Filed 9/15/16 In re Joe CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re WARDELL JOE, on Habeas Corpus.	B275593 (Los Angeles County Super. Ct. No. BA240172)

ORIGINAL PROCEEDING: Petition for writ of habeas corpus. William R. Pounders, Judge. Writ granted.

Tracy J. Dressner, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Respondent.

Petitioner Wardell Joe drove a getaway car for a robbery, during which his accomplice killed security guard Juan Hernandez. In 2004, Joe was convicted of special circumstance felony murder as an aider and abettor and sentenced to life without the possibility of parole (LWOP). We affirmed the judgment of conviction in a nonpublished opinion, *People v. Bridges* (Jan. 30, 2006, B176263) (*Bridges*). Thereafter, *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) held that an LWOP sentence for an aider and abettor of felony murder is constitutionally permissible only if the aider and abettor was a "major participant" in the crime and acted with "reckless indifference to human life," as stated in the special circumstance statute, Penal Code[1] section 190.2, subdivision (d) (hereafter, § 190.2(d)). Applying that rule to the defendant before it, also the getaway driver for an armed burglary during which a security guard was killed, *Banks* found that there was insufficient evidence to uphold the special circumstance finding.

Citing *Banks*, Joe petitioned for a writ of habeas corpus in the California Supreme Court, which ordered the Secretary of the Department of Corrections and Rehabilitation to show cause in this court why *Banks* "is not retroactive to petitioner's case and why petitioner is not entitled to the relief requested." We now conclude that *Banks* is retroactive to Joe's case, and, moreover, that there is insufficient evidence to support the special circumstance finding. We therefore grant Joe's petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

We adopt the statement of facts from *Bridges*.

"1. *The prosecution's evidence*.

"a. *Overview*.

"On November 3, 1998, appellants Bridges, Denem, Hatter and Joe, assisted by Reginald Howard, Jesse Singleton, Amar Mobley and Tiasha Croslin, committed an armed robbery at the Big Saver Foods Market near Slauson and Compton Avenues in

[1] All further undesignated statutory references are to the Penal Code.

Los Angeles. Six of the eight robbers belonged to the 69 East Coast Crips. Bridges belonged to a related gang, West Covina Neighborhood Crips, and Croslin, Bridges's girlfriend, formerly belonged to a gang in San Diego. In the course of the robbery, Howard shot and killed the security guard, Juan Hernandez. The robbers also took Hernandez's gun. Bridges robbed a cashier at gunpoint, obtaining money and food stamps which were divided at Hatter's home after the robbery. Leonard Jackson, a gang associate of the robbers, arrived at Hatter's home just as the robbers returned from the crime scene. Jackson shared in the proceeds of the robbery.

"Appellants were charged with first degree murder and robbery of Hernandez in counts one and two, and robbery of the cashier in count three.

"Croslin and Jackson testified against appellants at trial. Before detailing their testimony, we summarize the testimony of the eyewitnesses and the investigation of the offense.

"b. *Eyewitness testimony*.

"Gilbert Davis lived down the street from Best Saver Foods Market. On November 3, 1998, Davis saw a Buick Regal, an Oldsmobile Cutlass and a Pontiac Trans Am in front of his home and became suspicious. From the porch of his home, Davis saw four males enter the market. Davis and some of his friends walked toward the market. The driver of the Cutlass, who was alone in the car, looked straight ahead. Davis returned home and called 911. Davis then saw someone 'hop in[to] the Cutlass, then they took off.'

"Market employee Carlos Guzman saw three males looking around the store. One of the males wore a hat and had long curly hair. He had a handgun and ordered everyone to get down, then pointed the gun at the ceiling and fired one shot. Guzman heard another shot about thirty seconds later.

"Marissa Ayon, a cashier at the market, saw the security guard struggling with two males. After Ayon heard a shot, one of the males ran from the market. Ayon ran to the manager's office but the manager locked the door before she could enter. An armed male

took Ayon at gunpoint from the door of the office to the cash registers and forced her to empty the contents of two registers into a plastic bag.

"c. *Investigation.*

"The crime went unsolved for two years until Jackson, who was serving a 17-year federal drug term, wrote a letter to the U.S. Attorney in December of 2000 offering to assist in the investigation of this case in the hope of obtaining a reduction of his term. In March of 2001, Los Angeles Police Detective Joseph Martinez interviewed Jackson at a federal correctional facility in Victorville. Jackson identified photographs of six of the participants in the robbery and offered the name of the seventh, Denem.

"In April of 2001, Detective Martinez showed photographic lineups to the market employees. Jose Molina identified Singleton and Bridges; Jose Lopez identified Howard; Haydee Penate and Carlos Guzman identified Singleton. Ayon, the cashier, failed to identify anyone in the photographic lineups. However, toward the close of Ayon's trial testimony, she indicated that, after looking at Bridges, he appeared similar to the individual who directed her at gunpoint to empty the cash registers.

"On May 30, 2001, Detective Martinez re-interviewed Davis, the witness who lived down the street from the market, at Men's Central Jail. Davis identified Hatter and Croslin in photographic lineups and at trial as the individuals he had seen in the Regal outside the market and identified Joe as the driver of the Cutlass.

"In May of 2001, Martinez interviewed Croslin who was in federal custody in Connecticut in connection with a 1999 bank robbery conviction for which Croslin had been sentenced to a term of five years and three months. Croslin admitted her role in the Big Saver Food case and identified the participants. Croslin initially faced a term of life without the possibility of parole for her involvement in the robbery. However, Croslin pleaded no contest to one count of voluntary manslaughter and two counts of robbery in exchange for a prison term of 12 years and her truthful testimony in this case.

"d. *Croslin's testimony*.

"At trial, Croslin testified that in November of 1998, she lived with Bridges on 68th Street in Los Angeles. Jackson lived in the house in front of them. Through Bridges, Croslin met Hatter and Denem, both of whom were members of the 69th Street Crips. Hatter's nickname was Doughboy and Denem's nickname was [ ] Baby Doughboy, indicating the two had a close relationship.

"On the morning of November 3, 1998, Bridges and Croslin drove separately from their home to Hatter's home on 84th Street where all four appellants, plus Singleton, Howard and Mobley, began to discuss a robbery. During the trial, Croslin specifically identified appellants Hatter, Bridges, Denem and Joe. Croslin also identified Singleton, Howard and Mobley, who were brought into the courtroom for that purpose. Hatter said he needed money to get a car out of impound. When the conversation ended, Bridges told Croslin to get into a Regal with Hatter. Hatter drove the Regal to the Best Saver Foods Market. Croslin understood they were going to commit a robbery. After Hatter and Croslin entered the market, Hatter said, 'This is where we're going to hit.' Croslin was surprised because there was no bank in the market. Hatter and Croslin made a purchase, then left the store. They drove past a Cutlass driven by Joe and a Trans-Am driven by Mobley parked on 58th Street. Shortly thereafter, Hatter and Croslin drove past the market and saw individuals running from it.

"After the robbery, the entire crime team returned to Hatter's residence. Howard was pacing and repeatedly said, in a scared manner, 'I killed him, I killed him.' Bridges and Hatter loudly urged Howard to calm down. They divided the money and food stamps obtained in the robbery and gave some food stamps to Jackson, who was wanted by his parole officer. After the property had been divided, everyone left.

"Croslin did not learn of the death of the security guard until later when she saw the news on television. When Bridges returned home that evening, Croslin confronted him. Bridges told her, 'Howard was tussling with the security guard and shot him.' Bridges indicated his role was to get the money from the safe in the office with Denem or

Singleton, and Howard's job was to distract the security guard. Bridges said Denem wore a disguise of a hat and a curly wig and that Hatter's purpose in driving along 58th Street was to indicate to the others it was okay to rob the market.

"Croslin was arrested two days after the robbery and remained in custody on a federal bank robbery charge until the time of her testimony in this case.

"e. *Jackson's testimony*.

"Jackson was serving 17 years in federal custody for a conviction of distribution of cocaine he suffered in October of 2000. Jackson also had a prior conviction of robbery in 1991. In 1998, Jackson associated with Hatter, Denem, Joe and Bridges. They all were members of the 69 East Coast Crips except Bridges who was a member of the West Covina Neighborhood Crips. They all frequented Hatter's home on 84th [S]treet or Jackson's home on 68th Street. Jackson sold the Cutlass involved in this case to Joe.

"On November 3, 1998, Jackson was at Hatter's home when Hatter, Bridges, Denem, Joe, Howard, Singleton, Mobley and Croslin quickly exited cars and entered the house. Denem had a hat and a wig. Once inside, they argued. Hatter asked where the money was and Bridges said they only got food stamps. Bridges said they would have gotten more if Howard was not 'so trigger happy.' Howard was 'jumping around real jittery like, real nervous.' They divided food stamps among themselves and gave Jackson some. When they saw a news report[] of the robbery, Bridges and Denem said police sketches of the suspects did not look like them. While they watched the news, Denem laughed because the sketches depicted him as having long hair. Hatter told Singleton to get rid of the Trans Am.

"Two days after the robbery, Jackson was arrested for violating parole. Jackson has been in federal custody since March of 2000. He contacted the United States Attorney's office about cooperating in this case in December of 2000 and was interviewed by Detective Martinez in March of 2001. Approximately five months after that interview, Bridges and Jackson were incarcerated together in Victorville. Bridges told Jackson that detectives had spoken to him about the Big Saver Foods robbery.

Bridges then began to relate details of the crime to Jackson. Bridges said Hatter and Croslin entered the store first to 'check the move out[.]' Bridges said he and Denem intended to force the manager to open the safe at the back of the store but the manager locked himself in a room. Bridges heard a shot, then ran with Denem to the front of the market and saw that Howard and Singleton already had fled. Bridges then took food stamps from the cash register. Bridges said Howard had a .45 caliber handgun.

"f. *Other evidence*.

"The deputy district attorney previously assigned to this case testified she told Jackson that someone from her office might write a letter regarding his cooperation in this case but promised nothing.

"Los Angeles Police Detective Gerald Ballesteros, a gang expert, testified Jackson is a member of the 76 East Coast Crips.

"2. *Defense evidence*.

"Steven Thornton, a defense investigator, interviewed Croslin in county jail on December 24, 2002. Croslin said Detective Martinez forced her to make a statement against the defendants. Croslin claimed Martinez threatened she would spend the rest of her life in prison if she did not cooperate. Croslin later realized the police did not have a viable case against her and she should not have made a statement. On January 15, 2003, Croslin told Thornton she wanted to reject the deal she had struck and go to trial with appellants.

"Los Angeles Police Detective Gregory McKnight interviewed Jackson with Detective Martinez at Victorville in March of 2001. Jackson identified six male suspects and one female. Jackson did not identify Denem." (*Bridges*, *supra*, B176263, at [pp. 2-7].)

II. Procedural background

Joe was charged with crimes arising out of these events and, on February 27, 2004, a jury found him guilty of special circumstance first degree murder (§§ 187, subd. (a), 190.2, subd. (a)(17)) and of two counts of second degree robbery (§ 211). As to all

counts, the jury found true principal gun use (§§ 12022.53, subds. (c), (d), (e)(1)) and gang (§ 186.22, subd. (b)(1)) allegations. The trial court sentenced Joe to LWOP plus 25 years to life in prison. (§ 190.2(d).)

In 2006, we affirmed the judgment.[2] (*Bridges*, *supra*, B176263, at [p. 32].)

In 2015, the California Supreme Court filed *Banks.* Based on *Banks*, Joe petitioned the California Supreme Court for habeas corpus relief. He argued that his situation was indistinguishable from *Banks*, and therefore the special circumstance finding under section 190.2(d) must be reversed.[3] The California Supreme Court issued an order to show cause in this court why *Banks* was not retroactive and why Joe was not entitled to relief.

We now conclude, first, that under *Banks*, there was insufficient evidence to support the special circumstance finding, and, second, *Banks* applies retroactively to Joe.

DISCUSSION

I. There was insufficient evidence to support the special circumstance finding.

In California, certain statutorily specified crimes are "deemed sufficiently reprehensible to warrant possible punishment by death" or LWOP. (*Banks*, *supra*, 61 Cal.4th at p. 797.) Those "special circumstance" crimes are delineated in section 190.2. That statute extends eligibility for death or LWOP, not only to killers, but also to certain aiders and abettors of first degree murder. (§ 190.2, subds. (c), (d).) Section 190.2(d), for example, provides: "[E]very person, not the actual killer, who, with *reckless indifference to human life* and as a *major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons,

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[2] After we affirmed the judgment, Joe also filed petitions for writ of habeas corpus in federal court and in the Los Angeles Superior Court.

[3] Joe also has a petition for writ of habeas corpus pending in the Ninth Circuit Court of Appeals. The Ninth Circuit stayed those proceedings pending resolution of this habeas proceeding.

and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4." (Italics added.)[4]

For the first time since section 190.2(d) was added in 1990 by initiative, our California Supreme Court, in *Banks*, considered what it means to be a "major participant" and to act with "reckless indifference to human life" in the context of felony murder. (*Banks*, *supra*, 61 Cal.4th at p. 794.) In *Banks*, Matthews was the getaway driver for an armed robbery of a medical marijuana dispensary. After dropping his accomplices, including Banks, off near the dispensary, Matthews waited just blocks away for 45 minutes. During the burglary, Banks shot and killed a security guard. Banks called Matthews, who drove toward the dispensary and picked up accomplices.

In considering whether Matthews was a "major participant" who acted with "reckless indifference to human life," our Supreme Court found that felony-murder participants may be placed on a spectrum or a continuum. (*Banks*, *supra*, 61 Cal.4th at pp. 800, 802, 811; *Tison v. Arizona* (1987) 481 U.S. 137, 149-150.) On one end is, for example, the getaway driver who was " 'not on the scene, who neither intended to kill nor was found to have had any culpable mental state.' " (*Banks*, at p. 800; see also *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty could not be imposed on getaway driver to an armed robbery during which two victims were killed].) Such a person is ineligible for the death penalty or LWOP. At the other extreme is the actual killer and those who attempted or intended to kill, who may be eligible for such punishment. (*Banks*, at p. 800; *Tison*, at p. 150.)

To determine where on that continuum an accomplice to felony murder lies, *Banks* listed nonexclusive factors: "What role did the defendant have in planning the criminal

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[4] Section 190.2(d) is not a separate jury finding; rather a jury is instructed on section 190.2(d) as an element of the special circumstance allegation, here section 190.2, subdivision (a)(17). (*People v. Mil* (2012) 53 Cal.4th 400, 408-409.)

enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Banks*, *supra*, 61 Cal.4th at p. 803, fn. omitted.)

Applying those factors, *Banks* concluded there was insufficient evidence to sustain the section 190.2(d) special circumstance finding. As to whether Matthews was a "major participant" in the crime, no evidence was introduced about his role in planning the robbery or in procuring weapons. (*Banks*, *supra*, 61 Cal.4th at p. 805.) Matthews and two accomplices were gang members, but there was no evidence that any of them had previously committed a violent crime such as murder or attempted murder. (*Ibid*.) Matthews was not at the dispensary. In short, Matthews was "no more than a getaway driver," not a major participant under section 190.2(d). (*Banks*, at p. 805.)

There was similarly insufficient evidence Matthews had the requisite mens rea, i.e., "reckless indifference to human life," which " 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' " (*Banks*, *supra*, 61 Cal.4th at p. 807; see also *id.* at p. 808, citing *Tison v. Arizona*, *supra*, 481 U.S. at p. 157; see also *Enmund v. Florida*, *supra*, 458 U.S. at p. 798 [focus must be on the getaway driver's culpability, "for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence' "].) Although there was evidence from which it could be inferred that Matthews knew he was participating in an armed robbery, nothing in that evidence supported the conclusion beyond a reasonable doubt he "knew his own actions would involve a grave risk of death." (*Banks*, at p. 807.) Stated otherwise, Matthew's mere awareness that his confederates were armed and that armed robberies carry a risk of death was insufficient to establish the requisite reckless indifference to human life. (*Id.* at p. 809.)

The factual scenario here is not distinguishable from *Banks* in any meaningful way. As to the major participant element, we know that Joe was present when the "come up" was discussed, that he waited near the Big Saver Market while the robbery and murder took place, and that he drove a getaway car. Beyond that, we know nothing about his participation. There is, for example, no evidence what Joe's specific role was in the "come-up" discussion. Croslin, for example, did not hear Joe speak during the pre-robbery meeting. (*Bridges*, *supra*, B176263, at [p. 7].) There is similarly no evidence Joe supplied or used a lethal weapon or what his awareness was of any weapon. He was not in the Big Saver Market. Such mere "participation in planning with the intent of facilitating the commission of the crime" does not constitute major participation within the meaning of section 190.2(d). (Compare *Banks*, *supra*, 61 Cal.4th at pp. 803 & 805 [participation in an armed robbery, without more, "does not involve 'engaging in criminal activities known to carry a grave risk of death' "], with *People v. Williams* (2015) 61 Cal.4th 1244, 1281 [defendant who was the "founder, ringleader, and mastermind" behind gang and its crimes was a major participant and acted with reckless indifference to human life].)

Moreover, there was evidence from which it could be inferred that shooting Hernandez was not part of the plan. Jackson told Detective McKnight that Mobley and Howard, although armed, didn't plan to kill Hernandez. But when a struggle broke out, Howard panicked and shot Hernandez. Bridges also told Croslin that Howard was supposed to "distract" the security guard, and Denem and Singleton were supposed to get the safe. But Howard tussled with the Hernandez and shot him. Back at the house, the men argued, and people were saying " 'shut up' " and " 'calm down.' " Howard was particularly upset, saying, " 'I killed him. I killed him.' " Bridges commented that they would have gotten more than just food stamps had Howard not been so "trigger happy." These distraught reactions and comments raise the inference that shooting Hernandez was not "planned."

As to Joe's mens rea, our prior conclusion in *Bridges* that Joe had the requisite mens rea rested on an inference he knew this was an *armed* robbery. We said, "Further, regardless of whether it is reasonable to assume a security guard in such a market would be armed, it is relatively indisputable that members of a criminal street gang planning to rob the market would be armed. Thus, strong circumstantial evidence suggested Joe knew his companions were armed and his claim to the contrary is simply not credible." (*Bridges*, *supra*, B176263, at [p. 14].) *Banks* now dictates that such knowledge is insufficient to establish a reckless indifference to human life. Felony murderers who simply are aware that their confederates are armed and that armed robberies carry a risk of death, "lack the requisite reckless indifference to human life." (*Banks*, *supra*, 61 Cal.4th at p. 809; accord, *People v. Clark* (2016) 63 Cal.4th 522, 617-618 [mere fact that a robbery involves a gun is insufficient to establish reckless indifference]; *People v. Perez* (2016) 243 Cal.App.4th 863, 882.) "Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum." (*Banks*, at p. 808; accord, *Clark*, at p. 617 ["reckless indifference" "encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions"].) *Banks* also noted that where, as here, there is evidence the plan did not include the use of lethal force, "absence from the scene may significantly diminish culpability for death." (*Banks*, at p. 803, fn. 5.)

Nor can we distinguish *Banks* based on Joe's and his accomplices' gang membership. *Banks* refused to impute the requisite mens rea based solely on gang membership, at least in the absence of evidence that the getaway driver or his accomplices or a clique member had ever participated in shootings, murder or attempted murder or otherwise had a propensity for violence. (Compare *Banks*, *supra*, 61 Cal.4th at pp. 810-811; *People v. Clark*, *supra*, 63 Cal.4th at p. 621, with *People v. Medina* (2016) 245 Cal.App.4th 778, 792 [defendant who knew his accomplices were not "reluctant to shoot" acted with reckless indifference to human life]; *Tison v. Arizona*, *supra*, 481 U.S.

at p. 158.) The People fail to point to any such evidence which might distinguish Joe from Matthews.

The People, however, also suggest that Joe exhibited reckless indifference to human life based on evidence of his continued participation in the crimes after Hernandez was shot. This suggestion rests on an inference that Joe, who was parked near the Big Saver Market, must have heard the gunshots but nonetheless drove away his accomplice, instead of disassociating himself. But the getaway driver in *Enmund v. Florida* "no doubt found out after the robbery that his coconspirators had killed two people, yet he still drove them away to safety and apparently directed disposal of the murder weapons." (*Banks, supra,* 61 Cal.4th at p. 807.) *Banks* therefore rejected the notion that after the fact knowledge a shooting occurred is sufficient to establish the requisite mens rea.

We therefore conclude there is insufficient evidence to support the special circumstance finding under section 190.2(d).

II. Banks applies retroactively to Joe.

Although this case is not factually distinguishable from *Banks* in any material sense, the People would preclude Joe from benefitting from that decision on the ground *Banks* does not apply retroactively to cases, such as Joe's, which were final on appeal when *Banks* was decided. We disagree.

Although not absolute, the general rule is judicial decisions are given retroactive effect. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 793-794.) No single test determines when a decision should be given retroactive effect to convictions final on appeal. (*In re Hansen* (2014) 227 Cal.App.4th 906, 917.)[5] *People v. Mutch* (1971) 4 Cal.3d 389, for example, articulated one "expansive theory of retroactivity." (*Hansen*,

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[5] Retroactivity to cases final on appeal is to be distinguished from retroactivity to cases not final on appeal. (*In re Hansen, supra,* 227 Cal.App.4th at pp. 916-917 & fn. 2.) In the latter situation—not at issue here—"an appellate opinion will govern convictions not yet final on appeal where the opinion does not announce a change in the law or where the opinion announces a new rule of law where no rule existed before." (*Id.* at p. 917, fn. 2; see also *People v. Guerra* (1984) 37 Cal.3d 385, 399.)

at p. 916.) *Mutch* considered the retroactive effect of a then recent case which interpreted and limited the asportation aspect of kidnapping to commit robbery under section 209. The new case did not redefine a crime or change evidentiary or procedural rules; "instead, it confirmed a substantive definition of [a] crime duly promulgated by the Legislature." (*Mutch*, at p. 395.) In such circumstances, finality for purposes of relief is no bar to relief. (*Id.* at p. 396; accord, *Woosley*, at p. 794 [" 'Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim.' "].)

A second, "tripartite" test, applied largely to questions of procedure, to determine retroactivity consists of three elements: " ' "(a) the purpose to be served by the new standards [or new rule], (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." ' " (*In re Hansen*, *supra*, 227 Cal.App.4th at p. 917; see also *In re Lucero* (2011) 200 Cal.App.4th 38, 45; *Schriro v. Summerlin* (2004) 542 U.S. 348, 351-352 [new substantive rules that alter the range or conduct or the class of persons that the law punishes generally apply retroactively].) " '[T]he more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that the rule will be afforded retrospective application. Further, if the rule relates to characteristics of the judicial system which are essential to minimizing convictions of the innocent, it will apply retroactively regardless of the reliance of prosecutors on former law, and regardless of the burden which retroactivity will place upon the judicial system.' [Citation.] '[T]he most consistent application of this principle [of applying new rules retroactively] has been in cases in which the primary purpose of the new rule is to promote reliable determinations of guilt or innocence.' [Citation.]" (*Lucero*, at p. 45.)

Fiore v. White (2001) 531 U.S. 225 suggests another "test" for deciding whether an appellate decision should be applied "retroactively": whether the federal

Constitution's guarantee of due process demands it. Fiore was convicted of violating a Pennsylvania statute prohibiting operating a hazardous waste facility without a permit. After his conviction became final, the Pennsylvania Supreme Court interpreted the statute for the first time and made clear that Fiore's conduct was not within its scope. The United States Supreme Court certified a question to the Pennsylvania Supreme Court, asking whether its interpretation announced a new rule of law. The Pennsylvania court replied that its decision was merely a clarification of the statute's plain language. (*Id.* at p. 228.) Based on that reply, *Fiore* found that no issue of retroactivity was presented. "Rather, the question is simply whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit." (*Ibid.*) *Fiore* answered its question in the negative: due process forbids a state from convicting a person without proving the elements of a crime beyond a reasonable doubt. (*Id.* at pp. 228-229; see also *Bunkley v. Florida* (2003) 538 U.S. 835.)

Although we think that *Banks* clearly applies retroactively to Joe, it is less clear under what test or tests. Similar to *Mutch*, which did not redefine the crime of kidnapping for robbery, *Banks* did not redefine special circumstance felony murder for aiders and abettors under section 190.2(d). Rather, *Banks* simply confirmed or clarified the substantive meaning of that section in line with longstanding United States Supreme Court authority on which section 190.2(d) was premised. Nor would ignoring *Banks* to Joe's detriment comport with due process, given the state's failure to prove the elements of the special circumstance beyond a reasonable doubt. Thus, whether under *Mutch* or as a matter of due process, *Banks* must be given retroactive effect.

Our conclusion that *Banks* applies to cases final on appeal such as Joe's requires us also to reject the People's related contention that Joe's writ petition is procedurally barred. The general rule is a claim raised and rejected on direct appeal may generally not be raised again in a petition for writ of habeas corpus. (*In re Waltreus* (1965) 62 Cal.2d 218; *In re Harris* (1993) 5 Cal.4th 813, 825.) An exception to the rule includes where a

court has acted in excess of jurisdiction. (*Harris*, at pp. 838-841; *People v. Mutch, supra*, 4 Cal.3d at p. 396.) Where, as here, "*what defendant did was never proscribed*" under the pertinent statute, the court acts in excess of jurisdiction, and therefore "finality for purposes of appeal is no bar to relief, and . . . habeas corpus or other appropriate extraordinary remedy will lie to rectify the error . . . . '[A] defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct.' " (*Mutch*, at p. 396.) Joe is therefore entitled to habeas corpus relief.

DISPOSITION

The petition for writ of habeas corpus is granted. The matter is remanded for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.