No. S266606

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

CHRISTOPHER STRONG,
Defendant and Appellant.

Third Appellate District, Case No. C091162
Sacramento County Superior Court, Case No. 11F06729
The Honorable Patrick Marlette, Judge

RESPONDENT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE

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INTRODUCTION

This case concerns whether a "true" finding on a felony-murder special circumstance that pre-dates this Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522 (*Banks*/*Clark*) renders a defendant statutorily ineligible for resentencing under Penal Code section 1170.95.[1] The parties have already extensively addressed the issue through the lens of statutory construction and an analysis of the *Banks*/*Clark* decisions. Contrary to Strong's argument, section 1170.95 is not a vehicle to relitigate factual matters previously decided at a petitioner's trial, and therefore a challenge to a felony-murder special circumstance based on the *Banks*/*Clark* decisions is inappropriate in section 1170.95 proceedings. Any challenge to fact-finding from trial must be made either on direct appeal when available or via habeas corpus.

The State Public Defender (SPD), the Santa Clara Independent Defense Counsel (IDO), and attorney Jonathan E. Demson (Demson) now argue that the conditions triggering traditional issue preclusion must be applied when considering the impact prior factual findings have on the section 1170.95 resentencing process.[2] These arguments should be rejected.

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

[2] As recognized by amici (SPD 12-13; IDO 17), traditional preclusion doctrines include claim preclusion (res judicata), law of the case, and issue preclusion (collateral estoppel). Amici,

(continued…)

The specific procedures in section 1170.95 demonstrate that the Legislature did not intend for traditional issue preclusion to apply at the prima facie stage of the process. Rather, the Legislature adopted a prima facie review process wherein factual findings from trial are binding. Specifically, a court must reject allegations in a resentencing petition when the allegations are: (1) contrary to the facts established at trial, and (2) those facts demonstrate ineligibility as a matter of law.[3] In any event, even assuming issue preclusion applies here, a felony-murder special circumstance finding that pre-dates *Banks*/*Clark* prohibits a petitioner from re-litigating the facts underlying that finding in section 1170.95 proceedings because a true felony-murder special circumstance finding resolved the identical issue that renders a petitioner ineligible for resentencing.

(…continued)

however, have focused primarily on the application of issue preclusion. (SPD 13-25; IDO 32-43; Demson 9-13.) Accordingly, the People will address only the applicability of that doctrine in this case.

[3] While 1170.95 does not permit a petitioner to challenge factual findings, petitioners are not without recourse. "[W]hen a criminal defendant believes an error was made in his trial that justifies reversal of his conviction, the Legislature intends that he should appeal to gain relief." (*In re Harris* (1993) 5 Cal.4th 813, 827.) And, habeas corpus provides "an avenue of relief to those for whom the standard appellate system failed to operate properly." (*Id.* at p. 828.)

ARGUMENT

I. THE LEGISLATURE INTENDED FACTUAL FINDINGS FROM TRIAL TO BE BINDING AT THE PRIMA FACIE STAGE OF SECTION 1170.95 PROCEEDINGS

Amici argue that traditional issue preclusion conditions should apply when a superior court relies on factual findings from a petitioner's trial to deny a section 1170.95 resentencing petition at the prima facie stage.[4] (SPD 11-15; IDO 17-19; Demson 9.) But there is nothing to suggest that the Legislature intended that a section 1170.95 petition would provide an opportunity to relitigate factual findings unless issue preclusion standards are met. Under the specific procedures adopted by the Legislature, traditional issue preclusion simply does not apply at the prima facie stage of section 1170.95 proceedings.

Issue preclusion prohibits "a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding." (*People v. Sims* (1982) 32 Cal.3d 468, 477.) Like other traditional preclusion doctrines, issue preclusion, has "ancient roots" whose "contours and associated terminology have evolved over time" through judicial decisions. (*Samara v. Matar* (20180 5 Cal.5th 322, 326.) Whether traditional issue preclusion applies to a particular statutory scheme, however, is governed by legislative intent.

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[4] Since this case involves a prima facie denial, the People will address only the question of whether issue preclusion applies at the prima facie stage. The question of whether issue preclusion (or any other preclusion doctrines) would apply at an evidentiary hearing pursuant to section 1170.95, subdivision (d) is not implicated here.

"'[A] court may not give preclusive effect to the decision in a prior proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged.'" (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 945, quoting *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 326.) The specific statutory resentencing process established by the Legislature in section 1170.95 is inconsistent with application of traditional issue preclusion at the prima facie stage. Instead, the Legislature intended that prior factual findings from a petitioner's trial would have preclusive effect without consideration of the judicially recognized conditions that govern application of traditional issue preclusion.

Two aspects of section 1170.95 proceedings demonstrate the Legislature's intent regarding the effect that factual findings in the record of conviction have on the prima facie review process. First, as discussed below, the record of conviction "necessarily inform[s] the trial court's prima facie inquiry." (*People v. Lewis* (2021) 11 Cal.5th 952, 971.) Second, section 1170.95 may not be used as a vehicle to challenge factual findings from the record of conviction. (*People v. Allison* (2020) 55 Cal.App.5th 449, 461.) Individually and together, these aspects of section 1170.95 demonstrate that the Legislature did not intend for traditional issue preclusion to apply to factual findings in the record of conviction. In other words, section 1170.95 itself obviates the need to rely on traditional issue preclusion, because the statutory

scheme makes clear that certain factual findings must be considered by the court when evaluating a prima facie showing.

A. The record of conviction informs a trial court's evaluation of a petitioner's prima facie showing

In construing section 1170.95, this Court held that at the prima facie stage of the resentencing process, "the parties can, and should, use the record of conviction to aid the trial court in reliably assessing whether a petitioner has made a prima facie case." (*Lewis*, *supra*, 11 Cal.5th at p. 972.) At that stage, a court may deny a resentencing petition on the merits when the record of conviction "'contain[s] facts refuting the allegations made in the petition.'" (*Id.* at p. 971.) Thus, the Legislature created a statutory scheme that did not require application of traditional issue preclusion to give preclusive effect to prior factual findings against a petitioner.

Section 1170.95, subdivision (c) requires the superior court to undertake a review of a facially sufficient resentencing petition to determine if a petitioner has made "a prima facie showing that he or she is entitled to relief." This prima facie review is "limited" and generally requires the superior court to accept the factual allegations in the petition as true when determining if a prima facie showing has been made. (*Lewis, supra*, 11 Cal.5th at p. 971.)

But, as this Court noted, the statute contemplates review of the record. "The record of conviction will necessarily inform the trial court's prima facie inquiry under section 1170.95, allowing the court to distinguish petitions with potential merit from those that are clearly meritless." (*Lewis, supra*, 11 Cal.5th at p. 971.)

Accordingly, if the record of conviction "'contain[s] facts refuting the allegations made in the petition,' then 'the court is justified in making a credibility determination adverse to the petitioner.' [Citations.]" (*Ibid.*) Permitting a prima facie denial based on the record of conviction ensures "that clearly meritless petitions can be efficiently addressed as part of a single-step prima facie review process." (*Ibid.*)

When enacting section 1170.95, a criminal resentencing statute, the Legislature was necessarily aware that every section 1170.95 petition would have a corresponding record of conviction from a prior criminal proceeding. For example, in subdivision (d)(3) of section 1170.95, the Legislature specifically authorized the parties to use the "record of conviction . . . to meet their respective burdens." The Legislature was also necessarily aware that, in some cases, the record of conviction would contain factual findings—such as personal discharge of a firearm causing death (§ 12022.53, subd.(d))—that would render a petitioner ineligible for resentencing as a matter of law. Accordingly, by expressly incorporating the record of conviction in section 1170.95 procedures, the Legislature intended for factual findings in that record to support summary denials at the prima facie stage.

As this Court has recently noted, factual findings from the record of conviction may be used by the superior court to make "a credibility determination adverse to the petitioner" and to deny a resentencing petition at the prima facie stage. (*Lewis*, *supra*, 11 Cal.5th at p. 971.) What this means in practice is that the superior court may affirmatively reject the allegations in the

petition as untrue and summarily deny resentencing because the petitioner failed to make "a prima facie showing that he or she is entitled to relief." (§ 1170.95, subd. (c).) In other words, a prima facie denial represents a merits determination that the petitioner is ineligible for relief.

The prima facie review process in section 1170.95, subdivision (c) is "analogous" to the prima facie stage of the habeas corpus process. (*Lewis*, *supra*, 11 Cal.5th at p. 971.) At the prima face stage in habeas, like in section 1170.95 proceedings, a court must generally accept the factual allegations of the petition as true, and "the court should not reject the petitioner's undisputed factual allegations on credibility grounds without first conducting an evidentiary hearing." (*In re Serrano* (1995) 10 Cal.4th 447, 456; *People v. Duvall* (1995) 9 Cal.4th 464, 475.) However, when "the record" contains "facts refuting the allegations made in the petition . . . the court is justified in making a credibility determination adverse to the petitioner" and may summarily reject the petition.[5] (*Serrano*, at p. 456; see also *People v. Romero* (1994) 8 Cal.4th 728, 739 ["matters of record may persuade the court that the contentions advanced in the petition lack merit"].)

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[5] Like in a section 1170.95 proceeding, the record of conviction may be reviewed by a habeas court when conducting a prima facie review of a habeas petition. (See *In re Clark* (1995) 5 Cal.4th 750, 798, fn. 35 [this Court "will take judicial notice of its own records" including the "record of the appeal" when conducting a prima facie review of a habeas petition].)

By adopting a prima facie review process analogous to existing habeas procedures, the Legislature intended that review of section 1170.95 petitions operate in the same manner. (*Moore v. Superior Court* (2020) 58 Cal.App.5th 561, 574 ["Courts are required to 'assume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules.' [Citation.]"].) In habeas, the prima facie review process does not involve application of traditional issue preclusion. Instead, when a court rejects allegations in a habeas petition, based on facts in the record, and summarily denies the petition at the prima facie stage, that denial constitutes a rejection of a petitioner's factual allegations on the merits. (*Serrano*, *supra*, 10 Cal.4th at p. 456.) The Legislature intended a prima facie denial of a section 1170.95 petition to similarly permit a merits rejection when the record refutes a petitioner's allegations in the petition. (*Lewis*, *supra*, 11 Cal.5th at p. 971 [prima facie review in section 1170.95 "ensur[es] that clearly meritless petitions can be efficiently addressed" prior to an evidentiary hearing].)

Moreover, no authority suggests that a court's ability to reject factual allegations at the prima facie stage of a habeas action based on existing facts in the record turns on traditional issue preclusion principles. Rather, the court rejects a petitioner's allegations based on a "credibility" determination, i.e., that the allegations are not true because they are affirmatively refuted by facts in the record. (*Serrano*, *supra*, 10 Cal.4th at p. 456.) Similarly, in section 1170.95 cases, the denial

of a resentencing petition at the prima facie stage does not involve the application of issue preclusion principles.

In short, by adopting a prima facie review process in section 1170.95 procedures that includes review of the record of conviction, the Legislature did not intend that traditional issue preclusion would apply at that stage. Rather, the Legislature established a process modeled after the prima facie review process found in habeas corpus, which allows a court to review the record but does not involve the application of traditional issue preclusion principles.

B. Section 1170.95 is not a vehicle to collaterally attack or to otherwise challenge factual findings from trial

In addition to incorporating the record of conviction into the prima facie review process, section 1170.95 does not permit a petitioner to challenge the validity of prior factual findings contained in that record. (ABM 20-37.) This limitation on the scope of section 1170.95 further demonstrates that the Legislature did not intend for traditional issue preclusion to apply at the prima facie stage of section 1170.95 proceedings.

Issue preclusion applies when an issue that was previously decided is subject to litigation in a second proceeding. (*Sims, supra,* 32 Cal.3d at p. 477.) In the context of section 1170.95, issue preclusion does not apply because previously-decided facts are not the subject of litigation at all in section 1170.95

proceedings.[6] Accordingly, there is no relevant issue to "preclude" a party from litigating.

The limited scope of section 1170.95 proceedings renders issue preclusion at the prima facie stage inapplicable. Issue preclusion principles would apply only if factual matters decided at a petitioner's trial were subject to re-litigation in section 1170.95 proceedings. Since the Legislature did not intend section 1170.95 to give petitioners a second chance to litigate prior factual findings, issue preclusion simply does not come into play.

II. A TRUE FINDING OF A FELONY-MURDER SPECIAL CIRCUMSTANCE THAT PRE-DATES *BANKS*/*CLARK* BARS LITIGATION OF THE FINDING IN SECTION 1170.95 PROCEEDINGS

Even assuming that issue preclusion principles apply to section 1170.95 proceedings, a felony-murder special circumstance that pre-dates *Banks*/*Clark* will preclude re-litigation of the finding. Amici's arguments to the contrary should be rejected.

Issue preclusion prohibits "a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding." (*Sims*, *supra*, 32 Cal.3d at p. 477.) Issue preclusion has "five threshold requirements":

> 1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the

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[6] As discussed above, a defendant who wishes to challenge the accuracy of factual findings from trial may do so on direct appeal or in habeas corpus. (*Harris*, *supra*, 5 Cal.4th 827-828.)

> prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding.

(*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.) Under traditional issue preclusion, the jury's true finding on the felony-murder special circumstances at Strong's trial bars him from re-litigating the facts underlying that finding in section 1170.95 proceedings.[7]

A. The elements of the felony-murder special circumstance and their meanings remain identical before and after *Banks/Clark*

Amici first argue that the jury's determination at trial that Strong was a major participant in the underlying felony who acted with reckless indifference to human life is not "identical" to the finding that would be required for a murder conviction today pursuant to amended section 189, subdivision (e). (SPD 16-25; IDO 43; Demson 10-11.) Amici are incorrect.

The People addressed this matter extensively in the Answer Brief (ABM 44-49) and will not repeat that argument in full here. A few points, however, bear repeating. First, the current statutory language required to find a defendant guilty of felony murder is substantively identical to the statutory language that was required to find true a felony-murder special circumstance in Strong's case. (See, e.g., § 189, subd. (e)(3) [murder liability if the

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[7] Because amici are challenging only the first and second threshold requirements for issue preclusion, the People will not address the third (necessarily decided), fourth (finality), or fifth (privity) threshold requirements.

"person was a major participant in the underlying felony and acted with reckless indifference to human life"]; § 190.2, subd. (d) [felony-murder special circumstance applies to "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids . . . in the commission of a felony . . . which results in the death of some person"].) Second, the "factual issues" required to find a felony-murder special circumstance did not change following *Banks*/*Clark*. (*People v. Nunez* (2020) 57 Cal.App.5th 78, 94, review granted January 13, 2021, S265918 ["the pre-*Banks* and *Clark* jury necessarily resolved the same factual issues beyond a reasonable doubt that a post-*Banks* and *Clark* jury would necessarily resolve beyond a reasonable doubt"].) Third, *Banks*/*Clark* did not change the required jury instructions for the felony-murder special circumstances, so a jury in a post-*Banks*/*Clark* trial could be given the exact instructions as a jury in a pre-*Banks*/*Clark* case. (*Allison, supra*, 55 Cal.App.5th at pp. 458-459.)

Despite the identical elements that are required for felony-murder liability and a felony-murder special circumstance finding that pre-dated *Banks*/*Clark*, amici maintain that a pre-*Banks*/*Clark* finding is not "identical" to the finding required under section 189, subdivision (e)(3). (SPD 17-18; IDO 43; Demson 10-11.) Amici argue that, because this Court's decisions "clarified" the law in this area, that necessarily changed the factual determination that the jury makes. (SPD 21-22; IDO 43, 66-69; Demson 10-13.)

This Court, however, has made clear that the "identical issue" requirement turns on whether "identical *factual allegations*" are involved in the two proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, italics added.) A pre-*Banks*/*Clark* felony-murder special circumstance involves the same "factual allegations" that are required under section 189, subdivision (e)(3). (ABM 38-39.) In both situations, the jury must find that the defendant was (1) a major participant in the underlying felony and (2) the defendant acted with reckless indifference to human life. (§§ 189, subd. (e)(3); 190.2, subd. (d).) Thus, the required factual findings for each are identical.

To the extent that this Court's decisions in *Banks*/*Clark* served to clarify the relevant law or narrow the quantum of evidence that would satisfy this finding does not make *factual determinations* that occurred before or after *Banks*/*Clark* any different.[8] Rather, *Banks*/*Clark* serve as a guide to reviewing courts tasked with determining the sufficiency of the evidence of jury findings. (*People v. Jones* (2020) 56 Cal.App.5th 474, 483, review granted January 27, 2021, S265854 ["The only difference, then, between a pre-*Banks/Clark* special circumstance finding and a post-*Banks/Clark* finding is at the level of appellate review"].) *Banks/Clark* are therefore akin to this Court's opinion in *People v. Anderson* (1968) 70 Cal.2d 15. In *Anderson*, this

[8] Because this Court clarified what the statute has meant all along, insufficiency claims based on *Banks/Clark* may be raised in habeas petitions, even for final judgments. (*In re Scoggins* (2020) 9 Cal.5th 667, 674.)

Court identified three categories of evidence that were generally required, individually or collectively, to establish premeditation and deliberation sufficient to sustain a first degree murder conviction. (*Id*. at pp. 26-27.) These categories included evidence of planning, motive, and manner of killing. (*Ibid*.) The *Anderson* decision therefore, "guides appellate courts in conducting sufficiency-of-evidence review of findings by juries of premeditation and deliberation. [Citation.] It does not even purport to constrain juries in making such findings." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1080.)

B. The felony-murder special circumstance was "actually litigated" at Strong's trial

Amici also argue that the felony-murder special circumstance was not "actually litigated" in Strong's murder trial. (IDO 35-36; SPD 20, fn. 10.) Amici misconstrue the meaning of "actually litigated" as defined by this Court.

"For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 citing *Sims, supra*, 32 Cal.3d at p. 484.) Moreover, "[t]he failure of a litigant to introduce relevant available evidence on an issue does not necessarily defeat a plea of collateral estoppel." (*Sims*, supra, 32 Cal.3d at p. 481.) The "focus" of this inquiry is the extent that the party against whom issue preclusion is sought was provided "'an adequate opportunity to litigate the factual finding'" at the prior proceedings. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869.)

In this case, the truth of the felony-murder special circumstance allegation was certainly "properly raised, submitted for determination, and determined in that proceeding." (*Hernandez, supra,* 46 Cal.4th at p. 511.) Specifically, Strong's jury found true the robbery and burglary felony-murder special circumstances that had been charged by the prosecution. (Opinion 2 (*Strong II)*; CT 109; § 192, subds. (a)(17)(A) & (G).) Moreover, Strong's not guilty plea and denial of the special circumstance allegations "put the elements of the crimes [and special circumstances] in issue" and required the prosecution to prove those matters to be true beyond a reasonable doubt. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.) Finally, Strong had every opportunity and incentive to litigate the factual issue underlying the special circumstance at his trial. To the extent he failed to avail himself of that opportunity at trial is irrelevant to the issue of whether the issue was actually litigated. (*Murray, supra*, 50 Cal.4th 860, 869.)

In short, the facts underlying the felony-murder special circumstance were "actually adjudicated" in Strong's trial. The jury decided those facts against him and, contrary to the suggestion of amici (SPD 34; IDO 36-39), he had the same "incentive at his original trial to attempt to minimize his involvement in the robbery and his culpability for the killings as he would have had if his trial had taken place after *Banks* and *Clark*." (*Allison*, *supra*, 55 Cal.App.5th at p. 459.)

CONCLUSION

Accordingly, the arguments of amici regarding issue preclusion should be rejected and the judgment affirmed.

Respectfully submitted,

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December 10, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE uses a 13-point Century Schoolbook font and contains 3,658 words.

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/s/ Eric L. Christoffersen

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December 10, 2021

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Strong**
No.: **S266606**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 10, 2021, at Sacramento, California.

/s/ *D. Boggess*
Declarant

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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

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