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May 5, 2022

Jorge E. Navarrete, Clerk
California Supreme Court
Room 1295
350 McAllister Street
San Francisco, California 94102

Re: People v. Strong, California Supreme Court No. S266606/Court of Appeal No. C091162

Dear Mr. Navarette:

Counsel for Mr. Strong has the following response to the request of amici for a portion of Mr. Strong's oral argument time in the above matter. Counsel for Mr. Strong has had the opportunity to further review the briefs of amici. Based upon that review, counsel has concluded that the positions of the amici do not aid in deciding the issue that this case presents. Counsel has reached that conclusion based upon several factors.

First, the amici over complicate a straightforward legal issue with lengthy discussions of the collateral estoppel doctrine that are unnecessary to the decision in Mr. Strong's case. The finality of Mr. Strong's judgment and the judgments of pre-*Banks* and *Clark* section 1170.95 petitioners is not at issue in this case. Therefore, the amici's very lengthy treaties on the doctrine of collateral estoppel do not aid in answering the question on which this court granted review. It is well-settled law that the collateral estoppel bar of finality does not prevent a subsequent action by the same parties on the same subject matter where a new law has changed the substance of the previously determined issue *and* where that new law has been made retroactive by one of the settled doctrines that make new laws retroactive. (*People v. Ruiz* (2020) 49 Cal.App.5th 1061, 1066-1070.) The question here is whether the Legislature's amendments to Penal Code sections 188 and

189 have lifted the bar of finality for these petitioners. There is no need for argument explaining in detail the finality doctrine whose application is not at issue in this case.

Second, the amici's long explications of collateral estoppel are not focused on the question that this case presents: (1) has there been a change in the law of aggravated felony murder and (2) is there a settled doctrine that makes the new law retroactive? The collateral estoppel doctrine operates to reduce litigation opportunities between the same parties on the same subject matter following final determination. The doctrine does not create new ones by making new law retroactive. (*Wassmann v. Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 844.) The question here for decision is whether something extrinsic to the collateral estoppel bar has created a new opportunity for pre-*Banks* and *Clark* petitioners to litigate the special circumstances elements of felony murder, i.e., has there been a change in the subject matter so that the issue is not longer the same issue that was litigated previously. (*Ruiz*, *supra*, 49 Cal.App.5th at p. 1069.) A lengthy explication of the doctrine of collateral estoppel is wholly unnecessary to answer that question. Rather, and simply put, the Attorney General's position is nothing has taken place to raise the finality bar. On the other hand, Mr. Strong's position is that the Legislature has codified this Court's changes in the law of aggravated felony murder articulated in *People v. Banks* (2015) 61 Cal.4th 788 in the amendments to sections 188 and 189 and that change has been made retroactive by express Legislative intent. In other words, Mr. Strong's position is (1) there is a change in the law *and* (2) a well-settled doctrine that makes those changes in the law retroactive and therefore raises the finality bar. A lengthy explication of how matters become final according to the collateral estoppel bar is time-consuming and wholly unnecessary to resolve the difference of opinion between the Attorney General and counsel for Mr. Strong.

Third, several portions of the briefs of amici have already been determined by this court's decision in *People v. Lewis* (2021) 11 Cal.4th 952. Mr. Kutchins and Ms. Peterson go on at some length about the decision in *People v. Secrease* (2021) 63 Cal.App.5th 231, but *Lewis'* limitation on court factfinding at the prima facie stage has negated that case's direction to trial courts to conduct a "sufficiency of the evidence review" at the prima facie stage. Thus, these portions of Mr. Kutchins' and Ms. Peterson's briefs are not helpful in deciding Mr. Strong's matter.

Fourth, Ms. Peterson's brief, which urges this Court to adopt her "actually litigated" test in *People v. Gonzalez* (2021) 65 Cal.App.5th 420, 433 is based upon a significant error of law; and therefore, cannot be adopted by this Court. Ms. Peterson

asserts that collateral estoppel gives the defendant a second opportunity to litigate an element of aggravated felony murder in a subsequent proceeding by withholding evidence on that element. (Peterson Brief, pp. 35-26.) According to Ms. Peterson, if the defendant did not present evidence on the special circumstance that issue was not "actually litigated." Ms. Peterson has made a significant error of law. Withholding evidence or not presenting evidence does not mean that an element was not "actually litigated." Rather, the party asserting the "actually litigated" bar must "prove that the issue was raised, actually submitted for determination and determined." (*Barker v. Hull* (1987) 191 Cal. App. 3d 221, 226.) Here, that test is met because it is well-settled law that, in a criminal trial, the prosecution bears the burden of proving every element of the offense beyond a reasonable doubt, and every element of the charged offense must be submitted to a jury for determination. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 5 L.Ed.2d 368]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Ms. Peterson's view that special circumstances are not elements of felony murder is also another legal error in her brief. (Peterson Brief, pp. 25-26.) Her assertion is wrong as a matter of California law and is contrary to the Legislature's understanding of the law of aggravated felony murder. Special circumstances are elements of the offense of aggravated felony murder. (*People v. Superior Court (Engert)* 1982) 31 Cal.3d 787, 803).) (Memo from Senate Public Safety File for SB 1437 (Skinner), of the 2017-18 Legislative Session, by Gabriel Caswell, Principal Consultant, Senate Public Safety Committee, Re: Constitutionality of SB 1437 (Skinner), pp. 7-9.).) Addressing amici's multiple legal errors is unnecessarily time consuming and shifts the focus from the question presented.

For the foregoing reasons, counsel for Mr. Strong believes that it would be adverse to his interests to grant the amici's request for his oral argument time. The amici have not focused on the simple issue before the court, and attempts to over complicate that issue will adversely impact Mr. Strong. It really is not necessary to argue about what is not in dispute.

Respectfully submitted,

Deborah Hawkins

Deborah L. Hawkins
Attorney for Appellant
Christopher Strong

Case Name: People v. Strong Case No. S266606

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and not a party to the subject cause. My business address is 1637 E. Valley Parkway PMB 135, Escondido, California 92027.

On May 5, 2022, I served the attached

Appellant's Letter re Oral Argument

of which a true and correct copy of the document filed in the cause is served by TrueFiling or by United States Mail by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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The Hon. Patrick Marlett,
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Case Name: People v. Strong Case No. S266606

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Each document was filed through TrueFiling or deposited in the United States mail by me at Escondido, California, on May 5, 2022.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at Escondido, California on May 5, 2022.

DEBORAH L. HAWKINS Deborah Hawkins