

Supreme Court No. S266606

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent

v.

CHRISTOPHER STRONG,
Defendant and Appellant

Court of Appeal
No. C091162

**BRIEF OF *AMICUS CURIAE* - SANTA CLARA COUNTY
INDEPENDENT DEFENSE COUNSEL OFFICE
IN SUPPORT OF APPELLANT CHRISTOPHER STRONG**

Appeal From Final Order Denying Penal Code Section 1170.95 Petition
Sacramento County Superior Court No. 11F06729
The Honorable Patrick Marlette, Presiding Judge

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INTEREST OF *AMICUS*

The Santa Clara County Independent Defense Counsel Office (IDO) nominates attorneys for appointment by the Santa Clara County Superior Court to indigent persons in criminal and other qualifying cases, and administers the conflicts program for the County. Through this program, attorneys on the IDO panel represent indigent defendants in criminal cases when the Public Defender or Alternate Defender declares a conflict.

IDO's mission is to provide quality legal representation with high professionalism, enabling attorneys to seek optimal results for their clients with efficient use of taxpayer resources. IDO is dedicated to the promise of this nation and California in particular that every person stands equal before the law regardless of resources, embodied in *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 and *In re Allen* (1969) 71 Cal.2d 388, 390. Accordingly, IDO has an interest in fair and even-handed development and application of criminal laws, including recent legislative enactments such as Senate Bill 1437 (2017-2018 Reg. Sess.) (S.B. 1437) for which the jurisprudence is still evolving.

This Court's docket in *People v. Strong*, rvw. gtd. Mar. 10, 2021, S266606 (*Strong*), states the following issue:

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

IDO has both an immediate and a broader interest in this issue. Its immediate interest is that numerous clients of IDO

attorneys have filed section 1170.95 petitions from convictions of murder with special circumstances prior to *Banks* and *Clark*, and thus will be directly affected by this Court's opinion in *Strong*.

IDO's broader interest relates to its mission statement and the legal position IDO takes in this *amicus* brief: In IDO's view, for determining whether a prior verdict – including a prior special circumstance finding – will be preclusive of a current proceeding, a fair and even-handed body of caselaw requires applying established law to section 1170.95 petitions the same as it is applied to any other type of case. Under established law in other types of cases, a prior verdict is only preclusive of a current proceeding if either a statute so provides, or the elements of one of the traditional preclusion doctrines (claim preclusion [res judicata], law of the case, or issue preclusion [collateral or direct estoppel]) are satisfied. IDO's broader interest is in ensuring this body of established law is applied fairly and even-handedly to Penal Code section 1170.95 petitions.

IDO's counsel for this *amicus* brief has extensive experience in the area of Penal Code section 1170.95 petitions. As part of that experience, she was (and is) counsel for the appellant in *People v. Eloy Gonzalez* (2021) 65 Cal.App.5th 420, rvw. gtd. Aug. 18, 2021, S269792. Out of the approximately 16 published Court of Appeal opinions that have considered the issue before this Court, *Eloy Gonzalez* is the only one that utilized the type of traditional preclusion analysis this brief will urge.

BRIEF OF AMICUS CURIAE

I. Introduction And Overview

Amicus sets forth the central point of this brief:

A prior verdict or finding, whether civil or criminal, has no preclusive effect on a current proceeding unless either statutory language requires preclusive effect (see, e.g., *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852), or every requirement of one of the traditional preclusion doctrines – claim preclusion (*res judicata*), law of the case, or issue preclusion (collateral/direct estoppel) – is satisfied.

The issue that the parties presented to this Court has been stated in most published opinions with the words “preclude,” “preclusive,” or “preclusion.” (See citations *post*, p. 33) This Court’s statement of the issue on the *Strong* docket, which we will shorthand as the “*Banks/Clark* issue,” does too (emphasis added):

This case presents the following issue: 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?

Amicus submits that the word “preclude” is the right choice, and it should be taken to mean what it says: For a prior verdict to have **preclusive** effect on a current section 1170.95 petition (or on any other pleading that initiates a civil or criminal action or special proceeding), either there must be statutory preclusion, or all of the requirements of one of the three traditional preclusion doctrines must be satisfied.

There is no statutory preclusion here. Section 1170.95 does not state that a prior special circumstance finding is categorically

preclusive of a section 1170.95 petition. Section 1170.95's only statutory preclusion is in subdivision (d)(2), which provides preclusive effect *against the People* for a prior not true finding of major participation + reckless indifference. Had the Legislature wanted to add a second statutory preclusion by making a true finding preclusive against the *defendant*, it would have said so.

As a result, and because courts cannot properly make up *ad hoc* doctrines to block remedies enacted by the Legislature (*Bernard v. Foley* (2006) 39 Cal.4th 794, 811) or override the Legislature on a special proceeding such as section 1170.95 (*see Smith v. Westerfield* (1891) 88 Cal. 374, 378-379), the only basis to preclude a section 1170.95 petition based on a special circumstance would have to be one of the three traditional preclusion doctrines – claim preclusion, law of the case, and issue preclusion.

Yet as will be discussed, only 1 of the 16 published opinions on the *Banks/Clark* issue to date (listed in Part II below) – *People v. Eloy Gonzalez* (2021) 65 Cal.App.5th 420 (*Eloy Gonzalez*), rvw. gtd. Aug. 18, 2021, S269792 – has used traditional preclusion standards to analyze the issue. It was correct in doing so.

The *Eloy Gonzalez* opinion first addressed the “*Banks/Clark* issue” that the *Strong* parties have addressed in their briefs to this Court, and found in favor of petitioner Gonzalez (Part II of the *Eloy Gonzalez* opinion). Then, it found the petitioner made a *prima facie* case under the standard ratified by this Court in *People v. Lewis* (2021) 11 Cal.5th 952, 971-972, requiring reversal of the trial court’s denial order (Part III of *Eloy Gonzalez*). Finally, as a separate ground for reversal, it analyzed the three traditional preclusion doctrines, and concluded none of their

requirements were satisfied, so the petition could not be categorically barred on that ground either (Part IV).

We agree with the *Eloy Gonzalez* Court's analysis of the "*Banks/Clark* issue" in Part II of its opinion. The type of traditional preclusion analysis in Part IV of the *Eloy Gonzlaez* opinion, however, is the focus of this brief.

We will show that the "*Banks/Clark* question" before this Court in the *Strong* case is merely a small subset of a traditional preclusion analysis that applies to all types of cases, civil and criminal. If this Court finds *Banks* and *Clark* changed the law or legal doctrine such that appellant Strong prevails on the "*Banks/Clark* issue," then a special circumstance prior to *Banks* and *Clark* is categorically nonpreclusive, because preclusion requires material identity of law between the prior and current cases. But if this Court resolves the "*Banks/Clark* issue" against Strong, that is only one small facet of a traditional preclusion analysis, and a court must also examine the rest of the preclusion criteria as applied to the case before it. Indeed, traditional preclusion analysis is also operative for cases tried between the *Banks* and *Clark* opinions, or tried after *Banks* and *Clark*, or for any other case in which a court considers the use of a prior verdict to preclude a section 1170.95 petition.

In this context, there is nothing special about special circumstance findings, or any other kind of verdict. Whether they are preclusive must be determined under the preclusion laws that govern all types of cases.

II. The Sixteen Published “*Banks/Clark* Issue” Opinions To Date

We list the 16 published “*Banks/Clark* issue” opinions of which we are aware:

A. Special Circumstance Findings As Fully Categorically Preclusive

Seven opinions have held a special circumstance finding is categorically preclusive of a section 1170.95 petition, and that *Banks* and *Clark* did not effect a change of law governing major participation + reckless indifference (which will be shorthanded in this brief as “full categorical preclusion”):

People v. Gomez (2020) 52 Cal.App.5th 1, 17, rvw. gtd. Oct. 14, 2020, S264033

People v. Galvan (2020) 52 Cal.App.5th 1134, 1142, rvw. gtd. Oct. 14, 2020, S264284

People v. Allison (2020) 55 Cal.App.5th 449, 457

People v. Murillo (2020) 54 Cal.App.5th 160, 167-168, rvw. gtd. Nov. 18, 2020, S264978

People v. Jones (2020) 56 Cal.App.5th 474, 483-484, rvw. gtd. Jan. 27, 2021, S265854

People v. Nuñez (2020) 57 Cal.App.5th 78, 95-96, rvw. gtd. Jan. 13, 2021, S265918

People v. Simmons (2021) 65 Cal.App.5th 739, 748-749, rvw. gtd. Sept. 1, 2021, S270048

B. Special Circumstance Findings As Partially Categorically Preclusive

Four opinions have held a prior special circumstance finding is categorically preclusive of a section 1170.95 petition if there is substantial evidence to support a finding of major

participation + reckless indifference under the *Banks/Clark* standard (shorthanded as “partial categorical preclusion”):

People v. Secrease (2021) 63 Cal.App.5th 231, 264, rvw. gtd. June 30, 2021, S268862

People v. Pineda (2021) 66 Cal.App.5th 792, ___ [281 Cal.Rptr.3d 402, 408-409], rvw. gtd. Sept. 29, 2021, S270513

People v. Arias (2021) 66 Cal.App.5th 987, ___ [281 Cal.Rptr.3d 580, 592-593], rvw. gtd. Sept. 29, 2021, S270555

People v. Wilson (Sept. 29, 2021, D078231) ___ Cal.App.5th ___ [2021 WL 4451424, pp. *5-11]

C. Special Circumstance Findings As Not Categorically Preclusive

Five opinions have held a prior special circumstance finding is not categorically preclusive of a section 1170.95 petition:

People v. Torres (2020) 46 Cal.App.5th 1168, 1178-1179, rvw. gtd. June 24, 2020, S262011 (disappr’d on other grds. in *People v. Lewis, supra*, 11 Cal.5th 952, 963)

People v. Smith (2020) 49 Cal.App.5th 85, 93-94, rvw. gtd. July 22, 2020, S262835

People v. York (2020) 54 Cal.App.5th 250, 258-259, rvw. gtd. Nov. 18, 2020, S264954

People v. Harris (2021) 60 Cal.App.5th 939, 956-958, rvw. gtd. Apr. 28, 2021, S267802

People v. Eloy Gonzalez (2021) 65 Cal.App.5th 420, ___ [279 Cal.Rptr.3d 868, 874-876], rvw. gtd. Aug. 18, 2021, S269792

III. Traditional Preclusion: Sources Of Law

The three traditional preclusion doctrines – claim preclusion (*res judicata*), law of the case, and issue preclusion (collateral or direct estoppel), are of ancient common-law vintage. (*E.g.*, *Caperton v. Schmidt* (1864) 26 Cal. 479, 493-494 [claim and issue preclusion]; *Graziani v. Ambrose* (1923) 201 Ky. 466, ___ [257 S.W. 21, 22]][law of the case].) In California they draw legal force from a general statute, Civil Code section 22.2:

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.

Traditional claim preclusion is also codified in Code of Civil Procedure section 1908, which by its terms applies to all actions and special proceedings. (*Needelman v. DeWolf Realty Co.* (2015) 239 Cal.App.4th 750, 757; *Federation of Hillside and Canyon Ass'ns v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1205.)¹ Traditional issue preclusion is also codified in Code of Civil Procedure section 1911 (*Kerley v. Weber* (2018) 27 Cal.App.5th 1187, 1194; *Smith v. Smith* (1981) 127 Cal.App.3d 203, 208), the other half of the common-law *res judicata* doctrine in section 1908 that similarly applies to all actions and special proceedings. (*Harman v. Mono General Hospital* (1982) 131 Cal.App.3d 607,

¹ Section 1170.95 is a special proceeding because it is an independent proceeding commenced by petition that does not fit the common-law definitions of an action at law or a suit in equity. (*Tide Water Associated Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 822.) A court's jurisdiction over a special proceeding is strictly limited by the terms and conditions of the authorizing statute. (*Smith v. Westerfield, supra*, 88 Cal. 374, 378-379.)

616; *Pomona College v. Dunn* (1935) 7 Cal.App.2d 227, 232-233.) Law of the case is a doctrine of judicial procedure. (*People v. Boyer* (2006) 38 Cal.4th 412, 441.)

If a statute specifically provided for a method of preclusion contrary to the traditional doctrines, of course the statute would prevail, as this Court held in *Gikas v. Zolin, supra*, 6 Cal.4th 841, 852. That is also consistent with Civil Code section 22.2 and Code of Civil Procedure sections 1908 and 1911.

But as was discussed *ante*, pp. 18-19, Penal Code section 1170.95 contains no statutory language that makes a special circumstance finding categorically preclusive. Because there is no statutory preclusion, we will focus in this brief on the three traditional preclusion doctrines, mostly issue preclusion because it seems to be what is most clearly at issue.

Because Civil Code section 22.2 and Code of Civil Procedure sections 1908 and 1911 contain the Legislature's adoption of claim and issue preclusion, those doctrines create no separation of powers issue. The Legislature in these statutes has specified that these preclusion doctrines are valid means for courts to limit litigation, absent another statute to the contrary.

In the "*Banks/Clark* cases" underlying this Court's grant of review, however, the published opinions that have found special circumstance findings partially or fully categorically preclusive (shorthand terms explained *ante*, Part II) are violating the separation of powers: Without understanding they are doing so, they are creating their own preclusion remedies without support in any statute, and without adhering to the legal restrictions of traditional preclusion doctrines the Legislature has required.

IV. Why A Prior Special Circumstance Finding Is Not Categorically Preclusive (Fully Or Partially) Under Any Of The Three Traditional Preclusion Doctrines

If the three traditional preclusion doctrines are properly applied, none of them permit a prior true finding on a special circumstance allegation to be categorically preclusive of a section 1170.95 petition, i.e., to defeat a prima facie case by itself. That principle should govern the *Strong* case and all 16 of the currently published opinions which discuss the “*Banks/Clark* issue,” since all 16 involved appeals from summary section 1170.95 denials based on lack of a prima facie case.

A. Claim Preclusion

Claim preclusion cannot make a special circumstance true finding a full or partial categorical bar in a section 1170.95 case, for any of several reasons.

1. First: Legislative Authorization

When the Legislature authorizes an action or a defense that supersedes the operation of claim preclusion, the Legislature’s statute prevails. (*Deas v. Knapp* (1981) 29 Cal.3d 69, 78-79; *Mueller v. Walker* (1985) 167 Cal.App.3d 600, 607.) Here, the Legislature expressly authorized a section 1170.95 petition to seek vacatur of a murder conviction, which supersedes the claim-preclusive effect of the murder conviction insofar as the petition meets all of section 1170.95's requirements.

Claim preclusion is based on the policy against a party needlessly splitting their claims. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.) It would make no sense to say there

is a claim-splitting issue for a claim the Legislature only authorized years after the original litigation.

2. Second: Claims That Arose After The Initial Pleading

Claim preclusion is not a bar to claims that arose after the initial pleading was filed, or that could not have been litigated in the original action. (*McCready v. Whorf* (2015) 235 Cal.App.4th 478, 482; *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 155.)

A section 1170.95 petition obviously could not have been litigated in a pre-S.B. 1437 trial, at a time when S.B. 1437 did not exist. The very function of section 1170.95 is to permit reconsideration of murder culpability that was originally adjudicated prior to S.B. 1437. Moreover, there is no claim-splitting issue for a claim that did not arise until long after the original action.

3. Third: A Section 1170.95 Petition Is Addressed To The Murder Conviction, Not To Any Special Circumstances

“The claim preclusion doctrine, formerly called *res judicata*, ‘prohibits a second suit between the same parties on the same cause of action.’ [Citation.] ‘Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit.’ [Citation.]” (*Kim v. Reins Int’l Calif., Inc.* (2020) 9 Cal.5th 73, 91.)

In a “*Banks/Clark* case” under section 1170.95, the petitioner is not challenging the prosecution’s cause of action on the special circumstance. Rather, the petition addresses only the first-degree murder conviction, as section 1170.95 expressly

permits. (*Accord People v. Eloy Gonzalez, supra*, 65 Cal.App.5th 420, ___ [279 Cal.Rptr.3d 868, 877].) The Court of Appeal asserted otherwise in *People v. Jones, supra*, 56 Cal.App.4th 474, 484 [“Jones’s challenge is to his special circumstance finding...”], but that is simply not so: Section 1170.95 says nothing about challenging special circumstance findings or a petitioner being required to do so.

Granted, if the murder conviction is vacated, the special circumstance falls with it. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 73-74 & fn.17; *In re Birdwell* (1996) 50 Cal.App.4th 926, 931; *People v. Williams* (1984) 157 Cal.App.3d 145, 155). But that doesn’t mean the petitioner is challenging the special circumstance, any more than a litigant is attacking an enhancement by challenging the conviction to which it is appended. (*See, e.g., People v. Bean* (1989) 213 Cal.App.3d 639, 646-647 [enhancement has no life of its own].) The section 1170.95 petitioner seeks a legislatively prescribed form of relief from the murder conviction, based on a statute that doesn’t mention special circumstances. (*See People v. Eloy Gonzalez, supra*, 65 Cal.App.5th 420, ___ [279 Cal.Rptr.3d 868, 877]; *People v. Harris, supra*, 60 Cal.App.5th 939, 956-957; *People v. York, supra*, 54 Cal.App.5th 250, 260.) Hence, on a section 1170.95 petition, claim preclusion does not apply to a prior special circumstance finding.

4. Fourth: Section 1170.95's Provision For New Evidence In Subdivision (d)(3)

Claim preclusion does not apply when there is new evidence that did not exist or could not reasonably have been discovered at

the time of, or could not have been presented in, the prior proceeding. (*People v. Ocean Shore Ry. Co.* (1948) 32 Cal.2d 406, 418-419; *Allied Fire Protection v. Diede Construction, supra*, 127 Cal.App.4th 150, 156; *Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164, 178-179.) Section 1170.95, subdivision (d)(3) thus incorporates a legal standard inconsistent with using claim preclusion as a categorical bar.

5. Fifth: Using New Evidence To Make A Prima Facie Case In Light Of Subdivision (d)(3)

Furthermore, a valid categorical bar would prevent a petitioner from making a prima facie case irrespective of the evidence. But that is not so under section 1170.95; because of subdivision (d)(3), a section 1170.95 petitioner has the right to include new facts in a prima facie case showing.

In the prima facie case stage, “ “the court takes petitioner’s factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved.... [Citation.]” (*People v. Lewis, supra*, 11 Cal.5th 952, 971.) If the petitioner’s factual showing at the prima facie case stage includes the new evidence permitted by subdivision (d)(3) as a basis for relief, there would be no legal basis for a trial court not to accept it as true, under the prima facie case standard set forth in *Lewis*. (*Accord People v. Smith, supra*, 49 Cal.App.5th 85, 95 [“Only after giving a petitioner the opportunity to file a reply, in which he may develop a factual record beyond the record of conviction, is a trial court in a position to evaluate whether there has been a prima facie showing of entitlement to relief.”]) Offers of proof can also be

utilized when using new evidence for a prima facie case is permitted. (See, e.g., *Conservatorship of Everette M.* (1990) 219 Cal.App.3d 1567, 1574; *Meakin v. Steveland, Inc.* (1979) 68 Cal.App.3d 490, 504.)²

B. Law Of The Case

Law of the case cannot make a special circumstance finding a full or partial categorical bar in a section 1170.95 proceeding, for any of several reasons.

1. Definitions

“Where an appellate court states in its opinion a principle of law necessary to the decision, that principle becomes law of the case and must be adhered to in all subsequent proceedings....

[U]nder the doctrine of the law of the case, the case may not go over ground that has been covered before in an appellate court.”

(*Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1506.)

“Thus, the law-of-the-case doctrine ‘prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances.’ [Citation.] The doctrine is one of procedure, not jurisdiction, and it will not be applied ‘where its application will result in an unjust decision, e.g., where there has been a “manifest misapplication of existing principles resulting in

² This Court stated in *Lewis* that because the petitioner was not relying on new evidence, the Court expressed no view on the merits of the assumption that petitioners cannot present new evidence at the prima facie case stage. (*Id.* at p. 974, fn.7.)

substantial injustice” [citation]...’ [Citation.]” (*People v. Boyer, supra*, 38 Cal.4th 412, 441.)

2. First: Points Of Law Not Presented And Determined In A Prior Appeal

In light of the definition above, law of the case does not apply to points of law which were not presented and determined on a prior appeal. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1130; *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 179.) This was the basis on which *People v. Eloy Gonzalez, supra*, 65 Cal.App.4th 420, rejected law of the case under the circumstances of that particular case. (*Id.* at p. ___ [279 Cal.Rptr.3d 868, 878].)

3. Second: Inapplicability To Matters Of Evidence

“Since the doctrine of law of the case rests upon the existence of error, it is not favored, and it rarely applies to matters of evidence.” (*Weaver v. Shell Co.* (1939) 34 Cal.App.2d 713, 717.) Thus, it would not apply to matters of evidence that were not actually litigated in an earlier appellate opinion.

4. Third: Inapplicability To Issues Of Fact

Issues of fact are not subject to the law of the case doctrine. (*Ajaxo, Inc. v. E*Trade Financial Corp.* (2020) 48 Cal.App.5th 129, 180.)

5. Fourth: Inapplicability When There Is New Evidence

“Where the evidence in [a] new trial is materially changed, the former determination on sufficiency is, of course, inapplicable, and the doctrine cannot be invoked. This proposition is sometimes expressed in the statement that the doctrine will not apply where there is no substantial identity of facts.” (9 Witkin, Cal. Procedure (5th ed. 2020, on-line), § 472 Supp.)

Accordingly, when there is new evidence material to a legal issue, law of the case will not apply. (*Id.*; *Foley v. Northern Calif. Power Co.* (1913) 165 Cal. 103, 106.) “[T]he rule of the law of the case may not be extended to be an estoppel when new material facts, or evidence, or explanation of previous evidence appears in the subsequent trial. [Citations.]’ [Citation.]” (*People v. Barragan* (2004) 32 Cal.4th 236, 247.) Law of the case also does not prevent parties from introducing additional evidence. (*Investors Equity Life Holding Co. v. Schmidt* (2015) 233 Cal.App.4th 1363, 1381.)

Section 1170.95, subdivision (d)(3) expressly permits both parties to introduce new facts. The parties can do so at the post-OSC hearing stage; they can also do so at the prima facie case stage (discussed *ante*, section (A)(5), pp. 28-29).

6. Fifth: Inapplicable When Its Application Would Be Unjust

Since law of the case is merely a doctrine of procedure, it does not apply when doing so would create injustice. (*England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795.)

7. Sixth: *Banks And Clark*, Whether They Are A Change Or A Clarification In The Law

The law of the case doctrine “does not apply where the controlling rules of law have been altered or clarified by a decision intervening between the first and second judicial determinations.” (*Providence v. Valley Clerks Trust Fund* (1984) 163 Cal.App.3d 249, 256; *AT & T Comms., Inc. v. Superior Court* (1994) 21 Cal.App.4th 1673, 1680 [emphasis added]; *see, e.g., Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 531

[declining to apply law of the case when an intervening decision clarified the applicable law].)

Irrespective of whether this Court holds in the current case that *Banks* and *Clark* changed the law governing major participation + reckless indifference, presumably everyone would agree this Court at least *clarified* the law. (*Accord, e.g., People v. Jones, supra*, 56 Cal.App.5th 474, 482; *People v. Murillo, supra*, 54 Cal.App.5th 160, 168, fn.5.) Accordingly, law of the case does not apply to appellate determinations of the *Banks/Clark* issue prior to *Banks* and *Clark*.

8. Recapitulation

At least three of the published opinions on the “*Banks/Clark* issue” – *People v. Secrease, supra*, 63 Cal.App.5th 231, 264, *People v. Murillo, supra*, 54 Cal.App.5th 160, 168-169 and *People v. Galvan, supra*, 52 Cal.App.5th 1134, 1143 – invoked law of the case as a categorical (*Murillo, Galvan*) or partially categorical (*Secrease*) bar, but with the qualifying word “Generally.”

These opinions misunderstand law of the case, because law of the case is highly case-specific, and one cannot “generalize” from one case to another whether law of the case is operative. Further, as is shown *ante*, section (B)(7), p. 31, law of the case can never be applied in a “*Banks/Clark* issue” situation: Law of the case doesn’t apply when there is an intervening *clarification* of the law, and *Banks* and *Clark* undisputably were at least that.

C. Issue Preclusion

1. Overview

Finally, there is issue preclusion. That may be what the published opinions that find a full or partial categorical preclusion bar from a special circumstance (listed *ante*, Part II(A)-(B)) meant to invoke without saying so, since 8 of those 11 opinions use the word “preclusion” or some variation. (*See People v. Allison, supra*, 55 Cal.App.5th 449, 460-461 [full categorical preclusion]; *People v. Jones, supra*, 56 Cal.App.5th 474, 488-490 & *id.* at pp. 492, 495 (conc. opn. of Menetrez, J.) [full]; *People v. Nuñez, supra*, 57 Cal.App.5th 78, 92 [full]; *People v. Simmons, supra*, 65 Cal.App.5th 739, 742, 746, 749 [full]; *People v. Secrease, supra*, 63 Cal.App.5th 231, 253-254, 260-261, 263 [partial categorical preclusion]; *People v. Pineda, supra*, 66 Cal.App.5th 792, ___ [281 Cal.Rptr.3d 402, 403, 407-408] [partial]; *People v. Arias, supra*, 66 Cal.App.5th 987, ___ [281 Cal.Rptr.3d 580, 592, 588-589, 591-592] [partial]; *People v. Wilson, supra*, ___ Cal.App.5th ___ [2021 WL 4451424, pp. *3-6] [partial].) (All five opinions that hold a special circumstance is not categorically preclusive use the word “preclusion” or some variation. (*People v. Torres, supra*, 46 Cal.App.5th 1168, 1173, 1179-1180; *People v. Smith, supra*, 49 Cal.App.5th 85, 92-95; *People v. York, supra*, 54 Cal.App.5th 250, 257-258, 260-263; *People v. Harris, supra*, 60 Cal.App.5th 939, 944, 956-957; *People v. Eloy Gonzalez, supra*, 65 Cal.App.5th 420, ___ [279 Cal.Rptr.3d 868, 875-878].)

We grant that if this Court were to find that *Banks* and *Clark* didn’t materially change the law or interpretive doctrine governing special circumstances, then *Banks* and *Clark* could not

change whatever issue-preclusive effect a prior special circumstance finding might have in a case. But that fails to answer a foundational question in each individual case: Does a special circumstance have issue-preclusive effect in that case?

The answer can only be yes if issue preclusion's elements – set forth in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*) – are established with certainty (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1482) and no exception applies (*see, e.g., F.E.V. v. City of Anaheim* (2017) 15 Cal.App.5th 462, 474, fn.4).

Thus under traditional preclusion analysis, there is no legal basis to say a prior special circumstance finding is issue-preclusive on the basis that *Banks* and *Clark* do not change the law, in cases where the prior special circumstance finding had no preclusive effect irrespective of *Banks* and *Clark*.

The question of whether a prior finding is issue-preclusive, for special circumstance findings or any other, is intensely case-specific and thus unsuitable as a categorical bar. The question is fact-driven and dependent on the specifics of each case, since it requires courts to “examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter,” with an inquiry “set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” (*Yeager v. United States* (2009) 557 U.S. 110, 119-120.)

Some of the case-specific applications of issue preclusion are discussed below, and there are many others. Only one is needed to show issue preclusion is not either a full or partial categorical preclusion bar.

2. Definitions

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]” The party asserting collateral estoppel bears the burden of establishing these requirements. [Citation.] (*Lucido v. Superior Court, supra*, 51 Cal.3d 335, 341.)

“Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end.... [T]he public policies underlying collateral estoppel – preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation – strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy.” (*Id.* at pp. 342-343.) Furthermore, “ “courts will not apply the doctrine ... if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding.” ’ [Citation.]” (*Williams v. U.S. Bancorp Investments, Inc.* (2020) 50 Cal.App.5th 111, 118-119.)

“ “In view of the certainty required in estoppels, the application of the doctrine of res judicata cannot be made by inference or surmise as to the effect of the judgment. If, on the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when it is pleaded, and nothing conclusive in it when it is offered in evidence.” [Citations.]’ [Citations.]” (*SLPR, LLC v. San Diego Unified Port District* (2020) 49 Cal.App.5th 284, 313.)

3. First: No Issue Preclusion Where The “Actually Litigated” Element Is Not Satisfied

First is a basis described in *People v. Eloy Gonzalez, supra*, 65 Cal.App.4th 420, ___ [279 Cal.Rptr.3d 868, 877]: In some section 1170.95 cases, the second element of issue preclusion under *Lucido*, that an issue must have been “actually litigated,” will be unsatisfied.

“[A]n issue is actually litigated when an issue is raised, contested, and submitted for determination. [Citations.] Under this standard, neither an issue that could have, but was not, asserted (such as an affirmative defense) nor an issue that was raised but admitted was ‘actually litigated.’ See Restatement (Second) of Judgments § 27, cmt. (e) (1982) (‘A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; it is also not actually litigated if it is raised by a material allegation of a party’s pleading but is admitted (explicitly or by virtue of a

failure to deny) in a responsive pleading).’” (*Janjua v. Neufeld* (9th Cir. 2019) 933 F.3d 1061, 1066.)

Since actual litigation of an issue is an essential element of issue preclusion, there is no preclusion in cases where the issue wasn’t actually litigated. (For examples, see, *e.g.*, *People v. Superior Court (Whitley)* (1999) 68 Cal.App.4th 1383, 1390-1391; *National Computer Rental, Ltd. v. Bergen Brunswick Corp.* (1976) 59 Cal.App.3d 58, 63; *Purdue Pharma L.P. v. Iancu* (Fed.Cir. 2019) 767 Fed.Appx. 918, 922; *Gates v. District of Columbia* (D.D.C. 2014) 66 F.Supp.3d 1, 12-14.)

At least 7 of the 16 published opinions to date on the “*Banks/Clark* issue” – the ones that state facts indicating a defense of nonculpability – may fall into this category (and the one in the next section), based on the evidence recited in the opinions. The 7 opinions are *Galvan* and *Nuñez* [full categorical preclusion], *Secrease*, *Arias* and *Wilson* [partial categorical preclusion], and *Harris* and *Eloy Gonzalez* [no categorical preclusion].

Failure to meet the “actually litigated” element of issue preclusion was one of the bases of Part IV of the *Eloy Gonzalez* opinion. (*Id.*, 279 Cal.Rptr.3d 868, 877-878.) *Eloy Gonzalez* is discussed illustratively in section (E)(1), *post*, pp. 47-51.

4. Second: No Issue Preclusion Where The Affected Party Did Not Have Adequate Incentive To Vigorously Litigate The Issue

Akin to the “actually litigated” element of issue preclusion is the requirement that the affected party must have had

adequate incentive to vigorously litigate the issue in the prior action.

“[C]ourts have recognized that certain circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be ‘unfair’ to the defendant as a matter of law. [Citation.] Such ‘unfair’ circumstances include a situation where the defendant had no incentive to vigorously litigate the issue in the prior action, ‘particularly if the second action is not foreseeable.’ [Citations.]” (*Roos v. Red* (2005) 130 Cal.App.4th 870, 880; *accord Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 332, 330.) Foreseeability of future litigation matters “because of its impact on the incentive to litigate in the first proceeding.” (*In re Sokol* (2d Cir. 1997) 113 F.3d 303, 307 (*Sokol*).

In almost every section 1170.95 case, the second action will not have been foreseeable, since trial counsel would not have been able to envision the Legislature enacting S.B. 1437 in late 2018. Moreover, it can often be a solid tactical choice for counsel to focus only on an absolute defense to the most serious charges, rather than diluting it with a “but if you find otherwise...” alternative that would be easy fodder for opposition rebuttal. (*See, e.g., People v. Cunningham* (2001) 25 Cal.4th 926, 1005; *People v. Thomas* (1992) 2 Cal.4th 489, 531-532.)

That was particularly true for major participation + reckless indifference special circumstance issues prior to S.B. 1437: Many of these cases had 25 year-to-life vicarious gang enhancement allegations (Pen.Code, § 12022.53, subd. (d/e)), multiple counts and enhancements, or other factors that made a

murder conviction *without* a special circumstance punishable by a sentence equivalent to the LWOP that would be obtained *with* a special circumstance.

In such a situation, a defendant and his counsel may have had little or no incentive to litigate the special circumstance because it would be perceived as accomplishing nothing in real life, and they would focus instead on trying to beat the murder charge without an alternative argument that could impair that effort. Counsel may thus lack incentive to vigorously litigate an alternative defense of “But if you find my client guilty, you should still find the special circumstance isn’t true,” in part because it could undermine the argument for innocence.

In re Sokol, supra, 113 F.3d 303, presents a good example. Sokol was indicted with co-defendants for stealing over \$1 million from the State’s Medicaid program. He was convicted of second-degree grand larceny, which required that the property taken was valued between \$50,000 and \$1 million. The only evidence of the amount of Sokol’s theft was presented at sentencing; it indicated losses of \$222,000. Sokol was denied a restitution hearing, and the trial court imposed a \$222,000 restitution order. The State also brought a civil action to recover treble damages, and invoked issue preclusion to fix Sokol’s liability at \$222,000 which it could then treble. Sokol filed for bankruptcy and sought to discharge the civil liability, which led to the question of whether the \$222,000 restitution order from the criminal case was issue-preclusive.

The Court of Appeals rejected the issue preclusion claim on the basis in this section, that Sokol did not have a full and fair

opportunity to litigate the amount of his damages in the criminal case, because he lacked incentive to litigate the issue vigorously (and in fact did not litigate it at all) since his criminal defense was based entirely on innocence:

Sokol not only had no incentive to litigate damages, he did not actually do so. His entire trial strategy was dedicated to proving his innocence, not to proving a lesser degree of damages. He did not deny that over \$1 million had been stolen from the State's Medicaid Program; he denied that he was a participant in the larceny. The focus of the criminal trial was on Sokol's knowledge of implicated billing practices and counterfeit sonograms, not on the amount stolen. Sokol never presented evidence as to the amount he stole, as that would have been inconsistent with a defense of innocence.

(In re Sokol, supra, 113 F.3d 303, 307.)

This reasoning applies to a trial on a charge of murder with special circumstances and other charges. There too, the defendant and counsel may lack the incentive to litigate vigorously an alternative defense of minimizing the penalty if the defendant is found guilty (i.e., “If you believe he’s guilty of murder, you should still reject the special circumstances”), because only a defense of innocence could realistically result in the defendant being freed within his lifetime. That was also the situation in the *Eloy Gonzalez* case discussed illustratively in section (E)(1), *post*, pp. 47-51.

5. Third: Issue Preclusion Is Inapplicable When The Affected Party Was Unable To Present Material Facts In The Original Proceeding

When a party is unable to present material facts in the original proceeding through no fault of its own, issue preclusion

does not apply to the original verdict. (*Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1417.)

This scenario is part of the *Eloy Gonzalez* illustration in section (E)(1) below.

6. Fourth: The Statutory Proviso For New Evidence Defeats Using Issue Preclusion As A Categorical Bar

“[N]ew evidence, however compelling, is generally insufficient to avoid application of collateral estoppel...” (*Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551, 1561.) “An exception to collateral estoppel cannot be grounded on the alleged discovery of more persuasive evidence. Otherwise, there would be no end to litigation.” (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 748.)

However, in section 1170.95, subdivision (d)(3), the Legislature expressly permitted both parties to present new evidence. Were a categorical issue preclusion claim to succeed, it would defeat the Legislature’s provision that a petitioner can present new evidence, without restriction, in a section 1170.95 proceeding. (*See also ante*, section (A)(5), pp. 28-29.)

7. Fifth: Issue Preclusion Is Inapplicable When The Prior Verdict Was Based On A Material Error Or Irrationality, Including Situations In Which There Was Insufficient Evidence To Support The Verdict, When The Circumstances Indicate Compromise, Or When The Verdict Was Affected By Error

“[P]rinciples of collateral estoppel ... are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict” (*United States v. Powell* (1984) 469 U.S. 57, 68.) When the assumption of a rational jury verdict breaks down, so does the principled basis for applying issue

preclusion. “Where circumstances suggest that an issue was resolved on erroneous considerations, ‘taking the prior determination at face value for purposes of the second action would [impermissibly] extend the ... imperfections in the adjudicative process.’” (*Bravo-Fernandez v. United States* (2016) 580 U.S. ___, ___ [137 S.Ct. 352, 358, 196 L.Ed.2d 242] [quoting Restatement (2d), Judgments, § 29, Comm. (g)].)

Such a situation could occur in any of at least three possible situations:

(1) *Where multiple jury verdicts cannot rationally be reconciled.* In that situation, usually one of compromise or mistake, it is impossible to know which (if any) of the verdicts was the rational one. Hence, the assumption of a rational jury that is the basis of issue preclusion breaks down, and issue preclusion does not apply. (*United States v. Powell, supra*, 469 U.S. 57, 68-69.)

(2) *Where there is insufficient evidence to support a verdict (taking the evidence favorably to the verdict).* “[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 317.) Because the principles of issue preclusion are based on the assumption of a rational trier of fact (*United States v. Powell, supra*, 469 U.S. 57, 68), those principles do not apply when the record shows the trier of fact did not reach its verdict rationally, and insufficiency of evidence is one such situation. Similarly, a verdict based on insufficient evidence is one “resolved on erroneous considerations”

(*Jackson*, at p. 317), which means that “ ‘taking the prior determination at face value for purposes of the second action would [impermissibly] extend the ... imperfections in the adjudicative process.’ ” (*Bravo-Fernandez v. United States*, *supra*, 137 S.Ct. 352, 358 [citing Restatement (2d), Judgments].)

(3) *Where instructional error may have affected the verdict.* That too is a situation in which “circumstances suggest that an issue was resolved on erroneous considerations,” such that “ ‘taking the prior determination at face value for purposes of the second action would [impermissibly] extend the ... imperfections in the adjudicative process.’ ” (*Bravo-Fernandez v. United States*, *op. cit. ante.*)

This would be true even if the instruction in question was legally erroneous. (See *Westinghouse Elec. Corp. v. General Circuit Breakers & Elec. Supply, Inc.* (9th Cir. 1997) 106 F.3d 894, 901-902 [applying analysis of the “necessarily decided” element of issue preclusion, to findings actually made by jury but under erroneous instructions].) Suppose for example that in a 2000 case, the trial court gave an implied malice instruction that contained the error found by this Court in *People v. Knoller* (2007) 41 Cal.4th 139, 156; the defendant was convicted; the Court of Appeal affirmed; and the judgment became final. On those instructions, the defendant’s conviction might have been based on a mental state of less than malice – but all theories of murder with a mental state of less than malice (other than felony-murder, irrelevant in this example) were eliminated by S.B. 1437. Thus on a section 1170.95 petition, issue preclusion does not apply,

since the issue of malice was not “necessarily decided” under the law that governs malice.

8. Sixth: No Application Where There Is A Change Of Law Or A Doctrinal Shift In The Law – Including *Banks And Clark*

“Collateral estoppel is not applicable to the decision of a mixed question of fact and law, particularly if there has been an intervening change in the law or a doctrinal change.

(*Commissioner v. Sunnen* (1947) 333 U.S. 591, 600—601 [(*Sunnen*)].” (*Powers v. Floersheim* (1967) 256 Cal.App.2d 223, 230 (*Powers*).) Whether a person’s actions rise to the level of major participation + reckless indifference is a mixed question of law and fact, since it involves determining what the actions are and then whether they meet a given legal standard. (*Cf., e.g., Redington v. Pacific Postal Tel. Cable Co.* (1895) 107 Cal. 317, 324 [negligence is a mixed question using that type of analysis].)

In the above quote from *Powers v. Floersheim*, we note the word “doctrinal” in the disjunctive with “change of law”: A full change of law isn’t necessary to defeat issue preclusion; a “doctrinal” shift will suffice. Even if the elements at issue are the same, if intervening decisions mark a doctrinal shift in how those elements are interpreted, issue preclusion does not apply.

The latter (doctrinal shift) is the **minimum** one can say about *Banks* and *Clark*. Therefore, collateral estoppel does not apply – and obviously, it is not a categorical bar – no matter how the “*Banks/Clark* issue” is characterized, and no matter how this Court rules on the *Strong* appeal before it. We will also discuss this further *post*, Part V(B), *post*, pp. 67-70.

D. Example Situations In Which Traditional Preclusion Analysis Would Apply Irrespective Of How The “Banks/Clark Issue” Is Decided

Not every section 1170.95 case will raise the *Banks/Clark* issue. However, the application of traditional preclusion law must be uniform across all civil and criminal actions and special proceedings, with no judicial carve-outs for section 1170.95 cases.

Accordingly, traditional preclusion law also applies in section 1170.95 cases in situations where the *Banks/Clark* issue is not presented. Those situations may include, as examples:

1. Special circumstance cases tried after both *Banks* and *Clark* were decided. There is no “*Banks/Clark* issue” in these cases because the law governing special circumstances was fully settled by the time of *Clark*. However, traditional preclusion law still applies.

2. Special circumstance cases tried after *Banks* but before *Clark*. Since *Banks* and *Clark* are usually referenced as a dyad, it isn’t clear whether *Clark*’s language on 63 Cal.4th at p. 617 represented a material change from *Banks*, or merely a case-specific application. Either way, it won’t matter in a given case if traditional preclusion is defeated for other reasons.

3. Non-special circumstance cases in which the governing interpretation of law has changed. Suppose a petitioner was convicted of first-degree murder and conspiracy to commit murder in 1990. The People might claim this petitioner is categorically ineligible for section 1170.95 relief, but suppose a review of the instructions – part of a traditional issue preclusion analysis (*Yeager v. United States, supra*, 557 U.S. 110, 119-120) –

reveals the first-degree murder conviction could have been based on “natural and probable consequences,” and the conspiracy conviction could have been based on implied malice which was later held to be a legal impossibility. (See *People v. Cortez* (1998) 18 Cal.4th 1223; *People v. Swain* (1996) 12 Cal.4th 593.) In this hypothetical, the prior verdict is not preclusive because the elements of murder under current law – including malice (intent to kill) – were not “necessarily decided” by the prior verdict. It would be erroneous for a court to say “It wasn’t a felony-murder case, so the prior first-degree murder verdict is preclusive,” without a true preclusion analysis.

4. Non-special circumstance cases in which the original conviction was based on an error of law or demonstrable jury irrationality. This was discussed in section (C), *ante*, pp. 41-44.

5. Other non-special circumstance cases with instructions that permitted conviction under a theory no longer valid under current law. This too implicates a traditional preclusion analysis, in which the “necessarily decided” element of *Lucido*’s description of collateral estoppel is not satisfied.

E. Specific Examples Of Illustrative Scenarios

To help illustrate how adhering to the requirements of traditional preclusion doctrines can defeat preclusion, thus promoting due process by ensuring that a petitioner who isn’t legally precluded has a fair opportunity to litigate their claims, we use two examples. We do so keeping in mind that for traditional preclusion analysis, a court must “examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter,” with an inquiry “set

in a practical frame and viewed with an eye to all the circumstances of the proceedings.” (*Yeager v. United States, supra*, 557 U.S. 110, 119-120.)

We could frame these situations as purely hypothetical, since they are illustrative of *amicus*’s points irrespective of whether they are real cases. However, there seems to be no need, since they are offered merely for illustration; the records of and briefing in these cases are before this Court; and the People have copies. Hence, we will describe them as the real-life illustrations they are, recognizing they work just as well for illustrative purposes as would hypotheticals.

1. *People v. Eloy Gonzalez* (S269792)

In *People v. Eloy Gonzalez, supra*, 65 Cal.App.5th 420, this Court’s adjudication of the “*Banks/Clark* issue” shouldn’t matter to the ultimate result. The *Banks/Clark* issue is Part II of the *Eloy Gonzalez* opinion, but independent of that is the preclusion analysis, which is Part IV of the opinion. Part IV is operative irrespective of what this Court does with the issue in Part II.

The *Eloy Gonzalez* Court held that claim preclusion was inapplicable because the special circumstance was a different cause of action than the murder conviction which was the subject of the section 1170.95 petition, and law of the case was inapplicable because the major participation/reckless indifference issue was not addressed in the prior appeal. (*Id.*, 65 Cal.App.5th 420, ___ [279 Cal.Rptr.3d 868, 877-878].) That left issue preclusion.

Eloy Gonzalez involved a scenario such as that described *ante*, sections (C)(3)-(4), pp. 36-40, in which trial counsel did not

actually litigate the special circumstance, and lacked the incentive to litigate it vigorously, because such litigation could have undermined counsel's defense of legal innocence while prevailing on the special circumstance would accomplish nothing. As noted *ante*, p. 37 (section (C)(3)), at least six other published opinions among the 16 on "*Banks/Clark* issue" – the *Galvan*, *Nuñez*, *Secrease*, *Arias*, *Wilson* and *Harris* opinions – also state evidence that potentially implicate that type of scenario.³

Had trial counsel in *Eloy Gonzalez* litigated the special circumstance and succeeded in the 2000 trial, his client would have ended up with a sentence of 50 years to life for count 1 (Vargas's murder, with a vicarious gang firearm enhancement), plus a very large determinate term – i.e., a life sentence with no parole within the client's lifetime. In other words, "succeeding" in litigating the special circumstance would yield the same real-life sentence of life without parole as not litigating it.

Counsel (quite reasonably) decided this would be pointless. Instead, akin to *In re Sokol*, *supra*, 113 F.3d 303, 307, he focused solely on a nonculpability defense to the murder charge, that his client had withdrawn from the robbery conspiracy early enough to negate the robbery component of robbery-murder.

When a defendant does not contest a serious charge, it amounts to a real-life concession. (*Accord*, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 677-678; *People v. Flood* (1998) 18 Cal.4th 470, 504-505.) Eloy Gonzalez's counsel would have had no reason

³ The *Simmons* opinion did not contain a recitation of evidence, so it was not included in this canvass of the opinions mentioned in the text above.

to think that if he made no argument on the special circumstance, the jury might still find it not true.⁴

This was the context in which the *Eloy Gonzalez* Court found issue preclusion did not apply because the “actually litigated” requirement, element “Second” of this Court’s *Lucido* opinion (51 Cal.3d 335, 341), was not satisfied:

Here, defense counsel did not ‘actually litigate’ the robbery special circumstance. Instead, he argued Gonzalez was not guilty of murder at all. Because Gonzalez made no effort to litigate the special circumstance, and had no reason to do so, the ‘actually litigated’ element of collateral estoppel is not satisfied by the jury’s true finding. Therefore, the jury’s prior special circumstance finding has no preclusive effect on a current section 1170.95 proceeding.

(*Eloy Gonzalez*, at p. ____ [279 Cal.Rptr.3d 868, 877].)

There were other possibilities for the Court of Appeal to find the requirements of issue preclusion unsatisfied. One was that for the reasons above, *Eloy Gonzalez*’s trial counsel did not

⁴ With apologies for the triple negative.

Even in similar cases that didn’t have extra counts or a firearm discharge enhancement adding an extra 25 years-to-life under section 12022.53, many defendants or attorneys who were asserting innocence would have felt there was minimal incentive for counsel to argue alternatively “but if you find him guilty, you still shouldn’t find the special circumstance true.” In the real world, a sentence of 25 years-life was often considered little different from LWOP, since so few lifers were paroling. (See, e.g., D. Slater, “Can You Talk Your Way Out Of A Life Sentence?” *New York Times Magazine* (Jan. 1, 2020), URL <https://www.nytimes.com/2020/01/01/magazine/prison-parole-california.html> [after Polly Klaas’s 1993 murder, “parole all but disappeared,” and “[b]y 1999, a lifer’s chance of receiving parole was well below 1 percent].)

have an incentive to vigorously litigate the special circumstance. (*See ante*, section (C)(4), pp. 37-40)

Further, the Court of Appeal’s opinion did not mention the evidence that trial counsel was unsuccessful in presenting at Eloy Gonzalez’s trial because the prosecution was able to exclude it, before the prosecution’s turnaround in which it presented the same evidence at the capital trial of the killer Vargas. This was the evidence from witnesses Laura Espinoza and Amor Gonzalez (no relation) that when Eloy Gonzalez and co-defendant Matthew Miller found out Vargas had murdered the victim, they were angry at Vargas and told him he would “regret it for the rest of his life.” (*People v. Vargas* (2020) 9 Cal.5th 793, 803.) The new evidence would be highly material to the issue of whether Eloy Gonzalez was recklessly indifference to Jesse Muro’s life, since his anger at Vargas’s murder of Jesse is contrary to the reckless indifference requirement as stated by this Court in *People v. Clark, supra*, 63 Cal.4th 522, 617 [“a willingness to kill (or to assist another in killing) to achieve a distinct aim”]. This crucial evidence, which Eloy Gonzalez’s trial counsel was blocked from presenting at his trial despite his best efforts, would defeat issue preclusion for the reasons *ante*, sections (C)(5)-(6), pp. 40-41.

All of this would be true irrespective of how this Court rules on the *Banks/Clark* issue. If this Court finds in favor of the People on that issue, then the “change of law or doctrinal shift” exception to issue preclusion, described *ante*, section (C)(8), p. 44, cannot be satisfied. But change of law or doctrinal shift is only one of the many ways to defeat issue preclusion, and Eloy Gonzalez’s case implicates several others, including but not

limited to the one in Part IV of the *Eloy Gonzalez* opinion. The result of the Court's opinion in that case, reversal and remand with directions to issue an order to show cause, is thus unaffected by how this Court ultimately decides the "*Banks/Clark* issue.

In short, Eloy Gonzalez's case illustrates why the "*Banks/Clark* issue" is only a small subset of a traditional preclusion analysis.

2. *People v. Juan Gonzalez* (S270771)

People v. Juan Gonzalez (no relation to anyone in the *Eloy Gonzalez* case), before this Court on a petition for review in No. S270771, is not a section 1170.95 case. It therefore presents a different illustration of why the "*Banks/Clark* issue" is only a small subset of the broader question of whether the requirements of any traditional preclusion doctrine are satisfied.

As shown by the record before this Court, the *Juan Gonzalez* case involved two armed gang members getting out of Juan's truck after it stopped late at night, and confronting a couple of innocent kids on their bikes with a gang challenge. The armed gang members didn't hear what they wanted, so they opened fire, killing one youth and badly wounding the other. Juan, who was a member of the same gang, was alleged to be the driver; there was no evidence he was the shooter. Juan was stopped driving his own truck 15-20 minutes after the shootings, and there were multiple forms of consciousness of guilt evidence, so the prosecution's evidence for Juan being the driver at the scene was pretty much overwhelming. Because of the availability of gang firearm discharge enhancements (Pen.Code, § 12022.53,

subds. (d/e)), Juan faced a maximum sentence of 67 years to life – a real-life equivalent of LWOP.

However, there was no evidence that Juan had the specific intent to kill required for aiding and abetting murder and attempted murder (*People v. Johnson* (2016) 62 Cal.4th 600, 641; *People v. Lee* (2003) 31 Cal.4th 613, 623), and neither the People nor the courts pointed to any. (That said, the case was tried and its appeal was decided before this Court made clear that intent to kill is required for aiding and abetting murder [or attempted murder] in a non-natural and probable consequences case. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118 & fns. 1-2; compare, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1379 [pre-*McCoy*: “[T]he specific intent necessary for conviction of an aider and abettor in a murder would not be the specific intent to kill, but the intent to ‘encourage and bring about conduct that is criminal.’ ”])

If the jury were to find Juan was the driver who drove the two armed gang members in his own truck, there would have been no realistic defense to a natural and probable consequences theory of murder. At the very least, transporting two armed gang members was a crime of aiding and abetting firearm felonies (e.g., then-Pen.Code §§ 12025, subd. (a) and 12031, subd. (a)), and a jury would almost inevitably find that a murder and an attempted murder were reasonably foreseeable consequences of such a crime. The prosecution, in fact, requested a natural and probable consequences instruction.

Had the jury found him guilty of both crimes on a natural and probable consequence theory, Juan Gonzalez would probably

have been freed by now: Since there was no evidence to support any theory of murder other than natural and probable consequences, and in particular no evidence of malice if Juan was the driver, section 1170.95 relief would be required.

Because nobody in 1999 could foresee S.B. 1437 being enacted in 2018, Juan's only realistic hope of escaping an LWOP-equivalent sentence for these two horrible crimes – based on what was known then – was for a jury to find reasonable doubt he was the driver. Probably out of desperation in that light, Juan chose to testify that he had merely lent his truck to the two gang members, and wasn't at the scene of the shooting.

The attorneys then argued the case. The prosecution argued against Juan's only defense, that he wasn't there, plus the consciousness of guilt evidence. Juan's trial counsel argued in favor of Juan's testimony, and that was his only argument.

After the attorneys' arguments, the trial court gave its instructions. The court, however, refused the prosecution's request for a natural and probable consequences instruction, instead instructing only on express malice murder. (The record does not say why.) It mentioned the existence of implied malice as an alternative to express, but didn't instruct further on implied malice, of which there was no evidence anyway.

The jury acquitted Juan on the charges of premeditation and deliberation for murder and attempted murder, but convicted him of second-degree murder and nonpremeditated/deliberated attempted murder, and found the gang firearm allegations true. He was sentenced to 67 years to life.

Given that there was no evidence of intent to kill, but that was the only theory of conviction on which the jury was instructed, there were four realistic possibilities of how Juan could have been convicted which also may have worked in combination. They were:

1. Since the jury was given no lesser offense option below murder, the case exemplified what this Court has recognized in those situations as a defendant being “exposed to the substantial risk that the jury’s practice will diverge from theory [that no evidence means acquittal]. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.)

2. There were multiple forms of powerful consciousness of guilt evidence. While appellate opinions show this doesn’t fill in evidence of intent to kill that doesn’t otherwise exist (*Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487, 498; *Beck Development Co. v. Southern Pac. Transp. Co.* (1996) 44 Cal.App.4th 1160, 1205; see *People v. Jones* (2013) 57 Cal.4th 899, 971, on the limits of consciousness of guilt evidence), jurors don’t read appellate opinions.

3. If Juan’s own attorney didn’t argue intent to kill, jurors’ minds would not have been focused on it. (See *Herring v. New York* (1975) 422 U.S. 853, 862.) Even if they thought about it, jurors would have no reason to assume that failure to contest an essential element was anything other than a concession. (See, e.g., *People v. Flood, supra*, 18 Cal.4th 470, 505.)

4. There was an instruction that implied malice existed, but the instructions never defined it. (1CT 106; 3CT 807) That left jurors free to use their own definitions, including nonlegal definitions of malice as harmful intent (*People v. Adams* (2004) 124 Cal.App.4th 1486, 1493-1494) – which jurors could easily derive from a person being in a gang and driving around two armed gangsters, then hiding their guns, concocting a false alibi and testifying falsely.

Whatever the jury scenario in 1999, Juan was statutorily eligible for relief under Penal Code section 1170.95. He met each of the three criteria:

(a)(1) The information allowed the prosecution to proceed on a theory of murder under the natural and probable consequences doctrine.

(a)(2) Juan was convicted of second degree murder following a trial.

(a)(3) He “could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019”: Those changes eliminated all theories of murder without malice (other than in felony-murder cases, irrelevant to Juan’s case), and whatever the theory was on which the jury convicted Juan, it was necessarily less than malice because there was no evidence of malice.

Furthermore, there was an obvious prima facie case factually under any legal standard, for the same reason Juan

satisfied subdivision (a)(3): There was no evidence to support a conviction of murder under current law. (*See citations post*, p. 58)⁵

Nonetheless, the trial court dismissed Juan’s section 1170.95 petition summarily, and the Court of Appeal affirmed. Both did so on the basis that the jury was only instructed on express malice murder, so the prior conviction for express malice murder was preclusive.

Traditional preclusion doctrines would have required not giving preclusive effect to the prior verdict. Claim preclusion was inapplicable for the reasons *ante*, sections (A)(1)-(3). Law of the case was inapplicable because the prior appellate opinion never mentioned the issue of insufficiency of evidence of specific intent to kill nor did it point to any such evidence (*see* section (B)(2), *ante*, p. 30), and there was no such evidence so that applying law of the case would be unjust (*see ante*, section (B)(6), p. 31). And issue preclusion was inapplicable because trial counsel did not “actually litigate” the issue of specific intent to kill, nor did he have an incentive to do so since it would have likely invited a disastrous natural and probable consequences instruction (*see ante*, sections (C)(3)-(4), pp. 36-40); plus, issue preclusion is inapplicable when there is no evidence to support the prior verdict (*see ante*, section (C)(7), pp. 41-44).

Juan Gonzalez’s case also illustrates why traditional preclusion in section 1170.95 cases is not limited to “*Banks/Clark* issues.” It further exemplifies the need for this Court to issue an

⁵ If the Governor signs S.B. 775, the same analysis will apply to his conviction for attempted murder.

opinion which holds that traditional preclusion analysis must be applied in section 1170.95 cases as in any other kind of case.

F. Related Observations On The Leading Full Categorical Preclusion And Partial Categorical Preclusion Opinions

All of the opinions that espouse full or partial categorical preclusion for special circumstances err by not using traditional preclusion analysis, and generally, no further analysis is needed. We comment briefly here on aspects of the two leading categorical bar opinion, *Galvan* (full) and *Secrease* (partial), which might at first blush appear not to implicate traditional preclusion, but on closer examination actually do.

1. *Galvan* And The “Because Of...” Clause

The *Galvan* Court concluded that if the *Banks/Clark* issue is decided adversely to the defense, then section 1170.95 petitioners with prior special circumstances are all precluded, on the basis that they cannot satisfy the “because of...” clause in section 1170.95, subdivision (a)(3). (*Galvan*, 52 Cal.App.5th 1134, 1142.) That was in error, because it overinterprets subdivision (a)(3) to say things it doesn’t, and because it bypasses the requirements of traditional preclusion analysis.

Subdivisions (a)(1) and (a)(2) are trivial in these cases. As for subdivision (a)(3), it states:

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.

This subdivision is only a requirement that the petitioner might have been convicted of murder under a legal theory that no longer exists under S.B. 1437, and that the prosecution cannot now prove the petitioner’s guilt beyond a reasonable doubt under a

theory of murder that still exists post-S.B. 1437. (*People v. Fortman* (2021) 64 Cal.App.5th 217, 224, rvw. gtd. July 21, 2021, S269228; *People v. Harris, supra*, 60 Cal.App.5th 952-953; *People v. Clements* (2021) 60 Cal.App.5th 597, 603, rvw. gtd. Apr. 28, 2021, S267624; *People v. Rodriguez* (2020) 58 Cal.App.5th 227, 230-231, rvw. gtd. Mar. 10, 2021, S266652; *People v. Lopez* (2020) 56 Cal.App.5th 936, 951, rvw. gtd. Feb. 10, 2021, S265974.)

A petitioner who meets this criterion is eligible to make a prima facie case for relief under section 1170.95 – period. This statutory criterion says nothing about special circumstances creating an exception. Courts cannot permissibly read exceptions into statutes that the Legislature didn’t put there. (*Dominguez v. Superior Court* (1990) 226 Cal.App.3d 524, 530.)

The statute also says nothing about requiring a side trip to habeas corpus to obtain vacatur of the conviction before seeking section 1170.95 relief. Furthermore, any such position would affirmatively contravene the statute, because habeas relief might be denied for failure to show there is insufficient evidence under the *Banks/Clark* standard, in cases where the statute would require section 1170.95 relief because the prosecution could not make a subdivision (d)(3) case beyond a reasonable doubt.

Disagreeing with the above was *Galvan*, which deemed a petitioner with a prior special circumstance to be categorically unable to satisfy subdivision (a)(3):

Although *Galvan* is asserting that he could not now be convicted of murder, the alleged inability to obtain such a conviction is not “because of changes” made by Senate Bill No. 1437, but because of the clarification of the requirements for the special circumstance finding in *Banks*

and *Clark*. Nothing about those requirements changed as a result of Senate Bill No. 1437. Just as was the case before that law went into effect, the special circumstance applies to defendants who were major participants in an underlying felony and acted with reckless indifference to human life.

(*Galvan*, at p. 1142.)

Responding to that was *People v. York* (2020) 54

Cal.App.5th 250:

[T]he *Galvan* court states that “[a]lthough *Galvan* is asserting that he could not now be convicted of murder, the alleged inability to obtain such a conviction is not ‘because of changes’ made by Senate Bill No. 1437, but because of the clarification of the requirements for the special circumstance finding in *Banks* and *Clark*. Nothing about those requirements changed as a result of Senate Bill No. 1437.” (*Galvan, supra*, 52 Cal.App.5th at p. 1142.)

This is simply untrue. What permits a defendant convicted of felony-murder to challenge his or her murder conviction based on the contention that he or she was not a major participant in the underlying felony who acted with reckless indifference to human life, are the changes Senate Bill 1437 made to sections 188 and 189, and in particular the addition of section 189, subdivision (e)(3), not the rulings in *Banks* and *Clark*. This is readily apparent from the fact that, even a petitioner who successfully challenged a special circumstance finding after *Banks* and *Clark*, but before Senate Bill 1437 became effective, remained convicted of murder. [Citations.]

(*York*, 54 Cal.App.5th 250, 261)

We agree. Furthermore, we see no basis to overinterpret subdivision (d)(3) as requiring more than its language does. It does not state that special circumstances are categorically preclusive, and it does not override traditional preclusion doctrines.

Granted, a special circumstance could defeat a petitioner's ability to show eligibility for relief under subdivision (a)(3), if it created a preclusive bar to the petitioner's invocation of subdivision (a)(3). But the question of whether a special circumstance creates such a preclusive bar just goes back to the question of whether one of the traditional preclusion doctrines is applicable. If the answer is no, then the special circumstance has no effect on the petitioner's invocation of subdivision (a)(3).

2. The *Secrease* “Middle Ground,” Which Is Not One, And Which Fails To Apply Traditional Preclusion As Much As The Full-Preclusion Opinions

We address briefly the *Secrease* line of cases, also including *Pineda*, *Arias*, and most recently *Wilson*. The latter three of those opinions postdated *People v. Eloy Gonzalez, supra* (as did the full categorical preclusion *Simmons* opinion), yet none of those opinions mentioned Part IV of the *Eloy Gonzalez* opinion or its preclusion analysis. Nonetheless, *Secrease*, as well as the partial categorical preclusion opinions that followed it (*Pineda*, *Arias*, *Wilson*), all used the word “preclude” or some variation. (Citations *ante*, p. 33)

Hence, while those Courts of Appeal had the opportunity to address the preclusion issues which the *Eloy Gonzalez* opinion ultimately brought into the open, none chose to do so. Nor have any explained why section 1170.95 petitions can be deemed an *ad hoc* exception to the statutory and traditional preclusion analysis required for every other kind of case.

Secrease sought to position itself as a “middle ground” between full categorical preclusion and no categorical preclusion.

(*Id.*, 63 Cal.App.5th 231, 247.) It is a small middle ground of sorts, in that it doesn't require a separate trip to habeas for a petitioner to make the showing of insufficiency of evidence required by the full categorical preclusion opinions.

That is only a “middle ground” the same way 1% is a “middle ground” between 0 and 100%. Penal Code section 1170.95 puts the burden of proof on the prosecution beyond a reasonable doubt to prove a petitioner's guilt of murder under current (post-S.B. 1437) law. The *Secrease* “middle ground” is effectively the opposite, granting relief only when there is no substantial evidence of murder under current law.

Thus, with every respect to the learned Justices who authored and concurred in the opinion, *Secrease*'s self-described “middle ground” does not comport with what the Legislature enacted in section 1170.95. Which could still be justifiable if *Secrease* and its progeny followed the paradigm of requiring statutory or traditional preclusion, but they don't. So in the end, *Secrease* is not based on established law – the preclusion law required by the Legislature in Civil Code section 22.2 and Code of Civil Procedure sections 1908 and 1911, as construed in caselaw – any more than the full-preclusion opinions are.

Secrease states that its position is based on “agreement with a critical premise of the [full-preclusion] courts ... – specifically, that section 1170.95 does not allow relitigation of factual questions that were settled by a prior jury ...” (*Id.* at p. 247.) But, what law governs whether there is a legally permissible “relitigation of factual questions that were settled by

a prior jury”? The answer is the one in this brief – the law of statutory and traditional preclusion.

“Middle grounds” can be enticing, but *Secrease* is not one. And when it comes to compliance with established law of statutory and traditional preclusion, there is no “middle ground”: Either the court is complying with the law, or it isn’t. *Secrease*, *Pineda*, *Arias* and *Wilson* are not, because they have all overlooked the most important component of what they agree is a question of “preclusion” – the law that uniformly governs questions of preclusion, as codified by our Legislature.

V. Further On The “*Banks/Clark* Issue”

A. Its Effect On Tangible Cases

The parties in *Strong* have already set forth their positions on whether *Banks* and *Clark* materially changed the law governing special circumstances.

But there is a further point the parties have not addressed: How would this Court’s reinterpretation of major participation + reckless indifference in *Banks* and *Clark* have tangibly affected cases that preceded *Banks*? In our view, the more significant the effect on actual cases, the stronger the case is for this Court to hold that *Banks* and *Clark* materially changed the law or its application governing major participation + reckless indifference.

In the 17 years between *People v. Proby* (1998) 60 Cal.App.4th 922 (*Proby*) and *Banks*, there are many opinions in which reviewing courts found sufficient evidence of major participation + reckless indifference, on evidence that likely or certainly would have failed a *Banks* analysis. *Proby* is a landmark because it held no instruction was required beyond one in simple “grave risk” language – e.g., “A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] [her] acts involve a grave risk of death to an innocent human being.” – even if the defense requested further instruction. (*Id.* at p. 933.) So the caselaw remained for 17 years until *Banks*.

Most prominent in the published opinions between *Proby* and *Banks* are those that contained language disapproved by *Banks*, *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1115-1118 and *People v. Hodgson* (2003) 111 Cal.App.4th 566, 579. Both opinions stated that merely participating in an armed robbery

was sufficient for a “grave risk.” (*Hodgson*, at p. 580; *Lopez*, at p. 1117; see *Banks*, 61 Cal.4th 788, 809, fn.8.) There are also the post-*Banks* habeas corpus opinions that reconsidered pre-*Banks* findings that evidence was sufficient, and held instead that the evidence was insufficient; they are listed in the footnote below.⁶ The juries in all of these cases would have had only the standard “grave risk” instructions of then-CALJIC No. 8.80.1 or then-CALCRIM No. 703, in light of *Proby*’s holding that trial courts could properly refuse requests for further instructions.

In addition, there were a host of unpublished opinions on the issues of major participation and reckless indifference between *Proby* and *Banks*, including the Court of Appeal opinion reversed by *Banks*. A small sampling is catalogued in the footnote below – not because *amicus* cites them as authority (we do not); but to show further that juries with only standard “grave risk” instructions could easily conclude that mere participation in an armed robbery suffices for reckless indifference, which would not be supportable after *Banks*. (This is a permissible reason for referring to unpublished opinions, since it is merely a recitation of historical facts and the opinions are not cited as legal authority.)

⁶ See *In re Scoggins* (2020) 9 Cal.5th 667, 676-683; *In re Moore* (Aug. 31, 2021, A154032) __ Cal.App.5th __ [2021 WL 3878267], pp. 5-12; *In re Taylor* (2019) 34 Cal.App.5th 543, 557-561; *In re Ramirez* (2019) 32 Cal.App.5th 384, 404-408; *In re Bennett* (2018) 26 Cal.App.5th 1002; *In re Miller* (2017) 14 Cal.App.4th 960, 974-977.

(*McArthur v. McArthur* (2014) 224 Cal.App.4th 651, 656, fn.5; *K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 172, fn.9.)⁷

There were doubtless many others, and undoubtedly far more in which the defendants at trial – where the standard was proof beyond a reasonable doubt, rather than insufficiency of evidence – could have benefited from an option of an instruction that came much closer to *Banks* than a standard “grave risk” instruction, which prosecutors could easily (and often did) argue was satisfied by mere participation in an armed robbery due to its

⁷ *E.g.*, *People v. Felix* (Mar. 25, 2015, D066686) 2015 WL 1357536 [planner of armed robbery in which the plan was to avoid violence]; *People v. Hunter* (Apr. 4, 2014, D064063) 2014 WL 1339865 [participant in armed robbery]; *People v. Scott* (Dec. 10, 2013, C068543) 2013 WL 6485269 [participant in armed robbery]; *People v. Banks* (Aug. 29, 2013, B236152) 2013 WL 4628094 [driver in armed robbery; reversed by the Supreme Court]; *People v. Smith* (Feb. 5, 2013, B233544) 2013 WL 439217 [driver in armed robbery, who was told victim would not be home]; *People v. Jenkins* (June 15, 2012, E052342) 2012 WL 2190619 [woman who set up armed robbery, but after her brother murdered the victim, protested that he needn’t have done that]; *People v. White* (Sept. 16, 2011, D059000) 2011 WL 4337109 [driver in armed robbery]; *People v. Moffett* (Nov. 9, 2010, A122763) 2010 WL 4471437 [co-perpetrator of robbery, who fled and was not at the scene when killer fired fatal shots]; *People v. Castillo* (June 29, 2009, F055493) 2009 WL 1845208 [participant in armed robbery who fled at the first shot]; *People v. Ellis* (Mar. 5, 2008, C054797) 2008 WL 588920 [participant in armed robbery]; *People v. Smith* (2005) 135 Cal.App.4th 914, 927-928 [outside lookout in robbery with deadly weapon]; *People v. Jones* (Nov. 24, 2004, C045098) 2004 WL 2677207 [participant in armed burglary or robbery]; *People v. Lopez* (Oct. 6, 2004, B170919) [lookout in armed robbery]; *People v. Cole* (Mar. 26, 2004, C042903) 2004 WL 605196 [driver in armed robbery].)

inherent danger. However, in light of *Proby*, no such instructional option was available prior to *Banks* and *Clark*.

The dictionary definitions of “grave risk” readily led to the kinds of results described above, since they would permit jurors to find reckless indifference merely because of the inherent danger of an armed robbery. In a Merriam-Webster on-line dictionary, “grave” has multiple definitions. The ones applicable here are:

- (1) “meriting serious consideration,”
- (2) “likely to produce great harm or danger,” and
- (3) “significantly serious.”

While *Tison v. Arizona* (1987) 481 U.S. 137 used “grave” in the second sense (*id.* at p. 157), jurors who are instructed with “grave risk” alone could also use the third sense (“significantly serious”), especially with the prosecutor arguing the case in that sense – as prosecutors naturally would do. And jurors would usually follow that for a defendant whom they already found culpable for first-degree murder.

Thus, it would have been easy for a prosecutor to argue and jurors to find that an attempted theft by people with guns *inherently* presented a “grave risk to human life,” without regard to whether the defendant anticipated or recognized the homicide as a realistic possibility. After all, in every one of these types of cases, the risk to life materialized in someone’s death.⁸

⁸ Similarly in cases where a defendant pled to a special circumstance, there may be no way to know whether that was done on a correct view of the law. For example, the defendant could have been told a crime with guns is inherently a grave risk to life and thus reckless indifference, a theory supported by *Proby* (continued...)

Putting it all together: Jurors' ability to reach a result contrary to *Banks* and *Clark* by construing their instructions in plain English, plus the documentable existence of so many pre-*Banks* cases where the result *on appeal* would likely have been different under the *Banks/Clark* standards, further shows *Banks* and *Clark* clarified the law of major participation and reckless indifference to the point of materially changing how it is applied.

We agree with the parties that the Legislature's amendment to Penal Code section 189, subdivision (e)(3) in S.B. 1437 incorporated the *Banks* and *Clark* standards. No prior statutory law had incorporated *Banks* and *Clark*. Section 189(e)(3) represents as much a change in the application of the law from pre-*Banks/Clark* cases, as the opinions themselves did.

B. The Effect Of *Commissioner v. Sunnen*, Cited In *Powers v. Floersheim* (1967), On An Issue Preclusion Analysis

Finally, we return to the intersection of the issues in this Court's grant of review – the “*Banks/Clark* issue” – with the law of traditional issue preclusion, to show that the “*Banks/Clark* issue” should be resolved favorably to appellant Strong under traditional issue preclusion principles.

To show this, we draw upon *Commissioner v. Sunnen*, *supra*, 333 U.S. 591, the case cited by *Powers v. Floersheim*,

⁸(...continued)
but found insufficient by *Banks*. Such ambiguity makes it impossible to determine precisely what the defendant admitted. While *People v. Allison*, *supra*, 56 Cal.App.4th 449, holds otherwise (*id.* at p. 460 “[T]hat is precisely what Allison admitted as part of his plea bargain.”), *Allison* overlooks the ambiguity of what a defendant is admitting by a plea in such circumstances. (See *People v. Watts* (2005) 131 Cal.App.4th 589, 596-597.)

supra, 256 Cal.App.2d 223 in its statement of the issue preclusion standard quoted *ante*, section (C)(8), p. 44:

Collateral estoppel is not applicable to the decision of a mixed question of fact and law, particularly if there has been an intervening change in the law **or a doctrinal change**. [Citation to *Sunnen*.]

(*Powers*, at p. 230 [boldface added].)

At the very least, *Banks* and *Clark* are a “doctrinal change.” Therefore, categorical issue preclusion cannot apply to a prior special circumstance finding.

As relevant here, *Sunnen* was an 89% stockholder in a corporation (his wife had another 10%) that entered into licensing agreements for other companies to manufacture and sell his devices. The other companies agreed to pay Sunnen a royalty of 10% of the gross sales price of his devices. Sunnen then assigned his wife all of the right, title and interest in the license contracts including royalty payments, and in 1937, he paid her royalties of \$4,881.35 on the 1928 license contract. In a 1935 proceeding dealing with tax years 1929-1931, the Board of Tax Appeals concluded that Sunnen was **not** taxable on the royalties under the 1928 license contract. The Tax Court applied issue preclusion to rule that the same result of nontaxability was required for 1928 contract royalties paid in tax year 1937.

Sunnen claimed that because he assigned the contracts, and they were the source of the royalties, he was freed from tax liability on the royalties. It appears that when the Board of Tax Appeals found nontaxability, that particular situation had never been addressed by the High Court, in the context of the basic rule that an assignor was taxable if he “retain[ed] sufficient power

over the assigned property or over receipt of the income to make it reasonable to treat him as the recipient of the income” (*id.* at p. 604). However, two 1940 decisions of the High Court and subsequent opinions, the “*Clifford-Horst* line of cases,” clarified the law as it related to intrafamily transfers. The basic element at issue – sufficient retention of power over assigned property – remained the same, but the two High Court opinions and their progeny provided “guideposts” (*Sunnen*, at p. 606) on how that law would be applied in cases such as *Sunnen*’s.

The U.S. Supreme Court thus held issue preclusion did not apply on the 1928 payments. Its analysis applies directly here:

[T]he clarification and growth of these principles through the *Clifford-Horst* line of cases constitute, in our opinion, a sufficient change in the legal climate to render inapplicable in the instant proceeding, the doctrine of collateral estoppel relative to the assignment of the 1928 contract. True, these cases did not originate the concept that an assignor is taxable if he retains control over the assigned property or power to defeat the receipt of income by the assignee. But they gave much added emphasis and substance to that concept So substantial was the amplification of this concept as to justify a reconsideration of earlier Tax Court decisions reached without the benefit of the expanded notions, decisions which are now sought to be perpetuated regardless of their present correctness. Thus in the earlier litigation in 1935, the Board of Tax Appeals was unable to bring to bear on the assignment of the 1928 contract the full breadth of the ideas enunciated in the *Clifford-Horst* series of cases. And, as we shall see, a proper application of the principles as there developed might well have produced a different result, such as was reached by the Tax Court in this case in regard to the assignments of the other contracts. Under those circumstances collateral estoppel should not have been used by the Tax Court in the instant proceeding to perpetuate the 1935 viewpoint of the assignment.

(*Sunnen*, 333 U.S. 591, 606-607 [underscoring added].)

Sunnen is directly on point for the inapplicability of issue preclusion to the *Banks/Clark* issue in appellant Strong's case. At the time of Strong's trial and the trials in the other 16 published opinions, the law governing major participation + reckless indifference had not been fully developed, like the law governing taxability of intrafamily assignments of contract rights in *Sunnen*. But then, two decisions of a highest court – *Clifford* and *Horst* in *Sunnen*, *Banks* and *Clark* here – marked a “sufficient change in the legal climate” that would render issue preclusion inapplicable. Furthermore, that is so even though the basic statement of the legal issue – “the concept that an assignor is taxable if he retains control over the assigned property” in *Sunnen* (*id.* at p. 607), and major participation + reckless indifference here – remained identical. Beyond that, *Sunnen* noted that a proper application of the two new decisions (*Clifford* and *Horst*) “might well have produced a different result,” which is just as true of a proper application of *Banks* and *Clark* to many special circumstances, as discussed in section (A) above.

Powers v. Floersheim obtained its statement of issue preclusion being inapplicable to a change in law or legal doctrine from *Commissioner v. Sunnen*. And *Sunnen* is directly on point to the *Banks/Clark* issue as it relates to issue preclusion.

In short, whether or not the doctrinal shift from *Proby* to *Banks* and *Clark* marks a full-fledged change in law, it is at least a sufficient doctrinal shift to negate issue preclusion.

CONCLUSION

The Santa Clara County Independent Defense Counsel Office, as *amicus curiae*, respectfully urges this Court to hold that a prior special circumstance finding is not preclusive of a Penal Code section 1170.95 petition unless it meets all of the criteria of at least one of the traditional preclusion doctrines – claim preclusion, law of the case, or issue preclusion.

Respectfully submitted this 30th day of September, 2021.

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CERTIFICATION OF WORD COUNT

As counsel for the appellant, I certify under rule 8.360(b)(1), California Rules of Court, that this brief contains 13,998 words according to the word count of the computer program used to prepare the brief.

I declare under penalty of perjury of the laws of the State of California that the above is true and correct, and that this document was executed on the date below.

Respectfully submitted this 30th day of September, 2021.

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I, MICHELLE MAY PETERSON, declare as follows:

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I declare under penalty of perjury of the laws of the State of California that the above is true. Dated on September 30, 2021.

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Michelle May Peterson

STATE OF CALIFORNIA
Supreme Court of California

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