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November 07, 2022

The Honorable Jorge E. Navarette
Clerk and Executive Officer
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Letter of Amicus Curiae, Office of the State Public Defender, Supporting Petition for Review
People v. Vinck, No. S276876; *People v. Vinck*, (Sept. 8, 2022, D079239) 2022 WL 4100850 [nonpub. opn.]

Dear Mr. Navarette:

This letter is on behalf of the State Public Defender, appearing as amicus curiae, in support of the petition for review filed in the above-captioned case. Please transmit this letter to the justices for their consideration.

INTEREST OF AMICUS CURIAE

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases. The Legislature has instructed OSPD to "engage in related efforts for the purpose of improving the quality of indigent defense." (Gov. Code, §15420, subd. (b).) Further, OSPD is statutorily "authorized to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law, especially regarding prosecutions for the crime of murder, and more generally in the protection of the constitutional and statutory rights of those convicted of crimes.

OSPD has represented and currently represents numerous petitioners appealing superior court decisions in Penal Code section 1172.6 proceedings.[1] Since the passage of Senate Bill No. 1437 (Stats. 2018, ch. 1015, "SB 1437") in 2018, OSPD has provided amicus input and briefing in several cases in this Court involving section 1172.6, see *People v. Gentile* (2020) 10 Cal.5th 830, *People v. Lopez* (2021) 286 Cal.Rptr.3d 246, *People v. Strong* (2022) 13 Cal.5th 698, *People v. Silva* (review denied March 16, 2022, S272229), *People v. Reyes* (review granted October 27, 2021, S270723), specifically including cases addressing the lower court conflict concerning the proper treatment of the factor of youth in these proceedings. (See *People v. Mitchell* (2022) 81 Cal.App.5th 575, 581 (review denied October 12, 2022, S276189) (*Mitchell*).) Because OSPD represents several youthful offenders at different stages of 1172.6 petitions, OSPD has a particular interest in the proper assessment of youth in such proceedings, including several issues raised in this appeal that divide the Courts of Appeal: whether an offender's youth (and relatedly, intellectual disability) *must* be considered by trial courts as part of a proper *Banks/Clark*[2] analysis, the proper weight to accord such evidence, and whether a factfinder making no mention of these factors must be presumed to have undertaken analysis of them, even in the absence of any legal requirement to do so.

INTRODUCTION

By enacting Senate Bill 1437, the Legislature recognized that some defendants in California received lengthy prison sentences disproportionate to their individual culpability. (See Senate Bill No. 1437, (2017-2018 Reg. Sess.) § 1, subds. (d) and (e) ("SB 1437").) To remedy this inequality, section 1172.6—enacted by SB 1437 and later amended by Senate Bill No. 775 (Stats. 2021, ch. 551 § 2)—created a petition process for defendants convicted of murder, attempted murder, or manslaughter under prior law to seek resentencing under current law.

SB 1437 restricted the felony murder rule, allowing murder liability only for those who were major participants in an underlying felony and who acted with at least reckless indifference to human life, terms recently

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[1] Further statutory references will be to the Penal Code. Effective June 30, 2022, section 1170.95 was renumbered as section 1172.6. (Stats. 2022, ch. 58, § 10.)

[2] *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*); *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*).

construed by this Court in the leading cases of *Banks* and *Clark*. (§ 1172.6, subd. (a)(3); § 189, subd. (e)(3).) The issues in this case relate to whether and how trial and reviewing courts must assess evidence of youth and intellectual disability in a *Banks/Clark* analysis.

A defendant's youth is directly relevant to the analysis a court is required to conduct under section 1172.6 because it implicates both culpability and proportionality of a sentence. Numerous courts and our Legislature have recognized the importance of youth in assessing culpability in other contexts. (See *Roper v. Simmons* (2005) 543 U.S. 551 [prohibiting death penalty for juveniles as cruel and unusual punishment]; *Miller v. Alabama* (2012) 567 U.S. 460 [mandatory life without parole violated Eighth Amendment when accounting for a juvenile's lessened culpability as compared to adults]; *In re Jenson* (2018) 24 Cal.App.5th 266, 276 [Legislature enacted Senate Bill No. 260 to implement limitations on juvenile sentencing because youthfulness "lessens a juvenile's moral culpability"].) And several California Courts of Appeal have explicitly endorsed the view that youth is central to an accurate understanding of culpability in the context of a *Banks*/*Clark* analysis. (See *People v. Ramirez* (2021) 71 Cal.App.5th 970, 990–991 (*Ramirez*); *In re Moore* (2021) 68 Cal.App.5th 434, 454-455 (*Moore*); *People v. Harris* (2021) 60 Cal.App.5th 939, 960 (review granted April 28, 2021, S267802) (*Harris*); *People v. Keel* (4th Dist. Div. 1, Oct. 21, 2022) 2022 WL 12215190 (*Keel*).)

Yet not all courts have acknowledged that youth must be considered in assessing a defendant's culpability and mens rea under *Banks* and *Clark*. In *In re Harper*, Division Two of the Fourth District cast doubt on any requirement to separately consider youth, noting that *Banks* and *Clark* "did not address youth, and nothing in those decisions indicates youth must be incorporated as a factor into the analysis of whether a special circumstance applies in the first place." (*In re Harper* (2022) 76 Cal.App.5th 450, 466-467 (*Harper*).) Highlighting the Attorney General's original position that youth was "irrelevant to analysis under *Banks* [citation] and *Clark* [citation]," *Harper* refused to recognize any express obligation for trial or reviewing courts to consider evidence of youth, simply assuming *arguendo* that they might be required to do so. (*Id.* at pp. 466, 470.) An identical approach was adopted below by Division One.

The conflict between lower courts deepens over *how* courts must assess such evidence. The Courts of Appeal are openly divided on this question. *Harper*—in addition to highlighting that nothing in *Banks* and *Clark* even required consideration of youth—openly disagreed with *Moore*, which it claimed gave too much weight to the factor of youth. (*Harper*, *supra*, 76

Cal.App.5th at p. 470 ["We decline to follow *Moore*" to the extent it held "youth is, by itself, a *decisive* factor"], italics in original.).) Other courts, while not expressly denying the relevance of youth, have given it short shrift in analyzing major participant/reckless indifference under *Banks* and *Clark*. (*Mitchell*, *supra*, 81 Cal.App.5th at p. 595.)

And the Court of Appeal below took these divisions one step further, holding that reviewing courts must *presume* that superior courts considered evidence of youth (and intellectual disability) in their *Banks/Clark* analysis, notwithstanding that these critical factors were never even referenced in the trial court decision. Complicating matters further, the court below adopted a presumption that trial courts properly assessed such crucial evidence while simultaneously refusing to recognize any requirement that trial courts consider this evidence in the first place. The proper assessment of evidence of youth and intellectual disability is a critically important and regularly recurring issue that has already generated divisions that appear to be multiplying. This Court should grant review now to end the confusion and provide much needed guidance to the lower courts.

FACTS AND PROCEDURAL HISTORY

The victim in this case, Jet Turner, was a 56-year-old pedophile who had raped the defendant, Robert Vinck, an 18-year-old youth with an intellectual disability. Turner had employed Vinck and other young men under the guise of delivering newspapers, then pressured them and/or offered to pay them for sex.

Vinck told an older (and much larger)[3] acquaintance named Larry Schwartz that Turner owed him money for uncompensated sexual services Vinck had provided to him when Vinck was as a minor. Vinck also relayed to Schwartz the "traumatic" experience of being raped by Turner and two other men. (*People v. Vinck* (4th Dist. Div. 1, Sept 8, 2022, D079239) 2022 WL 4100850 at *2 (*Vinck*)).

Subsequently, Schwartz and Vinck entered Turner's residence, where they tied Turner up, and Schwartz stomped on his head, killing him. Afterwards, the two fled. (*Vinck*, *supra*, 2022 WL 4100850 at *2.) In his statement to police, Vinck denied participating in the actual killing and

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[3] As the Court of Appeal noted, Schwartz was 6'6" and Vinck was 5'8" or 5'9". (*Vinck, supra,* 2022 WL 4100850 at *2.)

claimed that he did not know that Schwartz was going to kill Turner that night. (*Id.* at *3.) Further, Vinck claimed that when Schwartz had threatened during the home invasion to kill Turner, Vinck had urged Schwartz to "stop with the killing shit, because we don't need that." (*Ibid.*) Although alleging that he had tried to persuade Schwartz not to kill Turner, Vinck also stated that he could not have stopped Schwartz due to his much larger size. (*Ibid.*) Vinck denied being present for the killing, which he claimed occurred while had had walked outside for five or ten minutes. (*Ibid.*)

At the preliminary hearing, a 14-year-old boy who had been having sex with Turner and was present in the home testified that Schwartz ordered Vinck to tie him up, and that Vinck appeared nervous and was shaking. (PFR at p. 13.) Blanche Lopez, Schwartz's mother, testified that Schwartz told her he had "beaten up a guy, kicked him, twisted his head around, and then killed him." (PFR at p. 15.) According to the magistrate who presided over the hearing, there had been "no express evidence of premeditation" at the preliminary hearing and "no evidence before me that [Vinck] intended to murder somebody when he went to the residence." (*Vinck, supra,* 2022 WL 4100850 at *1.) Vinck ultimately pleaded guilty to second degree murder. (*Ibid.*)

In 2019, Vinck filed a petition seeking to vacate his murder sentence pursuant to section 1172.6. (*Vinck*, *supra*, 2022 WL 4100850 at *2.) At Vinck's resentencing hearing, the prosecution introduced the preliminary hearing transcript, the probation officer's report from the 1984 proceeding, Vinck's interview with law enforcement from 1984, and his comprehensive risk assessment. The prosecution relied primarily on the live testimony of Schwartz, who was still in CDCR custody for Turner's murder and is currently scheduled for another parole hearing in 2023. Schwartz testified that Turner had refused to pay Vinck for sexual acts he had performed, and that Vinck suggested they rob and murder Turner. (*Ibid.*) During the home invasion, Schwartz went into the kitchen and grabbed a carving knife, threatening Turner before tying him up with a telephone cord. (*Ibid.*) Schwartz explained that, after he and Vinck tied Turner up, Schwartz ordered Vinck to turn Turner's head at an angle, and, without further warning, Schwartz stomped on it several times, killing Turner. (*Ibid.*) It is undisputed that Schwartz was the actual killer and had murdered Turner by stomping his face while he was prone on the ground. Schwartz and Vinck burglarized the apartment, dropped the minor off, and fled to Mexico, returning a short time later. (*Id.* at *3.)

The probation officer's report, an exhibit before the superior court at the 1172.6 hearing, detailed Vinck's limitations, including that he had an IQ of 72, was "remarkably immature," had been diagnosed as dyslexic, and was reading at a second-grade level. (*Vinck*, *supra*, 2022 WL 4100850 at *3.) In discussing the *Banks/Clark* factors, neither the prosecution nor defense counsel noted the evidence before the trial court of Vinck's youth and intellectual limitations. Following the evidentiary hearing, the superior court denied Vinck's petition, concluding that Vinck was a major participant who acted with reckless indifference to human life and, alternatively, aided and abetted the murder. (*Ibid.*) The trial court explicitly relied on the probation report—citing the ambiguous admission by Vinck that "I did it because he raped me and I lost my mind for that reason and I did not have control over it but then after I did it I felt very very sorry [for] what we did and very stupid about it." (*Ibid.*) However, although also noted in the probation report, nowhere in its analysis of mens rea did the superior court consider—or even mention—Vinck's youth or intellectual disability.

On appeal, counsel argued that remand was appropriate for the trial court to consider Vinck's youth and intellectual disability. The Court of Appeal refused to affirmatively hold that the trial court was required to consider these factors. (*Vinck*, *supra*, 2022 WL 4100850 at *5.) Paradoxically, however—although declining to recognize any legal *requirement* that the trial court independently assess a petitioner's youth or intellectual disability—the Court of Appeal held it was required to *presume* the trial court did so. "[E]ven assuming that the trial court was required to consider Vinck's youth and intellectual disability," and even though the trial court did not analyze or discuss these factors, the Court of Appeal held that a presumption of implicit consideration was warranted simply because there was evidence regarding these factors presented at the hearing. (*Ibid.*) According to the Court of Appeal, because "[t]he trial court did not state that it had *not* considered Vinck's youth or intellectual disability," a reviewing court was bound to assume that it *had* considered these factors. (*Ibid.*, italics in original.) The opinion below reasoned that this approach was mandated by the general rule that, on appeal, "[t]he court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*Id.* at *5, citing *People v. Myers* (1999) 69 Cal.App.4th 305, 310; *People v. Brugman* (2021) 62 Cal.App.5th 608, 637.)

WHY REVIEW SHOULD BE GRANTED

Amicus urges this Court to grant review to address two important issues. First, this Court should resolve whether a court should be required to consider a petitioner's youth and intellectual disability as part of an analysis of *Banks/Clark* factors. The time to reach this issue is now. This Court has already remanded to the Courts of Appeal multiple cases involving lower courts' failure to consider youth in assessing the major participant and reckless disregard for human life factors set forth in *Banks and Clark*, which are determinative at a section 1172.6 hearing. (*In re Moore* (order to show cause issued December 16, 2020, No. S259591 [court below must consider "whether petitioner's youth at the time of the offense should be one of the factors considered" under *Banks* and *Clark*]); *Moore*, *supra*, 68 Cal.App.5th 434 [granting relief after order to show cause issued by this Court]; cf. *Harper, supra,* 76 Cal.App.5th at p.466 [denying relief after order to show cause issued by this Court]; see also *In re Harper* (original petition for writ of habeas corpus pending, No. S275040 [informal response filed October 13, 2022]).).

These early decisions in *Moore* and *Harper*—generated by this Court's orders to show cause—already reflect confusion in the lower courts. For instance, *Harper*, like the opinion below, refused to affirmatively hold that youth must be considered in 1172.6 proceedings. (*Harper*, *supra*, 76 Cal.App.5th at p. 470.) The *Harper* court cast significant doubt on such a requirement, highlighting that *Banks* and *Clark* "did not address youth, and nothing in those decisions indicates youth must be incorporated as a factor into the analysis of whether a special circumstance applies in the first place." (*Id.* at pp. 466-467.) The opinion also underscored the Attorney General's position in its briefing (later retracted at oral argument) that youth was "irrelevant to analysis under *Banks* and *Clark*[.]" (*Id.* at p. 466.)

In contrast, other courts have held that youth must be considered in a *Banks/Clark* analysis. (*Moore*, *supra*, 68 Cal.App.5th at p. 454; *Ramirez, supra*, 71 Cal.App.5th at pp. 988, 991; *Harris, supra,* 60 Cal.App.5th at p. 960; *Keel*, *supra*, 2022 WL 12215190, at *7.) This Court should intervene to resolve this conflict and establish a straightforward rule of decision concerning whether courts must consider factors such as youth and intellectual disability when analyzing the *Banks/Clark* factors.

Second, this Court should resolve *how* to assess these factors in a *Banks/Clark* analysis. Even courts, such as the court below, which have accepted that youth *may* warrant express consideration, have not settled on

how to evaluate its effects on a *Banks/Clark* analysis. There is already a split in the Courts of Appeal regarding what *weight* youth should hold. (See *Harper*, *supra*, 76 Cal.App.5th at p. 468 [disagreeing with *Moore*'s application of a supposed rule that youth should be "the *decisive* factor in determining whether the defendant acted with reckless disregard for human life."].) And even when there is no express disagreement, application of this factor by lower courts varies significantly. Because of the large number of youthful offenders who never actually killed but were nonetheless given life-sentences based on theories of imputed liability, this issue is a recurring and important one. And, for a variety of reasons documented in the Petition for Review, a defendant's intellectual disability should be considered similarly to youth. (PFR at pp. 22-31.) Because this case presents the opportunity to resolve both issues, this Court should grant review to resolve the broader confusion in the lower courts about the meaning and proper application of youth and intellectual disability in assessing accomplice liability in felony murder cases.

These issues are of utmost concern and have far-reaching consequences. They will continue to arise in section 1172.6 proceedings across California, as hundreds of section 1172.6 appeals have been delayed for years awaiting final resolution of important legal issues.[4] Resolving the issues immediately would satisfy the Legislature's stated intention to fairly address individual culpability and reduce prison overcrowding. (See Senate Bill No. 1437, (2017-2018 Reg. Sess.) § 1, subds. (d) and (e).)

A. This case presents an opportunity to assess whether a petitioner's intellectual disability should be independently considered when assessing whether an accomplice was a major participant who acted with reckless indifference to human life.

As detailed in the Petition for Review, Vinck's limited intellectual functioning was relevant to a *Banks/Clark* analysis; yet there is no affirmative indication that this highly salient factor was ever considered by

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[4] For example, more than 320 petitions for review were granted and held pending this Court's decision in *People v. Lewis* (2021) 11 Cal.5th 952 (see https://www.capcentral.org/high_court/casedetails?id=752 (as of August 18, 2021)), and more than 170 petitions for review were granted and held pending the decision in *People v. Strong*, *supra*,13 Cal.5th 698 (see https://www.capcentral.org/high_court/casedetails?id=784 (as of August 8, 2022)).

any court when assessing whether Vinck was a "major participant" acting "with reckless indifference to human life" in the felony murder.

Vinck was 18 at the time of the crime, and the record before the court demonstrated that Vinck had dramatic intellectual deficits. At his resentencing hearing, the prosecution introduced the probation officer's report from 1984, which detailed Vinck's limitations, including that he had been "extraordinarily unsuccessful student in school," and had tested in the "borderline" category for intellectual disability with an IQ of 72. (2CT 490.) Vinck was described as "remarkably immature," and an "intellectually limited person, with learning problems." (*Ibid.*) He had been diagnosed as dyslexic and reading at a second-grade level. (*Ibid.*)

For the same reasons that courts have found youth relevant—and sometimes determinative—in conducting a *Banks/Clark* analysis, evidence of intellectual disability should be considered in assessing whether a petitioner was a "major participant" and acted with "reckless indifference to human life." (See *Moore*, *supra*, 68 Cal.App.5th at p. 454 [finding defendant lacked the "experience, perspective, and judgment to adequately appreciate the risk of death posed by his criminal activities"]; *Ramirez*, *supra*, 71 Cal.App.5th at p. 975 [finding a 15-year-old "may well have lacked the experience and maturity to appreciate the risk that the attempted carjacking would escalate into a shooting and death"]); *Harris*, *supra*, 60 Cal.App.5th 939, ["given [appellant]'s youth at the time of the crime, particularly in light of subsequent case law's recognition of the science relating to adolescent brain development [citations], it is far from clear that [appellant] was actually aware 'of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants.' [citation.]".) The logic underpinning these decisions—all holding that youth is relevant to a *Banks/Clark* analysis—is that cognitive limitations interfere with a young person's ability to understand the risks and consequences of their actions and implicates their culpability. This reasoning applies with equal or greater force to intellectual disability. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 318 [those who are intellectually disabled are less culpable in part because they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders]; Cuevas & Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure* (2016) 37 Cardozo L. Rev. 2161, 2186 ["Although the intellectually disabled 'are, of course, *not* children,' the effects of adolescent psychology on youth risk-taking and decisionmaking are similar to the effects of intellectual disability on that population's impulse control."], footnote omitted, italics in original.)

The Court of Appeal below attempted to sidestep this critical issue, not by itself analyzing the relevance of Vinck's intellectual disability, but by relying entirely on a presumption: the trial court *must* have duly considered the factor of Vinck's severe cognitive limitations simply because evidence on that issue was placed before it. (*Vinck*, *supra*, 2022 WL 4100850 at *5.) Such a presumption makes little sense given the legal landscape governing the trial court's decision. Although the Court of Appeal held that "[t]he [superior] court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary," (*Vinck*, *supra*, 2022 WL 4100850 at *5) there is not a *single case* holding that intellectual disability must be considered by trial or reviewing courts in conducting a *Banks/Clark* analysis. There is therefore no reason to presume that the superior court considered evidence when it was not legally required to do so.

Further, the factual basis of the presumption that the trial court properly assessed Vinck's intellectual disability is also extremely weak. Troublingly, neither party below even highlighted the evidence of intellectual disability in their arguments to the superior court. The bare presumption that the superior court considered Vinck's intellectual deficits because this information was contained in an exhibit is simply insufficient to demonstrate that the factfinder gave appropriate credence to evidence so fundamental to the mental state question at issue. The Court's guidance is therefore necessary to accurately resolve how courts should address evidence of intellectual disability.

B. Whether the interrelated factor of youth *must* be considered in section 1172.6 proceedings is an important, recurrent issue that this Court should resolve as soon as possible.

As detailed below, this Court has already stepped in on multiple occasions to correct lower courts' cursory treatment of youth in *Banks/Clark* cases. That disagreement nonetheless persists is itself is strong evidence that this Court should intervene. However, there is further reason for this Court's involvement: in the opinion below, the majority simultaneously declined to acknowledge that the trial court was legally required to consider youth (or intellectual disability) in a *Banks/Clark* analysis, but *also* held that the trial court was presumed to have engaged in the very analysis it refused to hold was required. The confused reasoning of the decision below is but one in a series of cases in which some Courts of Appeal have entirely ignored or largely discounted the impact of youth in analyzing *Banks/ Clark* factors. Amicus urges this Court to grant review to provide needed guidance in this area of law.

1. **Youth is critical to the analysis of whether a petitioner was a major participant who acted with reckless indifference to human life.**

Courts have long acknowledged that "children are constitutionally different from adults for purposes of sentencing." (*Miller v. Alabama*, *supra*, 567 U.S. at p. 471.) For years, the science relating to adolescent brain development has informed decisions on how courts assess a juvenile or youthful defendant's culpability. (See, e.g., *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama*, *supra*, 567 U.S. 460; *People v. Gutierrez* (2014) 58 Cal.4th 1354.) A "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk-taking for juveniles. (*Miller v. Alabama*, *supra*, 567 U.S. at p. 471, citing *Roper, supra,* 543 U.S. at p. 569.) Youthful defendants "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings." (*Ibid.*)[5]

The fact that youth are prone to making rash decisions and have an inability to assess consequences matters in a *Banks/Clark* analysis because youthful defendants are simply unable to make the same mental calculus regarding risk or conform their behavior in the same way as adults. In turn, these cognitive limitations are directly relevant to the factors courts are required to assess when determining whether a defendant was a major participant in the underlying felony, e.g., whether a youthful defendant was aware "of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants." (*Banks*, *supra*, 61 Cal.4th at p. 803.)

Likewise, when considering whether a defendant acted with reckless indifference to human life, a court must assess whether the defendant was aware of and willingly involved in the violent manner in which the particular offense was committed and consciously disregarded "the significant risk of death his or her actions create[d]." (*Moore*, *supra*, 68 Cal.App.5th at p. 448,

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[5] This developmental pattern is consistent with adults' superior ability to make mature judgments about risk and reward and to exercise cognitive control over their emotional impulses, especially in circumstances that are socially charged. (Chein, et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 Developmental Sci. F1 (2011); Spear, *The Behavioral Neuroscience of Adolescence* (2010) pp. 121-126.)

citing *Clark*, *supra*, 63 Cal.4th at p. 617.) A juvenile or young adult's brain is less able to make these calculations and appreciate the risks inherent in participating in a felony that ultimately results in a death. This Court explained in *Scoggins* that assessing a defendant's culpability under *Banks* and *Clark* "requires a fact-intensive, individualized inquiry." (*In re Scoggins,* 9 Cal.5th 667, 683.) Youth is therefore a relevant and necessary part of this calculus.

While many of the cases addressing youth have considered petitioners under eighteen, Vinck was only a few months past his eighteenth birthday at the time of the crime.[6] Yet, the same principles courts have found persuasive in assessing the culpability of juvenile defendants apply to young adults because our understanding of the age of maturity is evolving.[7] The California Legislature has recognized that evidence of immaturity is relevant up until age 26 by amending Penal Code section 3051 to provide for "youth offender" parole hearings for those who were 25 and under at the time of their offense. (§ 3051, subd. (b).) At that time, the Board of Parole Hearings is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see Cal. Code Regs., tit. 15, §§ 2445, subd. (b), 2446.) Nor, in assessing the impact of an individual factor such as youth on a larger question of mental state, is there any need for a bright line between juveniles and adults that may arise in other contexts. (See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 289 (dis. opn. of Alito, J.) [prior case involving a "mentally dull 19-year-old youth" exemplified fact that those over the age of 18, no less than juveniles, may also be particularly susceptible to outside pressure].) And in the 1172.6 context, even cases addressing 18-year-olds have acknowledged that the cognitive impacts of youth. (*Mitchell*, *supra*, 81 Cal.App.5th at p. 595 [noting that "youth can distort risk calculations" though still finding sufficient evidence to support trial court's mens rea finding].) In short, there is little question that youthful offenders are in a

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[6] Petitioner was born March 30, 1966, and so had turned 18 four months before the crime.

[7] Ongoing brain development continues through the early twenties, which has "profound implications for decision-making, self-control, and emotional processing." (MGH Ctr. for Law, Brain & Behavior, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policymakers* (2022) at p. 2.)

different category and their actions—and in particular their mental state—must be assessed through the lens of their cognitive limitations.

2. This Court has already expressed interest in the proper analysis of youth in a *Banks/Clark* assessment.

In *Moore*, *supra*, 68 Cal.App.5th 434, a post-*Banks/Clark* habeas petition by a defendant who was only sixteen at the time of the crime, the First District Court of Appeal originally summarily denied a petition challenging the sufficiency of the felony murder special circumstance finding. (*Id.* at p. 439.) This Court issued an order to show cause and transferred the case back to the Court of Appeal to consider the sufficiency of evidence supporting the robbery-murder special circumstance finding and, specifically, "whether [Moore's] youth at the time of the offense should be one of the factors considered under *Clark* and *Banks*." (*Ibid.*) On remand, the Court of Appeal agreed with *People v. Harris*, recognizing youth as a factor relevant to major participation and then extending the analysis to reckless indifference. (*Id.* at p. 454.) The court observed that a 16-year-old defendant lacked the experience and judgment to appreciate the risk of death posed by his criminal activities. (*Ibid.*)

In *Harper, supra*, 76 Cal.App.5th 450, this Court was forced to intervene in another special circumstance case in which the Court of Appeal summarily rejected a habeas petition challenging the sufficiency of the special circumstance finding for a juvenile defendant (in this case, 16) who had been sentenced to life without the possibility of parole despite not being the actual killer. Harper's youth was central to the defendant's argument that his conduct did not satisfy the requirements of *Banks* and *Clark.* As detailed below, the immediate conflict between these two cases demonstrates that simply remanding to the lower courts is not a permanent solution. This Court must provide more substantive guidance to the lower courts on this issue.

The proper application of *Banks/Clark* is an important issue that warrants close attention for many reasons, not the least of which is the extreme punishments that have been levied against juvenile and youthful offenders. This Court has repeatedly expressed interest in how the trial and appellate courts are applying *Banks* and *Clark*. Since these cases were decided, numerous defendants have filed habeas corpus petitions challenging the sufficiency of the evidence supporting their felony-murder special-circumstance findings. In a number of those cases, the Courts of Appeal have summarily denied the petitions, only to have this Court issue an order to

show cause requiring the courts to reconsider their decisions under *Banks* and *Clark*. (See, e.g., *In re Parrish* (2020) 58 Cal.App.5th 539, 542; *In re Loza* (2017) 10 Cal.App.5th 38, 41–42; *In re Taylor* (2019) 34 Cal.App.5th 543, 549; *In re Ramirez* (2019) 32 Cal.App.5th 384, 392; *In re Bennett* (2018) 26 Cal.App.5th 1002, 1007.)

In response to these orders to show cause, several Courts of Appeal have recently vacated felony-murder special-circumstance findings. (See, e.g., *In re Taylor*, *supra*, 34 Cal.App.5th at pp. 546–547; *In re Ramirez*, *supra*, 32 Cal.App.5th at p. 388; *In re Bennett*, *supra*, 26 Cal.App.5th at p. 1007; see also *In re Miller* (2017) 14 Cal.App.5th 960, 964.) In addition to *Harper*, at least two Courts of Appeal have denied habeas corpus petitions even after this Court issued an order to show cause or transferred the case for reconsideration in light of *Banks* and *Clark*. (See *In re Parrish*, *supra*, 58 Cal.App.5th at p. 542; *In re Loza*, *supra*, 10 Cal.App.5th at p. 42.) In both of those cases, youth was never mentioned as part of the lower court's analysis, although both petitioners were under 26 at the time of the crime (and thus would have qualified as "youth offenders" had they not been sentenced to LWOP). (See *In re Parrish*, *supra*, 58 Cal.App.5th at p. 544; *In re Loza*, *supra*, 10 Cal.App.5th at pp. 53–54.)

3. While some Courts have embraced consideration of the effect of youth on a major participant/reckless indifference analysis, other courts have expressed skepticism.

Several Courts of Appeal have held that, in assessing the relevant *Banks/Clark* factors, courts must place particular emphasis on critical factors such as the defendant's youth. (See, e.g., *Moore*, *supra*, 68 Cal.App.5th at p. 454 [considering appellant's youth, no rational trier of fact could find that appellant "was subjectively aware that his actions created a graver risk of death than any other armed robbery"]; *Ramirez*, *supra*, 71 Cal.App.5th at p. 990 [appellant's "youth at the time of the shooting greatly diminishes any inference he acted with reckless disregard for human life by participating in the attempted carjacking knowing [his coparticipant] was armed"]; *Harris*, *supra*, 60 Cal.App.5th at p. 960, ["given [appellant]'s youth at the time of the crime, particularly in light of subsequent case law's recognition of the science relating to adolescent brain development [citations], it is far from clear that [appellant] was actually aware 'of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants.' [citation.]"]; *Keel*, *supra*, 2022 WL 12215190 at *7 ["youth can be a relevant consideration—potentially an important one—depending on the facts of the case bearing on whether a juvenile defendant acted with reckless indifference to human life"].)

Other courts, however, have questioned whether courts must even independently *consider* youth as a factor in a *Banks*/*Clark* analysis. In *Harper*, as noted above, the court voiced its belief that "nothing in [the *Banks* or *Clark*] decisions indicates youth must be incorporated as a factor into the analysis," merely "[a]ssuming without deciding" that youth is an "appropriate" factor for the *Banks/Clark* analysis. (*Harper*, *supra*, 76 Cal.App.5th at pp. 466, 470.) The court below did the same. (*Vinck*, *supra*, 2022 WL 4100850 at *1.)

This ambiguity over the proper consideration of youth is not without consequence. Indeed, the superior court's failure in this case to affirmatively assess the relevance of the defendant's youth is surely attributable in some part to the absence of any legal requirement to do so. For this reason alone, this Court should take up this case now to dispel any remaining uncertainty.

C. Additional guidance from this Court is needed because the Courts of Appeal continue to disagree on the weight to give the factor of youth in determining mens rea under *Banks/Clark*.

The uncertainty whether an explicit analysis of youth is necessary is exacerbated by disagreement on *how* lower courts must assess youth. The often case-determinative factor of youth has arisen with increasing frequency (particularly in section 1172.6 cases) and the lower courts are openly divided on how to treat such evidence. This Court should thus also act to resolve the issue of what weight courts should give youth (and the related factor of intellectual disability) in a *Banks/Clark* analysis.

As documented above, several Courts of Appeal have found that a defendant's youth is relevant to the major participant/reckless indifference analysis. Most recently, the court in *Keel* found youth highly relevant to the reckless indifference analysis: "In addition to the factors enumerated in *Clark*, Keel's youth *bears significantly* on his culpability." (*Keel*, *supra*, 2022 WL 12215190 at *9, italics added; see also *id.* at *7 [recognizing youth as "potentially an important [factor], depending on the facts of the case—bearing on whether a juvenile defendant acted with reckless indifference to human life"].) The court reaffirmed the proposition established in *Ramirez* that "'the background and mental and emotional development of a youthful defendant [must] be duly considered" in assessing his culpability.' [Citation.] '[T]hey "are more vulnerable or susceptible to ... outside pressures" than adults ....'" (*Id.* at *9, citing *Ramirez, supra*, 71 Cal.App.5th at p. 991.) The court correctly concluded that Keel's youth "may have rendered him especially vulnerable to outside pressures," noting that he associated with street gang when he was just six or seven years old and received a moniker at

the age of six from a gang member that, in Keel's words, he considered to be a "father figure." (*Ibid.*) According to Keel, there was an expectation among gang members that younger gang associates would "instantly go do" their bidding. (*Ibid.*) The court concluded that 15-year-old Keel's "youth at the time of the shooting greatly diminishes any inference he acted with reckless disregard for human life" during the armed robbery. (*Ibid.*)

Under this analysis, the fact that the petitioner in this case had only recently turned 18 at the time of the crime is not only a relevant consideration in the *Banks/Clark* analysis, but a crucial component of any determination regarding the extent of his participation and, most critically, his mens rea. However, other courts have employed a much different interpretation of these same factors, leading to divergent results in cases with significant factual similarities. For instance, as noted above, in *Harper*, the court expressly disagreed with *Moore* as to the weight youth should be given. (*Harper*, *supra*, 76 Cal.App.5th at p. 470.) Instead, the court reasoned, assuming youth was a relevant factor, it ought not be treated as a determinative consideration among several in a *Banks*/*Clark* analysis. (*Ibid.*)

More importantly, *Harper*'s reasoning regarding the factor of youth departs radically from that employed by the cases cited above. In *Harper,* a 16-year-old with a background of physical abuse fell in with a much older (28-year-old) man, the "dominant one in the relationship" who sometimes "beat [petitioner], leaving him black and blue." (*Harper*, *supra*, 76 Cal.App.5th at p. 454.) Brown, Harper, and another associate robbed a 99-cent store. While Harper was in front of the store, Brown took the victim/manager to the back of the store and handcuffed him in a bathroom. Out of the presence of Harper, one confederate put a knife to the victim's throat, and then Brown shot the manager with a shotgun. (*Id.* at pp. 454-455.)

Numerous factors concerning Harper's youth should have supported a lower mental state finding, e.g., 1) that he lied about his age to others to seem older; 2) that he had a close friend tragically gunned down when he was 14; 3) that he had suffered significant "abuse and neglect" by his father as a child; and 4) that he "had personal experience with [the co-defendant's] violent tendencies, having been the victim of [his] beatings." (*Harper*, *supra*, 76 Cal.App.5th at pp. 460-461.) The court rejected these considerations in the following cursory, illogical fashion: 1) "The point . . . is not just he told people this, but that they believed him. In other words, he was able to pass for 19"; 2) "He certainly had an appreciation for the risks and consequences of what goes on in a criminal behavior, because one of his very best friends was killed at age 14 in a drive-by shooting, and he said he missed his friend greatly"; 3)

"petitioner's "abuse and neglect" by his father "were not trivial," but "mostly came to an end when he was seven years old and he was returned to his mother"; and 4) petitioner must have been aware of risk of death and co-defendant's likelihood of killing "because he was the victim of Brown's beatings." (*Id.* at pp. 461, 470-471.)

In *People v. Mitchell*, another case involving a youthful offender (18 years old) in which amicus recently supported a petition for review, the lower court gave similarly cursory treatment to the relevance of youth. The court brushed off as irrelevant what it characterized as purely "sympathetic factors" about Mitchell's childhood, in particular that he had no family to speak of besides his older brother, the very ringleader who engineered the robbery and perpetrated the murder. (*Mitchell*, *supra*, 81 Cal.App.5th at p. 595.) And despite ample evidence that youth was relevant to the analysis of Mitchell's role in the crime and understanding of the associated risks, the Court of Appeal disposed of petitioner's age as a consideration with the summary observation that:

> We ascribe meaning to Mitchell's actions despite his age. Youth can distort risk calculations. But every 18 year old understands bullet wounds require attention. The fact of youth cannot overwhelm all other factors." (*Id.* at p. 595.)

The *Mitchell* court's reasoning, like *Harper,* reveals a fundamental misunderstanding of how youth functions in a *Banks/Clark* analysis. The same truth on which the *Mitchell* court predicated its mens rea finding—that 18-year-olds understand that wounds require attention—applies equally to twelve or even ten-year-old children. Such analysis does not seriously account for the critical mental differences between adult and youthful offenders. And indeed, the Court made no effort to assess how the *Banks/Clark* factors it identified would be impacted by the petitioner's youth.

In contrast, the dissent in *Mitchell* appreciated exactly how the tragic facts of Mitchell's youth directly impacted his participation in the crime and his understanding of the associated risks:

> Here the record shows appellant's older brother suggested the robbery to which appellant agreed. Appellant was homeless on the night of the crime and was staying with his older brother. The record also reflects appellant was raised in foster homes after his PCP-addicted mother was taken to a psychiatric facility. His mother physically beat him and his father, who owned a business, left and started another family with

> another woman. Appellant recalled stealing a roasted chicken when he was 10 years old because he was hungry. He was jumped into his older brother's gang at age 15. He viewed his brother as the family member who cared about him, helped him deal with their mother's addiction, and gave him a place to stay when he was homeless. Indeed, he joined the gang because of his brother. Appellant's age under these circumstances weighs against a finding that he harbored reckless indifference to human life.

(*Mitchell*, *supra*, 81 Cal.App.5th at p. 601 (dis. opn. of Stratton, P).)

As these cases attest, appellate courts are deeply divided not only on the label of what weight to accord youth (merely a "proper factor among many we *may* consider" versus a "significant[]" or "important" factor "greatly diminishing" the inference of reckless disregard),[8] but also the manner in which to do so. These obvious differences have led directly to the troubling result in this case: where the important factor of the defendant's youth was entirely unaddressed by either the trial level or reviewing court decisions. The contrast to the more detailed reasoning of cases such as *Moore, Keel*, *Ramirez*, and *Harris* is stark.

Vinck's adolescence is highly relevant to whether he was recklessly indifferent, specifically with regard to his diminished ability to appreciate the potentially fatal consequences of his actions—the issue at the very heart of the *Banks/Clark* analysis. Indeed, as the court in *Moore* noted, the "hallmarks of youth"—among them "immaturity, impetuosity, and failure to appreciate risks and consequences"—are potentially "more germane to a juvenile's mental state than to his or her conduct." (*Moore*, *supra*, 68 Cal.App.5th at p. 454.) This evidence of Vinck's youth (and intellectual disability) deserved far more consideration than was afforded by the courts below. And the willingness of courts to shrug off this evidence entirely—without analysis—embodies the need for this Court's guidance.

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[8] (Compare *Harper*, *supra*, 76 Cal.App.5th at p. 470 with *Ramirez*, *supra*, 71 Cal.App.5th at p. 990; *Keel*, *supra*, 2022 WL 12215190 at *9.)

CONCLUSION

To provide necessary clarity to the lower courts, the Court is urged to grant the petition for review.

Respectfully submitted,

/s/ Jamie Dickson

Jamie Dickson
Deputy State Public Defender

Elias Batchelder

ELIAS BATCHELDER
Director of Amicus Litigation

DECLARATION OF SERVICE

Case Name: *People v. Robert Vinck*
California Supreme Court Case No. S276876
Fourth Appellate District, Div. 1 Case No. D079239
San Diego County Superior Court Case No. CR70016

I, **Ann-Marie Doersch**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the County of Sacramento. My business address is 777 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

LETTER OF AMICUS CURIAE, OFFICE OF THE STATE PUBLIC DEFENDER, SUPPORTING PETITION FOR REVIEW

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 **November 7, 2022**, as follows:

Honorable Albert Harutuaninan III San Diego County Superior Court 1100 Union Street San Diego, CA 92101

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **November 7, 2022**:

Kristen Kinnaird Chenelia Office of the Attorney General 600 W. Broadway, Ste. 1800 San Diego, CA 92101	Alex Nicholas Coolman Law Office of Alex Coolman 3268 Governor Drive #390 San Diego, CA 92122

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Appellate Defenders, Inc. (ADI) 555 West Beech Street Suite 300 San Diego, CA 92101 *eservice-court@adi-sandiego.com*	Court of Appeal Fourth Appellate District, Div. 1 750 B Street, Suite 300 San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **November 7, 2022**, at Sacramento County, CA.

Ann-Marie Doersch Digitally signed by Ann-Marie Doersch
Date: 2022.11.07 15:58:34 -08'00'

ANN-MARIE DOERSCH