

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
)	Supreme Court
Plaintiff and Respondent,)	No. S266606
)	
v.)	Court of Appeal
)	No. C091162
CHRISTOPHER STRONG,)	
)	Superior Court
Defendant and Appellant.)	No. 11F06729
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APPEAL FROM THE SUPERIOR COURT
OF SACRAMENTO COUNTY
Honorable Patrick Marlette, Judge

**APPLICATION OF AMICUS CURIAE
JONATHAN E. DEMSON FOR LEAVE TO FILE BRIEF
AND AMICUS CURIAE BRIEF IN SUPPORT OF
APPELLANT CHRISTOPHER STRONG**

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Amicus Curiae

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**TO THE HONORABLE TANI CANTIL-SAKAUYE,
CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE STATE OF
CALIFORNIA:**

Pursuant to rule 8.520(f) of the California Rules of Court, applicant Jonathan E. Demson respectfully requests that this Court grant permission to file the attached amicus curiae brief.

A. Applicant's Interest

Applicant is an attorney who has been appointed by the Court of Appeal of California, Second Appellate District, to represent the defendants in seven different cases, all of which are substantially similar to this case (*People v. Shawn Earl Berry* (B307146); *People v. Dante Lavell Bloxton* (B307556); *People v. Brandon Daniels* (B308995); *People v. Gerald McKenzie* (B305393); *People v. Gregory Douglas Miner* (B301803); *People v. Mark Damon Myers* (B306667); *People v. José Yuriar* (B305575)). Each of these defendants is appealing from the summary denial of his petition for resentencing pursuant to Penal Code section 1170.95. In each case, the superior court ruled that the defendant is ineligible for resentencing because his record of conviction includes a felony-murder special circumstance true finding (Pen. Code, § 190.2, subd. (a)(17)). In each case, the special circumstance true finding pre-dates this Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522.

In two of these cases, this Court has granted review and held the case pending this Court's decision in this case (*People v. Gerald McKenzie* (S269217); *People v. Gregory Douglas Miner*

(S268685)). In one case, a petition for review on the same issue is pending (*People v. Dante Lavell Bloxton* (S270612)), and in one case a similar petition is being filed tomorrow. The remaining three cases are fully briefed and awaiting decision by the court of appeal, and the issue on appeal is the same.

This Court's decision in this case will, of course, be binding on the court of appeal in each of the aforementioned seven cases. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) For this reason, applicant has an interest in how this Court decides this issue.

B. The Attached Amicus Curiae Brief Would Assist This Court In Deciding the Issue In this Case

Applicant's amicus curiae brief focuses on an aspect of the issue in this case that has not been fully addressed in the relevant case law. Because appellant's jury was not asked to decide whether he is eligible for resentencing under Penal Code section 1170.95, a law not yet in existence, the crucial question is whether appellant's felony-murder special circumstance true finding nevertheless precludes him from making a *prima facie* showing of eligibility for relief under that law. This question directly implicates the doctrine of issue preclusion, sometimes referred to as 'collateral estoppel.' Applicant therefore concludes that the resolution of this case should turn on the proper application of the doctrine of issue preclusion, yet that doctrine has received little attention in the relevant case law. Applicant's amicus curiae brief focuses on that issue.

C. Statement of Monetary Contribution/Authorship

The attached amicus curiae brief was authored and is funded entirely by Jonathan E. Demson, counsel for appellant in each of the seven aforementioned cases. The brief is based on briefs applicant filed in these seven cases, for which counsel was compensated by the State of California. No additional compensation or reimbursement is being sought for the preparation and filing of this amicus curiae brief.

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ARGUMENT

I. THE COURT OF APPEAL'S RULING THAT APPELLANT'S FELONY-MURDER SPECIAL CIRCUMSTANCE TRUE FINDING PRECLUDES HIM FROM MAKING A *PRIMA FACIE* SHOWING OF ELIGIBILITY FOR RESENTENCING UNDER PENAL CODE SECTION 1170.95 IS BASED ON A MISAPPLICATION OF THE DOCTRINE OF ISSUE PRECLUSION

Because the jury at appellant's 2014 trial was not asked to decide whether he is eligible for relief pursuant to Penal Code section 1170.95, a law not in existence at that time, the crucial question in this case is whether the jury's special circumstance finding nevertheless precludes re-litigation of whether appellant acted with reckless indifference to life as a major participant in the underlying robbery and burglary. Such a finding today would presumably render appellant ineligible for relief under the new law because he could still be convicted of felony murder under the current version of Penal Code section 189, subdivision (e)(3), as amended by Senate Bill No. 1437. (See Pen. Code, § 1170.95, subd. (a).)

In short, does issue preclusion (sometimes referred to as 'collateral estoppel') render appellant ineligible for relief as a matter of law?

Issue preclusion applies only if the issue previously decided by the jury is *identical* to the issue currently before the court. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) If that were true in cases like this one, no defendant with a felony murder special circumstance true finding, regardless of whether

it predates this Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522, could challenge that finding by way of a habeas corpus petition or in any other proceeding. Such is the doctrine of issue preclusion: Once an issue has been resolved, its re-litigation is precluded by principles of *res judicata*.

Yet, in recent years defendants in appellant's position have successfully challenged their felony-murder special circumstance true findings. (See, e.g., *In re Scoggins* (2020) 9 Cal.5th 667, 677-683; *In re Taylor* (2019) 34 Cal.App.5th 543, 556-561; *In re Ramirez* (2019) 32 Cal.App.5th 384, 404-406; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1018-1027; *In re Miller* (2017) 14 Cal.App.5th 960, 974-977.)

Such defendants have done so on the grounds that *Banks* and *Clark* altered the criteria for such findings to such an extent that, although affirmed on direct appeal prior to *Banks* and *Clark*, their special circumstance findings are no longer supported by sufficient evidence. (See *People v. Galvan* (2020) 52 Cal.App.5th 1134, 1141 ["These new considerations clarified the requirements for the felony murder special circumstance so significantly that courts have allowed defendants to challenge the validity of pre-*Banks* and *Clark* special circumstances findings via habeas corpus"], review granted October 14, 2020, S264284.)

But why were such defendants not prevented by the doctrine of issue preclusion from re-litigating their special circumstance true findings? The answer is simple. The issue decided by a jury prior to *Banks* and *Clark* is not necessarily

identical to the issue presented today.

Some courts (including the court of appeal in this case) have concluded that a pre-*Banks* and *Clark* felony-murder special circumstance true finding is really no different from the same finding after *Banks* and *Clark* because the pattern jury instructions concerning that allegation are not necessarily any different, since specific instructions on the *Banks* and *Clark* factors are optional. (See *People v. Allison* (2020) 55 Cal.App.5th 449, 458.) Other courts have asserted that any differences arise only at the level of appellate review. (See *People v. Nunez* (2020) 57 Cal.App.5th 78, 93, fn. 7, review granted January 13, 2021, S265918)

But if all felony-murder special circumstance true findings necessarily resolved identical issues regardless of whether they predated *Banks* and *Clark*, defendants would be precluded from re-litigating those findings once their judgments become final, and every so-called '*Banks* writ' would have to be denied on that basis. Clearly, such is not the case. To be sure, not all defendants who file a *Banks* writ will prevail, but the mere possibility that they might, and the fact that such a petition is colorable, shows that the jury's finding in such cases is not necessarily identical to the same finding made today.

All that matters for cases like this one is that a pre-*Banks* and *Clark* felony-murder special circumstance true finding is not necessarily identical to the same finding after *Banks* and *Clark*. From the standpoint of issue preclusion, it does not matter whether the differences arise only at the level of appellate review.

If the issue decided by the jury is not necessarily *identical* to the issue currently before the court, issue preclusion does not apply. And unless the jury's special circumstance true finding precludes re-litigation of whether appellant acted with reckless indifference to human life as a major participant, that finding does not preclude appellant's eligibility for resentencing under Penal Code section 1170.95.

Furthermore, a judicial determination that the evidence is sufficient to sustain appellant's special circumstance finding even after *Banks* and *Clark* would not make that finding identical to the same finding made after *Banks* and *Clark*. Evaluated in relation to the factors set forth in *Banks* and *Clark*, evidence that is still *sufficient* to sustain such a finding may nevertheless no longer be enough to persuade the finder of fact that the allegation is true beyond a reasonable doubt. While the pattern jury instructions on the *Banks* and *Clark* factors may be optional, both parties now have every incentive to tailor their approach to the evidence around those factors, which in turn makes it more likely the aforementioned optional instructions will be given. In any event, the extent to which the trial evidence and/or the jury instructions would differ because of *Banks* and *Clark* if appellant were tried today is a matter of pure speculation, and there is simply no basis for the claim that a jury's finding today would necessarily be identical to the jury's finding in 2014, regardless of whether the 2014 finding survives another sufficiency review. This is why a judicial determination that the evidence is still sufficient to sustain appellant's special circumstance finding is

irrelevant to his eligibility for relief under the new law.

This does not mean that appellant's special circumstance true finding was rendered a nullity by the decisions in *Banks* and *Clark*. It remains part of his judgment of conviction unless and until it is vacated. Furthermore, nothing prevents the prosecution from endeavoring to prove beyond a reasonable doubt at an evidentiary hearing (Pen. Code, § 1170.95, subd. (d)(3)) that appellant acted with reckless indifference to human life as a major participant as those terms were clarified in *Banks* and *Clark*.

But the court of appeal's ruling that appellant's felony-murder special circumstance true finding precludes him from making a *prima facie* showing of eligibility for resentencing is based on a misapplication of the doctrine of issue preclusion.

CONCLUSION

This Court should hold that a felony-murder special circumstance true finding that pre-dates *Banks* and *Clark* does not preclude a defendant from making a *prima facie* showing of eligibility for resentencing under Penal Code section 1170.95.

Respectfully Submitted,

Dated: September 30, 2021

JONATHAN E. DEMSON
Amicus Curiae

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.520(c)(1) of the California Rules of Court, amicus curiae Jonathan E. Demson certifies that his amicus curiae brief filed in connection with the above-captioned matter consists of approximately 2,422 words, as determined by using the ‘word count’ feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: September 30, 2021

JONATHAN E. DEMSON
Amicus Curiae

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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Date

/s/Jonathan Demson

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