes "to more equitably sentence offenders in accordance with their involvements in homicides." (Stats. 2018. ch. 1015 § 1, subd. (b), p. 2.).) The bill's findings repeated Resolution No. 48's recognition that "a person should be punished for his or her actions according to his or her own level of individual culpability." (Stats. 2018. ch. 1015 § 1, subd. (d).) Further, the findings explained that "[r]eform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in reduction of prison overcrowding . . . ." (Stats. 2018 ch. 1015 § 1, subd. (e).)

To give effect to these reforms, Senate Bill No. 1437 amended "the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not

imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018. ch.1015 § 1, subd. (f).) The new bill amended the definition of malice in Penal Code sections 188 and the liability for felony murder in section 189. (*People v. Martinez* (2019) 31 Cal.App.5th 718, 723 (*Martinez*).)

Amended Penal Code section 188 provides:

> "(a) For purposes of Section 187, malice may be express or implied.
>
> "(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature
>
> "(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
>
> " (3) *Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought*. Malice shall not be imputed to a person based solely on his or her participation in a crime."

(Stats 2018 ch 1015 § 3 (SB 1437), effective January 1, 2019) (emphasis added).)

Amended Penal Code section 189 provides

> "(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping,

train wrecking, or any act punishable under Section 206, 286, 287, 288, or 289, or former Section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

" (b) All other kinds of murders are of the second degree.

" (c) As used in this section, the following definitions apply:

> "(1) 'Destructive device' has the same meaning as in Section 16460.
>
> "(2) 'Explosive' has the same meaning as in Section 12000 of the Health and Safety Code.
>
> (3) 'Weapon of mass destruction' means any item defined in Section 11417.

"(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of the defendant's act.

" (e) *A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:*

> *" (1) The person was the actual killer.*
>
> *" (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.*
>
> *" (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section*

190.2.

> " (f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties."

(Stats 2018 ch 1015 § 3 (SB 1437), effective January 1, 2019) (emphasis added).)

D. *BANKS* AND *CLARK* NARROWED THE LAW OF SPECIAL-CIRCUMSTANCES FELONY MURDER

Prior to the amendments to Penal Code section 188 and 189, section 189 defined first-degree felony murder as "[a]ll murder … which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, . . . is murder of the first degree." (*People v. Farley* (2009) 46 Cal.4th 1053, 1117.) The intent to commit the felony substituted for the intent to kill.[1] (*People v. Patterson* (1989) 49

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[1]California also recognized second-degree felony murder when a death occurred during the commission of an inherently dangerous felony.

> "There is no precise statutory definition for the second degree felony-murder rule, and the doctrine is the 'creature of judicial invention.' (*Id.* at p. 829, fn. 3.) 'A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen. Code, § 189) constitutes at least second degree murder. [Citations.]' (*People v. Ford* (1964) 60 Cal.2d 772, 795 [36 Cal. Rptr. 620, 388 P.2d 892]; *People v. Patterson, supra*, 49

Cal.3d 615, 626.) In 1990, "state law made only those felony-murder aiders and abettors who intended to kill eligible for a death sentence." (*Banks, supra,* 61 Cal.4th at p. 789; *See, Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135)*; People v. Anderson* (1987) 43 Cal.3d 1104, 1147.) That year, the voters added subdivisions (c) and (d) to Penal Code section 190.2 to expand the liability of nonkillers convicted of felony murder. (Prop. 115, as approved by voters, Prim. Elec. (June 5, 1990), § 10.) These provisions made a special circumstance applicable to a person other than the actual killer." (*People v. Mil* (2012) 53 Cal.4th 400, 409 (*Mil*)) (original emphasis.) Subdivision (c) applied to a non-killer with the intent to kill.

> "(c) *Every person, not the actual killer, who, with the intent to kill*, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4."

(emphasis added.)

Subdivision (d) applied to a nonkiller without the intent to kill who met two requirements, "major participation" and "reckless indifference to human life" in the commission of a section 190.2, subdivision (a)(17) felony.

Cal.3d 615, 621.)"

(*People v. Lee* (1991) 234 Cal. App. 3d 1214, 1221.) Only a conviction for first-degree murder supports a special circumstance. (Pen. Code § 190.2, subd. (a).)

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

(emphasis added.) (*Ibid*.)

In California, the special circumstance finding is not a "sentencing function" or "an aggravating factor." (*People v. Superior Court (Engert)* 1982) 31 Cal.3d 787, 803) (*Engert*).) Rather, it is an element of the offense.

> ". . . .[I]t *is a fact or set of facts, found beyond a reasonable doubt by a unanimous verdict (Pen. Code § 190.4) which changes the crime from one which must be punished either by death or life imprisonment without the possibility of parole*. The fact or set of facts to be found in regard to the special circumstance is no less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which, when found by the jury, define the crime rather than a lesser included offense or component."

(*Ibid.)* (emphasis added.) California thus recognizes murder *simpliciter* (Penal Code § 189) as a separate offense from special-circumstances felony murder. (Penal Code § 190.2, subdivision (a)(17).) (*Mil*, *supra*, 53 Cal.4th at pp. 408-409.) The jury must be instructed on the elements of the special circumstances allegation.

Thus, the jury must be instructed that the nonkiller must (1) have personally had the intent to kill and (2) have been a major participant in the commission of the burglary or robbery and have acted with reckless indifference to human life. (*Id.* ab p. 409.) The Legislature was aware of the distinction between felony murder *simpliciter* and special-circumstances felony murder when it enacted Senate Bill 1437. (Memo from Senate Public Safety File for SB 1437 (Skinner), of the 2017-18 Legislative Session, by Gabriel Caswell, Principal Consultant, Senate Public Safety Committee, Re: Constitutionality of SB 1437 (Skinner), pp. 7-9.).)

The language that the electorate codified in section 190.2, subdivision (d) in 1990 to impose special-circumstances felony murder liability on nonkillers came from *Tison v. Arizona* (1987) 481 U.S. 137, 158 [107 S.Ct. 1679, 95 L.Ed.2d 172] (*Tison*). (*Banks, supra*, 61 Cal.4th at p. 798.) In *Tison,* the United States Supreme Court held that major participation in the felony combined with reckless indifference to human life is sufficient to satisfy the Eighth Amendment's standards for imposing the death sentence. (*Banks*, *supra*, 61 Cal.4th at pp. 800-801.) In *Tison,* Ricky and Raymond Tison were nonkillers who, nevertheless, aided their father's armed escape from prison, which included kidnapping a family at gunpoint. (*Tison, supra,* 481 U.S. at p. 139-141.) Their father and his cellmate then killed the family. (*Ibid.*) The death penalty could be applied to Ricky and Raymond, even as nonkillers, because of their substantial role in the series of crimes, and because they could have foreseen that their actions would "create a grave risk of . . . death." (*Id.* at p. 142.)

The application of the death penalty in *Tison*, contrasts with

an earlier case, *Enmund v. Florida* (1982) 458 U.S. 782, 795 [102 S.Ct. 3368, 73 L.Ed.2d 1140] (*Enmund*). In that case, the United States Supreme Court held that "the Eighth Amendment bars the death penalty for any felony-murder aider and abettor 'who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.'"(*Banks, supra,* 61 Cal.4th at p. 799 citing *Enmund, supra*, 458 U.S. at p. 797.) The intent to commit an underlying felony, such as an armed robbery, was insufficient to support a sentence of death unless the evidence shows "the further 'intention of participating in or facilitating a murder.'" (*Ibid.* citing *Enmund, supra,* 458 U.S. at p. 798.) In that case, Enmund had been the getaway driver in a home-invasion robbery in which his co-defendant unexpectedly killed the victims while Enmund waited in the car. (*Enmund, supra*, 458 U.S. at p. 782.)

In *Banks, supra*, 61 Cal. 4th at p. 800, Justice Werdegar recognized the need for a clear standard to distinguish felony murder *simpliciter* from special-circumstances felony murder. After *Enmund* and *Tison,* in *Kennedy v. Louisiana* (2008) 554 U.S. 407, 421 [128 S.Ct. 264, 171 L.Ed. 515] (*Kennedy)* the United States Supreme Court had described the standard for permitting the death penalty for nonkillers as "involvement in the events leading up to the murders [that] was active, recklessly indifferent, and substantial." (*Banks, supra*, 61 Cal.4th 801, citing *Kennedy, supra*, 554 U.S. at p. 421.) At the state level, *People v. Proby* (1998) 60 Cal.App.4th 922, 933-934 "rephrased *Tison's* dictates in essentially synonymous words." (*Banks, supra,* 61 Cal.4th at p. 800.) But neither case established the boundaries between special-circumstances felony murder, for which a nonkiller could be death eligible, and felony murder *simpliciter*.

(*Ibid.*) The Eighth Amendment limits the ability of the states to impose death for "felony murder *simpliciter.*" (*Ibid. citing Tison, supra*, 481 U.S. at p. 147.)

Justice Werdegar addressed this lack of clarity in *Banks* by distilling several principles which distinguish special-circumstances felony murder from felony murder *simpliciter*. (*Ibid.*) First, the federal constitution requires "an individualized decision" in capital cases. (*Id*. at p. 801, citing *Lockett v. Ohio* (1978) 438 U.S. 586, 602 [98 S.Ct. 2954, 57 L.Ed.2d 973].) This means that the sentencing body must examine "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." (*Ibid*. citing *Tison, supra, 481 U.S. at p. 158.)* Second, with respect to the mental aspect, the question is "whether a defendant has 'knowingly engag[ed] in criminal activities known to carry a grave risk of death.'" (*Ibid.* citing *People v. Estrada* (1995) 11 Cal.4th 568, 577 (*Estrada*), *quoting Tison, supra,* 481 U.S. at p. 157.) "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*., citing *Tison, supra,* 481 U.S. at p. 154.) Third, with respect to conduct, "*Tison* and *Enmund* establish that a defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder such as Earl Enmund." (*Id*. at pp. 801-802.) Based upon the facts that the United States Supreme Court used to distinguish the Tisons from Enmund, Justice Werdegar set out a list of nonexclusive factors which the jury must consider to determine

whether an offense is death eligible. (*Id.* at p. 803.)

> "Among those factors that distinguish the Tisons from Enmund, and thus may play a role in determining whether a defendant's culpability is sufficient to make him or her death eligible, are these: What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? 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? 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? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' (*Tison v. Arizona, supra*, 481 U.S. at p. 157) was sufficiently significant to be considered 'major' (id. at p. 152; see *Kennedy v. Louisiana, supra*, 554 U.S. at p. 421.)"

(*Ibid.*)

These principles and the accompanying nonexclusive factors distilled in *Banks* apply to life without parole cases as well as to death penalty cases as a matter of state statute. (*Ibid.*) In *Estrada, supra*, 11 Cal.4th at p. 575 this court found that "reckless indifference to human life' is not constitutionally required for a life imprisonment without parole sentence." However, section 190.2, subdivision (d) does not extend life without parole to every defendant convicted of felony murder because, "by importing the *Tison-Enmund* standard, it permits such a sentence only for those felons who constitutionally could also be subjected to the more severe punishment, death."

(*Banks, supra*, 61 Cal.4th at p. 804.) The *Tison-Enmund* standard is "applicable to all allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole." (*Estrada, supra, 11 Cal.4th* at p. 576.) "Accordingly, the considerations that informed the Supreme Court's distinctions between differing levels of culpability in *Tison v. Arizona, supra*, 481 U.S. 137 should guide juries faced with making those same distinctions under section 190.2(d)." (*Banks, supra,* 61 Cal.4th at p. 804.)

Banks thus changed the law of felony murder in California by recognizing a standard for distinguishing felony murder *simpliciter* from special-circumstances felony murder. After *Banks,* a jury must apply the *Tison-Enmund* continuum standard to "the totality of the circumstances" to determine whether the defendant's conduct supports a sentence of death or life without parole." (*Banks, supra,* 61 Cal. 4th at pp. 801-802.)

Banks rejected the Attorney General's contention that participant liability should encompass "anyone whose conduct involves the intentional assumption of some responsibility for the completion of the crime regardless of whether the crime is ultimately successful," a proposition that *Enmund* had already rejected. (*Banks, supra,* 61 Cal.4th at p. 803 and footnote 5 citing *Enmund, supra,* 458 U.S. at p. 795.) The *Tison-Enmund* continuum standard defined in *Banks* narrowed the definition of a "major participant" and of "acted with reckless indifference to human life" by focusing the jury's inquiry on individual culpability. For example, under *Banks,* a nonkiller who has no reason to anticipate a killing during the commission of the underlying felony would not meet the

standard of being "aware of and willingly involved in the violent manner in which the particular offense" was committed. But previously, a jury could have deemed a nonkiller "a major participant" who had "acted with reckless indifference to human life" as Matthew's special circumstance finding in *Banks* demonstrates. (*Banks, supra,* at p. 794.)

The following year, this court again addressed the distinction between felony murder *simpliciter* and special-circumstances felony murder in *Clark, supra,* 83 Cal.4th at p. 522. *Clark* reiterated the *Enmund* principle, explained in *Banks*, that ordinary aiding and abetting of a felony will not support special-circumstance felony murder. "Because the elements are different, what is sufficient to establish the elements for an aider and abettor of first degree felony murder is not necessarily sufficient to establish the elements of the felony-murder aider and abetter special-circumstance." (*Id.* at p. 616.) Any defendant involved in a felony enumerated in section 189 does not "automatically [exhibit] reckless indifference to human life."[2] (*Ibid.* citing *Banks, supra,* 61 Cal.4th at pp. 809-810.)

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[2]But *Clark* also recognized that "major participation" and "acted with reckless indifference to human life" may overlap and aiding and abetting certain felonies may be sufficient to satisfy both requirements. This court explained:

> "As an initial matter, we consider the interrelationship between the two elements, being a major participant, and having reckless indifference to human life. Tison stated: "These requirements significantly overlap both in this case and in general, for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life."

In *Clark,* application of the *Banks* factors did not conclusively establish that Clark was a major participant as a planner of the armed robbery, but this court left that question unresolved because the evidence was insufficient to establish that Clark acted "with reckless indifference to human life." (*Id.* at pp. 613-615.) The opinion in *Clark,* therefore, focused on the "acted with reckless indifference to human life"element and found that for a nonkiller, liability "encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Id.* at p. 617.) *Clark* defined the term reckless using the Model Penal Code definition:

> "A person acts recklessly with respect to a material element of an offense when he consciously disregards a

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> (*Tison, supra*, 481 U.S. at p. 153.) The high court also stated: "Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Id.* at p. 158, fn. 12.) In *Banks*, we observed that Tison did not specify "those few felonies for which any major participation would 'necessarily exhibit[] reckless indifference to the value of human life.'" (*Banks, supra*, 61 Cal.4th at p. 810, fn. 9.) We surmised a possible example would be "the manufacture and planting of a live bomb." (*Ibid.*) Yet we also concluded that armed robbery, by itself, did not qualify. (*Ibid.*)"

(*Clark, supra,* at pp. 614-615.)

> substantial and unjustifiable risk that the material element exists or will result from his conduct."

(*Ibid.*) This definition has a subjective and objective standard. (*Ibid.*) "The subjective element is the defendant's conscious disregard of risks known to him or her." (*Ibid.*) But recklessness must also be considered according to an objective standard, "'what a law-abiding person would observe in the actor's situation.'" (*Ibid.* citing Model Pen. Code § 2.02, subd. (2)(c).) With respect to armed robberies, *Clark* reiterated *Banks'* finding that neither knowledge that the other participants were armed nor that armed robberies carry a risk of death establish "acted with reckless indifference to human life."[3] (*Id.* at p. 618.)

Clark, like *Banks*, narrowed the liability for special-circumstances felony murder by creating a more meaningful and narrow definition of "acted with reckless indifference to human life."[4]

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[3]*Clark* considered the following specific factors, in its analysis which are in accord with the holding of *Tison*:

"(1) Knowledge of weapons and use and number of weapons; (2) Physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) Duration of the felony; (4) Defendant's knowledge of cohort's likelihood of killing; (5) Defendant's efforts to minimize the risks of the violence during the felony."

(*Clark, supra,* 63 Cal.4th at pp. 618-623.)

[4]*Clark* also helped refine the "major participant" element to the extent that Clark's role as the planner of the crime did not, standing alone, automatically support the "major participant" finding. (*Clark*, *supra*, 63 Cal.4th at p. 618.) Previously *Proby* had defined "major participant" very broadly as "notable or conspicuous

E. THE *BANKS* AND *CLARK* CHANGES IN THE LAW OF SPECIAL- CIRCUMSTANCES FELONY MURDER HAVE BEEN INCORPORATED INTO SECTIONS 188 AND 189 AND THESE ARE MADE APPLICABLE TO APPELLANT BY PENAL CODE SECTION 1170.95

"The Legislature has full power to define crimes and set penalties, and, by enacting Senate Bill No. 1437, the Legislature redefined the crime of murder as part of a broader penal reform. (*People v. Marquez* (2020) 56 Cal.App.5th 40, 51 citing *People v. Nash* (2020) 52 Cal.App.5th 1041, 1080–1081.) "Senate Bill 1437 restricts the circumstances under which a person can be held liable for murder under the felony murder rule." (*Id.* at p. 50.)

As part of the narrowing of liability for felony murder, as to nonkillers who do not aid and abet with the intent to kill, the Legislature abolished felony murder *simpliciter* but retained special-circumstances felony murder as those elements are more narrowly defined by *Tison* and *Enmund*. After the amendments to Penal Code sections 188 and 189, special-circumstances felony murder's elements, "major participation" and "acted with reckless indifference to human life *as described in subdivision (d) of Section 190.2*" must be applied according to the *Tison-Enmund* continuum standard as explained in *Banks*. It is a fundamental rule of statutory construction that the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes "'in the light of such decisions as have a direct bearing upon them.'" (*People v. Overstreet*

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in effect or scope" and "one of the larger or more important members . . . of. . . a group." (*Proby, supra*, 60 Cal.App. 4th at p. 933-934.)

(1985) 42 Cal. 3d 891, 897, 726 quoting *Estate of McDill* (1975) 14 Cal.3d 831, 839.)

Moreover, ascertaining the intent of the legislature to effectuate the purpose of the law is the fundamental rule of statutory construction. (*In re Ge M*. (1991) 226 Cal.App.3d 1519, 1522-1523.) In determining the intent of the legislature, the court looks first to the words themselves. (*Ibid*.) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*People v. Lawrence* (2000) 24 Cal.4th 219, 230.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Id*. at pp. 230-231; *People v. Coronado* (1995) 12 Cal.4th 145, 151.)" (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Here, there is no ambiguity. For nonkillers, who do not aid and abet with the intent to kill, the elements of special-circumstances felony murder are (1) aiding and abetting a section 189, subdivision (a) felony without the intent to kill; (2)"major participation" and (3) "[acting] with reckless indifference to human life" as defined by individual culpability under the *Tison-Enmund* continuum standard. (*Banks, supra,* 61 Cal.4th a p. 804.)

The legislative history also supports the conclusion that the Legislature intended for the terms "major participant" and "reckless indifference to human life" to be interpreted narrowly, according to a nonkiller's individual culpability as described in *Banks*. Courts may consider legislative history to support a conclusion as to proper interpretation. (*Miller v. Bank of America, NT & SA* (2009) 46 Cal.4th 630, 642; *Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 202 [legislative history may provide additional authority confirming

the court's interpretation of a statute].)

As noted in Part I A., *supra*, Senate Bill 1437 was passed to implement the reforms identified in Senate Concurrent Resolution 48, a measure which "would recognize the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime." (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175, p. 1.) The following legislative findings in Resolution 48 demonstrate that the Legislature understood the *Banks* decision to mean that the higher liability for special-circumstances felony murder may only be imposed based upon individual acts and individual awareness of the risk of death under the narrower standard articulated in *Banks*.

> "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 . . . ."

By citing *Banks* when explaining its understanding of Penal Code section 190.2, the Legislature indicated that it understood the terms "major participant' and "acted with reckless indifference to human life" as construed by that decision. Thus, the Legislature meant that these terms "as described in subdivision (d) of Section 190.2" are "described" according to the narrower standard in *Banks*.

The Legislature's intent that the terms "major participant" and "acted with reckless indifference" be implemented more narrowly under the *Tison-Enmund* standard articulated in *Banks* is also consistent with the Legislature's concerns about overpopulation in prison leading to "inhumane and poor living conditions." (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175, p. 1.) The Legislature limited the application of felony murder *simpliciter* to actual killers and aiders and abetters with the intent to kill and limited special-circumstances felony murder to nonkillers who aided and abetted with the intent to kill or to nonkillers whose conduct met the elements of Penal Code section 190.2, subdivision (d) under the *Banks* standard. The Legislature made these changes in the law of felony murder retroactive and enacted the procedures in Penal Code section 1170.95 to give nonkillers who could not now be convicted of either crime a procedure to obtain relief from their convictions. (Stats 2018 ch 1015 § 3 (SB 1437), effective January 1, 2019.) The purpose of the procedures created in section 1170.95 is to effectuate the Legislative intent to reduce the prison population.

The Legislature also adopted the *Banks* limitations into the elements of special-circumstances felony murder "as described in subdivision (d) or Penal Code section 190.2" to bring the statutory elements into alignment with Eighth Amendment jurisprudence. In

stating the need for reform in the law of felony murder, the Legislature made the following finding:

> "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 (2017–2018 Reg. Sess.) res. ch. 175, p. 1.)

It follows, then, from the amendment to Penal Code section 189, subdivision (e)(3) that nonkillers with special circumstances findings under pre-*Banks* and *Clark* adjudications are not disqualified by their special circumstance from making a prima facie showing under section 1170.95. A petitioner who alleges that he is a nonkiller and who alleges that he has been convicted upon a theory of felony murder, is not disqualified by a pre-*Banks* and *Clark* special circumstance because he may also allege that he "could not be convicted of first . . . degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (Pen. Code § 1170.95, subd. (a)(3).) The changes in section 189, subdivision (e)(3) include the narrowing of the special circumstances elements under *Banks* and *Clark*. Simply put, a petitioner with a pre-*Banks* and *Clark* special circumstance finding has not had all of the elements of special-circumstance felony murder proven beyond a reasonable doubt under the redefined and narrowed elements of special-circumstances felony murder as set forth in amended Penal Code section 189, subdivision (e)(3).

F. THE COURT OF APPEAL ERRED WHEN IT UPHELD THE DENIAL OF APPELLANT'S PETITION

Here, the court of appeal relied on several decisions by other appellate courts to erroneously uphold denial of appellant's petition for resentencing. The court first relied on the Second District, Division One's opinion in *People v. Galvan* (2020) 52 Cal.App.5th 1134. (*Galvan*). (Slip opn. at p. 8.) *Galvan* reasoned incorrectly that *Banks* and *Clark* were not changes to the elements of felony murder. (*Id*. at pp. 1140-1141.) *Galvan* held that section 1170.95 was not available to a defendant to litigate the *Banks* and *Clark* changes to the special circumstances elements and held that a defendant must first petition for a writ of habeas corpus to obtain relief from pre-*Banks* and *Clark* special circumstance findings before being eligible to seek relief under section 1170.95. (See also *People v. Gomez* (2020) 52 Cal.App.5th 1, 16 (*Gomez).)*

Galvan was incorrect because, as appellant has explained in Part I D. *, supra*, special circumstances are elements of the special-circumstances form of felony murder which, under California law, is distinct from felony murder *simpliciter*. (*Engert, supra,* 31 Cal.3d at p. 803; *Mil, supra*, 53 Cal.4th at p. 409.) *Banks* and *Clark* changed the law applicable to the elements of the offense of special-circumstances felony murder, and the Legislature created the section 1170.95 procedure to allow those convicted under the former, broader standard to seek relief from their convictions.

Galvan's assertion that allowing pre-*Banks* and *Clark* defendants to "relitigate" their special circumstance in a section

1170.95 proceeding will treat post-*Banks* and *Clark* defendants differently is also wrong. (*Galvan, supra*, 52 Cal.4th at pp. 1142-1143.) Defendants who were convicted under the post-*Banks* and *Clark* standard have had an opportunity to litigate the elements of special-circumstances felony murder under that standard.[5] For them, the "changes in the statute" are not changes in the elements of the offense and therefore the changes will not affect their special-circumstances felony murder conviction. But, as noted previously, the defendants who were convicted before *Banks* and *Clark* have never had the opportunity to litigate the elements of special-circumstances felony murder under the new, narrower standard embodied in section 189, subdivision (e)(3).

The court of appeal in this case also relied heavily upon the Second District, Division One's, opinion prior to *Galvan*, *People v. Allison* (2020) 55 Cal.App.5th 449 (*Allison*). (Slip opn. at pp. 11-12.) In the instant case, the court of appeal cited with approval *Allison'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, 214)." (*Ibid*. citing *Allison,*

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[5]This statement assumes that post-*Banks* and *Clark* juries were correctly instructed on the narrow *Tison-Enmund* continuum standard. Given the appellate view that *Banks* did not set a standard for juries to consider, it is entirely possible that post-*Banks* defendants may have been denied the opportunity to litigate under the narrower standard. (See e.g., *People v. Allison*, *supra*, 55 Cal.App.5th at p. 457.) Appellant discusses this possibility in greater detail, *infra*.

supra, 55 Cal.App.5th at p. 11) (*original emphasis*.) But, that conclusion, of course, is incorrect. (See Part I D., *supra*.) Moreover, the *Allison* court's assertion that the Legislature simply reenacted the pre-*Banks* and *Clark* form of special-circumstances felony murder in Penal Code sections 188 and 189 fails to take into account the Legislative purpose to reduce the class of defendants who could be convicted of special-circumstances felony murder and to ease the prison population by reducing the sentences of those no longer eligible for the life term under the amended statutes. (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175, p. 1.)

The court of appeal in the instant case also found support for its assertion that the Legislature did not change the requirements for special-circumstances felony murder in *Allison's* finding that the pattern jury instructions did not change following *Banks* and *Clark*. (Slip opn. at p. 11 citing *Allison,* 55 Cal.App.5th at p 457.) Relying on *People v. Price* (2017) 8 Cal.App.5th 409, 451 (*Price)*, the *Allison* court had stated, "Jury instructions regarding the mental state required for a felony-murder special circumstance are not defective if they do not include the *Banks* and *Clark* factors." While the question of jury instructions in pre- and post-*Banks* and *Clark* special-circumstances prosecutions is not the question presented by the instant case, the issue must be addressed because it bears on an understanding of the elements of the offense of special-circumstances felony murder and how they were changed by *Banks* and subsequently defined in *Clark*.

To recap briefly, we know that the "major participant" and "acted with reckless indifference to human life" findings are elements of the offense of special-circumstances felony murder in California.

(*Engert, supra,* 31 Cal.3d 803.) We also know that it is reversible error to fail to instruct a jury on these elements in a special-circumstances felony murder prosecution. (*Mil*, *supra*, 53 Cal.4th at pp. 408-409.) We also know that in *Banks*, Justice Werdegar stated unambiguously that

> "According, the considerations that informed the Supreme Court's distinctions between differing levels of culpability in *Tison v. Arizona, supra*, 481 U.S. 137 should guide *juries* faced with making those same distinctions under section 190.2, subdivision (d)."

(*Banks, supra*, 61 Cal.4th at p. 804) (emphasis added.) It follows then, that if the question of whether the jury was sufficiently instructed according to the *Tison-Enmund* continuum standard was presented in a post-*Banks* and *Clark* special-circumstances petition, the dicta in *Allison* would not only be incorrect, it would not be controlling because *Banks* held that juries must consider the narrower *Tison-Enmund* continuum standard.[6] (*Ibid.*) (Cf. *People v.*

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[6]*Price* stated that "The Supreme Court's express approval of *Proby* and the citation of *Estrada* with approval support the People's arguments that there is no constitutional requirement of a more explicit or detailed instruction on the meaning of the special circumstance elements." (*Price, supra,* 8 Cal.App.5th at p. 451.) *Price*, however, was wrong. The *Banks* opinion held that, as a matter of state law, the more narrow and detailed *Tison-Enmund* continuum standard must be applied by *juries*. (*Banks, supra,* 61 Cal.4th at p. 804.) Further, *Banks* recognized that the United States Supreme Court recognized in *Tison* that the the federal Eighth Amendment sets limits on the imposition of the death penalty and that by incorporating this language in section 190.2, subdivision (d) our state statute has also incorporated those limits with respect to death and life without parole sentences. (*Ibid.*) Whether construed as a matter of state statute or whether construed as an Eighth Amendment requirement, the *Tison-Enmund* continuum standard

Nunez (2020) 57 Cal.App.5th 78, 92 [*Banks* does not require a jury to be instructed on the *Tison-Enmund* continuum standard]; *People v. Jones* (2020) 56 Cal.App.5th 474, 484 [*Banks* and *Clark* did not have to be incorporated into the jury instructions and did not change the applicable law].) Regardless of how that issue would be decided in another case, it is not presented here. What is clear in this case is that, in 2014, appellant's jury was never instructed on the elements of special-circumstances felony murder under the *Tison-Enmund* continuum standard. Thus, appellant has never had the opportunity to be "more equitably sentence[d] . . . in accordance with [his] involvement in the crime" according to need for reform cited in Resolution No. 48 which cited *Banks* in support of this reform. (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175, pp. 1-2.)

The remaining opinions cited as authority by the court of appeal for its holding that appellant's special circumstances bar further consideration of his resentencing petition fare no better in supporting the court of appeal's decision to uphold the trial court's denial of appellant's petition. In *Gomez*, *supra*, 52 Cal.App.5th at p. 16, the court of appeal held that a defendant had to relitigate a special-circumstances finding under the *Banks* and *Clark* standards in a habeas proceeding before being eligible for consideration for resentencing under section 1170.95. *Gomez* was incorrect. By finding that two of the elements of special-circumstances felony murder had

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must be applied by juries to all defendants tried for special-circumstances felony murder in California.(*Banks, supra*, 61 Cal.4th at p. 804.)

to be adjudicated in a separate proceeding, *Gomez* treated the special-circumstances as if they were not elements of the offense. That conclusion is contrary to established precedent. (*Engert, supra*, 31 Cal.3d at p. 803, *Mil, supra*, 53 Cal.4th at pp. 408-409.) The *Gomez* decision, which allows only one element of the offense, the nonkiller participation in the underlying felony element, to be eligible for section 1170.95 proceedings, is contrary to the intention of the Legislature that section 1170.95 shall be the sole procedure for relief for previously convicted defendants of both felony murder *simpliciter* and special- circumstances felony murder. (*Martinez, supra*, 31 Cal.App.5th 727.)

Moreover, as noted previously, the Legislature was aware that California recognizes two forms of felony murder, felony murder *simpliciter* and special-circumstances felony murder. (Memo from Senate Public Safety File for SB 1437 (Skinner), of the 2017-18 Legislative Session, by Gabriel Caswell, Principal Consultant, Senate Public Safety Committee, Re: Constitutionality of SB 1437 (Skinner), pp. 7-9.) Senate Bill 1437's amendments to the law of felony murder cover both forms of the offense. In enacting section 1170.95, the Legislature did not intend that two elements of special-circumstances felony murder must be decided in a habeas proceeding, thereby denying the special-circumstances felony murder defendant the advantage of litigating all the elements of his conviction under the procedures in section 1170.95. The Legislature extended the procedural advantages of appointed counsel as set forth in Penal Code section 1170.95, subdivision (c), and the burden of proof placed on the prosecution in section 1170.95, subdivision (d) to all the elements of special-circumstances felony murder, not just to

the nonkiller participation in the underlying felony element. (Pen. Code § 1170.95, subd. (a)(3).) *Gomez*'s holding that a special-circumstances felony defendant must litigate his pre-*Banks* and *Clark* special circumstance only by way of habeas is wrong as a matter of law. (*Engert, supra*, 31 Cal.803.; *Mil, supra*, 53 Cal.4th at pp. 408-409.) (See also, *People v. Murillo* (2020) 54 Cal.App.5th 160, 167-168 [the finding for special circumstances were not changed by *Banks* and can only be litigated in a petition for a writ of habeas corpus].)

The decision by the Second Appellate District, Division Five, in *York*, *supra*, 54 Cal.App. at p. 250, further action deferred pending consideration of *People v. Lewis,* S260598, has correctly recognized that the Legislature's amendments to the elements of special-circumstances felony murder incorporate the narrower meaning of "major participant" and "acted with reckless indifference to human life" as explained by *Banks* and *Clark*. (*York*, *supra* 54 Cal.App.5th at p. 258.)

> "However, in *People v. Banks* (2015) 61 Cal.4th 788 [189 Cal. Rptr. 3d 208, 351 P.3d 330] (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 [203 Cal. Rptr. 3d 407, 372 P.3d 811] (*Clark*), our Supreme Court "construed the meanings of 'major participant' and 'reckless indifference to human life' *'in a significantly different, and narrower manner than courts had previously.'* (*Torres, supra*, 46 Cal.App.5th at p. 1179.)" (*Smith, supra*, 49 Cal.App.5th at p. 93, review granted.)

(*Id*. at p. 258) (emphasis added.)

The *York* court correctly concluded that because *Banks* and *Clark* narrowed the reach of a special circumstance finding to exclude someone whose "conduct involves the intentional

assumption of some responsibility" for the underlying felony, and to place the emphasis on individual acts and knowledge.

> ". . . [A] pre-*Banks* and *Clark* special circumstance finding cannot preclude eligibility for relief under the section 1170.95 as a matter of law, because the factual issues that the jury was asked to resolve in a trial that occurred before Banks and Clark were decided are not the same factual issues our Supreme Court has since identified as controlling"

(*Id*. at p. 258.) *York* correctly concluded that a pre-*Banks* and *Clark* special circumstance finding does not bar a petitioner from stating a prima facie case for relief under Penal Code section 1170.95, subdivision (a).) [7]

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[7] The *Allison* opinion, which was highly critical of *York*, stated, incorrectly, that "the consequences of *York's* analysis is that no prior jury findings would ever preclude relief under section 1170.95" and "every convicted murderer who could make a prima facie showing (whatever that might be) that the prior findings were factually incorrect would be entitled to a bench trial de novo on those findings." (*Allison, supra,* 55 Cal.App.4th, at p. 461.) The *Allison* court overlooked the reach of Penal Code section 190.2, subdivision (d). That provision applies to aiders and abettors, not to "the actual killer. . . ." (Pen. Code § 190, subdivision (d); *Banks, supra*,61 Cal.4th at p. 798.) The findings that a jury makes as to "major participant" and "acted with reckless indifference to human life" are findings made only as to nonkiller aiders and abetters in the underlying felony who lacked the intent to kill. (Pen. Code § 190.2, subd. (d).) The narrowing of those terms in *Banks* and *Clark* did not affect Penal Code section 190.2, subdivision (b) which states that actual killers may be convicted of a special circumstance without regard to intent. The *Allison* court overlooked the fact that amended Penal Code section 189, subdivision (e)(1), applicable to actual killers, is in accord with section 190.2, subdivision (b). As to actual killers in a felony murder, the amendments to do not appear to change the actual killer's liability for felony murder in either form based upon the intent to commit the underlying felony.

G. APPELLANT'S PETITION SHOULD BE REINSTATED, AN ORDER TO SHOW CAUSE ISSUED, AND A HEARING HELD UNDER PENAL CODE SECTION 1170.95, SUBDIVISION (d)

In the instant case, the trial court dismissed appellant's petition at Step Two of the procedure that the Legislature created in Penal Code section 1170.95. Appellant had filed a petition under section 1170.95, subdivisions (a) and (b). (C.T. pp. 8-10, 12.) Counsel had been appointed for appellant, and the prosecutor had filed an opposition under Penal Code section 1170.95, subdivision (c) to which appointed counsel responded for appellant. (C.T. pp. 94, 96.)

At this stage, the trial court erred by dismissing the petition based upon appellant's special circumstance findings. (C.T. p. 10.) The correct statutory procedure, as set out in Penal Code section 1170.95, subdivisions (c) and (d), required the trial court to issue an order to show cause and set a hearing within sixty days because the prosecutor's opposition and appointed counsel's reply had identified an outstanding issue of fact, material to the issue of appellant's participation in the underlying felony. (Pen. Code § 1170.95, subds. (c) and (d).) The issue of fact was for the trial court to decide in the Penal Code section 1170.95, subdivision (d) hearing.[8]

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[8]In *People v. Law* (2020) 48 Cal.App.4th 811, 822-825 the court of appeal demonstrated a misunderstanding of the statutory procedure by resolving the disputed factual issues with respect to the statutory elements of "major participant" and "acted with reckless indifference to human life" on appeal. The court of appeal agreed that the special circumstances finding did not disqualify the petitioner from stating a prima facie case, but instead of remanding the case to give petitioner the benefit of the Penal Code section 1170.95, subdivision (d) hearing, the court of appeal treated the

In opposition to appellant's petition, the deputy district attorney had repeated the court of appeal's statement in *Strong I* that appellant urged Ortez-Lucero to shoot Aquitania when Aquitania reached for appellant's weapon when appellant went to the aid of Ortez-Lucero in the fight with Acquitania. (C.T. pp. 93-94.) In reply, counsel for appellant disputed the court of appeal's recitation and alleged that the prosecutor conceded at trial that the killings of the toddler and the father were unintentional, and the facts at trial established that Ortez-Lucero, not appellant, was the shooter. (C.T. p. 106.) The accuracy of the court of appeal's recitation of appellant's participation in the underlying felony versus the evidence in the record of appellant's trial, including concessions by the prosecutor, and any new evidence that the parties wished to introduce on the issue should have been resolved in a section 1170.95, subdivision (d) hearing. (*People v. Woodell* (1998) 17 Cal.4th 448, 457 "[the extent to which an appellate opinion is probative in a specific case must be decided on the facts of that case"].) Instead, this factual dispute was never resolved on the merits because the trial court dismissed the petition on the basis of the special circumstances findings.

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statutory elements of "major participation" and "acted with reckless indifference" as appellate issues to be resolved by the court of appeal according to the substantial evidence standard without a hearing, without the opportunity to introduce additional evidence, without the trial court sitting as a fact finder de novo, and without the burden of proof placed upon the prosecution. (*Ibid.*) The court erred in *Law* because the Legislature intended for section 1170.95 to be the exclusive procedure for petitioners to seek relief and to resolve factual issues attendant upon whether a petitioner can no longer be convicted under Penal Code section 188 and 189. (*Martinez, supra,* 31 Cal.App.5th 727.)

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: May 17, 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 brief produced on a computer must not exceed 14,400 words Word Perfect states that the foregoing Appellant's Opening Brief on the Merits contains 9,709 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 17, 2021, at Escondido, California.

Deborah Hawkins
Deborah L. Hawkins

Case Name: People v. Strong Case No. S266606

DECLARATION OF SERVICE

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 Opening Brief on the Merits

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DEBORAH L. HAWKINS Deborah Hawkins

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. STRONG**
Case Number: **S266606**
Lower Court Case Number: **C091162**

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