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 REPLY BRIEF

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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 circumstances findings do not preclude eligibility for resentencing. Respondent's contention that appellant cannot state a prima facie case for eligibility until his prior circumstances findings are vacated in a petition for habeas corpus is error. The Legislature established a single procedure to determine eligibility for resentencing in section 1170.95. The Legislature was aware of the two forms of felony murder in California, simple and aggravated, and was aware that this Court's decision in 2015 in *Banks* changed the law of felony murder by narrowing eligibility for conviction of aggravated felony murder based upon the *Tison-Enmund* standard articulated in *Banks*. That standard, for the first time, directed juries to focus on personal role, awareness of risk of death, and willing involvement in the violent manner in which the offense was committed in order to convict a defendant of aggravated felony murder.

The re-sentencing inquiry for pre-*Banks* and *Clark* petitioners is not foreclosed at the prima facie stage because in their pre-2015 trials their juries did not make special circumstances findings based upon personal role, awareness of risk of death, and willing involvement in the violent manner in which the offense was committed. Prior to *Banks*, juries could convict defendants of

aggravated felony murder based solely upon participation in the underlying felony. Thus, the existing jury findings in pre-*Bank*s and *Clark* cases do not disqualify those petitioners, including appellant, at the prima facie stage.

Respondent's contention that the findings of appellant's jury are "trial error" which appellant must "correct" through habeas corpus proceedings which inquire into the *Banks* standard is legal error. The allegations in section 1170.95, subdivision (a) do not require the petitioner to allege that his prior jury findings are "correct" or free of "trial error." Appellant's allegation in the present that he cannot now be convicted under the narrower standards of the amendments to sections 188 and 189 is not an allegation that his present conviction rests upon an "error" from his prior trial. His allegation is that he cannot, in the present, be found to be a "major participant" or that he "acted with reckless indifference" under the narrower standard incorporated into the amended statutes.

The Legislature did not intend that two elements of aggravated felony murder be litigated as "trial errors" or that they be litigated in a proceeding other than a section 1170.95, subdivision (d)(3) proceeding. Respondent's position that these elements must be litigated in a habeas proceeding to qualify pre-*Banks* and *Clark* petitioners for eligibility for resentencing nullifies section 1170.95, subdivision (d)(3) and denies these petitioners the right to counsel, the right to a hearing, and the right to have the prosecution bear the burden of proof in factfinding proceedings. Respondent's position also places a double burden on our trial courts to first hear a habeas to find facts and then to conduct a section a 1170.95 proceeding to establish eligibility for resentencing based upon facts found in the

prior habeas. This was never the Legislature's intent in enacting section 1170.95.

Respondent's contention that post-*Banks* and *Clark* findings by courts of appeal may be used at the prima facie stage as substitutes for jury findings which were never made at a pre-*Banks* and *Clark* trial violates a pre-*Banks* and *Clark* petitioner's due process right to be heard. Substituting appellate findings on the narrower *Tison-Enmund* standard for jury findings denies the petitioner the right to litigate the question in the trial court in the first instance and to introduce his own evidence on the critical question of personal role, awareness of risk of death, and willing involvement in the violent manner in which the offense was committed.

Here, appellant has stated a prima facie case under section 1170.95, subdivisions (c) and (d). His pre-*Banks* and *Clark* special circumstance findings do not make him ineligible for relief as a matter of law. Thus, 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).)

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. RESPONDENT'S CONTENTION THAT *BANKS* AND *CLARK* ESTABLISHED ONLY A "GUIDE FOR REVIEWING COURTS" TO DETERMINE THE ADEQUACY OF A JURY'S SPECIAL CIRCUMSTANCES FINDING IS LEGAL ERROR

Respondent's claim that this Court's decisions in *Banks* and *Clark* are applicable only on appellate review and in habeas proceedings and that pre-*Banks* and *Clark* special circumstances findings are "trial errors" to be resolved through a writ of habeas corpus is legal error. (Respondent's Answer Brief on the Merits, hereinafter "R.B., at pp. 24-36 and 44-52.) Respondent asserts, erroneously, that the *Banks* decision was nothing more than a "non-exclusive list of factors" developed for courts, not juries, which "clarified" but did not change the law of felony murder.[1] (R.B. pp. 41-

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[1]"Clarify" means to "remove ignorance, misconception, or error . . . ." (The New Shorter Oxford English Dictionary (1993 ed.) p. 411, col. 1.) "Removing ignorance or error" in the understanding of the difference between simple felony murder and aggravated felony murder was not an "absence of change" in the law of murder as respondent states. (R.B. pp. 41-42.) Rather, the opinion in *Banks* changed existing law by"removing [an] . . . error" in then existing legal doctrine which conflated the elements of simple felony murder (guilt only on the underlying felony) with the elements of aggravated felony murder (personal role, awareness of risk of death, willing

42.)

Respondent is wrong. As appellant explained in detail in Appellant's Opening Brief on the Merits, hereinafter "A.O.B.," at pp. 21-24, *Banks* changed the law of felony murder by establishing that a defendant could not be convicted of special circumstances felony murder, hereinafter "aggravated felony murder," based only upon evidence that he committed felony murder *simpliciter,* hereinafter "simple felony murder." (*Banks, supra,* 61 Cal.4th at p. 803.) In *Banks*, the Attorney General asserted that guilt of the underlying felony was sufficient for an aggravated conviction, and *Banks* explicitly rejected that contention. (*Ibid.*) Until this point, both defense attorneys and prosecutors believed, as the Attorney General's argument in *Banks* demonstrates, that guilt of the underlying felony would support an aggravated felony murder conviction. Hence, the getaway driver in *Banks* received the same life without parole sentence as all the other participants. (*Banks, supra*, 61 Cal.4th at p. 797.) Prior to *Banks*, there was no California authority to support a simple felony murder conviction for the getaway driver and an aggravated felony murder conviction for a robber-gunman who participated in the same offense.

Banks changed the law of felony murder by establishing that juries must apply the *Tison-Enmund* standard, derived from the United States Supreme Court's Eighth Amendment precedent, to

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involvement in the violent manner in which the offense was committed." (*Banks, supra*, 61 Cal.4th pp. 801-802, 803.)
The word "clarify" does not mean "absence of change" as respondent asserts. (R.B. pp. 41-42.) It means to change by removing "ignorance or error."

distinguish between the two forms of felony murder recognized by California law. (Appellant's Opening Brief on the Merits, hereinafter "A.O.B.", pp. 19-20; Pen. Code § 189; § 190.2, subd. (a)(17); *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 803 (*Engert*) and *People. v Mil* (2012) 53 Cal.4th 400, 408-409 (*Mil*).)

Respondent focuses on the "non-exclusive factors" in *Banks* and asserts that these factors are the holding of the case, meant only for courts to apply to define "major participant" and "acted with reckless indifference to human life" in appellate and writ proceedings. (R.B. pp. 41-42.) But respondent is wrong. As to who must apply that standard, *Banks* is quite clear:

> "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, subdivision (d)."

(*Banks, supra*, 61 Cal.4th at p. 804) (emphasis added.)
As to the "non-exclusive factors," while they may be non-exclusive, the principles that they implement are not. Respondent has missed the most important portion of this Court's opinion in *Banks:* the three mandatory prongs of the *Tison-Enmund* standard required to distinguish the two forms of felony murder.

Banks distills these three prongs as three clear principles which are the heart of the decision and which are in no way "non-exclusive." (*Id.* at p. 803.) First, the jury must consider "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." (*Id.* at p. 801, citing *Tison v. Arizona* (1987) 481 U.S. 137, 158 [107

S.Ct. 1679, 95 L.Ed.2d 172]) (original emphasis.) Second, the jury must consider "whether a defendant has 'knowingly engag[ed] in criminal activities known to carry a grave risk of death'" including whether he was "aware of and willingly involved in the violent manner in which the offense is committed." (*Banks, supra,* 61 Cal.4th at p. 801, citing *People v. Estrada* (1995) 11 Cal.4th 568, 577 (*Estrada*), *quoting Tison, supra,* 481 U.S. at pp. 154, 157.) Third, " . . . 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.)

The "non-exclusive factors" that respondent claims are the holding of *Banks,* were meant to implement these three *Tison-Enmund* principles: personal role, willing involvement in violence while aware of risk of death, and involvement greater than ordinary aiding and abetting. The "non-exclusive factors" acquire far more meaning when they are tied to these three prongs of the inquiry which comprise the *Tison-Enmund* standard for distinguishing simple felony murder from aggravated felony murder. Respondent's contention that this Court did not make a substantive change in the law of felony murder in *Banks* to be applied by juries is, therefore, error.

Moreover, when the Legislature amended Penal Code sections 188 and 189 and created the procedures in section 1170.95 to give previously convicted defendants the benefit of those changes, the Legislature was aware that California law distinguishes between simple felony murder and aggravated felony murder and that the decisions in *Banks* and *Clark* narrowed the scope of aggravated felony murder in 2015 and 2016 by adopting the *Tison-Enmund*

standard for juries to apply. (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.); Appellant's Opening Brief on the Merits, hereinafter "A.O.B.", pp. 19-20; Pen. Code § 189; § 190.2, subd. (a)(17); *Engert, supra*, 31 Cal.3d at p. 803 and *Mil, supra*, 53 Cal.4th at pp. 408-409.) Thus, when the legislature amended Penal Code section 189, subdivision (e) (3), the Legislature intended that "major participant" and "reckless indifference to human life" be understood and applied according to the standard in *Banks*. (*Ibid.*) ; Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.) res. ch. p. 1; A.O.B. p. 29.)

A pre-*Banks* and *Clark* petitioner's allegation that he or she "could not now be convicted of first or second degree murder because of changes to section 188 or 189 made effective January 1, 2019" is not barred by a prior jury finding of "major participation" and "reckless indifference" because pre-*Banks* and *Clark* juries did not find those terms according to the narrower *Tison-Enmund* standard.

B. APPELLANT'S PRE-*BANKS* AND *CLARK* SPECIAL CIRCUMSTANCES FINDINGS DO NOT RENDER HIM INELIGIBLE TO LITIGATE THE QUESTION OF WHETHER HE COULD BE CONVICTED OF FIRST DEGREE MURDER UNDER THE CHANGES TO SECTIONS 188 AND 189

Respondent contends that the jury's 2014 findings on the special circumstance allegations "established all the facts necessary to render Strong liable for murder under the current law of murder as amended pursuant to SB 1437." (R.B. p. 38.) In support of that

proposition, respondent argues that *Banks* and *Clark* did not change the law of felony murder, a proposition that appellant has already refuted in Part A, *supra*.

In further support of respondent's contention that prior findings satisfy the new, narrower standard, respondent cites the text of CALCRIM No. 703, which, according to respondent, establishes that appellant was "a major participant" or"acted with "reckless indifference to human life" under the narrower standard. (R.B. pp. 38.) The following is the language that respondent has quoted: "[T]he people must prove either that the defendant intended to kill, or the People must prove all of the following:

"1. The defendant's participation in the crime began before or during the killing;

"2. The defendant was a major participant in the crime;

"AND

"3. When the defendant participated in the crime, he/she acted with reckless indifference to human life."

(R.B. p. 38.) While respondent has contended that *Banks* did not change the law of felony murder as stated in this instruction, respondent offers no analysis to demonstrate how this jury instruction fulfills the three-pronged *Tison-Enmund* standard. (R.B. pp. 38-49.) To the contrary, the text of CALCRIM No. 703 demonstrates that the instruction did not direct the jury to consider appellant's personal role, willing involvement in violence while aware of risk of death, and involvement greater than ordinary aiding and abetting. (*Banks, supra* 61 Cal.4th at pp. 801-802.)

Rather, the text of CALCRIM No. 703 allowed a jury to convict

a defendant of aggravated felony murder based on evidence that he was guilty only of simple felony murder. Thus, in a prosecution for aggravated felony-murder robbery, the jury could infer at step one of CALCRIM No. 703 that the defendant began to participate in the robbery before or during the killing. At step two, the jury could infer that the defendant was a major participant in the crime of robbery. At step three, the jury could have inferred, as the Attorney General argued in *Banks,* that the defendant's "conduct which involv[ed] the intentional assumption of some responsibility for the completion of the [robbery]" was participation with reckless indifference to human life. (*Banks, supra*, 61 Cal.4th at p. 803.) These three findings do not satisfy the three-prongs of the *Tison-Enmund* inquiry: personal role, willing involvement in violence while aware of risk of death, and involvement greater than ordinary aiding and abetting.

Respondent also insists that because some courts of appeal have reviewed pre-*Banks* and *Clark* aggravated felony murder convictions in post-*Banks* and *Clark* proceedings for "sufficiency of the evidence," and found the evidence sufficient to sustain the special circumstances under *Banks* and *Clark* this review means that every pre-*Banks* and *Clark* jury necessarily made the three-pronged *Tison-Enmund* analysis even though the jurors in those cases were only instructed with CALCRIM No. 703. (R.B. p. 46.) In support of this proposition, respondent cites *People v. Williams* (2015) 61 Cal.4th 1244, 1281-1280; *In re Parrish* (2020) 48 Cal.App.5th 541-545; *In re McDowell* (2020) 55 Cal.App.5th 999, 1008-1115; *People v. Price* (2017) 8 Cal.App.5th 409, 454) in which appellate courts reviewed pre-*Banks* and *Clark* trials and found the evidence sufficient under the narrower standard. (R.B. p. 46.) Contrary to respondent's

assertion, these five cases do not stand for the proposition that pre-*Banks* and *Clark* jury findings bar a petitioner from stating a prima facie case under Penal Code section 1170.95, subdivision (a)(3).

First, these five appellate opinions merely demonstrate that in these five instances, a court of appeal found evidence to sustain a special circumstance finding, reviewing that evidence in the appellate record in the light most favorable to the prosecution, and after finding that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L. Ed. 2d 560, 99 S. Ct. 2781].) These opinions do not establish that the pre-*Banks* and *Clark* juries in these cases actually made these findings beyond a reasonable doubt after being instructed with CALCRIM No. 703.

Moreover, it is certain that a pre-*Banks* and *Clark* defendant never had the opportunity in the trial court to introduce evidence on his behalf to demonstrate that his level of personal involvement did not meet the *Tison-Enmund* standard. The essence of due process is the right to be heard; and because none of the parties in the trial court, including the defendant, were on notice of the application of the *Tison-Enmund* standard in the trial proceedings, the pre-*Banks* and *Clark* petitioner never had the opportunity to be heard on this narrower standard. (U.S. Const. Amend. V and Amend. XIV; *Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18, 32, 96 S.Ct. 893]; *Mullane v. Central Hanover Bank & Trust Co.*(1950) 339 U.S. 306, 314 [70 S.Ct. 652, 657, 94 L.Ed.2d 864]; *Burns v. United States* (1991) 501 U.S. 129, 136, 138 [111 S.Ct. 2181, 115 L.Ed.2d 123].) Concomitantly, the prosecution never bore the burden of proving the narrower standard beyond a reasonable doubt.

The Legislature has now created a process in which these pre-*Banks* and *Clark* petitioners can be heard on the narrower standard and in which the prosecution must prove the three prongs of this standard beyond a reasonable doubt to establish murder liability under the amendments to the law of murder. Using pre-*Banks* and *Clark* findings or appellate sufficiency of the evidence findings which were not made by a jury to deny the pre-*Banks* and *Clark* petitioner the statutory rights that the Legislature has created in section 1170.95 violates due process because it forecloses the petitioner from being heard on the narrower standard, a question he has never before litigated, at a meaningful time and in a meaningful manner. (*Ibid.*;U.S. Const. Amend. V and Amend. XIV; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 5 L.Ed.2d 368]; 47 L. Ed. 2d 18]; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 348-350 [100 S.Ct. 2227, 65 L.Ed.2d 175] (*Hicks*); *People v. Odle* (1988) 45 Cal.3d 386, 412.)

Moreover, *In re Scoggins* (2020) 9 Cal.5th 667, 683 refutes respondent's claim that CALCRIM No. 703 adequately instructed pre-*Banks* and *Clark* juries on the narrower *Tison-Enmund* standard. In *Scoggins*, a pre-*Banks* and *Clark* jury over-convicted Scoggins whose personal culpability did not meet the narrower standard. Thus, it is highly likely that there are more pre-*Banks* and *Clark* defendants who were convicted of aggravated felony murder on the theory that their "conduct involv[ed] the intentional assumption of some responsibility for the completion of the crime regardless of whether the crime [was] ultimately successful." (*Banks, supra*, Cal.4th at p. 803.) Simply put, in enacting Penal

Code section 1170.95, the Legislature created a process to identify those defendants who were convicted of aggravated felony murder before *Banks* and *Clark* but who are eligible for resentencing because their actual culpability is that of simple felony murder.

C. THE TRIAL COURT CANNOT MAKE FACTUAL FINDINGS AT THE PRIMA FACIE STAGE; THEREFORE THE COURT CANNOT APPLY THE APPELLATE "SUFFICIENCY OF THE EVIDENCE" STANDARD TO THE PRE-*BANKS* AND *CLARK* SPECIAL CIRCUMSTANCES FINDINGS AT THE PRIMA FACIE STAGE

Respondent contends that the trial court must evaluate a pre-*Banks* and *Clark* conviction at the prima facie stage under the appellate "sufficiency of the evidence" standard of review because the issue presented is a legal question. (R.B. pp. 58-60.) Respondent is incorrect for several reasons.

First, as appellant has just demonstrated, *supra*, the jury's findings of "major participation" and "acted with reckless indifference" in a pre-*Banks* and *Clark* trial were not based on the narrower *Tison-Enmund* standard. To deny a pre-*Banks* and *Clark* petitioner access to the section (d)(3) fact-finding process by finding as a matter of law at the prima facie stage that pre-*Banks* findings meet a standard that was never litigated in the petitioner's trial denies the pre-*Banks* and *Clark* petitioner's due process right to be heard on the narrower standard in the procedure for being heard that the Legislature created in section 1170.95. (See part B, *supra*, and the authorities cited therein.)

Second, in *People v. Lewis* (2021) 2021 Cal.LEXIS 5258, 30-31 (*Lewis*) this Court held that the trial court may rely on the record

of conviction at the prima facie stage of the proceedings. However, the court must also take as true the petitioner's factual allegations" at this stage of the re-sentencing eligibility process. (*Id*. at p. 31.) And the trial court should not engage in "factfinding involving the weighing of evidence or the exercise of discretion" at the prima facie stage. (*Id*. at p. 32.) Application of the "sufficiency of the evidence" standard at the prima facie stage to defeat a pre-*Banks* and *Clark* petitioner's allegation that he cannot now be convicted under the amendments to the law of murder requires the trial court to treat the petitioner's allegation as untrue and requires the trial court to engage in "weighing the evidence" and in factfinding using the substantial evidence standard which reviews all of the evidence "in the light most favorable to the prosecution." (*People v. Lopez* (2020) 56 Cal.App.5th 936, 951, review granted, February 10, 2021, S265309 (*Lopez*).)

Third, a pre-*Banks* and *Clark* petitioner is not "relitigating" his or her special circumstance findings in a section 1170.95 petition, either at the prima facie stage or at the section (d)(3) stage as respondent contends. (R.B. pp. 23-34, 49-54.) The allegation in Penal Code section 1170.95, subdivision (a)(3) states that the petitioner could not presently be convicted of murder under the changes to sections 188 and 189, which incorporate the narrower *Tison-Enmund* standard. When a pre-*Banks* and *Clark* petitioner was convicted of aggravated felony murder, he was not convicted under the narrower standard articulated in *Banks*. Thus, he is not seeking to re-litigate the findings previously made under the broader standard which did not inform the jury that aggravated felony murder could not be found merely upon participation in the

underlying felony. (*Banks, supra*, 61 Cal.4th at pp. 803-804.) Rather, when a pre-*Banks* and *Clark* petitioner alleges that he could not now be convicted of first degree murder, he is alleging for the first time that the evidence in his case will not meet the narrower standard beyond a reasonable doubt when examined in a section 1170.95, subdivision (d)(3) hearing.

For all of these reasons, in appellant's case, the trial court cannot infer at the prima facie stage that the jury's special-circumstance findings which were made in 2014 establish that appellant could now be convicted of first degree murder as a "major participant" or that he "acted with reckless indifference to human life" as those terms are used in Penal Code section 189, subdivision (e)(3). Thus, the jury's 2014 findings do not refute, as a matter of law, appellant's allegation that he cannot now be convicted of first degree murder under the changes to sections 188 and 189. Appellant has made a prima facie showing of eligibility and is entitled to an OSC and a section 1170.95, subdivision (d) (3) hearing.

II. THE LEGISLATURE DID NOT INTEND FOR HABEAS CORPUS TO BE A PREREQUISITE FOR ESTABLISHING PRIMA FACIE ELIGIBILITY FOR RESENTENCING

A. RESPONDENT ADVOCATES A DOUBLE BURDEN ON OUR TRIAL COURTS THAT THE LEGISLATURE NEVER INTENDED

In the foregoing section, appellant addressed respondent's erroneous contention that pre-*Banks* and *Clark* findings are the equivalent of post-*Banks* and *Clark* findings. In this section, appellant will address respondent's alternate claim that if those findings are not equivalent, they still disqualify appellant from eligibility for resentencing until such findings are vacated through a writ of habeas corpus to reduce appellant's conviction to simple felony murder. Once again, respondent is wrong as a matter of law. The Legislature did not double burden our trial courts by requiring two trial court proceedings, rather than one, in order for a petitioner to establish re-sentencing eligibility.

Respondent's double burden on our trial courts rests upon respondent's contention that the Legislature did not confer the authority on a trial court in a section 1170.95 proceeding to hear a "trial error," a term petitioner fails to define by citation to any authority. (California Rules of Court rule 8.204(a)(1)(B) and (C) [points should be supported by authority].) (R.B. p. 26.) In appellate doctrine, a "trial error," is an error which occurs during presentation of the case, which is not a "structural error." (See e.g. *Arizona v. Fulminate* (1991) 499 U.S. 279, 307-308 [111 S.Ct. 1246, 113 L.Ed.2d 302].) A "trial error" is not reversible per se like a

structural error but is reviewed under state and federal standards of harmless error analysis. Examples of trial errors include the admission of involuntary confessions, erroneous admission of evidence, or improper jury instructions. (*Id.* at p. 310; *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 557.) It is not clear if respondent is referring to this appellate standard of review doctrine, which defines "trial error," when respondent writes that a "trial error" is "error related to the original conviction." (R.B. p. 26.) Respondent writes,

> "Ultimately, providing for error correction in section 1170.95 is illogical because section 1170.95 relief is simply not predicated upon the existence of *trial error*."
>
> (R.B. p. 26) (emphasis added.)

Notably, the issue that this Court asked the parties to brief is not the broader question of whether all "trial errors," which are subject to harmless error review on appeal, disqualify a petitioner from stating a prima facie case for resentencing eligibility. The issue is whether pre-*Banks* and *Clark* petitioners are disqualified by special circumstances findings prior to 2015. Respondent's undefined "trial error" term appears to embrace a much larger class of potential resentencing petitioners since many types of "trial error" are subject to harmless error review.

In addition to having a claim that does not rest on "trial error," respondent says that the eligible section 1170.95 petitioner must have a "final and presumptively correct murder conviction." Respondent writes,

> "To the contrary, resentencing is available to petitioners with final and presumptively correct murder

convictions."

(R.B. p. 26-27.)

Again, respondent cites no authority to define the term "final and presumptively correct murder conviction,"[2] and appellant was

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[2]Appellant could not find a California case that defines or even mentions "a presumptively correct *murder* conviction." (emphasis added.) The term "final and presumptively correct convictions" is found in Justice Benke's dissenting opinion in *In re Hansen* (2014) 227 Cal.App.4th 906, 930.) *Hansen* was a prosecutorial appeal from a grant of habeas corpus based upon retroactive application of this Court's decision in *People v. Chun* (2009) 45 Cal.4th 1172, 1199 for a defendant previously convicted of second degree murder. Among other issues, the *Hansen* court considered the applicable standard of review in a habeas when a conviction is no longer valid based upon a retroactive change in the law. In arguing for a more restrictive standard, Justice Benke quoted a portion of *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637 [113 S.Ct. 1710, 123 L.Ed.2d 353] which recognized the state's interest in not overturning "final and presumptively correct convictions on collateral review." To the extent that respondent may be suggesting that policy applies here, respondent is incorrect. The Legislature has clearly stated its intention that the final convictions described in section 1170.95 are to be reevaluated in the trial court in the process set out in the statute. (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175, p. 1.)

Based upon context, it also appears that respondent is arguing that a conviction for simple felony murder is a "final and presumptively correct murder conviction"for purposes of section 1170.95 whereas a conviction for aggravated felony murder is not. According to respondent, such pre-*Banks* and *Clark* aggravated felony murder convictions are not "final and presumptively correct" because respondent believes that the petitioner has an obligation to further litigate two elements of the offense in habeas proceedings to transform his judgment into a conviction for simple felony murder, or in respondent's idiom, a "final and presumptively correct" murder conviction. (R.B. pp. 26-27.) No authority supports this view. Both pre-*Banks* and *Clark* simple felony murder convictions and aggravated felony murder convictions are "final convictions" because

unable to find any case law in California that uses that term. Moreover, if absence of "trial error" is the definition of a "final and presumptively correct murder conviction," that bar to stating a prima facie case appears to apply to many potential petitioners other than pre-*Banks* and *Clark* petitioners and considerably restricts the availability of section 1170.95 relief.

But whatever respondent means by the terms, according to respondent, a petitioner, whose resentencing claim rests upon a "trial error" and who lacks " a final and presumptively correct murder conviction," must file a writ of habeas corpus for "error correction." (R.B. pp. 54-57.) This represents an added burden on our trial courts since a petitioner must file a petition for a writ of habeas corpus in the superior court that rendered the judgment. (*Robinson v. Lewis* (2020) 9 Cal.5th 883, 895 (*Robinson*).) Then, after the trial judge has heard those proceedings, possibly with a pro per petitioner, respondent contends that the petitioner must file a section 1170.95 petition in the same trial court, and establish his eligibility through the process set out in Penal Code section 1170.95, this time with appointed counsel. According to respondent, the Legislature deprived the trial court of authority over "trial error," whatever that may be, to "streamline" section 1170.95 proceedings by directing

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the defendants have long ago been sentenced and the time for appeal has long been expired. (*People v. McKenzie* (2020) 9 Cal.5th 40, 46-47.) The Legislature was aware of the two forms of felony murder and intended for the resentencing process created by section 1170.95 to cover all the elements of both offenses. (see A.O.B. pp. 37-38; (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.)

"trial error" proceedings to habeas writs for resolution. (R.B. p. 30.) In respondent's view, instead of a trial court hearing the post-conviction case for resentencing in one proceeding under section 1170.95, the Legislature "streamlined" resentencing procedure by depriving the trial court of "trial error" jurisdiction and requiring two trial court proceedings instead of one. (R.B. p. 30.) The logic of this position speaks for itself.

B. SECTION 1170.95, SUBDIVISION (A) ALLEGATIONS ARE NOT ALLEGATIONS OF ERROR IN THE PRIOR TRIAL

THE ALLEGATION THAT A PETITIONER CANNOT NOW BE CONVICTED OF MURDER UNDER THE AMENDED LAW OF MURDER IS NOT AN ALLEGATION OF "TRIAL ERROR"

The allegations that a petitioner must make at the prima facie stage of a section 1170.95 petition are not allegations of "error related to the original conviction" as respondent contends. (R.B. p. 26.) The allegations in section 1170.95, subdivisions (a) (1) and (2) are allegations of existing facts, i.e. the petitioner was prosecuted and convicted of felony murder.[3] Neither of these allegations is an allegation of an "error related to the original conviction." (R.B. p. 26.)

The allegation in section 1170.95, subdivision (a)(3) that the petitioner "could not be convicted of first or second degree murder because of changes to section 188 or 189 made effective January 1,

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[3]Appellant disagrees with respondent's characterization of section 1170.95, subdivision (a) allegations as "forward" and "backward" on the time spectrum. (R.B. p. 25.) All of the allegations in section 1170.95, subdivision (a), at the time they are made, are alleged to be presently true.

2019," is also not an allegation of "error related to the original conviction" which respondent contends is beyond the authority of the trial court to adjudicate under section 1170.95. (R.B. p. 26.) The petitioner is not alleging that an error in his trial is the reason that he cannot presently be convicted of first or second degree murder. The petitioner is alleging that "changes in section 188 or 189" have affected the prosecution's present ability to convict him of murder. The question presented is whether there presently exists evidence to convict the petitioner under the amended standards of murder, not does his original conviction rest upon an error that happened during his trial.

This Court established in *Lewis*, *supra*, 2021 Cal.LEXIS at pp. 31, that the trial court may examine the record of conviction at the prima facie stage and may deny a petition based upon findings of law. Thus, if a trial court finds that the jury has previously determined "major participant" and "acted with reckless indifference" under the narrower standard in the amended statutes, the court may deny the petition. But nothing in section 1170.95 requires the trial court to conduct a whole record review at the prima facie stage to identify an error at the prior trial that might have affected the jury's findings and deny the petition based on the existence of "trial error."

As appellant noted earlier, respondent's undefined "trial error" term appears to be derived from the appellate standard of review doctrine of trial/structural error. A jury instruction is a "trial error" that is examined for harmless error on appeal. (*People v. Breverman* (1998) 19 Cal. 4th 142, 178.) It appears that respondent is arguing that the failure to instruct juries on the narrow *Tison*-

Enmund standard, which was not recognized as applicable before *Banks*, was an "error" that occurred in a pre-*Banks* and *Clark* petitioner's prior trial. (R.B. p. 26.)

If this is respondent's contention, it is incorrect. An allegation that a pre-*Banks* and *Clark* petitioner cannot presently be convicted of first degree murder under the amendments to the law of murder is not an allegation that an error in his trial must be "corrected." An error is defined as a "mistake." (Black's Law. Dict. (11th Ed. 2019) p. 683, col. 1.) When a pre-*Banks* and *Clark* petitioner makes a section 1170.95, subdivision (a)(3) allegation that he or she can no longer be convicted of first degree murder under the new narrower standard, he is not alleging that his prior conviction is the result of a mistake that occurred at his trial. Juries who sat before 2015 could not have been instructed on the narrower standard of aggravated felony murder liability because at that time no case had held that the standard was applicable.

When the trial court examines a pre-*Banks* and *Clark* petitioner's record of conviction at the prima facie stage, the court is not called upon to decide if an error occurred at the petitioner's trial that affected the jury's findings. (*Lewis, supra*, 2021 Cal. LEXIS 5258, p. 30.) Rather, at the prima facie review stage, the court must decide what the jury's findings were and then must decide if, as a matter of law, those findings demonstrate that the petition is "clearly meritless." (*Ibid.*) Since a pre-*Banks* and *Clark* jury never adjudicated the elements of the narrower *Banks* standard, a court cannot find at the prima facie stage that the jury's prior findings on the elements of aggravated felony murder render the petitioner ineligible for relief as a matter of law. A factual issue exists as to the

petitioner's culpability as a "major participant" and "acted with reckless indifference" under the narrower standard. This is not a "correction" of an "error" in the prior trial.

C. THE LEGISLATURE DID NOT INTEND TO REQUIRE PRE-*BANKS* AND *CLARK* PETITIONERS TO LITIGATE THEIR FACTUAL CLAIMS IN A SEPARATE HABEAS PROCEEDING TO ESTABLISH RESENTENCING ELIGIBILITY

(1) SECTION 1170.95 DOES NOT DEPRIVE THE TRIAL COURT OF THE AUTHORITY TO FIND FACTS IN A SECTION 1170.95 PROCEEDING

Respondent contends that errors in the fact finding process may not be found "outside of the well-established remedies afforded by direct appeal and habeas corpus." (R.B. p. 34.) Respondent is wrong for two reasons. First, appellate courts do not find facts on appeal. Appellate courts review the facts found by the jury, assuming all findings in favor of the verdict. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Second, as appellant has just demonstrated, the allegation in section 1170.95, subdivision (a)(3) is not "the petitioner cannot now be convicted of first or second degree murder because of an error that occurred at his trial." The allegation is "the petitioner cannot now be convicted of first or second degree murder because of changes in law that have occurred *since* his trial."

(2) PRE-*BANKS* AND *CLARK* PETITIONERS ARE NOT SEEKING A "SUI GENERIS" EXCEPTION TO CHALLENGE FINDINGS FROM THEIR MURDER TRIAL

Respondent contends that a pre-*Banks* and *Clark* petitioner is requesting a "sui generis" exception at the prima facie review stage to allow this class of petitioners to challenge "findings from their murder trial" in a section (d)(3) hearing. (R.B. p. 43.) Respondent is incorrect. Section 1170.95, subdivision (c) gives the trial court the authority to examine the jury trial findings of all petitioners at the prima facie stage of review. (*Lewis*, *supra*, 2021 Cal.LEXIS at pp. 31.) As noted previously, where a jury has found "major participant" and "acted with reckless indifference" under the standard effective in the January 1, 2019, amendments, the court may deny the petition at the prima facie stage. However, as appellant has demonstrated, the court cannot make that finding as a matter of law in pre-*Banks* and *Clark* cases. Pre-*Banks* and *Clark* petitioners are just like all other petitioners whose juries did not make a finding that renders their petitions "clearly meritless" as a matter of law at the prima facie stage of review. (*Ibid*.)

(3) NOTHING IN SECTION 1170.95 REQUIRES A PETITIONER TO SEEK HABEAS RELIEF PRIOR TO FILING A SECTION 1170.95 PETITION

Respondent cites two provisions of section 1170.95, subdivisions (d)(2) and (f) to bolster respondent's contention that the Legislature intended for habeas relief to be a prerequisite to establishing resentencing eligibility for pre-*Banks* and *Clark* petitioners. (R.B. p. 30, 33.) Neither provision supports respondent.

At page 30, respondent relies on Penal Code section 1170.95, subdivision (d)(2), which provides:

> "*If there was* a prior finding by a court or a jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner."

(emphasis added.)

Respondent contends that this language demonstrates that "the Legislature intended for petitioners to "first address any errors from the original trial" in habeas proceedings. (R.B. pp. 30-33.) Respondent is incorrect. First, a petitioner is not seeking relief from "errors from the original trial." Second, 1170.95, subdivision (d)(2) says "if there was," not "there must be." The words "if there was" do not mean "there has to be" as respondent contends. (R.B. p. 31.) Respondent's interpretation of the conditional words, "If there was" to require a "prior finding by a court" to "trigger" "mandatory" resentencing is contrary to the meaning of the words used in the statute. (R.B. pp. 31.) Statutory construction gives the words of a statute "their usual and ordinary meaning." (*People v. Lawrence* (2000) 24 Cal.4th 219, 230.)

At pages 43-44 of Respondent's Brief, respondent makes much of the appellate and habeas proceedings which took place after *Banks* and *Clark* to relieve over-convicted defendants of aggravated felony murder convictions and reduce their sentences from life without parole to twenty-five-years-to-life. Respondent cites these proceedings as evidence that the Legislature intended that appellate review and habeas be the only avenues for factual determinations of

prior over-convictions for aggravated felony murder. (R.B. pp. 31, 43-44.) If respondent is correct, Penal Code section 1170.95, subdivision (d)(3) is mere surplusage. Courts ordinarily reject interpretations that render particular terms of a statute mere surplusage, instead of giving every word some significance. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2019) 32 Cal. App. 5th 585, 597.)

The Legislature's reference in Penal Code section 1170.95, subdivision (d) (2) to the *possibility* of prior exculpatory findings is simply a recognition that after *Banks* and *Clark*, some defendants' aggravated felony murder convictions were reduced to simple felony murder via appeal or habeas. Now these defendants are entitled to have their murder convictions vacated and to be resentenced on the underlying felony under section 1170.95, subdivision (d)(2) without further hearing. The provision that respondent relies on to require all potential section 1170.95 petitioners to use direct appeal and habeas as a prerequisite for factual findings that are a predicate to section 1170.95 relief was intended by the Legislature only to apply to those who had already had their sentences reduced via appeal or habeas before section 1170.95 was enacted.

Similarly, Penal Code section 1170.95, subdivision (f) does not aid respondent. (R.B. p. 33.) That provision provides,

> "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner."

Section 1170.95, subdivision (f) simply preserves a petitioner's existing rights or remedies. It contains no language that even suggests that any of a petitioner's existing rights or remedies must be prerequisites to eligibility for a section 1170.95 proceeding. The word

"diminish" means "decrease, lessen, or take away." (Black's Law Dict. (11 th Ed. 2019) p. 574, col. 1.) A statement that no rights or remedies are being decreased or lessened is not a statement that any of those rights or remedies are a prerequisite for eligibility. All of the prerequisites for eligibility are stated in section 1170.95, subdivision (a).

The term "abrogate" means to "annul" or "repeal." (Black's Law Dict. (11 th Ed. 2019) p. 8. col. 1.) A statement that the Legislature is not annulling or repealing any existing rights or remedies is not a statement that any of those rights or remedies which have been preserved are prerequisites for eligibility. Again, the portion of the statute which states the prerequisites is subdivision (a).)

(4) RESPONDENT'S POSITION ANNULS PENAL CODE SECTION 1170.95, SUBDIVISION (D)

Respondent's position that fact-finding on the question of whether the petitioner can now be convicted of first-degree felony murder based upon being a "major participant" or "acted with reckless indifference" must take place in a habeas proceeding rather than in a section 1170.95, subdivision (d)(3) proceeding, annuls Penal Code section 1170.95, subdivision (d)(3) for pre-*Banks* and *Clark* petitioners including the rights that provision grants to all resentencing petitioners. Thus, at the time of a section 1170.95, subdivision (d)(3) hearing, the petitioner already has appointed counsel pursuant to subdivision (c), and the bar for stating a prima facie case has been set very low. (*Lewis, supra*, 2021 Cal.LEXIS 5258, at pp. 9-10.) Section (d)(3) further grants the petitioner a right

to a hearing, a right to introduce new evidence at that hearing, and a right to have the prosecution bear the burden of proof beyond a reasonable doubt. (Pen. Code § 1170.95, subd. (d)(3).)

On the other hand, respondent contends that the Legislature intended to deprive pre-*Banks* and *Clark* petitioners of these section 1170.95 rights and require them to litigate "major participant" or "acted with reckless indifference" in habeas proceedings. In habeas proceedings, neither the state nor the federal constitutions confer on a petitioner the right to counsel. (*In re Barnett* (2003) 31 Cal.4th 466, 474-475.) In habeas proceedings, the petitioner initially bears a heavy burden of proof, first to state a prima facie case and then to establish facts to overturn the judgment. (*In re Duvall* (1995) 9 Cal.4th 464, 474-475, 477.) The respondent does not bear a burden of proof beyond a reasonable doubt in habeas. (*Id*. at pp. 478-479.)

Respondent's reading of section 1170.95 effectively deprives pre-*Banks* and *Clark* petitioners of the rights conferred on previously convicted defendants by section 1170.95 when their judgments of conviction are reviewed for conformance with the amendments to the law of murder. Respondent's position nullifies the statutory right to counsel in section 1170.95, subdivision (c), the low threshold for stating a prima facie case recognized by this Court in *Lewis, supra*, and of all of the rights granted to a petitioner by section 1170.95, subdivision (d)(3). Under respondent's construction of the statute, a pre-*Banks* and *Clark* petitioner must establish eligibility for resentencing outside of the section 1170.95 (d)(3) procedure for factfinding. Respondent's position violates the well-settled rule that courts give effect to each word or phrase of a statute and avoid construing statutory language as surplusage. (*People v. Thomas*

(2021) 64 Cal.App.5th 924, 945.)

Contrary to respondent's claims, the language of section 1170.95 does not demonstrate a legislative intent to treat the elements of aggravated felony murder which were found by juries prior to 2015 as "trial errors." The Legislature never intended to burden our trial courts by requiring them to first entertain a habeas corpus petition for pre-*Banks* and *Clark* petitioners and then a section 1170.95 resentencing petition. Respondent's reading of the statute defeats the Legislature's purpose to effect more equitable sentencing for murder defendants and to save taxpayer dollars by reducing prison expenditures. (Sen. Conc. Res. No. 48, Stats, 2017 (2017-2018 Reg. Sess.) res. ch. 175 p. 1.)

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: August 31, 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 Opening Brief on the Merits contains 8,234 words.

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

Executed on August 31, 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.

On August 31, 2021, I served the attached

Appellant's Rely Brief

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DEBORAH L. HAWKINS Deborah Hawkins

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Case Number: **S266606**
Lower Court Case Number: **C091162**

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