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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTOPHER STRONG,

Defendant and Appellant.

No. S266606

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

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes – particularly the crime of murder.

According to its docket, this Court granted review in the instant case to consider whether "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[s] a defendant from making a prima facie showing of eligibility for relief under Penal Code section 1170.95."[1]

The State Public Defender has two levels of concern with the adjudication of this issue. Most immediately, OSPD represents several persons who would otherwise be entitled to seek relief under section 1170.95 but who have been precluded from doing so on precisely the basis described in the issue presented.

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[1] Unless specifically noted otherwise, all further statutory references will be to the Penal Code.

More generally, the State Public Defender is concerned because the opinion below, the concordant opinions of other lower courts, and the arguments presented by the Attorney General drastically curtail the scope of section 1170.95, without identifying any established legal basis for those decisions and ignoring binding precedent that clearly forbids the *ratio decidendi* they employ.

INTRODUCTION

The lower appellate courts have carried on a spirited debate regarding whether a prior finding, sustaining a special circumstance allegation, made before this Court's rulings in *Banks* and *Clark* automatically precludes a petitioner is from making out a prima facie case under section 1170.95.[2] Counsel for the petitioner in the instant case has capably argued, within the existing terms of that debate, why it is inappropriate to afford preclusive effect to such prior findings.

However, the opinions of the lower courts – including the Court of Appeal's decision in this case – have failed to acknowledge (much less apply) the fundamental legal rules and binding

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[2] A roster of the cases on both sides of the debate, as of July, 2021, is set out in *People v. Secrease* (2021) 63 Cal.App.5th 231, 252-253 (review granted June 30, 2021, S268862 (*Secrease*)). To those must be added *Secrease* itself and the published decisions that have adopted its reasoning (discussed in section III. of this brief) – which are in a category of their own. The Court is surely aware of the mentioned cases, having granted review but deferred briefing in nearly all of them pending the determination of either the instant case or another.

precedent that determine whether and when prior determinations can be given binding effect in a current proceeding.

That body of law is contained in the doctrines of res judicata, collateral estoppel, and law of the case. Those doctrines have rules that place the burden on the proponent of preclusive effect to demonstrate that it would be fair and equitable to foreclose a fresh adjudication.

As discussed below, the prosecution cannot meet that burden in any of the cases in which this issue has been implicated.

The lower courts' failure to apply these established principles, that govern when a prior determination can be afforded preclusive effect, has unfairly foreclosed individuals serving life sentences from seeking the relief from those sentences that the Legislature has expressly provided.

The lower courts have also failed to heed established principles of statutory construction. As discussed below, the pertinent statute contains a provision – section 1170.95(d)(2) – which expressly gives preclusive effect to a prior finding that a special circumstance allegation was *not* true but makes no mention of the effect of a *true* finding. This Court held, in a directly analogous context, that when a statute gives preclusive effect to one determination, but not the inverse determination, it is flatly impermissible for courts to allow the unmentioned determination to be used as a bar to future proceedings. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (*Gikas*).) Neither the lower court in this case, nor any of the other courts that have barred 1170.95 relief on the basis

of a prior section 190.2 finding, have acknowledged *Gikas* – much less distinguished it.

Finally, special attention must be paid to several of the most recent cases holding that a pre-*Banks* "true" special circumstance finding does *not* automatically preclude section 1170.95 relief. Those opinions – beginning with *People v. Secrease* (2021) 63 Cal.App.5th 231 (review granted June 30, 2021, S268862 (*Secrease*)) – purport to carve a middle path for resolving the issue but, like the cases finding preclusion, lack any foundation in the law and violate both established precedent and the Legislature's intent.

LEGAL ANALYSIS

I.
THE CASES GIVING PRECLUSIVE EFFECT TO PRIOR SPECIAL CIRCUMSTANCE FINDINGS FAIL TO RECKON WITH – OR EVEN MENTION – CLEARLY ESTABLISHED RULES GOVERNING WHEN PRIOR FINDINGS CAN BE GIVEN PRECLUSIVE EFFECT

The court below, and the others with which it agrees, *start* from the premise that the prior special circumstance finding acts as a bar to relief: "The issue here is solely whether defendant was able to challenge the continued viability of the jury's special circumstance findings in a petition brought pursuant to section 1170.95." (*People v. Strong* (Dec. 18, 2020, C091162), 2020 WL 7417057 at *3 [nonpub. opn.], review granted March 10, 2021, S266606 (*Strong*).) This formulation presupposes that the defendant was *required* to "challenge the continued viability of the jury's special circumstance findings" in order to proceed under section 1170.95. That in turn assumes that "a felony-murder special

circumstance finding … made before … *Banks* … and *Clark* … [*does*] preclude a defendant from making a prima facie showing of eligibility for relief under … section 1170.95" – the very question that this Court has specified for decision. Nowhere is there a suggestion of any legal doctrine or precedent that could support this predicate assumption.

This vice – assuming the answer to the predicate issue without acknowledging the issue, engaging in legal analysis, or providing any authority to support the (assumed) answer – is shared by every one of the appellate decisions holding that a pre-*Banks* special circumstance finding automatically bars section 1170.95 relief. (E.g., *People v. Nunez* (2020) 57 Cal.App.5th 78, 94 ["*Of course*, jury findings in a final judgment are generally considered to be valid and binding unless and until they are overturned by collateral attack, regardless of whether they were subjected to appellate review" (no citation provided; emphasis supplied).) It is the fulcrum of the Attorney General's brief in this Court. (See Respondent's Brief on the Merits (hereinafter "RB") 16-18.)

Remarkably, neither the Attorney General nor any of those courts has thought to examine the more fundamental question: Where is the *legal authority* for relying on a determination made in a prior proceeding to preclude these litigants from pursuing relief in the current proceeding? What makes that analytical failure even more remarkable is that there is a well-established body of precedent, familiar to all who practice law, governing such questions and providing clear rules for how they are to be decided: The

doctrines traditionally known as res judicata, collateral estoppel and law of the case.[3]

As framed by the Court of Appeal, the crux of the matter is whether "the special circumstance findings from petitioner's 2014 trial conclusively established that he was a 'major participant who acted in the robbery and burglary with reckless indifference to human life.'" (*Strong, supra*, 2020 WL 7417057 at *3.). This is a classic question of "issue preclusion," known more familiarly as "collateral estoppel." (*People v. Garcia* (2006) 39 Cal.4th 1070, 1087-1088 (*Garcia*); *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*); see also, *Samara v. Matar* (2018) 5 Cal.5th 322, 326-327.)[4] As this Court has defined it: "Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. Traditionally, the

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[3] In fairness, it was not just the cases giving preclusive effect to prior special circumstance findings that missed the fundamental doctrinal analysis. Only one reported case on either side of the debate has even mentioned the doctrines of preclusion. (*People v. Gonzalez* (2021) 65 Cal.App.5th 420, 279 Cal.Rptr.3d 868, 977-878.) Although that opinion correctly concluded that none of the preclusion doctrines themselves barred the petitioner from seeking relief, it failed to appreciate the significance of that conclusion – namely that the law simply does not permit pre-*Banks* special circumstance findings to be used to preclude a petitioner from making out a prima case under section 1170.95.

[4] Although the Court has indicated a preference for the term "issue preclusion" rather than "collateral estoppel" (*Samara v. Matar*, *supra*, 5 Cal.5th at p. 326), most of the pertinent precedent speaks in terms of "collateral estoppel." Accordingly, amicus will use the two terms interchangeably.

doctrine has been applied to give conclusive effect in a collateral court action to a final adjudication made by a court in a prior proceeding.”[5] (*People v. Sims* (1982) 32 Cal.3d 468, 477 (*Sims*).)

“Under California law, collateral estoppel will apply in any setting only where such application comports with fairness and sound public policy.” (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 835; see also *Smith v. ExxonMobil Oil Corp*. (2007) 153 Cal.App.4th 1407, 1414–1415; *Roos v. Red* (2005) 130 Cal.App.4th 870, 880; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941 [“Collateral estoppel is an equitable concept based on

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[5] As this Court has explained: “The doctrine of collateral estoppel is one aspect of the concept of res judicata. In modern usage, however, the two terms have distinct meanings. The Restatement Second of Judgments, for example, describes collateral estoppel as ‘issue preclusion’ and res judicata as ‘claim preclusion.’ (Rest.2d Judgments, § 27.) This case concerns only issue preclusion.” (*Lucido*, supra, 51 Cal.3d at p. 341 n.3.)

Briefly: “claim preclusion” is not implicated here because there is no assertion that the petitioner’s prior murder conviction in and of itself bars a challenge under section 1170.95; such an assertion would obviously fail given that the Legislature specifically devised the statute as a vehicle with which to challenge prior murder convictions. (See *Mueller v. Walker* (1985) 167 Cal.App.3d 600, 607 [Legislature is empowered to modify res judicata to allow relitigation].) The notion instead is that a specific prior finding precludes the petitioner from establishing an essential element of his claim that he is eligible for relief – hence “issue preclusion.” “Law of the case” pertains to legal principles articulated in a prior appellate opinion governing the same controversy (see *People v. Barragan* (2004) 32 Cal.4th 236, 246) – it obviously has no play in the situation presented here.

fundamental principles of fairness.”].) Thus the lodestar that guides issue preclusion determinations is whether it would be fair to bar a party from litigating, in the current proceeding, an issue that is material to the outcome of the current proceeding.

To that end, this Court has reiterated strict requirements that must be satisfied before the party can be precluded from raising the pertinent issue.[6] (See, *Garcia, supra*, 39 Cal.4th at p. 1077; citing, *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943; *Lucido, supra*, 51 Cal.3d at p. 341, *Sims*, *supra*, 32 Cal.3d at p. 484.) First and foremost among those requirements is

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[6] Justice Chin summarized over a century-and-a-half of this Court’s teaching on the point, as follows:

> ““The party asserting collateral estoppel bears the burden of establishing these’ threshold requirements. Because ‘the law does not favor estoppels’ this burden is a heavy one. As we have explained, ‘certainty is an essential element of every estoppel....’ Thus, where a party asserts ‘a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation.’ In other words, ‘every estoppel must be certain to every intent, and not to be taken by argument or inference.’ ‘If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.’”

(*Garcia*, *supra*, 39 Cal.4th at 1093-1094, citations omitted, ellipses in original (conc. & dis. op. of Chin, J.); quoted in *Kemp Bros. Construction, Inc. v. Titam Electric Corp.* (2007) 146 Cal.App.4th 1474-1482.)

that “the issue to be precluded must be identical to that decided in the prior proceeding.” (*Garcia*, *supra*, at p. 1077.)

That requirement cannot be satisfied in the instant case, nor in the others presenting the question now before the Court.

The prior finding at issue turns on whether the section 1170.95 petitioner aided and abetted the underlying felony “with reckless indifference to human life and as a major participant.” (Section 190.2, subd. (d).) It cannot plausibly be asserted that the determination of that issue in a current section 1170.95 petition would be *identical* to how the issue was adjudicated before this Court rendered its opinions in *Banks* and *Clark.* While the same words were used in the special circumstance allegation, sustained by Mr. Strong’s jury in 2014, as are used in section 1170.95, adopted by the Legislature in 2018, how they are understood and applied has changed dramatically.[7]

The lower court stated it succinctly: this “Court’s decisions in *Banks* and *Clark* clarified ‘what it means for an aiding and abetting defendant to be a “major participant” in an underlying felony and to

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[7] The fact that the words of the standard are essentially the same led the lower court (echoing one of its predecessors) to assert “that the requirements for a finding of felony murder under the newly amended version of section 189 were *identical* to the requirements of the felony-murder special circumstance that had been in effect at the time of the challenged murder conviction ….” (*Strong*, *supra*, 2020 WL 7417057 at *5, original italics, citing *People v. Allison* (2020) 55 Cal.App.5th 449, 456 (*Allison*).) But the assertion is untenable because, as discussed in the text – and as the court below elsewhere acknowledges – the accepted *meaning* of those words is quite different.

act with "reckless indifference to human life,'" and 'construed section 190.2, subdivision (d) in a significantly different, and narrower manner than courts had previously construed the statute.'" (*Strong, supra*, 2020 WL 7417057 at *4, citations omitted.) As a result, those two decisions and many that have followed overturned prior jury findings, like the one at issue here, under the extremely strict "sufficiency of the evidence" standard set forth in *Jackson v. Virginia* (1979) 443 U.S. 307, 319, and *People v. Edwards* (2013) 57 Cal.4th 658, 715. (*In re Scoggins* (2020) 9 Cal.5th 667, 681-682 (*Scoggins*); *Clark*, *supra*, 63 Cal.4th at p. 623; *Banks*, *supra*, 61 Cal.4th at p. 805-807; *In re Moore* (2021) 68 Cal.App.5th 434; *In re Taylor* (2019) 34 Cal.App.5th 543, 557-561; *In re (Arthur) Ramirez* (2019) 32 Cal.App.5th 384, 404; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1021-1027; *In re Miller* (2017)14 Cal.App.5th 960, 974-977 (*Miller*).)[8]

Despite the undeniable effect of those key opinions, the court below –like its predecessors – concluded that "*Banks* and *Clark* did not change the law …." (*Strong*, *supra*, 2020 WL 7417057 at *5, citations omitted.) But it should be obvious that *something* very significant changed in the law. The crucial difference wrought by *Banks* and *Clark* in the interpretation and application of the statutory test will likely change the outcome in the instant case and

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[8] Notably, the cited court of appeal opinions were habeas cases attacking convictions that had withstood challenges on direct appeal prior to the changes in the interpretation of the standard wrought by *Banks* and *Clark*, but which now required a different result.

many, if not most, cases in which the issue before the Court is pertinent. Put simply: *Banks* and *Clark* raised the threshold for what is required for an accomplice to a felony to be held liable for a killing that occurred during its commission.

For decades, the underlying question regarding accomplice culpability has been "whether a defendant has ""knowingly engaged in criminal activities known to carry a grave risk of death."" (*Banks, supra*, 61 Cal.4th at p. 801, quoting *People v. Estrada* (1995) 11 Cal.4th 568, 577, quoting *Tison v. Arizona* (1987) 481 U.S. 137, 157.) This Court recognized that the phrase "grave risk of death" – while accurate in itself – did not sufficiently define and delimit accomplice liability. Under that formulation, as it was commonly understood and applied prior to *Banks* and *Clark*, a prosecutor could have argued, and a trier of fact could have concluded, that virtually *anyone* who took part in an armed robbery or similar crime was "knowingly engaged in [an] activit[y] known to carry a grave risk of death" because such crimes inherently present such a risk.

The easy appeal of that (mis)understanding of the statutory standard is confirmed by the fact that even the appellate courts fell into it. Most obvious were the published opinions – disapproved by *Banks* – which indicated that mere participation in an armed robbery was sufficient for a "grave risk." (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 117, and *People v. Hodgson* (2003) 111 Cal.App.4th 566 – both disapproved in *Banks*, 61 Cal.4th 788, 809, fn.8.) There are also the many post-*Banks* habeas corpus opinions – cited above – that reconsidered pre-*Banks* findings and held instead that the evidence was insufficient under the new interpretation of

the standard.[9] And these published opinions were, of course, merely the tip of the iceberg; to them must be added a host of unpublished opinions, including the Court of Appeal opinion reversed by *Banks*.

What *Banks* and *Clark* clarified is that something substantially more than just knowingly participating in a potentially violent crime is needed to render an accomplice liable for special circumstance murder: "Notably, 'the fact a participant' or planner of 'an armed robbery could anticipate lethal force might be used' is not sufficient to establish reckless indifference to human life." (*Scoggins*, *supra,* 9 Cal.5th at p. 677, quoting *Banks*, *supra*, 61 Cal.4th at p. 808.) Rather, as the Court of Appeal summarized in *Miller*:

> To satisfy the mental state required by section 190.2, subdivision (d) (reckless indifference), the defendant must have ""'knowingly engag[ed] in criminal activities known to carry a grave risk of death.'" *The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed*, demonstrating reckless indifference to the significant risk of death his or her actions create." ...

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[9] For an example of the latter, the Court need look no further than *Banks* itself. After the passage of section 1170.95, the (co-defendant who was the actual subject of this Court's opinion in *Banks* (his name is Lovie Matthews) filed a petition for resentencing on the strength of that opinion. Although his petition was initially denied (based on the purported unconstitutionality of the statute) the Court of Appeal reversed and ordered the lower court to grant the petition – explicitly on the basis that doing so was compelled by section 1170.95, subdivision (d)(2). (*People v. Matthews* (July 7, 2020, B299951), 2020 WL 3790803.)

> "*[P]articipation in an armed robbery, without more, does not involve 'engaging in criminal activities known to carry a grave risk of death.*'"

(*In re Miller, supra*, 14 Cal.App.5th at pp. 970-971, quoting, *Banks*, *supra*, 61 Cal.4th at pp. 801, 805, 807, emphasis supplied; other citations omitted; accord, *Scoggins*, *supra,* 9 Cal.5th at 677.) In other words, accomplice liability for felony murder – properly understood – requires "willingness to kill (or to assist another in killing) to achieve a distinct aim." (*Clark*, *supra*, 63 Cal.4th at pp. 616-617; *Bennett*, *supra*, 26 Cal.App.5th at p. 1021.)

Thus *Banks* and *Clark* made absolutely clear that simply participating in a potentially violent crime can no longer be sufficient for liability under the section 190.2 standard. This clarification makes all the difference in the world in regard to the liability of section 1170.95 petitioners who were involved in felonies that turned fatal but were *not* themselves willing to kill or assist anyone else in doing so "to achieve a distinct aim." To preclude those petitioners from seeking relief because of a finding, rendered when neither the jury, nor the trial court, nor counsel were aware of the correct interpretation and application of the governing standard, would be fundamentally unfair and thus contrary to the equitable principles underlying the collateral estoppel doctrine.[10]

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[10] For much the same reasons, the second requirement of collateral estoppel – that the issue was "actually litigated in the former proceeding" (*Garcia*, *supra*, 39 Cal.4th at p. 1092) – will seldom if ever be met in this context. Because courts, counsel and juries routinely assumed that someone who knowingly participated in an armed robbery or equivalent crime necessarily was a "major

This Court has itself recognized the unshakeable reality that the law to be applied in these cases is different than it was prior to *Banks* and *Clark*. In *Scoggins,* the Court held that *Banks* and *Clark* had so significantly changed the law that it is now inappropriate to impose certain established procedural bars on habeas petitioners who sustained adverse findings under section 190.2 before those landmark cases were decided. (*Scoggins*, *supra*, 9 Cal.5th at pp. 673-674.) Specifically, the Court refused to apply the decades-old rules that precluded petitioners from asserting that the evidence against them had been insufficient and from presenting claims that had already been rejected on direct appeal. (*Ibid.*, discussing, respectively, *In re Lindley* (1947) 29 Cal.2d 709, 723; and *In re Waltreus* (1965) 62 Cal.2d 218, 225.) The Court explained its reasons for doing so as follows:

> Where a decision clarifies the kind of conduct proscribed by a statute, a defendant whose conviction became final before that decision "is entitled to post-conviction relief upon a showing that his [or her] conduct was not prohibited by the statute" as construed in the decision. "In such circumstances, it is settled that finality for purposes of appeal is no bar to relief ...."

(*Scoggins*, *supra,* 9 Cal.5th at p. 673, citations omitted.)

Exactly the same reasoning should apply when the asserted barrier to relief is the preclusive effect of a finding made under a repudiated interpretation of the substantive law. Again, as a legion

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participant acting with reckless indifference to human life" the issue was virtually never the focus of specific evidence or special argument.

of cases applying the issue preclusion doctrine have reiterated, the question is an equitable one: whether there has been a material change of legal circumstances such that the litigant should be permitted to demonstrate that – under the law as it is currently understood – a different outcome is appropriate. (See, *e.g.*, *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64; *Huber v. Jackson* (2009) 175 Cal.App.4th 663, 678 (*Huber*); *Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414-1415.)

The *Huber* case is illustrative. It concerned whether the Episcopal Church or a local parish owned the parish property after the parish had "disaffiliated" from the larger church. An earlier appellate opinion in another case had resolved the issue against the larger church, and the defendants in *Huber* (who represented the local parish) invoked the doctrine of collateral estoppel. (*Id*. at 677.) In the interim, however, the United States Supreme Court – in an unrelated case – had issued an opinion which more thoroughly explicated the standard (known as the "neutral principles of law approach") employed in the earlier appellate decision concerning the Episcopal Church. (*Id*. at 672, 677-678.) The Court of Appeal accordingly refused to apply the issue preclusion doctrine because, *inter alia,* "we now have Supreme Court precedent on the matter. Collateral estoppel does not apply where there are changed conditions or new facts which did not exist at the time of the prior judgment, or where the previous decision was based on different substantive law." (*Id*. at p. 678.)

Here too "we now have Supreme Court precedent on the matter" – precedent that makes clear that merely being involved in

an armed felony is *not* sufficient, without more, to demonstrate "reckless indifference to human life." (*Banks*, *supra*, 61 Cal.4th at p. 805; accord, *Scoggins*, *supra,* 9 Cal.5th at 677.) Regardless of whether it is described as a "new rule," a "deeper understanding," or a "clarification" the fact is that the interpretation of the pertinent standard, essayed in *Banks* and *Clark*, constitutes a material change in the legal circumstances that could and likely would yield different results than were obtained in the trials that predated those cases. It follows that the issue, as it would be determined in a current section 1170.95 proceeding, is not "identical" – as that term is used in collateral estoppel doctrine – to the issue decided in special circumstance findings prior to *Banks* and *Clark.*

"Moreover, even if [the prosecution] could satisfy the technical, threshold requirements of the res judicata doctrine, application of the doctrine would be inappropriate here. Whether res judicata applies in a given context is not simply a matter of satisfying the doctrine's technical requirements. As [this Court has] explained, ""the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality."" (*People v. Barragan*, *supra*, 32 Cal.4th at p. 256, citations omitted.) Thus "even where the minimal prerequisites for invocation of the doctrine are present … policy considerations may limit its use where the ... underpinnings of the doctrine are outweighed by other factors."' (*Vandenberg v. Superior Court*, *supra*, 21 Cal.4th at p. 829, quoting *Lucido*, *supra*, 51 Cal.3d at p. 343.)

To forbid petitioners who could not be found liable of murder under the law as it is now interpreted and applied from obtaining relief under section 1170.95 could not be more offensive to the policy explicitly underlying that statute. When it enacted section 1170.95 and the accompanying reforms to sections 188 and 189, "[t]he Legislature stated a need for 'statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.' Accordingly, the Legislature found it 'necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.'" (*People v. Gentile* (2020) 10 Cal.5th 830, 846–847, quoting Stats. 2018, ch. 1015, § l, subds. (b) & (f).) As the Attorney General accurately observes, "[t]hese findings and declarations demonstrate that the Legislature was concerned with inequities in the law of murder as it existed prior to SB 1437 and sought to address those inequities." (RB 34.) To effectuate that concern – as the Attorney General also acknowledges – the Legislature created a procedure under which one who was convicted under the law as it was formerly interpreted is entitled to a determination "of 'what would happen *today* if he or she were tried under the new provisions of the Penal Code.'" (RB 25, emphasis supplied, quoting *People v. Rodriguez* (2020) 58 Cal.App.5th 227, 241, review granted March 10, 2021, S266652.)

Given the express legislative purpose and intended function of the statute, to insist that persons who in fact were *not* "major participants … act[ing] with reckless indifference to human life," must nonetheless continue to serve life sentences for murder, based on a since-discredited interpretation of that standard, would be a clear violation of public policy. As such, it would constitute a flagrant misuse of the issue preclusion doctrine.

In short, the question before the Court – whether "a felony-murder special circumstance finding … made before [*Banks* and *Clark*] precludes a defendant from making a prima facie showing of eligibility for relief under … section 1170.95." – is nothing more or less than a question of issue preclusion, and under the well-established requirements of that doctrine and the fundamental principles of fairness and sound policy that animate it, the answer must be "no."

II.
BECAUSE THE STATUTE REQUIRES ONLY THAT PRECLUSIVE EFFECT BE AFFORDED TO PRIOR "NOT TRUE" FINDINGS, THIS COURT'S PRECEDENT FORBIDS GIVING PRECLUSIVE EFFECT TO PRIOR "TRUE" FINDINGS

As this Court has frequently reiterated, "'a court may not give preclusive effect to the decision in a prior proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged.'" (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 976; quoting, *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 945; quoting

Brosterhous v. State Bar (1995) 12 Cal.4th 315, 326.) That rule is sufficient in itself to resolve the issue before the Court. As discussed above, application of collateral estoppel in this context would be antithetical to the Legislature's stated purpose in enacting section 1170.95. Perhaps more directly to the point: the actual text of the statute demonstrates that Legislature clearly did not intend for earlier special circumstance findings to be used to preclude petitioners from seeking relief under section 1170.95.

In fact, the Legislature clearly indicated that prior "true" special circumstance findings should *not* be given preclusive effect. It did so by specifying the sole, limited context in which a special circumstance finding could function as collateral estoppel:

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

(§ 1170.95, subd. (d)(2), italics added.) Under well-established precedent, that limited estoppel power afforded to one specific prior special circumstance determination means that the courts are prohibited from giving preclusive effect to any other such determinations. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (*Gikas*); see also *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 261; *Santos v. Brown* (2015) 238 Cal.App.4th 398, 418.)

The Court's opinion in *Gikas* is on point. Mr. Gikas had been charged with "driving under the influence" but his criminal case had been dismissed because the traffic stop and detention had violated the constitution. (*Gikas*, *supra*, 6 Cal.4th at p. 845.) Facing a

Department of Motor Vehicles ("DMV") suspension based on the same conduct, he filed for a writ of administrative mandamus, asserting that the DMV proceeding was barred by the resolution of the criminal case. (*Ibid.*) This Court observed that the Legislature had carefully considered what preclusive effects, if any, were to be given to the respective proceedings – criminal and administrative – and had decided to give preclusive effect to the judgment in the criminal case only in one, defined circumstance: namely if the defendant actually received an acquittal. (*Id.* at p. 852, citing Veh. Code, § 13353.2.) Holding that the dismissal of the criminal charges did not constitute an "acquittal," the Court declined relief. (*Ibid.*) In doing so, the Court made this foundational point regarding the doctrine of collateral estoppel:

> The Legislature has thus chosen to have the administrative proceeding not affect the criminal at all, but to have the criminal affect the administrative in a specified limited manner. [¶] Because the Legislature has specified exactly what preclusive effect the criminal proceeding has on the administrative, we may not grant greater preclusive effect merely because we may find it to be desirable. *Expressio unius est exclusio alterius*. The expression of some things in a statute necessarily means the exclusion of other things not expressed. The expression of preclusion by an acquittal excludes preclusion in other regards not expressed.'

(*Id.* at p. 852 (emphasis and citations omitted).

For precisely the same reason expressed by the Court in *Gikas*, the Legislature's specific and limited provision for the preclusive effect to be given a prior special circumstance finding – *i.e.*, that a prior "not true" finding requires the grant of relief –

prohibits courts from granting preclusive effect to a prior "true" finding.

To paraphrase this Court's holding in another case in which it rejected an effort to read something else unintended into a statute: "Had the Legislature intended to [make prior special circumstance findings a bar to relief under section 1170.95] it could readily have done so. It is our task to construe, not to amend, the statute. 'In the construction of a statute the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted.'" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349, citation omitted.) Yet the thrust of the decisions below, and the Attorney General's argument in this case, is to urge what that rule condemns: the insertion of a collateral estoppel function into the statute despite the Legislature's clear decision to omit it.

The court below took no cognizance of these principles of statutory construction, and although the Attorney General devotes the bulk of his brief to statutory interpretation he offers only the feeblest responses on this decisive point. (RB 31-32.) He first argues that a prior "true" finding on a special circumstance is just one of "myriad circumstances in which resentencing should be denied" – and the Legislature could hardly have been expected to list all of them. (RB 32.) That of course misses the point of the canon *expressio unius est exclusio alterius*. What the Legislature *did* list was one, and only one, sort of prior special circumstance finding that may be given preclusive effect: the prior *not* true finding which bars the

prosecution from asserting that a petitioner was a major participant in the underlying felony who acted with reckless indifference. As *Gikas* held – and as logic dictates – the omission of any reference to the *only other possible* special circumstance finding demonstrates that it was *not* intended to be given preclusive effect.

The Attorney General also contends that the *expressio unius* canon cannot be applied to subdivision (d)(2) of the statute, because if it was similarly applied to subdivision (c) of the statute the result would be absurd. The Attorney General observes that subdivision (c) requires the trial court to issue an order to show cause if it finds a prima facie case for relief but does not explicitly say what happens if the court fails to find a prima facie case. Thus, the Attorney General argues, just as subdivision (c) does not explicitly say that the petition fails if no prima facie case is found, subdivision (d)(2) does not need to explicitly say that the petition fails if there was a prior "true" special circumstance finding. (RB 32.)

The obvious, fatal defect in the analogy is that the *only* rational interpretation of subdivision (c) is that it is setting a necessary precondition to relief – the finding of a prima facie case – and if that precondition is not met, it *necessarily follows* that there is no alternative path, and the petitioner cannot proceed. In contrast, if a petitioner cannot avail themself of the automatic relief provision set out in subdivision (d)(2), it does not necessarily follow that they are barred, for nothing either expressly or inferentially precludes them from pursuing the principal avenue set out in subdivision (d)(3) of the statute: a hearing at which the prosecution is required to prove that they were a "major participant acting with

reckless indifference to human life" or otherwise liable for murder under current law.

Weaker still is the Attorney General's reliance on section 1170.95, subdivision (f), which provides, in total: "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner." (See RB 33.) According to the Attorney General, this routine savings clause implies a Legislative mandate that petitioners must pursue any and all available remedies to vacate a prior "true" special circumstance finding before seeking relief under section 1170.95 rather than just litigate the "major participant/reckless indifference" issue in a hearing under subdivision (d)(3). Although there are likely hundreds (if not thousands) of similar savings clauses in California statutes, the Attorney General does not offer a particle of authority for the proposition that, by preserving other remedies, the Legislature is *requiring* that some other remedy be used instead of the specific one set forth in the pertinent statute. Rather, "the statutory text suggests the Legislature saw the new section 1170.95 statutory remedy it created as cumulative to other available remedies, including habeas corpus[.]" (*Secrease*, *supra*, 63 Cal.App.5th 231at p. 256.)[11]

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[11] The *Secrease* opinion contains a number of astute criticisms of the analysis adopted by the court below. Unfortunately, *Secrease* also advances an approach to resolving these cases which – as will be discussed in the text, *post* – in its own way is as misguided and nearly as pernicious as that taken by the cases it criticizes.

This brings us back to the basics of statutory construction. Again, *Banks* and *Clark* raised the threshold for what is required for an accomplice to a felony to be held liable for a killing that occurred during its commission. In section 1170.95, subdivision (d)(2), the Legislature ensured that where a court or jury made a previous factual finding that this threshold was not met, the defendant is entitled to relief; for everyone else, such entitlement is neither precluded nor automatic — it must be determined at a hearing. Simply put: The Legislature certainly may choose to bar litigation if a condition has been met while leaving the matter open to litigation if the condition has not. If the Legislature *had* intended the two-way preclusion that the Attorney General claims, it would have said so.

The balance of the Attorney General's arguments regarding statutory interpretation proceed from a single, unarticulated and unsupportable assumption – that a prior "true" special circumstance finding necessarily precludes a petitioner from obtaining relief under 1170.95, unless and until that finding is successfully attacked. Thus the Attorney General devotes the bulk of his brief to arguing that the Legislature did not intend section 1170.95 to be used as a vehicle for attacking those prior findings, and that instead they must be vacated by way of habeas corpus or some other (unnamed) form of collateral attack.

Mr. Strong's counsel and numerous courts of appeal have shown why that approach fails on its own terms. The more fundamental point, however, is that the analysis adopted by the lower courts is utterly without foundation: Neither the well-established law governing when and whether prior determinations

may be afforded preclusive effect, nor the statute itself, endorse the essential predicate. There is simply no legal basis for assuming that special circumstance findings, made prior to this Court's opinions in *Banks* and *Clark*, preclude a petitioner from making out a prima facie case for relief under section 1170.95, subdivision (c) or from ultimately obtaining relief under that statute.

III.
THE APPROACH ADOPTED BY *PEOPLE V. SECREASE* IS NOT AUTHORIZED BY THE STATUTE NOR BY ANY ESTABLISHED LEGAL PRINCIPLE; IT IS INCOHERENT

Amicus is confident that this Court will decide the issue before it by holding that a felony-murder special circumstance finding made before *Banks* and *Clark* does not necessarily preclude a petitioner from making a prima facie showing of eligibility for relief under section 1170.95. But amicus nonetheless remains concerned with what approach the Court will adopt for resolving cases that arise in that posture. The concern was sparked by the approach taken in the Court of Appeals opinion in *People v. Secrease*, which has in turn been adopted by several other lower appellate courts. (See *People v. Wilson* (Sept. 29, 2021, No. D078231) ___ Cal.App.5th ___ [2021 WL 4451424]; *People v. Arias* (2021) 66 Cal.App.5th 987, review granted Sept. 29, 2021, S270555; *People v. Pineda* (2021) 66 Cal.App.5th 792, review granted Sept. 29, 2021, S270513.)

Secrease purported to "adopt something of a middle ground" between the line of cases giving preclusive effect to prior special circumstances findings that predate *Banks* and *Clark* and the

competing cases holding that such prior findings pose no bar to potential eligibility for relief under section 1170.95. (*Secrease*, *supra*, 63 Cal.App.5th at p. 247.) While recognizing the unfairness of barring petitioners who would not be held culpable under a current and correct application of the law, the *Secrease* court could not accept that the statute could "reasonably be read to permit a 'do-over' of factual issues that were necessarily resolved against a section 1170.95 petitioner by a jury." (*Id*. at pp. 254-255.) Its solution was to direct the trial court to conduct a "sufficiency of the evidence" review of the record of conviction, applying *Banks* and *Clark*, to determine whether to afford preclusive effect to the prior special circumstance finding and thus "foreclose sentencing as a matter of law" at the prima facie stage. (*Id*. at p. 261.)

The *Secrease* approach shares the fatal defects of the opinions it criticizes and suffers from another of its own. It is invented out of thin air, without regard for either the established principles of collateral estoppel or the express provisions and purposes of the statute that it purports to serve. In doing so it creates a new hurdle for petitioners to overcome, if they can – one that has no precedent in the law and that turns the statutory procedure on its head.

Like the opinions of the courts that have reflexively given preclusive effect to prior special circumstance findings, *Secrease* ignores at least a century-and-a-half of this Court's precedent governing whether and when a prior determination can be given preclusive effect. What those cases hold is that, if a litigant has not previously litigated and lost precisely the same issue in the previous proceeding, they have an untrammeled right to litigate it in the

current proceeding just as if the prior determination had never been made. (See, e.g., *People v. Santamaria* (1994) 8 Cal.4th 903, 917-921.) Under the procedure devised by the Legislature, that means the petitioner has a right to a hearing in which they can introduce new and additional evidence, and in which the burden is on the prosecution to prove, beyond a reasonable doubt, that they *were* in fact either the actual killer, or an accomplice who intended the killing, or a major participant in the underlying felony who acted with reckless indifference to human life. (§1170.95, subd. (d)(3).)

What *Secrease* offers in its place is a process in which the trial judge examines only the cold record – a record developed at a point in time when the defendant had little or no incentive to adduce evidence or offer specific argument regarding the special circumstance allegation – and decides whether there was enough there that a rational jury *could have* made the requisite finding under a correct interpretation of the law based on whatever evidence had been presented to it. (See *People v. Lopez* (2020) 56 Cal.App.5th 936, 950 [describing operation of substantial evidence test – and why it is inappropriate – in context of § 1170.95, subd. (d)(3)].)

As the Attorney General recently observed, in explaining to this Court why the same substantial evidence approach should not be employed in the subdivision (d)(3) determination:

> The "beyond a reasonable doubt" burden of proof simply requires the factfinder to consider all the evidence presented and determine whether it leaves the factfinder with an "abiding conviction" that the charge is true. [Citation]. In contrast, the substantial evidence

> standard does not require the arbiter to decide whether the "*evidence proves* essential facts beyond a reasonable doubt, but instead asks only whether a rational jury could credit it. …
>
> Typically, the substantial evidence test is deferential to a prior factfinder's decision and does not permit the reweighing of evidence. [Citations]. But … at the section 1170.95 evidentiary hearing, there has been no prior jury determination that necessarily considered the petitioner's actions under the amended law of murder or the new evidence that the parties may introduce. [Employing the substantial evidence standard] instead requires trial courts to imagine what a *hypothetical* rational jury could find if presented with the amended theories of murder and the evidence introduced at the evidentiary hearing.
>
> [T]he substantial evidence test … cannot apply as traditionally construed in the absence of prior relevant factfinding. Nor is there an adequate basis in the statute to apply a quasi-substantial-evidence approach that asks what a hypothetical jury could or would find.

(*People v. Duke*, No S265309, Answer Brief on the Merits at pp. 36-37, italics in original.)

For the same reasons why it is clearly inappropriate to employ a substantial evidence test in the context of a subdivision (d)(3) hearing it is also improper to employ that test at the prima facie stage to pretermit the holding of a hearing altogether. In either case, the petitioner has been deprived of what the statute explicitly guarantees: A determination made by a trier of fact, based on all available admissible evidence, as to whether the prosecution has established beyond a reasonable doubt that the petitioner is liable for murder under governing law. There is simply no warrant in the statute or in any existing legal doctrine for substituting speculation

as to what a hypothetical jury could have found had it decided the case following a proceeding in which all of those requisites were met.

Notably, neither the *Secrease* opinion nor the cases that have followed it made any effort to ground its approach in the text of section 1170.95 or the legislative history – much less to reconcile its obvious conflict with the provisions of the statute. All that is offered is the lower court's naked opinion that they "think … section 1170.95, subdivision (c) cannot reasonably be read to permit a 'do-over' of factual issues that were necessarily resolved against a section 1170.95 petitioner by a jury." (*Secrease*, *supra*, 63 Cal.App.5th at pp. 254-255.)

The tendentious phrasing of that proposition betrays the fatal defect at the heart of the *Secrease* approach. A petitioner seeking a section 1170.95 hearing is *not* looking for a "do-over" – they are asking for critical factual determinations to be made *for the first time* under the correct legal test, based on all of the evidence pertinent to that determination and with the burden on the prosecution to prove their guilt beyond a reasonable doubt. In depriving petitioners of that right, *Secrease* violates both the letter and spirit of the statute and defies governing legal principles. This Court should not be swayed by its false promise of a "middle ground."

CONCLUSION

Amicus OSPD urges the Court to hold that felony-murder special circumstance findings made prior to the Court's opinions in *Banks* and *Clark* do not preclude petitioners from making prima

facie showings of eligibility for relief under section 1170.95. Amicus also urges the Court to explicitly reject the approach taken in *People v. Secrease*, and instead permit otherwise eligible petitioners to obtain hearings pursuant to section 1170.95, subdivision (d)(3) without first having to undergo substantial evidence review of pre-*Banks* and *Clark* special circumstance findings.

Dated: October 14, 2021

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

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CERTIFICATE OF COUNSEL

I, AJ Kutchins, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 7,849 words in length excluding the tables and this certificate.

DATED: October 14, 2021

Respectfully submitted,

/s/ AJ Kutchins
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Supervising Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Strong***
Case Number: **S266606**

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AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF PETITIONER

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **October 14, 2021**, at Sacramento, CA.

/s/ *Kecia Bailey*
KECIA BAILEY

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 10/18/2021 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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

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