
Office of the State Public Defender

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May 5, 2022

Jorge Navarrete
Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Strong*, No. S266606

Dear Mr. Navarrete

The referenced case, in which the Office of the State Public Defender (OSPD) has appeared as one of several amicus curiae, has been set for oral argument on May 24, 2022. The OSPD previously submitted the attached request to allow one of the amici to participate in that argument but was informed by your office that the request was premature and should be made after the argument date was set. We are accordingly renewing the request and ask that you please bring it to the attention of the Court.

We were also informed that the request must come from a party willing to share argument time. However, as set forth in our formal request and reiterated recently in her response to our request, Mr. Strong's counsel opposes amici's participation in the oral argument.

Nevertheless, for the reasons set out in our application, we would welcome the opportunity to participate in argument if that would be of assistance to the Court. Accordingly, we again ask the Court to consider

granting amici 10 minutes of oral argument time, separate and apart from the time allotted to either of the parties.

Respectfully submitted,

/s/ AJ Kutchins

AJ Kutchins

Supervising Deputy State Public Defender

Counsel for Amicus Curiae

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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

**REQUEST OF AMICUS CURIAE OFFICE OF THE STATE
PUBLIC DEFENDER TO PARTICIPATE IN ORAL
ARGUMENT**

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

The State Public Defender, appearing as amicus curiae,
respectfully requests permission to participate in oral argument in

the case titled above.¹ Amicus makes this unusual request because Mr. Strong’s counsel has not responded to our request to share argument time.²

Amicus seeks to participate in the argument because (1) the Court’s resolution of this “lead” case will determine whether an untold number of other indigent appellants are entitled to sentencing relief and (2) amici’s legal analysis is quite different from appellant’s and would assist the Court in its thorough review and consideration of the pertinent legal issues.

At issue in the instant case is 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.” To date there are over one hundred cases in which this Court has granted review and deferred resolution, pending the determination of that issue in the instant case. There are also an untold number of additional cases pending in the lower courts in which the outcome potentially turns on the Court’s resolution of the issue.

¹ Although the Court has not set the specific date for oral argument, it issued its “Oral Argument Notice” on March 1, 2022, advising that the case would be set for argument “within the next few months.”

² Because appellant’s counsel has not responded, amicus is unable to employ the more usual procedure set forth in California Rules of Court, rule 8.524 (g).

Recognizing the significant impact of the case, three separate entities – the State Public Defender, the Santa Clara County Independent Defense Counsel Office, and attorney Jonathan Demson – filed amicus curiae briefs in support of appellant Strong. All three amici submit that the essential question before the Court is whether a finding on a specific issue in a prior proceeding (namely, a pre-*Banks* jury trial) should be given preclusive effect in determining the same issue in a subsequent proceeding (namely, the determination of a section 1170.95 petition.) As such, all amici contend that the pending issue should be resolved by application of the well-established doctrine of issue preclusion (or “collateral estoppel”) that governs *all* cases in which asserts that a prior determination is to be given preclusive effect.

Nothing regarding this venerable doctrine was discussed by the lower courts in the instant case nor in any of the other many published cases giving preclusive effect to pre-*Banks* findings. Appellant Strong’s counsel has (very ably) disputed the lower court’s reasoning on its own terms but has also chosen to file a brief in this Court opposing amici’s issue preclusion analysis, even though that analysis does not conflict with appellant’s arguments and would provide an alternative ground for relief.

Because the fates of many other people depend on how this case is decided, amici urge this Court to give full consideration to the issue preclusion analysis, which could fully resolve the issue before the Court.

But equally or more important, since review was granted in this case, a number of lower courts have embraced what is described

as “something of a middle ground” between giving preclusive effect to prior special circumstances findings that predate *Banks* and *Clark* and holding that such prior findings did not bar eligibility for relief under section 1170.95. (*People v. Secrease* (2021) 63 Cal.App.5th 231, 247 (review granted June 30, 2021, S268862 (*Secrease*)).) This “middle” approach holds that a section 1170.95 petition is not *automatically* barred by a pre-*Banks* finding, but instead invents a procedure (not found in the statute or elsewhere) in which the trial court examines the prior trial record and decides whether there is “substantial evidence” to support such a finding under current law. (*Id.* at p. 261.)

As discussed in the amicus brief, the *Secrease* procedure is steadily gaining popularity in the lower courts. As also discussed, it is untenable if the underlying issue is analyzed under established principles governing issue preclusion. It was not, however, discussed by either of the parties in the lead case.

Unless amicus is permitted to participate in oral argument, there will be no advocate for application of the governing preclusion doctrine, nor will there be any counsel prepared to answer the Court’s questions regarding its significance for the underlying issue and for the *Secrease* remedy.

Accordingly, the State Public Defender, as amicus curiae respectfully asks that the Court grant it – or one of the other two

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attorneys representing amici in this matter – 10 minutes to present argument to the Court when the matter is set on calendar.

Dated: April 13, 2022

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/ AJ KUTCHINS

AJ Kutchins
Supervising Deputy State Public Defender
Attorney for Amicus Curiae

Document received by the CA Supreme Court.

DECLARATION OF SERVICE

Case Name: *People v. Strong*

Case Number: **S266606**

I, **Kecia Bailey**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a true copy of the following document:

**REQUEST OF AMICUS CURIAE OFFICE OF THE STATE
PUBLIC DEFENDER TO PARTICIPATE IN
ORAL ARGUMENT**

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **April 13, 2022** as follows:

The Hon. Patrick Marlett
Judge of the Superior Court
Sacramento County
720 9th Street
Sacramento California 95814

Elizabeth J. Smutz
Staff Attorney
Central California Appellate Program
2150 River Plaza Dr. Ste. 300
Sacramento, California 95833

Clerk of the Court
Court of Appeal, Third District
914 Capitol Mall, 4th Floor
Sacramento, California 95814

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The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **April 13, 2022**:

Deborah L. Hawkins
Attorney at Law
1637 E. Valley Parkway, PMB 135
Escondido, CA 92027
(Counsel for Appellant)

Eric L. Christoffersen
Office of The Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, California 94244-2550
(Counsel for Respondent)

Jonathan E. Demson
1158 26th Street, No.291
Santa Monica, CA 90403
(Counsel for Amicus)

Michelle May Peterson
Attorney at Law
P.O. Box 387
Salem, MA 01970-0487
(Counsel for Amicus)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **April 13, 2022**, at Sacramento, CA.

Kecia A. Bailey Digitally signed by Kecia A. Bailey
Date: 2022.04.13 12:16:52 -07'00'

KECIA BAILEY

Document received by the CA Supreme Court.

DECLARATION OF SERVICE

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

I, **Kecia A. Bailey**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a true copy of the following document:

LETTER FROM AMICUS CURIAE REQUESTING ORAL ARGUMENT

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

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Elizabeth J. Smutz
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2150 River Plaza Dr. Ste. 300
Sacramento, California 95833

Clerk of the Court
Court of Appeal, Third District
914 Capitol Mall, 4th Floor
Sacramento, California 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on May 5, 2022 at Sacramento, California.

**Kecia A.
Bailey**

Digitally signed by Kecia
A. Bailey
Date: 2022.05.05
15:21:26 -07'00'

Kecia A. Bailey