

No. S266606

**In the Supreme Court of the State of California**

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*  
v.  
CHRISTOPHER STRONG,  
*Defendant and Appellant.*

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

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**ANSWER BRIEF ON THE MERITS**

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August 13, 2021

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## ISSUE PRESENTED

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

## INTRODUCTION

Appellant Christopher Strong and a cohort decided to rob a local drug dealer. Unfortunately, the attempted robbery went tragically awry, and two innocent bystanders were killed—a young father and his infant son. Though not the actual shooter, Strong was convicted of two counts of first degree murder, and the jury found true two felony-murder special circumstances. In returning that verdict, the jury necessarily found that Strong had acted with “reckless indifference” to human life and as a “major participant” in the burglary and attempted robbery. (Pen. Code, § 190.2, subd. (d).)<sup>1</sup>

Two legal developments subsequent to Strong’s conviction are relevant here. First, during the pendency of his appeal, this Court interpreted the reckless indifference and major participation elements of the felony-murder special circumstance. (*People v. Clark* (2016) 63 Cal.4th 522; *People v. Banks* (2015) 61 Cal.4th 788.) Second, the Legislature enacted Senate Bill No. 1437 (Stats. 2018, ch. 1015 [SB 1437]), which limited murder

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the Penal Code.

liability in certain circumstances, including felony-murder, and added section 1170.95. Section 1170.95 established a procedure for defendants convicted of murder under prior law to be resentenced if they could no longer be convicted of murder under the amended law.

Strong now seeks resentencing pursuant to section 1170.95. But the jury's verdicts on Strong's felony-murder special circumstances bar relief. This is because the facts necessary to reach true findings on the felony-murder special circumstances necessarily include facts that render Strong ineligible for resentencing under section 1170.95. Because those factual findings by the jury demonstrate that Strong could still be convicted of murder under current law, he seeks to challenge those findings in his section 1170.95 petition.

Unfortunately for Strong, the Legislature did not intend for section 1170.95 proceedings to be a new or alternate vehicle to challenge factual findings made in special circumstance felony-murder cases. Strong must challenge his special circumstance findings with a proper vehicle, such as habeas corpus. Until he does so, he remains ineligible for resentencing as a matter of law.

### **STATEMENT OF THE CASE**

#### **A. A jury convicted Strong of first degree murder with felony-murder special circumstances**

On September 14, 2007, Strong and co-defendant Donald Ortez-Lucero, intended to rob a local drug dealer, Frederick Gill. (*People v. Ortez-Lucero et al.* (Dec. 27, 2017, C076606)  
\_\_\_Cal.App.5th\_\_\_ [2017 Cal. App. Unpub. LEXIS 8823, \*2]

(*Strong I*.)<sup>2</sup> As Strong and Ortez-Lucero—both armed with handguns—approached Gill’s house, they saw Sean Aquitania, a friend of Gill’s, in his car outside of the house. (*Ibid.*) Thinking to use Aquitania to assist in gaining access to Gill’s house, Ortez-Lucero approached Aquitania and hit him in the head with a gun. (*Ibid.*) The gun discharged as a result of the blow. Apparently unbeknownst to anyone at the time, the bullet struck the head of Aquitania’s infant son, who was sitting in the back seat of the car. (*Ibid.*)

Following the gun discharge, Ortez-Lucero and Strong walked Aquitania up to the front door of the house. (*Strong I, supra*, 2017 Cal. App. Unpub. LEXIS 8823, at pp. \*2-3.) When Gill opened the front door, Strong struck him with a gun. (*Id.* at p. \*3.) Strong then entered, threw Gill and another occupant on the ground and tied them with zip ties. (*Ibid.*) Strong demanded money from the two. (*Ibid.*)

Meanwhile, Ortez-Lucero held Aquitania at gunpoint at the front door until Aquitania asked to go check on his son in the car. (*Strong I, supra*, 2017 Cal. App. Unpub. LEXIS 8823, at p. \*3.) Moments after leaving, however, Aquitania burst into the house, kicking the front door off its hinges. (*Ibid.*) Enraged at what happened to his son, Aquitania began punching Ortez-Lucero. (*Ibid.*) Strong then abandoned his attempt to get money from Gill and went to Ortez-Lucero’s aid. (*Ibid.*) During the resulting

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<sup>2</sup> In the proceedings below, the Court of Appeal took judicial notice of this nonpublished opinion. (Opinion 2, fn. 3 (*Strong II*.)

melee, when Aquitania went for Strong's gun, Strong told Ortez-Lucero to shoot Aquitania. (*Ibid.*) Ortez-Lucero fired twice, hitting Aquitania both times, but one bullet went through him and struck Strong in the leg. (*Ibid.*) Strong and Ortez-Lucero fled the scene. (*Ibid.*)

Both Aquitania and his son died of their gunshot wounds. (*Strong I, supra*, 2017 Cal. App. Unpub. LEXIS 8823, at p. \*5.)

In 2014, Strong was found guilty by a jury of two counts of first degree murder (§ 187) with special circumstances of robbery murder (§ 190.2, subd. (a)(17)), burglary murder (§ 190.2, subd. (a)(17)), and multiple murder (§ 190.2, sub. (a)(3)). (*Strong II* at p. 2; CT 109.) Strong was sentenced to two terms of life without the possibility of parole, plus a determinate term of 36 years. (*Strong I, supra*, 2017 Cal. App. Unpub. LEXIS 8823, at p. \*1.)

In 2015 and 2016, while Strong's direct appeal was pending, this Court decided two cases related to felony-murder special circumstances. (*Clark, supra*, 63 Cal.4th 522; *Banks, supra*, 61 Cal.4th 788.) In those cases, this Court "clarified" the meaning of the terms "major participant" and "reckless indifference to human life" in section 190.2, subdivision (d) as they pertain to the felony-murder special circumstance set forth in section 190.2, subdivision (a)(17). (*In re Scoggins* (2020) 9 Cal.5th 667, 671; *Clark, supra*, 63 Cal.4th at pp. 618-623; *Banks, supra*, 61 Cal.4th at p. 803.)

In his opening brief on appeal, filed after *Banks/Clark*, Strong raised numerous challenges to his convictions, including a claim that the evidence was insufficient to support the

convictions for murder, attempted robbery, or burglary. (*Strong I, supra*, 2017 Cal. App. Unpub. LEXIS 8823, at pp. \*18-38, \*46-48.) Strong, however, did not challenge the sufficiency of the evidence of the special circumstance findings in general nor the specific findings that Strong was a major participant in the robbery/burglary who acted with reckless indifference to life. (*Strong II*, at p. 7, fn. 4; CT 110.) In December 2017, the Court of Appeal affirmed Strong's convictions and sentences in full. (*Strong I*, at p. \*49.)

**B. The superior court denied resentencing under section 1170.95**

Less than a year after Strong's direct appeal was decided, the Legislature enacted SB 1437, effective January 1, 2019. The law narrowed the felony-murder rule and generally limited murder liability to those who personally possess malice. (*People v. Gentile* (2020) 10 Cal.5th 830, 842.) SB 1437 also added section 1170.95, which provides a retroactive petition process for individuals with existing murder convictions. (*Gentile*, at p. 843.)

In February 2019, Strong filed a section 1170.95 petition for resentencing. (CT 8-10.) The superior court denied Strong's petition for resentencing after concluding that the jury's true findings on the felony-murder special circumstance allegations rendered Strong ineligible for relief. (CT 109-110.)

**C. The Court of Appeal affirmed the denial of resentencing under section 1170.95**

Strong appealed the denial of his section 1170.95 petition and, in the case here on review, the Court of Appeal affirmed. (*Strong II*, at pp. 2, 12.)

The court rejected Strong’s argument that, because the jury’s findings predated this Court’s decisions in *Banks* and *Clark*, the jury’s special circumstance findings did not preclude resentencing as a matter of law. (*Strong II*, at pp. 7-8.) The appellate court discussed the split in authority on this issue (*Strong II*, at pp. 8-11) and concluded that the cases finding ineligibility as a matter of law to be “more persuasive than the cases to the contrary.” (*Strong II*, at pp. 8, 11-12.) The court specifically held “that the appropriate avenue for defendant’s challenge to the special circumstance allegations is through a petition of habeas corpus, rather than the section 1170.95 petition filed in this case.” (*Strong II*, at pp. 11-12.)

### **SUMMARY OF ARGUMENT**

This case turns on the Legislature’s intent in enacting section 1170.95 as part of SB 1437. A straightforward exercise of statutory construction demonstrates that the Legislature did not intend section 1170.95 to give defendants a second chance to litigate allegations of trial error or otherwise challenge factual findings made at trial. It logically follows that the Legislature also did not intend to permit a petitioner to challenge the validity of a felony-murder special circumstance finding that predates the decisions in *Banks* and *Clark*.

In January 2019, SB 1437 changed certain theories of criminal liability for murder in California. It also added section 1170.95, which permits a defendant convicted of murder under the prior law to petition for the vacation of his or her murder conviction if they could not be convicted of murder under the



current law. Moreover, this substantial remedy is not contingent on any showing of trial error and operates to provide relief to those with fully lawful murder convictions. Because section 1170.95 provides relief without any showing of trial error, it follows that the section was not intended by the Legislature as a means to challenge the facts found at a petitioner's trial or otherwise litigate allegations of trial error.

The plain text of section 1170.95 demonstrates that the Legislature did not intend the resentencing petition process to address or resolve allegations of trial error. Several subdivisions of section 1170.95 establish procedures that are inconsistent with such a legislative intent.

The legislative history of SB 1437 confirms what the plain text of the statute shows. Specifically, the Legislature intended to amend the law of murder to limit the scope of the felony murder rule and to generally require that a defendant personally harbor malice to be convicted of murder. Nothing in the relevant legislative history, however, suggests that the Legislature intended to provide defendants a second chance to litigate claims of error in existing murder convictions.

The Legislature's intent is also evident by its adoption of a retroactive resentencing process similar to existing resentencing provisions in the Penal Code. Trial courts are without jurisdiction to consider these resentencing petitions during direct appeal. Accordingly, the Legislature intended and expected the vast majority of section 1170.95 petitions to be filed after completion of direct appeal when the judgment is presumed

correct. The Legislature could not have intended section 1170.95 petitions to challenge factual findings when the primary mechanism for error correction—direct appeal—has already occurred.

Since the Legislature did not intend for section 1170.95 petitions, in general, to be a means to challenge fact finding made at trial in general, it follows that the Legislature did not specifically intend to permit challenges to factual findings in felony-murder special circumstance cases in particular. This includes special circumstance findings that predated *Banks/Clark*.

In *Banks/Clark*—issued in 2015 and 2016—this Court clarified the meaning of the phrases “major participant” and “reckless indifference to human life” as used in section 190.2, subdivision (d). *Banks/Clark* did not, however, change the elements required to find a felony-murder special circumstance true or require that additional jury instructions. Felony-murder special circumstance findings that predate *Banks/Clark* involve the same factual findings as those that postdate the decisions. Consequently, instead of changing the elements of the special circumstance, *Banks/Clark* provided important guidance to reviewing courts evaluating the sufficiency of the evidence of felony-murder special circumstance findings. As a clarification of statutory law, sufficiency claims based on *Banks/Clark* may be raised on direct appeal and in habeas proceedings.

Accordingly, when the Legislature enacted SB 1437, it was aware of the *Banks/Clark* decision and that judicial review is

available of felony-murder special circumstance findings that predated *Banks/Clark*. Recognizing this, the Legislature provided a mandatory resentencing provision triggered by a petitioner's previously successful challenge to a felony-murder special circumstance based on *Banks/Clark*. (§ 1170.95, subd. (d)(2).) This specific provision, and the absence of any other statutory language permitting challenges to pre-*Banks/Clark* special circumstance findings, demonstrates the Legislature's intent that such claims may not be litigated in section 1170.95 proceedings.

Since Strong's felony-murder special circumstance findings remain unchallenged on appeal or habeas corpus and are presumptively correct, Strong is not eligible for resentencing as a matter of law. He is not entitled to challenge special circumstance findings via his section 1170.95 petition but must do so in a vehicle intended for error correction, such as a habeas corpus petition.

Finally, if this Court concludes that a felony-murder special circumstance predating *Banks/Clark* does not preclude resentencing as a matter of law, it should limit review at the prima facie stage to sufficiency of the evidence. As a pure question of law, a sufficiency of the evidence analysis is suited to the prima facie stage of section 1170.95 proceedings. At that point, the superior court is well equipped to resolve the issue, which will be dispositive of the petition.

## ARGUMENT

### I. SECTION 1170.95 IS AN ACT OF LENITY TO ELIMINATE A LAWFUL MURDER CONVICTION, NOT A MECHANISM TO CHALLENGE FACTUAL FINDINGS FROM THAT CONVICTION

The special circumstance findings in Strong’s case necessarily include findings of fact that render Strong ineligible for resentencing. To avoid the preclusive effect of these factual findings, Strong seeks to challenge their validity. He specifically claims that the jury’s true findings on the felony-murder special circumstances are now invalid because of this Court’s decisions in *Banks* and *Clark*, and maintains that a section 1170.95 petition is an appropriate vehicle to establish that claim. (OBM 32.) Strong is incorrect.

As part of SB 1437, section 1170.95 provides substantial ameliorative benefits to many convicted murders. However, the statutory text, legislative history, and a comparison to similar resentencing procedures demonstrate that the Legislature did not intend for section 1170.95 to provide an avenue to attack factual findings from a petitioner’s trial.

#### A. SB 1437 limits murder liability for some non-killers and provides a retroactive resentencing procedure for existing murder convictions

SB 1437 was enacted to “amend 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); see *Gentile, supra*, 10 Cal.5th at p. 842.) Both the text of the statute and its legislative history “clearly indicate

that the Legislature intended to restrict culpability for murder outside the felony-murder rule to persons who personally possess malice aforethought.” (*Gentile, supra*, 10 Cal.5th at p. 847.)

SB 1437 made three major changes to accomplish this legislative intent. First, it added section 189, subdivision (e), which included a requirement to the felony-murder rule that defendants who were not the actual killer or a direct aider and abettor in the murder must have been a major participant in the underlying felony and have acted with reckless indifference to human life. (*Gentile, supra*, 10 Cal.5th at p. 842.)

Second, SB 1437 amended section 188 by adding a requirement that all principals to murder must act with express or implied malice to be convicted of that crime, with the exception of felony-murder under section 189, subdivision (e). (*Gentile, supra*, 10 Cal.5th at p. 842.) This amendment effectively eliminated the natural and probable consequences doctrine as a theory for second degree murder liability.<sup>3</sup> (*Ibid.*)

Finally, SB 1437 “added section 1170.95 to provide a procedure for those convicted of felony murder or murder under the natural and probable consequences doctrine to seek relief under the” statutory changes to sections 188 and 189. (*Gentile, supra*, 10 Cal.5th at p. 843.) Section 1170.95 provides a multi-step petition process to determine a petitioner’s eligibility for

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<sup>3</sup> Prior to the passage of SB 1437, this Court eliminated the natural and probable consequences doctrine as a theory for first degree premeditated murder liability. (*People v. Chiu* (2014) 59 Cal.4th 155, 165.)

resentencing. (*People v. Lewis* (July 26, 2021, S260598)  
\_\_\_ Cal.5th \_\_\_ [2021 Cal.LEXIS 5258, at \*6-8].)<sup>4</sup>

Section 1170.95 provides for resentencing when three specific conditions are met:

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(§ 1170.95, subd. (a).)

To establish those conditions, a petitioner must first file a petition for resentencing “in the court that sentenced the petitioner.” (§ 1170.95, subd. (b).) Subdivision (b) specifies what must be included in a petition and provides a mechanism for a petitioner to correct a facially insufficient petition. (*Ibid.*)

If the petition is facially sufficient, the superior court then undertakes a prima facie review. (§ 1170.95, subd. (c).) At that stage, the superior court must “determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” (*Ibid.*) “If the petitioner makes a

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<sup>4</sup> Unless otherwise noted, all cases in which review has been granted by this Court were granted and held behind *Lewis*.

prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (*Ibid.*; *Lewis, supra*, 2021 Cal.LEXIS 5258, at \*10-11.)

Finally, if the petition survives prima facie review, “the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner.” (§ 1170.95, subd. (d)(1).) At the hearing, both parties “may rely on the record of conviction or offer new or additional evidence,” but “the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.” (§ 1170.95, subd. (d)(3).)<sup>5</sup> “If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.” (*Ibid.*)

**B. The statutory text demonstrates that the Legislature did not intend section 1170.95 to be a vehicle to litigate claims of trial error**

When determining the meaning of a statute, a court’s “task ‘is to ascertain and effectuate legislative intent.’ [Citation.]” (*People v. Trevino* (2001) 26 Cal.4th 237, 240.) This task “begin[s] by examining the statutory language, giving the words their usual and ordinary meaning.” (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) “If there is no ambiguity, then we presume the

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<sup>5</sup> The extent of the prosecution’s burden at this stage is currently before this Court in *People v. Duke* (2020) 55 Cal.App.5th 113, review granted January 13, 2021, S265309.

lawmakers meant what they said, and the plain meaning of the language governs.” (*Ibid.*)

Several specific subdivisions of section 1170.95 demonstrate the Legislature’s intent on this matter. Both individually and collectively, these subdivisions demonstrate that the Legislature did not intend section 1170.95 to be used to challenge fact finding from a petitioner’s original murder conviction. Rather, the Legislature intended section 1170.95 to provide a remedial resentencing provision that brings existing murder convictions in line with the newly amended laws of murder.

Indeed, section 1170.95 contains no language permitting challenges to findings of fact from trial or establishing any appellate-like review of existing convictions. (See *People v. Allison* (2020) 55 Cal.App.5th 449, 461 [“subdivision (a)(3) of section 1170.95 says nothing about erroneous prior findings or the possibility of proving contrary facts if given a second chance”].) Instead, section 1170.95 relief is conditioned on a forward-looking evaluation of a petitioner’s liability for murder under the newly-amended law of murder.

**1. Section 1170.95, subdivision (a)(3) requires a forward-looking analysis inconsistent with a process to address allegations of trial error**

Subdivision (a) of section 1170.95 requires three conditions be met before a petitioner is entitled to have his or her murder conviction vacated and be resentenced. The first two conditions are backward-looking and concern the nature of the charges and convictions from the petitioner’s trial. (§ 1170.95, subs. (a)(1) & (a)(2).) In contrast, the third condition is forward-looking. It



requires a determination that “[t]he petitioner could not be convicted of first or second degree murder *because of changes to Section 188 or 189 made effective January 1, 2019.*” (§ 1170.95, subd. (a)(3), italics added.) In other words, an individual’s petition under section 1170.95 “express[es] the hypothetical situation” of “what would happen today if he or she were tried under the new provisions of the Penal Code.” (*People v. Rodriguez* (2020) 58 Cal.App.5th 227, 241, review granted March 10, 2021, S266652.)<sup>6</sup>

The forward-looking nature of that inquiry differentiates section 1170.95 from the analysis that occurs when a court retroactively invalidates a theory of criminal liability. For example, in *Chiu*, this Court held that the natural and probable consequences doctrine was no longer a valid basis for first degree murder liability. (*Chiu, supra*, 59 Cal.4th at p. 165.) Accordingly, *Chiu* error occurs when the jury was improperly instructed on an invalid theory of first degree murder liability based on the natural and probable consequences doctrine. (*In re Martinez* (2017) 3 Cal.5th 1216, 1224.) When such error occurs, the “murder conviction must be reversed unless [the reviewing court] conclude[s] beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.” (*Chiu, supra*, 59 Cal.4th at p. 167.)

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<sup>6</sup> This case is currently pending behind *People v. Duke*, S265309.

When creating a retroactive petition process for SB 1437, the Legislature did not adopt a harmless-error approach like in *Chiu*. (*Rodriguez, supra*, 58 Cal.App.5th at p. 239 [section 1170.95 does not establish a *Chiu* harmless error standard].) Rather, the Legislature created a forward-looking inquiry into whether the petitioner would still be liable for murder if he or she had been tried under the newly amended laws of murder. Section 1170.95, subdivision (a)(3), requires a “hypothetical” determination of “what would happen today if [the petitioner] were tried under the new provisions of the Penal Code[.]” (*Rodriguez*, at p. 241.)

Moreover, the ability of both parties to “offer new or additional evidence to meet their respective burdens” (§ 1170.95, subd. (d)(3)) further demonstrates that section 1170.95 was not intended to address allegations of error related to the original conviction. “If the superior court’s ineligibility ruling may be based on evidence not heard by the original trier of fact, the Legislature cannot have intended the court simply to evaluate the grounds on which the original verdict was reached.” (*Rodriguez, supra*, 58 Cal.App.5th at p. 239; see also *Allison, supra*, 55 Cal.App.5th at 461 [“The purpose of section 1170.95 is to give defendants the benefit of amended section 188 and 189 with respect to issues not previously determined, not to provide a do-over on factual disputes that have already been resolved”].)

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. To the contrary, resentencing is

available to petitioners with final and presumptively correct murder convictions.

Consider, for example, a petitioner who was convicted, prior to SB 1437, of first degree felony-murder as an aider and abettor, with no felony-murder special circumstance charged in the case. In section 1170.95 proceedings, that petitioner would likely be entitled to an evidentiary hearing on his resentencing petition even if his trial was error free and the resulting murder conviction legally valid. This is because no factual findings would have been made at the petitioner's trial that would render him ineligible for resentencing as a matter of law. At an evidentiary hearing, the key issue to resolve would be whether the petitioner "could not be convicted of first or second degree murder because of changes to Section 188 or 189" and not whether any error occurred at his original trial. (§ 1170.95, subd. (a)(3).) The resentencing petition would then turn on whether the prosecution could establish additional facts beyond the jury's findings from trial that would render the petitioner liable for murder under the new laws. For example, the prosecution could attempt to show, *for the first time in the case*, that the petitioner was a major participant in the felony who acted with reckless indifference to human life. (§ 189, subd. (e)(3).)

Of course, Strong's case is different from the hypothetical case discussed above. At Strong's original trial, the jury found, unanimously and beyond a reasonable doubt, that the felony-murder special circumstance was true. At a minimum, therefore, the jury had concluded that Strong was a major participant in the

burglary and attempted robbery and that he acted with reckless indifference to human life. Consequently, the prosecution did not have to establish, in the section 1170.95 proceedings, any additional facts to show Strong was ineligible for resentencing. Since the jury already made all of the findings necessary to demonstrate that Strong could be convicted of murder under newly amended section 189, there is no need for an evidentiary hearing. (*People v. Gomez* (2020) 52 Cal.App.5th 1, 17, review granted October 14, 2020, S264033 [“The People should not be required to prove beyond a reasonable doubt, a second time, that Gomez satisfied those requirements for the special circumstance findings”].)

**2. Prima facie review under section 1170.95, subdivision (c) is not amenable to claims of trial error**

Section 1170.95, subdivision (c) provides for prima facie review of the resentencing petition in light of the record of conviction. At the prima facie stage, which follows the filing of a facially valid petition, the superior court must “determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.” (*Ibid.*) “If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (*Ibid.*)

At the prima facie stage, “a trial court should not engage in ‘factfinding involving the weighing of evidence or the exercise of discretion.’” (*Lewis, supra*, 2021 Cal.LEXIS 5258, at \*31-32, quoting *People v. Drayton* (2020) 47 Cal.App.5th 965, 980.) “However, if the record, including the court’s own documents,

contain[s] facts refuting the allegations made in the petition, then the court is justified in making a credibility determination adverse to the petitioner” and denying the petition at that stage. (*Id.* at \*31, internal quotations omitted.) Facts refuting a petitioner’s declarations of eligibility may include jury findings from a petitioner’s original murder trial. (See, e.g., *People v. Verdugo* (2020) 44 Cal.App.5th 320, 336, review granted March 18, 2020, S260493 [petitioner ineligible because jury necessarily found that petitioner “harbored the specific intent to kill” the victim].) Special circumstance findings can also render a petitioner ineligible as a matter of law. (*People v. Bentley* (2020) 55 Cal.App.5th 150, 154, review granted December 16, 2020, S265455 “[w]hen the jury found the special circumstance allegation true with regard to [Bentley], it found that he aided and abetted the shooter with the intent to kill”].)

The Legislature’s inclusion of a prima facie review stage prior to the issuance of an order to show cause is inconsistent with a procedure that generally permits challenges to factual findings from a petitioner’s trial. The point of a prima facie review is to “ensur[e] that clearly meritless petitions can be efficiently addressed as part of a single-step prima facie review process. (*Lewis, supra*, 2021 Cal.LEXIS, at \*30.) This stage “allow[s] the court to distinguish petitions with potential merit from those that are clearly meritless.” (*Ibid.*) However, if the findings that render a petitioner ineligible may be challenged in section 1170.95 proceedings, then the prima facie review would be meaningless. Any petitioner who is ineligible based on factual

findings from trial could overcome the prima facie review by simply asserting error in those findings.

It would be absurd to conclude that the Legislature established a prima facie review—where petitions could be summarily denied based on prior factual findings—but permit that process to be thwarted by a petitioner’s mere allegation that those findings were made in error. The Legislature could not have intended for the prima facie stage to be such an ineffectual step in the resentencing process.

**3. Section 1170.95, subdivision (d)(2) encourages petitioners to challenge felony-murder special circumstances prior to seeking resentencing**

Section 1170.95, subdivision (d)(2) provides, “If there was a prior finding by a court or 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.” (§ 1170.95, subd. (d)(2).) This subdivision imposes “a mandatory duty on the court to vacate defendant’s sentence and resentence him whenever there is a prior finding of [a] court that the defendant was not a major participant in the underlying felony and did not act with reckless indifference to human life.” (*People v. Ramirez* (2019) 41 Cal.App.5th 923, 932.) In addition, the subdivision provides a mechanism to “streamline the process” of resentencing and avoid delay. (*Ibid.*) This particular subdivision is highly probative of the Legislature’s intent regarding the timing of challenges to felony-murder special circumstances.

The subdivision applies specifically to the factual issues addressed in *Banks/Clark*. Therefore, by creating a mandatory resentencing provision triggered by a “prior finding by a court,” the Legislature intended that challenges based on *Banks/Clark* should occur prior to the resentencing process. If the Legislature did not intend petitioners to pursue error correction prior to the petition process, the Legislature would not have created such an enticing incentive for petitioners to do so.

In contrast to this interpretation, several appellate courts have relied on the language of section 1170.95, subdivision (d)(2) to conclude that the Legislature did not intend the existence of a felony-murder special circumstance to preclude relief as a matter of law. (See, e.g. *People v. Secrease* (2021) 63 Cal.App.5th 231, 257, review granted June 30, 2021, S268862; *People v. York* (2020) 54 Cal.App.5th 250, 260-261, review granted November 18, 2020, S264954; *People v. Smith* (2020) 49 Cal.App.5th 85, 94, review granted, July 22, 2020, S262835.)<sup>7</sup> According to these courts, because the Legislature did not include a specific statutory “disqualification” based on a true felony-murder special circumstance, the Legislature must not have intended for petitioners to be ineligible based on such a finding. (*Secrease*, at p. 257; *York*, at p. 261.) These courts have misconstrued the statute on this point.

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<sup>7</sup> In addition to being held pending *Lewis*, *Secrease* is also held pending disposition of this case.

Section 1170.95 defines the affirmative requirements for resentencing relief and does not attempt to list the myriad circumstances in which resentencing should be denied. Indeed, any attempt to foresee and codify such a list would be highly cumbersome if not impossible. (*Allison, supra*, 55 Cal.App.5th at p. 460 [“The Legislature could not and did not need to spell out every ground for denying a petition”].)

In addition, the logic of the courts’ statutory interpretation of subdivision (d)(2) crumbles when applied to the other subdivisions of section 1170.95. For example, subdivision (c) of section 1170.95 provides, “If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” Thus, like subdivision (d)(2), subdivision (c) defines a specific condition required for the resentencing process to continue. However, subdivision (c), also like subdivision (d)(2), does not specify that the failure to make a prima facie showing requires a denial of resentencing. Nor does subdivision (c) purport to specify all of the circumstances that would render a petitioner ineligible for resentencing as a matter of law and require denial at the prima facie stage. Despite the lack of statutory language directing courts on what to do when a prima facie showing is not made, no court has held that the lack of a specific statutory directive prevents superior courts from denying a petition when a prima facie showing is not made.



**4. Section 1170.95, subdivision (f) encourages use of appeal/habeas by reserving the availability of other remedies available to petitioners**

Subdivision (f) of section 1170.95 provides, “This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.” That subdivision shows the Legislature was aware that petitioners had access to other appellate and collateral remedies to address alleged errors in their convictions or sentence, and did not intend section 1170.95 to replace those remedies. By expressly maintaining the availability of other remedies, the Legislature intended for petitioners to first address any errors from the original trial with the appropriate and already available remedies before seeking resentencing pursuant to section 1170.95.

**C. The legislative history confirms that section 1170.95 does not provide an additional chance to litigate claims of trial error**

Even though the statutory language makes clear that the Legislature did not intend section 1170.95 to be a vehicle for error correction, “courts may always test their construction of disputed statutory language against extrinsic aids bearing on the drafters’ intent.” (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 613, fn. 7.) Extrinsic aids can include legislative history such as “statements of the intent of the enacting body contained in a preamble.” (*People v. Canty* (2004) 32 Cal.4th 1266, 1280.) Here, the Legislature’s statements of intent regarding SB 1437 bolster and confirm the textual analysis above, showing that the Legislature did not intend for section 1170.95 to be used for error correction.

In the uncodified preamble to SB 1437, the Legislature declared, “There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.” (Stats. 2018, ch. 1015, § 1, subd. (b).) Accordingly, the Legislature recognized a need to amend the law of murder in California “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.” (*Id.* at § 1, subd. (f).) The Legislature further intended to address imputed malice by establishing that, “[e]xcept as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought.” (*Id.* at § 1, subd. (g).)

These findings and declarations demonstrate that the Legislature was concerned with inequities in the law of murder as it existed prior to SB 1437 and sought to address those inequities. The Legislature made no findings suggesting that it was concerned with errors in the fact finding process from existing murder convictions or that it intended to create a vehicle to challenge that fact finding outside of the well-established remedies afforded by direct appeal and habeas corpus. (See, e.g., *People v. Stamps* (2020) 9 Cal.5th 685, 702 [in rejecting claim that Senate Bill No. 1393 was intended to permit trial courts to unilaterally modify a plea agreement, this Court noted that “none of the legislative history materials mention plea agreements *at all*”], original italics.)

**D. Consistent with existing resentencing procedures, the Legislature intended that section 1170.95 petitions be filed after a petitioner’s case was final on appeal**

When enacting a retroactive petition process in SB 1437, the Legislature adopted procedures that were similar to other ameliorative resentencing procedures existing at the time. By adopting procedures similar to existing resentencing processes, the Legislature intended section 1170.95 to 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.]”].)

At the time section 1170.95 was enacted, California had several ameliorative statutes that involved a resentencing petition process. (See, e.g., § 1170.126 [effective November 7, 2012]; § 1170.18 [effective November 5, 2014]; § 1170.22 [effective January 1, 2018].) Thus, when the Legislature enacted section 1170.95, it was aware of the existing resentencing statutes and presumptively intended that section 1170.95 be interpreted in the same manner as those statutes. (See *Gentile, supra*, 10 Cal.5th at pp. 852-856 [relying on similar resentencing procedures to hold that the Legislature intended for SB 1437 to apply retroactively only through the statutory petition process of section 1170.95].) Indeed, the Legislature placed section 1170.95 in the same section of the Penal Code as existing resentencing provisions.

When the Legislature enacted section 1170.95, it was well established that a trial court had no jurisdiction to entertain similar resentencing petitions during the pendency of direct

appeal. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 922 [§1170.18 petitions]; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 177 [§ 1170.126 petitions].) Therefore, the Legislature knew that trial courts would be without jurisdiction to consider section 1170.95 resentencing petitions while cases were pending on direct appeal. (See *People v. Burhop* (2021) 65 Cal.App.5th 808, 814 [an order granting resentencing pursuant to section 1170.95 was “null and void” because the order was entered when the case was still pending on direct appeal].)

This is significant. By adopting a retroactive petition process in which the trial court has jurisdiction only *after* completion of direct appeal, the Legislature necessarily intended that the vast majority of section 1170.95 petitions would be filed after an appeal.<sup>8</sup> Given that most petitions will be filed after appeal, it follows that the Legislature would not have intended for section 1170.95 to be a vehicle to challenge trial error.

There is little need for error correction in a case post appeal. (*In re Reno* (2012) 55 Cal.4th 428, 450 [“Courts presume the correctness of a criminal judgment”].) “The Legislature has established an elaborate appellate system in which a criminal defendant may present his or her claims for relief from alleged trial court errors.” (*In re Harris* (1993) 5 Cal.4th 813, 827.)

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<sup>8</sup> In limited circumstances, a section 1170.95 petition may be adjudicated prior to completion of appeal. (*Gentile, supra*, 10 Cal.5th at p. 858 [“a defendant may nevertheless file a motion in the appellate court requesting a stay of the appeal and a limited remand for the purpose of pursuing section 1170.95 relief”].)

Accordingly, “when 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.” (*Ibid.*)

Moreover, in the unlikely event that direct appeal provides an insufficient avenue for error correction, habeas corpus remains as “a ‘safety valve’ for those rare or unusual claims that could not reasonably have been raised at an earlier time.” (*Reno, supra*, 55 Cal.4th at p. 452.) Thus, habeas corpus provides “an avenue of relief to those for whom the standard appellate system failed to operate properly.” (*Harris, supra*, 5 Cal.4th at p. 828.) The availability of a habeas corpus safety valve further refutes any argument that the Legislature intended to provide for error correction in the section 1170.95 process because it was not needed for that purpose.

Since appeal and habeas are the established procedures to address errors at trial, it would be illogical to conclude that the Legislature intended to also permit error correction in section 1170.95 petitions filed after appeal. The Legislature would not have intended that section 1170.95 be used as such an unnecessary, redundant, and ill-suited procedure for error correction.

**II. AS A CHALLENGE TO FACT FINDING FROM TRIAL, A *BANKS/CLARK* SUFFICIENCY OF THE EVIDENCE CLAIM IS NOT COGNIZABLE IN SECTION 1170.95 PROCEEDINGS**

SB 1437’s amendment to section 189, subdivision (e) effectively made the crime of felony murder subject to the same requirements as the felony-murder special circumstance. (§ 190.2, subs. (a)(17), (b), (c), & (d).) For a non-killer defendant without

the intent to kill, the felony-murder special circumstance applies only when the defendant was a major participant in the underlying felony who acted with reckless indifference to human life. (§ 190.2, subd. (d).) Subdivision (e)(3) of section 189 now subjects felony-murder liability to the same limitations imposed by section 190.2, subdivision (d). Thus, a true finding of a felony-murder special circumstance includes all of the elements now required to impose murder liability under SB 1437.

In this case, the jury's true verdict on the felony-murder special circumstances at Strong's trial established all of the facts necessary to render Strong liable for murder under the current law of murder as amended pursuant to SB 1437. Strong's jury was specifically instructed with CALCRIM No. 703, "which told the jury that if it found defendant was not the actual killer, in order to prove the special circumstances true: '[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.'"

(*Strong II*, at p. 2.)<sup>9</sup> Therefore, at a minimum, the jury determined that Strong was a major participant in the underlying felony who acted with reckless indifference to human life. That factual finding demonstrates that Strong would be liable for murder under current law, and renders him ineligible for resentencing as a matter of law.

To date, the jury’s special circumstance findings remain unchallenged and undisturbed. Strong has not undertaken the available opportunities to challenge those findings and instead asserts that, because the special circumstance finding occurred prior to *Banks/Clark*, he may litigate the factual issue anew in his section 1170.95 resentencing proceedings. (OBM 41-42.) Strong is incorrect. As discussed above, section 1170.95 was not intended by the Legislature to provide petitioners with a vehicle to litigate claims alleging fact-finding error from a petitioner’s original conviction. And, more importantly here, the Legislature did not intend to provide a special exemption specifically to permit petitioners to litigate claims based on *Banks/Clark*.

**A. *Banks* and *Clark* clarified the statutory elements of section 190.2, subdivision (d) to guide sufficiency of the evidence review**

In the related decisions of *Banks* and *Clark*, this Court “clarified the meaning of the special circumstances statute,” specifically the meaning of the phrases “major participant” and

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<sup>9</sup> The court below noted that the record on appeal before it did not include the jury instructions given at trial, “but [Strong] acknowledges the jury was instructed with CALCRIM No. 703.” (*Strong I*, at p. 2, fn. 2.)

“reckless indifference to human life” as used in section 190.2, subdivision (d). (*Scoggins, supra*, 9 Cal.5th at pp. 671, 674.) In those cases, this Court interpreted the statutory language to ensure it was applied consistent with United States Supreme Court precedent from which it was derived. (*Id.* at pp. 675-676.)

The punishment for a defendant convicted of first degree murder when at least one special circumstance has been found true is death or life without possibility of parole. (§ 190.2, subd. (a).) Among the special circumstances is the felony-murder special circumstance, which occurs when “[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit” a specified felony. (§ 190.2, subd. (a)(17).) Currently, section 190.2, subdivision (a)(17) lists 12 specific felonies, including robbery and burglary, that can serve as the basis of a felony-murder special circumstance.

Subdivision (d) of section 190.2—enacted in 1990 by the electorate as part of Proposition 115—imposes limits to the application of the felony-murder special circumstance to defendants who are not the actual killer. (*Banks, supra*, 61 Cal.4th at p. 794.) The statute provides:

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.

That specific subdivision “was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137 . . . which articulates the constitutional limits on executing felony murderers who did not personally kill.” (*Banks*, at p. 794.)

**1. *Banks* clarified the statutory meaning of “major participant”**

In *Banks*, this Court considered whether the evidence was sufficient to sustain a true felony-murder special circumstance finding for the getaway driver in an armed robbery that resulted in a killing. (*Banks, supra*, 61 Cal.4th at p. 794.) Because section 190.2, subdivision (d) incorporated the holding of *Tison v. Arizona, supra*, 481 U.S. 137, this Court explored *Tison* and the earlier, related, decision of *Enmund v. Florida* (1987) 452 U.S. 782. (*Banks*, at pp. 799-800.) From those cases, this Court developed a non-exclusive list of factors that would help courts determine whether an individual was a “major participant” for purposes of sufficiency of the evidence review. (*Id.* at p. 803.) These factors include, but are not limited to:

- the defendant’s role “in planning the criminal enterprise”;
- the defendant’s role “in supplying or using lethal weapons”;

- the defendant’s awareness “of particular dangers posed by the nature of the crime, the weapons used, or past experience or conduct of the other participants”;
- the defendant’s presence “at the scene of the killing, in a position to facilitate or prevent the actual murder”;
- whether the defendant’s “own actions or inaction play[ed] a particular role in the death”; and
- the defendant’s actions “after lethal force was used.”

(*Ibid.*) Based on those factors, this Court concluded that the evidence was insufficient to demonstrate that the getaway driver was a “major participant” in the robbery. (*Id.* at pp. 804-807.)<sup>10</sup>

**2. Clark clarified the statutory meaning of “reckless indifference to human life”**

The year after *Banks*, this Court returned to section 190.2, subdivision (d) and again analyzed the sufficiency of the evidence of a felony-murder special circumstance found true against a non-killer involved in an armed robbery resulting in a killing. (*Clark, supra*, 63 Cal.4th at pp. 610-618.) There, the defendant had planned a robbery of a retail establishment, but he did not actually enter the store and was not present for the killing. (*Ibid.*) This Court specifically evaluated the sufficiency of the evidence of the jury’s finding that Clark acted with “reckless indifference to human life.” (*Id.* at pp. 614-618). Like in *Banks*, this Court set forth a non-exclusive list of factors to be used by courts to

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<sup>10</sup> This Court further determined that the evidence was also insufficient to show that the driver acted with reckless indifference to human life. (*Banks, supra*, 61 Cal.4th at p. 810.)

determine if substantial evidence supports a jury's finding of reckless indifference to human life. (*Id.* at pp. 616-623.) These factors include:

- the defendant's knowledge of weapons used in the crime, how those weapons were used, and the number of weapons used;
- the defendant's proximity to the crime and the opportunity to stop the killing or aid the victims;
- the likely duration of the felony;
- the defendant's knowledge of the killer's propensity to kill; and
- the defendant's efforts, if any, to minimize the possibility of violence during the crime.

(*Ibid.*) This Court then held that the evidence was insufficient to support the conclusion that Clark acted with reckless indifference to human life. (*Id.* at p. 623.)

### **3. *Banks/Clark* are fully retroactive on direct appeal and in habeas corpus**

The impact of this Court's decisions in both *Banks* and *Clark* was immediate and widespread. Claims based on *Banks/Clark* have been raised and litigated on direct appeal and habeas corpus proceedings in this Court and the Courts of Appeal.

This Court and several Courts of Appeal immediately applied *Banks/Clark* to review felony-murder special circumstance findings in cases then pending on direct appeal. (See, e.g., *People v. Williams* (2015) 61 Cal.4th 1244, 1280; *People v. Price* (2017) 8 Cal.App.5th 409, 447-454; *People v. Medina* (2016) 245 Cal.App.4th 778, 781, 787-793; *People v. Perez* (2016)

243 Cal.App.4th 863, 867.) In addition to cases pending on direct appeal, courts addressed claims of insufficiency of the evidence based on *Banks/Clark* in habeas corpus. (*Scoggins, supra*, 9 Cal.5th at pp. 673-674; *In re Parrish* (2020) 58 Cal.App.5th 539, 543-544; *In re McDowell* (2020) 55 Cal.App.5th 999, 1012, 1015; *In re Taylor* (2019) 34 Cal.App.5th 543, 557; *In re Ramirez* (2019) 32 Cal.App.5th 384, 406; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1007; *In re Miller* (2017) 14 Cal.App.5th 960, 977-980; *In re Loza* (2017) 10 Cal.App.5th 38, 42.)

Significantly, habeas review of sufficiency claims based on *Banks/Clark* is available despite procedural rules that would generally preclude such claims. (*Scoggins, supra*, 9 Cal.5th at p. 673.) Specifically, the procedural rules limiting habeas review of appellate issues<sup>11</sup> and claims of sufficiency of the evidence<sup>12</sup> do not apply to claims based on *Banks/Clark*. (*Ibid.*) Accordingly, habeas review is generally available in cases that were already final when *Banks/Clark* were decided.

**4. The failure to instruct the jury on the *Banks/Clark* “factors” does not render a felony-murder special circumstances invalid**

Strong argues that the “actual issues 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.” (OBM at 40, quoting *York, supra*,

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<sup>11</sup> *In re Waltreus* (1965) 62 Cal.2d 218, 225.

<sup>12</sup> *In re Lindley* (1947) 29 Cal.2d 709, 723.

54 Cal.App.5th at p. 258.) Strong—and the court in *York*—are incorrect.

*Banks* and *Clark* did not automatically invalidate all existing felony-murder special circumstance findings. Instead, those cases clarified the “case-specific factors” to be used by a reviewing court to evaluate the sufficiency of the evidence. (*Clark, supra*, 63 Cal.4th at p. 618; see also *Scoggins, supra*, 9 Cal.5th at p. 677 [*Clark* factors are “relevant” when a court “analyze[s] the totality of the circumstances to determine” if the evidence is sufficient to support a finding of reckless indifference to human life].) This Court was clear that the relevant factors identified in *Banks* and *Clark* represented a non-exclusive list intended to guide courts and that “[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient” (*Clark*, at p. 618, quoting *Banks, supra*, 61 Cal.4th at p. 803.)

Significantly, *Banks/Clark* did not modify the elements of the felony-murder special circumstance. Following *Banks/Clark*, a jury must find the exact same elements it did before—for a non-killer who does not have the intent to kill, the jury must find beyond a reasonable doubt that the defendant was a major participant in the underlying felony who acted with reckless indifference to human life. No new elements are required.

Thus, the “factual issues” facing a jury post-*Banks/Clark* have not changed. (*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”].) *Banks/Clark* clarified the quantum of evidence that is necessary to support a true finding on those “factual issues,” and serve as a guide to reviewing courts tasked with determining the sufficiency of the evidence of jury findings. “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.” (*People v. Jones* (2020) 56 Cal.App.5th 474, 483, review granted January 27, 2021, S265854.)

Consequently, decisions reviewing felony-murder special circumstances following *Banks/Clark* have limited review to sufficiency of the evidence. (See, e.g., *Williams, supra*, 61 Cal.4th at p. 1280; *Parrish, supra*, 58 Cal.App.5th at pp. 541-544; *McDowell, supra*, 55 Cal.App.5th at pp. 1011-1015; *Price, supra*, 8 Cal.App.5th at p. 454.) For example, in *Williams*, decided shortly after *Banks*, this Court rejected the defendant’s claim that the evidence was insufficient to show “he was a major participant in the target offense or exhibited reckless indifference to human life as required by section 190.2, subdivision (d).” (*Williams*, at p. 1280.) Because William’s trial preceded the decision in *Banks*, the jury could not have been instructed on any of the *Banks* factors. Nevertheless, this Court easily concluded that “[t]he facts adduced are more than sufficient to uphold the special circumstance finding that defendant was a major participant and acted with reckless indifference to human life.” (*Id.* at p. 1282.) This Court expressed no concern that the jury’s

fact-finding was compromised because it was not instructed with the *Banks* factors.

Accordingly, courts have not evaluated *Banks/Clark* claims in term of instructional error. To the contrary, courts have concluded that additional instructions are not required by either *Banks* or *Clark*. (See *Price*, at p. 451; *Nunez, supra*, 57 Cal.App.5th at p. 92; *Allison, supra*, 55 Cal.App.5th at p. 458.) The relevant CALCRIM “instruction currently includes optional language suggested by the *Banks* and *Clark* decisions” and “[t]he bench notes to the instruction state that *Banks* ‘stopped short of holding that the court has a sua sponte duty to instruct on those factors,’ and *Clark* ‘did not hold that the court has a sua sponte duty to instruct on those factors.’” (*Allison*, at pp. 458-459, quoting Bench Notes to CALCRIM No. 703 (2020 ed.) p. 452.)

In support of his argument regarding the need for additional jury instructions, Strong relies heavily on a single sentence from *Banks*. (OBM 36.) That sentence reads:

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.) Strong reads too much into that sentence.

Nothing in the sentence suggests that this Court believed the jury instructions related to the driver in *Banks* were insufficient or faulty. The specific sentence does not even reference jury instructions at all. Rather, this Court’s reference to the need to “guide” juries should be read in context of the

entire opinion, which was focused on sufficiency of the evidence. Indeed, *Banks* only addressed whether the evidence was sufficient to support the jury’s felony-murder special circumstance finding against the getaway driver. (*Banks, supra*, 61 Cal.4th at p. 797.) “A decision ‘is not authority for everything said in the . . . opinion but only “for the points actually involved and actually decided.” [Citations.]’ [Citation].” (*People v. Mendoza* (2000) 23 Cal.4th 896, 915.)

Moreover, *Banks* does not support a claim of instructional error for failing to better define “major participant” and “reckless indifference to human life” in a felony-murder special circumstance case. Prior to *Banks*, two decisions had considered whether the statutory language of section 190.2, subdivision (d) provided sufficient guidance to juries considering a felony-murder special circumstance allegation. (*People v. Estrada* (1995) 11 Cal.4th 568, 571 [“reckless indifference to human life”]; *People v. Proby* (1998) 60 Cal.App.4th 922, 931-934. [“major participant”].) In both cases, the statutory language was held to provide juries with sufficient guidance on the meanings of those phrases, with no additional instructions required. (*Estrada*, at p. 578; *Proby*, at p. 931.)<sup>13</sup>

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<sup>13</sup> In *Estrada*, this Court suggested that if further clarification was necessary, juries should be instructed that reckless indifference to human life involves “knowingly engaging in criminal activities known to carry a grave risk of death.” (*Estrada, supra*, 11 Cal.4th at p. 580, quoting *Tison, supra*, 481 U.S. at pp. 157-158.) That language has since been incorporated  
(continued...)



In *Banks*, this Court cited and relied on both *Estrada* and *Proby*. (*Banks, supra*, 61 Cal.4th at pp. 800-801, 807.) As to “major participant,” this Court agreed with *Proby* “that there is no reason to think either the United States Supreme Court in *Tison* or the drafters of Proposition 115 had in mind a specialized or technical meaning for ‘major participant.’” (*Id.* at pp. 800-801.) Regarding “reckless indifference to human life,” this Court quoted the definition from *Estrada* for guidance. (*Id.* at p. 807.)

Based on Strong’s reasoning, however, *Banks* impliedly overruled *Estrada* and *Proby* on the issue of jury instructions. Such a conclusion is irrational given *Banks*’s citation, with approval, to both *Estrada* and *Proby*, and its reliance on those decisions. (*Banks, supra*, 61 Cal.4th at pp. 800-801, 807.) Moreover, courts do not lightly conclude that an appellate decision overrules prior precedent by implication. (*Meskill v. Culver City Unified School Dist.* (1970) 12 Cal.App.3d 815, 824.) [A “subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference is clear and impelling”].)

**B. Section 1170.95 does not include a sui generis exception for claims under *Banks/Clark***

As discussed above, section 1170.95 was not enacted by the Legislature to provide a vehicle for petitioners to generally challenge factual findings from their murder trials. Similarly,

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(...continued)

into the relevant jury instructions. (CALCRIM No. 703; CALJIC No. 8.80.1.)

nothing in the statute or relevant legislative history supports the conclusion that the Legislature intended to create an unwritten exception for challenges based on *Banks/Clark*. To the contrary, the Legislature was presumptively aware of *Banks/Clark* and did not create any special procedure in section 1170.95 to address special circumstance findings pre-dating those decisions.

In 2018, when the Legislature enacted section 1170.95, *Banks/Clark*, and numerous published decisions applying those decisions had issued. These decisions established a number of key principles related to *Banks/Clark*, including:

- Sufficiency of the evidence review for felony-murder special circumstance findings that predated *Banks/Clark* could be raised on direct appeal in cases still pending on appeal. (See, e.g. *Perez, supra*, 243 Cal.App.4th at pp. 867, 882 [applying “recent” decision in *Banks* to find insufficient evidence of a robbery-murder special circumstance].)
- *Banks/Clark* did not mandate additional jury instructions on the phrases “major participant” or “reckless indifference to human life,” and the failure to provide such instructions was not error. (*Price, supra*, 8 Cal.App.5th at p. 451.)
- Habeas corpus is available to raise a sufficiency of the evidence claim based on *Banks/Clark* for cases that were final before those decisions were issued. (*Miller, supra*, 14 Cal.5th at pp. 977-980.)

Accordingly, when enacting section 1170.95, the Legislature was aware that appellate or habeas review was available to defendants for claims based on *Banks/Clark*. (*In re Greg F.* (2012) 55 Cal.4th 393, 407 [“The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute”].) Given the availability of such remedies, the Legislature’s decision not to provide a specific vehicle to challenge felony-murder special circumstance findings in section 1170.95 shows the Legislature’s intent that section 1170.95 not be used in that manner.

Section 1170.95, subdivision (d)(2) further demonstrates the Legislature’s intent on this issue. That subdivision specifically provides that if a “prior court” has determined that a petitioner was not a major participant, or did not act with reckless indifference to human life, then resentencing is mandatory. (§ 1170.95, subd. (d)(2).) These are the precise findings at issue in a *Banks/Clark* claim. The Legislature’s inclusion of mandated relief if a court has *previously* granted a claim based on *Banks/Clark* demonstrates that the Legislature intended for petitioners to seek relief under *Banks/Clark* via appeal or habeas prior to filing a resentencing petition under section 1170.95.

Strong, and courts holding that felony-murder special circumstance findings do not preclude resentencing, have identified no logical reason to single out *Banks/Clark* claims for special treatment in section 1170.95 proceedings. (See, e.g., *Secrease, supra*, 63 Cal.App.5th at pp. 254-255 [finding that section 1170.95 “cannot reasonably be read to permit a ‘do-over’

of factual issues that were necessarily resolved against a section 1170.95 petitioner by a jury,” but holding that a *Banks/Clark* sufficiency challenge may be made in section 1170.95 proceedings[.]) A *Banks/Clark* claim is nothing more than a straightforward sufficiency of the evidence analysis. There is no logical reason why this particular sufficiency claim should be litigated in section 1170.95 proceedings but no other sufficiency claims.

- 1. The incorporation of *Banks/Clark* into the statutory changes of SB 1437 did not authorize challenges to felony-murder special circumstance findings in section 1170.95 petitions**

Strong argues that he is entitled to challenge, in his section 1170.95 petition, the jury’s true findings on the felony-murder special circumstance because of the amendments to section 189, subdivision (e)(3), which incorporated the holdings of *Banks/Clark*. (OBM 32.) While SB 1437 incorporated this Court’s clarifications of section 190.2, subdivision (d) into section 189, subdivision (e)(3), Strong misconstrues the import of that incorporation.

At the time the Legislature enacted SB 1437 in 2018, this Court’s clarifications of section 190.2, subdivision (d) were well established by *Banks* and *Clark*, which had been decided in 2015 and 2016, respectively. Therefore, the Legislature’s express reference to section 190.2, subdivision (d) in the amendment to section 189 demonstrates the Legislature’s intent that the phrases “major participant” and “reckless indifference to human life” are to be applied consistent with *Banks/Clark*.

The effect of this incorporation is simple. Going forward in new cases, felony-murder liability for a non-killer defendant, at a minimum, requires a finding (or admission) that the defendant was a major participant in the underlying felony who acted with reckless indifference to human life, as those terms were clarified in *Banks/Clark*. Similarly, for existing murder convictions to remain valid, any prior findings of “major participant” and “reckless indifference to human life” must also be supported by sufficient evidence to satisfy *Banks/Clark*.

What the incorporation of *Banks/Clark* into section 189 does not mean, however, is that the Legislature intended section 1170.95 to be the vehicle to re-litigate pre-*Banks/Clark* felony-murder special circumstance findings. As discussed above, the Legislature intended that such challenges should occur either on direct appeal or in habeas proceedings prior to the filing of a section 1170.95 petition. Under that scheme, a prior finding on a felony-murder special circumstance will be appropriately reviewed for sufficiency of the evidence under *Banks/Clark* on direct appeal or via a habeas corpus petition before any section 1170.95 proceedings even begin.

Strong overestimates the impact that incorporation of *Banks/Clark* in section 189 has on section 1170.95 proceedings. According to Strong, the amendment to section 189, subdivision (e)(3) means “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.” (OBM 32.) Thus, in Strong’s opinion, the

*possibility* that a felony-murder special circumstance finding that predates *Banks/Clark* may be susceptible to a sufficiency of the evidence challenge renders the special circumstance finding irrelevant in section 1170.95 proceedings.

However, the mere possibility that a given factual finding could be successfully challenged is no reason to disregard the legal effect of that finding. Judgments are presumed correct, including all factual findings supporting the judgment. (*In re Lawley* (2008) 42 Cal.4th 1231, 1240 [“criminal judgment rendered after procedurally fair trials” are accorded “presumption of correctness”].) That presumption of correctness is not rebutted by the possibility that a factual finding could be overturned at some future date because, at some level, the possibility always exists that factual findings could be successfully challenged in the future.

Since it is possible that all factual findings from a trial could be successfully challenged, there is no reasoned basis to treat felony-murder special circumstance findings any differently. *Banks/Clark* did not automatically invalidate existing felony-murder special circumstances—those cases simply opened the door for further appellate or habeas review. So, until an individual successfully challenges a felony-murder special circumstance in the proper forum, it should be treated like any other factual finding from a trial—presumed correct.

## **2. Habeas corpus is an appropriate vehicle to raise *Banks/Clark* sufficiency claims**

Several courts have held the writ of habeas corpus is not an appropriate remedy to address a petitioner’s *Banks/Clark* claim;

instead, a section 1170.95 petition should be used. (See *Secrease, supra*, 63 Cal.App.5th at p. 253, and cases cited therein.) The objections to habeas corpus as a remedy appears to be based on the relative burden that habeas corpus proceedings put on petitioners versus the burden in section 1170.95 proceedings. (*Id.* at pp. 257-258 [noting that petitioners “must clear the hurdles of habeas corpus”].) Respondent disagrees.

As discussed above, a petition for writ of habeas corpus is available to challenge a felony-murder special circumstance finding for insufficiency of the evidence following *Banks/Clark*. (*Scoggins, supra*, 9 Cal.5th at p. 673.) Indeed, several published decisions demonstrate that habeas corpus is an effective vehicle for litigating *Banks/Clark* claims. (See *Parrish, supra*, 58 Cal.App.5th at pp. 542-544; *McDowell, supra*, 55 Cal.App.5th at pp. 1011-1015; *Taylor, supra*, 34 Cal.App.5th at pp. 557-561; *Ramirez, supra*, 32 Cal.App.5th at pp. 404-406; *Bennett, supra*, 26 Cal.App.5th at pp. 1018-1027; *Miller, supra*, 14 Cal.App.5th at pp. 974-977; *Loza, supra*, 10 Cal.App.5th at pp. 49-55.) A *Banks/Clark* sufficiency claim raised in habeas presents a straightforward question of law that requires very little pleading burden for a habeas petitioner. Habeas corpus provides an easily-accessible and flexible remedy for individuals to challenge felony-murder special circumstance that predate *Banks/Clark*.

One potential issue could arise if petitioners seek to raise *Banks/Clark* claims in habeas corpus—timeliness of the habeas petition. Generally, a habeas petitioner must present claims without substantial delay. (*In re Robbins* (1998) 18 Cal.4th 770,

778.) Substantial delay is generally measured from the time a defendant knows or should have known of the facts and the legal basis of a habeas claim. (*Ibid.*)

In the case of *Banks/Clark*, the precise date that a defendant should have known the legal basis of the claim has not yet been clearly established. While *Banks/Clark* issued in 2015 and 2016, it was not clear at the time if they would apply to habeas corpus claims. In August 2017, however, an appellate court first held that habeas corpus was available for sufficiency claims based on *Banks/Clark*. (*Miller, supra*, 14 Cal.App.5th at pp. 977-980.) Finally, in 2020, this Court firmly established that such claims were appropriate on habeas corpus. (*Scoggins, supra*, 9 Cal.5th at p. 673.) Thus, it would not have been unreasonable for a prisoner to have waited until 2017 or possibly 2020 to file a habeas petition seeking relief pursuant to *Banks/Clark*.

Moreover, the effective date of SB 1437, January 2019, further impacts any timeliness determination. As this case demonstrates, it was unclear in 2019 whether a felony-murder special circumstance finding that predated *Banks/Clark* would preclude resentencing as a matter of law. It would not have been unreasonable at the time for a prisoner to choose a section 1170.95 petition instead of habeas corpus to challenge the validity of a jury's finding of major participation/reckless indifference to human life that predates *Banks/Clark*.

Thus, a petitioner who reasonably relied on section 1170.95 in lieu of habeas to challenge his or her felony-murder special circumstance finding would have good cause for any delay in



presenting a habeas claim. (See, e.g. *People v. Conley*, *supra*, 63 Cal.4th at p. 662, fn. 5 [providing that defendants litigating the retroactivity of Proposition 36 “will generally have good cause for filing late petitions”].)

Furthermore, this Court has “inherent authority to establish ‘rules of judicial procedure’” to establish timeliness rules in habeas corpus. (*In re Roberts* (2005) 36 Cal.4th 575, 593.) For example, this Court recently exercised that authority to establish “a time period of 120 days as the safe harbor for gap delay” for the time between a habeas denial in one court and a new habeas petition filed in a higher court. (*Robinson v. Lewis* (2020) 9 Cal.5th 883, 901.) This Court could adopt a similar “safe harbor” for *Banks/Clark* claims to provide individuals with felony-murder special circumstances that predate *Banks/Clark* a reasonable opportunity to seek judicial review of those findings.

**C. Strong is not entitled to resentencing as a matter of law**

In this case, both the superior court and the Court of Appeal, properly determined that Strong was ineligible as a matter of law. For all of the reasons outlined above, the Legislature did not intend that petitioners, such as Strong, who have a valid felony-murder special circumstance, be permitted to challenge the validity of the jury’s findings in a section 1170.95 petition. Since Strong’s felony-murder special circumstances remain valid and undisturbed, he is not entitled to resentencing. The felony-murder special circumstances required findings by a jury that demonstrate that Strong could be convicted of murder under the current law as amended by SB 1437. Specifically, to find the

felony-murder special circumstances alleged against Strong were true, the jury was instructed to find, and did find, that Strong intended to kill or was a major participant who acted with reckless indifference to human life. (*Strong II*, at p. 2; CT 109.) He is therefore statutorily ineligible for resentencing. (§ 1170.95, subd. (a)(3).)

**III. IF *BANKS/CLARK* CLAIMS ARE COGNIZABLE IN SECTION 1170.95 PROCEEDINGS, REVIEW SHOULD BE LIMITED TO SUFFICIENCY OF THE EVIDENCE**

If this Court holds that a felony-murder special circumstance finding that predates *Banks/Clark* does not preclude resentencing as a matter of law, it raises the related question of how the matter should be litigated in section 1170.95 proceedings. Strong argues that he should be entitled to re-litigate, de novo, the factual findings underlying the special circumstance at an evidentiary hearing. (OBM 41-42.) The more reasonable option, however, would be to limit any challenge to the special circumstance finding to a sufficiency of the evidence review. And, because sufficiency of the evidence presents a legal question, the analysis should be undertaken in the first instance by the superior court at the prima facie stage of section 1170.95 proceedings. (*Secrease, supra*, 63 Cal.App.5th at p. 261.)

When a superior court reviews a petition at the prima facie stage for a petitioner with a felony-murder special circumstance that predates *Banks/Clark*, the court could review that finding for sufficiency of the evidence. Since a review for sufficiency of the evidence involves a pure question of law, resolution at the

prima facie stage is appropriate. (See *Lewis, supra*, 2021 Cal.LEXIS 5258, at \*30-31.)

With such a review, if the evidence is sufficient to sustain the jury's finding on the special circumstance, then the petitioner is ineligible for resentencing as a matter of law. If sufficient evidence supports the jury's findings, then those findings are valid and sufficient to preclude resentencing. (*Secrease, supra*, 63 Cal.App.4th at p. 264.) If, however, the court determines that the evidence is insufficient to sustain the jury's finding, then, consistent with section 1170.95, subdivision (d) resentencing should be mandatory. In either event, an evidentiary hearing would not be necessary. The superior court's determination on the sufficiency of the evidence at the prima facie stage would be dispositive and either trigger denial or mandatory relief.

A section 1170.95 petitioner should not be given a greater opportunity to re-litigate jury findings than defendants on appeal or habeas corpus have been provided. As discussed extensively above, section 1170.95 is not a procedure to re-litigate factual findings previously made at trial. Furthermore, appellate and habeas review of pre-*Banks/Clark* felony-murder special circumstances have been limited to sufficiency of the evidence. (See, e.g., *Williams, supra*, 61 Cal.4th at p. 1280; *McDowell, supra*, 55 Cal.App.5th at pp. 1011-1015.) Strong's argument that he is entitled to a plenary re-litigation of the factual issues underlying the jury's true finding on the felony-murder special circumstance should therefore be rejected. (OBM 41-42.)

Furthermore, once a court determines the evidence is sufficient to sustain the finding, a pre-*Banks/Clark* felony-murder special circumstance finding is not otherwise suspect or invalid. Contrary to Strong's argument, when the evidence is sufficient to sustain the jury's findings, there remains no "outstanding issue of fact" (OBM 41) that would require resolution at an evidentiary hearing. Strong's attempt at getting another bite at the proverbial apple should be rejected.

### CONCLUSION

The trial court's denial of Strong's petition for resentencing under section 1170.95 should be affirmed.

Respectfully submitted,

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August 13, 2021

## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 11,647 words.

ROB BONTA  
*Attorney General of California*

*/s/ Eric L. Christoffersen*

ERIC L. CHRISTOFFERSEN  
*Supervising Deputy Attorney General  
Attorneys for Plaintiff and Respondent*

August 13, 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.

On August 13, 2021, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 13, 2021, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

The Honorable Anne Marie  
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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 August 13, 2021, at Sacramento, California.

*/s/ D. Boggess*

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Declarant

**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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