IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE Plaintiff and Respondent, v. ADORA PEREZ Petitioner and Appellant	Supreme Court No.: Court of Appeal No.: F077851 Kings County Superior Court No.: 18CM-0021

PETITION FOR REVIEW

Of the Order of the Court of Appeal, Fifth Appellate District, Denying Petitioner's Application to Recall Remittitur

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Questions Presented for Review

1. Do Penal Code section 187 and/or the state and federal constitutions permit a pregnant woman to be prosecuted for murder when she suffers a stillbirth and the prosecution alleges such stillbirth was caused by drug use?
2. Did the Court of Appeal err when it denied petitioner's application to recall the remittitur in her case, preventing petitioner from challenging the voluntary manslaughter conviction she accepted entirely because of her mistaken belief that her stillbirth could have resulted in a conviction for murder?

Necessity for Review

Review is necessary to settle important questions of law. (Cal. Rules of Court, rule 8.500, subd. (b)).

The Kings County District Attorney charged petitioner Adora Perez with murder based upon her stillbirth, which the prosecutor alleged was caused by drug use. Application of section 187[1] to a woman's conduct while pregnant has sweeping implications for a variety of issues of statewide importance: pregnancy and abortion rights, public and fetal health, criminal justice, and discrimination against low-income women, women of color, and women with addiction disorders.

This case is also not an isolated exception. Another woman who suffered a stillbirth in Kings County is currently facing murder prosecution based on the same legal and factual theory. (*People v. Becker*; F081341/S265209 [writ proceedings].)[2]

Ms. Perez accepted a plea to voluntary manslaughter only to avoid a murder conviction, but neither her attorneys nor the Superior Court informed her that the prosecution's theory of murder was untenable under section 187 and the state and federal constitutions. As punishment for suffering a stillbirth, she was sentenced to 11 years in prison, of which she has now served over three years.

Ms. Perez appealed, and the appellate record left no doubt that her plea was the product of ineffective assistance, was not

[1] All undesignated section references are to the Penal Code.
[2] All references to the *Becker* case are intended solely to illustrate the importance of the legal question raised in this petition, not as authority.

knowing, intelligent, and voluntary, and grossly violated due process. A certificate of probable cause was granted, so the plea could, and should, have been challenged on appeal. Yet appellate counsel filed a *Wende* brief and the judgment was affirmed.

Petitioner subsequently applied to recall the remittitur in her case so that she could challenge her unlawful conviction and sentence. In apparent recognition of the injustice that had occurred, then-Attorney General Javier Becerra informed the Court of Appeal that he did not oppose the application. Nonetheless, the Court of Appeal denied the application, based on its conclusion that Ms. Perez's claim could be more appropriately raised in a petition for habeas corpus, where the parties will have the option to present additional evidence.

Ms. Perez respectfully contends that the Court of Appeal's reasoning is incorrect. The facts are both undisputed and clearly established by the appellate record: Ms. Perez pled guilty because she had been led to believe (by counsel and the trial court) that she could be convicted of murder, which was not true. The appellate record leaves no doubt that her plea was the product of the ineffective assistance of counsel, was not knowing, intelligent and voluntary, and represents a gross violation of due process. Yet Ms. Perez's appellate counsel did not brief a single issue, effectively stripping Ms. Perez of her right to an appeal. There is no evidence that could be developed in habeas proceedings that would make any difference. The record is clear and the law required appellate counsel to brief these nonfrivolous issues. Recall of the remittitur is the correct remedy in this situation.

Review should be granted to correct the injustice in this case and resolve important legal questions: (1) can a woman be charged and convicted of murder based on the allegation that her drug use led to a stillbirth?, and (2) in such circumstances, is recall of a remittitur appropriate and necessary?

Combined Statement of the Case and Facts

On December 30, 2017, Petitioner Adora Perez suffered a stillbirth in a hospital. Deputies of the Kings County Sheriff were dispatched and spoke with Ms. Perez's OB-GYN, who attributed the stillbirth to methamphetamine use during the pregnancy. (1CT 29; 1CT 5.)

Section 187 contains an express exemption for acts consented to by the mother of a fetus – the statute makes no distinction between lawful or unlawful acts to which the mother consents. (§ 187, subd. (b)(3).) Yet, on January 3, 2018, the Kings County District Attorney filed a complaint charging Ms. Perez with murder in violation of section 187, subdivision (a), alleging that she had, with malice aforethought, murdered "a human fetus." (1CT 1.) In California, there has never been a murder conviction of woman who has suffered a stillbirth due to her own conduct.

Ms. Perez's appointed trial counsel never filed any motions or otherwise challenged the incorrect premise underlying the murder prosecution: namely, that if Ms. Perez's drug used caused the stillbirth, then she could properly be convicted of murder.

On March 26, 2018, after a few hearings (and prior to a preliminary examination), Ms. Perez agreed to enter a plea of no contest to a charge of voluntary manslaughter in exchange for the District Attorney dismissing the murder charge. (1CT 57.) At the plea hearing, counsel for Ms. Perez confirmed on the record that she was entering the plea to avoid the risk of a murder conviction. (1CT 58.) Likewise, the court had Ms. Perez confirm

that "the reason for [the plea]" and her acceptance of a manslaughter conviction was "to avoid the possibility of getting that life sentence on the murder case because of the death of your fetus." (1CT 59.)

The plea hearing transcript also conclusively established that Ms. Perez had been prosecuted for murder based on the allegation that her methamphetamine use while pregnant had caused the death of her fetus. (1CT 68 [court accepts as factual basis for plea that, if the case had proceeded to trial, People would have proved that petitioner's use of narcotics caused fetus to be stillborn].) The court, the prosecution and defense counsel further all agreed on the record that Ms. Perez had not actually committed manslaughter (because the manslaughter statutes do not apply to a fetus)[3], but that she would plead to it nonetheless to avoid being convicted for the murder of her fetus based on methamphetamine use while pregnant. (See *People v. West* (1970) 3 Cal.3d 595); (1CT 58-59.)

The plea was "open"; Ms. Perez would be sentenced to 3, 6, or 11 years, at the court's discretion. (1CT 59.)

Between the change of plea and sentencing, Ms. Perez's family hired private counsel to represent her. (1RT 6.) New counsel filed a motion to withdraw the no contest plea (1CT 73) but this motion also failed to argue that Ms. Perez could never have been convicted of murder based on the stillbirth of her fetus and that, therefore, her plea was not knowing, voluntary and

[3] See *People v. Brown* (1995) 35 Cal.App.4th 1585, 1592; *People v. Dennis*, *supra*, 17 Cal.4th at p. 515.

intelligent and violated due process. Instead, the primary basis for this motion was an allegation that prior counsel had failed to investigate whether some factor other than the drug use had caused fetal death - an argument that presumed, incorrectly, that if drug use *had* caused the stillbirth then a murder conviction was possible. (1CT 77; 1RT 107-109.)

On June 15, 2018, the court denied the new trial motion. (RT 110-116.) The court sentenced Ms. Perez to the highest term for voluntary manslaughter, 11 years in state prison. (RT 132.) The court justified imposition of the upper term in part based on its conclusion that, by her plea bargain, Ms. Perez had avoided a life sentence for the originally-charged murder. As it had at the change of plea hearing, the court wrongly assumed, and trial counsel once again did not challenge, that Ms. Perez could have been convicted of murder if her drug use had caused the death of her fetus. (RT 115, 132.)

Ms. Perez's counsel filed a notice of appeal and requested a certificate of probable cause, which the trial court granted. (1CT 99-100.) Appellate counsel identified no legal issues and filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. The judgement was affirmed in *People v. Perez* 2019 Cal. App. Unpub. LEXIS 2055; 2019 WL 1349709 (March 26, 2019, F077851.)

On October 29, 2020, Ms. Perez (now represented by current counsel) filed in the Court of Appeal an application to recall the remittitur. A few days later, the Attorney General filed a letter notifying the Court of Appeal that he did not oppose the application. Amicus briefs in support of Ms. Perez were

subsequently filed by the American Civil Liberties Union and the American College of Obstetricians and Gynecologists.

On March 29, 2021, the Court of Appeal denied the application. The court noted, "Although the Attorney General does not oppose appellant's application, we conclude appellant's claims are more appropriately raised by way of a petition for writ of habeas corpus in the superior court. On habeas, the parties have the option to present additional evidence relevant to appellant's claims and develop a more complete record. Therefore, the 'Application to Recall Remittitur …,' is denied." (See March 29, 2021 Order, attached hereto as Appendix A.)

Argument

I.
Review should be granted to confirm that a pregnant woman may not be prosecuted or convicted of murder based on the outcome of her pregnancy.

The record at the change of plea hearing was clear: Ms. Perez pled no contest to voluntary manslaughter in order to avoid a murder conviction under section 187 and a potential life sentence. (1CT 58, 59-60.) But the plain language of section 187 precluded a murder conviction. And, even if there were a need to look beyond the plain language of the statute, the Legislature clearly intended that only third parties acting without consent, not pregnant women themselves, could be convicted of fetal murder. Finally, any interpretation of the murder statute that would somehow have allowed for Ms. Perez to be convicted of the

murder of her fetus would be unconstitutional. All these arguments could and should have been raised on appeal.

A. The plain language and legislative intent of section 187 demonstrate that a woman cannot legally be convicted of murder as a result of her own omissions or actions that might result in pregnancy loss.

Before 1970, section 187 read in relevant part, "Murder is the unlawful killing of a human being with malice aforethought." In that year, however, the California Supreme Court decided *Keeler v. Superior Court* (1970) 2 Cal. 3d 619, in which a man attacked a pregnant woman and killed her fetus. Applying the plain terms of the statute and the established rule that a fetus is not a human being under the law, this court held that the assailant could not be convicted of murdering the fetus. (*Id*. at p. 639.)

In direct response to *Keeler*, the Legislature amended section 187. (See *People v. Davis* (1994) 7 Cal.4th 797, 829-836.) Section 187 now defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Subdivision (b), however, specifically precludes a murder conviction of a woman who causes the termination of her own pregnancy. It states:

> (b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:
>
> (1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

In interpreting section 187, the court must "begin with the plain, commonsense meaning of the language used by the Legislature." (*People v. Leiva* (2013) 56 Cal.4th 498, 506.) However, words and phrases must be construed in context, and a court may "reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results . . . that the Legislature could not have intended." (*Ibid*., citations omitted.) Ultimately, the court's "primary duty, of course, is to construe the statute to effectuate the Legislature's intent" because "the intent of the enacting body is the paramount consideration." (*In re Harris* (1993) 5 Cal.4th 813, 844.)

Applying these rules of statutory interpretation, both the plain language and the history of section 187 make clear that the Legislature did not intend to permit a mother to be convicted of murder of her own fetus based on actions to which she consents, which necessarily includes her own actions during pregnancy. The Legislature amended section 187 to remedy the lacuna in legal liability for willful attacks by third parties that was brought to light by *Keeler* and intended to make murder applicable in

fetal death cases only when a third party, acting with malice, kills a fetus without the mother's consent.

When it amended section 187, the Legislature included two provisions that maintained the legality of abortion. (§ 187, subd. (b)(1), (b)(2).) In a third provision (subdivision (b)(3), the Legislature provided immunity to the mother of a fetus – but it did *not* limit that immunity to when a mother consents to an abortion lawfully performed by a medical professional. The Legislature went further. Subdivision (b)(3) excludes from murder *any* act – whether or not that act is intended to terminate the pregnancy, and whether or not it is legal – that is solicited, aided, abetted, or consented to by the mother of the fetus. If the Legislature intended to permit murder liability when a mother does not take good enough care of herself and/or her fetus, subdivision (b)(3) would be far more narrow. It would simply state that a mother may not be prosecuted for murder for consenting to an abortion. The Legislature did not select such narrow language.

The California Attorney General agrees. In October 2019, the Kings County District Attorney charged a second woman, Chelsea Becker, with fetal murder based on the allegation that drug use during pregnancy caused her to suffer a stillbirth.[4] Counsel for Ms. Becker, recognizing that section 187 does not

[4] Concurrent with her application in the Court of Appeal, Ms. Perez filed a request for judicial notice ("Appellant's RJN") of the Attorney General's brief in the *Becker* case as well as the declaration of State Assemblyman W. Craig Biddle; that request was granted.

permit conviction under circumstances identical to those of Ms. Perez, filed a demurrer. The superior court denied the demurrer, but Ms. Becker filed a writ of prohibition in the Court of Appeals. In the writ proceeding, the Attorney General took the highly unusual step of filing an amicus brief in support of Ms. Becker's writ.[5]

In the brief, the Attorney General argued that "the text, purpose, and legislative history of California Penal Code section 187 demonstrate that a woman cannot be prosecuted for murder as a result of her own omissions or actions that might result in pregnancy loss." (Appellant's RJN, Attorney General's Brief at p. 5.) The Attorney General explained that because a "person 'consents' to her own voluntary actions and behaviors, when the mother of a fetus 'consent[s]' to the 'act' (i.e. the act that allegedly leads to the demise of the fetus), her conduct is necessarily exempted under subdivision (b)(3)." (*Id*. at p. 9.) The Attorney General also noted that "the Legislature's purpose in adding the killing of a fetus to Penal Code section 187 was not to punish women who do not—or cannot, because of addiction or resources—follow best practices for prenatal health." (*Id.* at p. 10.) In addition, the brief raised the concern that the DA's interpretation of section 187 "would subject all women who suffer

[5] On October 15, 2020, a two-justice majority of the Court of Appeal denied Ms. Becker's writ without prejudice to her bringing a future writ once the facts of her case become part of the record. (*People v. Becker*, Case F081341, order filed 10/15/2020.) A dissenting justice would have issued an order to show cause.

a pregnancy loss to the threat of criminal investigation and possible prosecution for murder." (*Id.* at p. 11-12.)

We know the Legislature did not intend that women be convicted of murder for their own acts leading to pregnancy termination. The primary author of the section 187 amendment, State Assemblyman W. Craig Biddle, executed an affidavit in 1990 and explained that the amendment was not intended to subject a pregnant woman to a murder conviction in these circumstances. According to Assemblyman Biddle, the purpose of the legislation,

> as explained to the Legislature [was] to make punishable as murder *a third party's* willful assault on a pregnant woman resulting in the death of her fetus. That was the *sole intent* of AB 816. No Legislator ever suggested that this legislation, as it was finally adopted, could be used to make punishable as murder conduct by a pregnant woman that resulted in the death of her fetus.

(Appellant's RJN, Biddle Declaration, ¶ 4, emphasis added.)

A legislator's statement is entitled to consideration when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700; *Marriage of Bouquet* (1976) 16 Cal.3d 583, 590; *Stanton v. Panish* (1980) 28 Cal.3d 107, 114.) Mr. Biddle's sworn affidavit reflects exactly this history, as he describes what was "explained to the Legislature," and it therefore is entitled to consideration.

The legislative intent behind the post-*Keeler* amendment to section 187 was clearly to extend criminal responsibility only to the unconsented-to acts of third parties. This is how the statute has been used in fact - to prosecute third parties who attacked pregnant women and caused pregnancy losses. (e.g., *People v. Taylor* (2004) 32 Cal.4th 863, 869; *People v. Dennis* (1998) 17 Cal.4th 468, 515; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1592; *People v. Harris* (2005) 37 Cal.4th 310, 321; *People v. Valdez* (2005) 126 Cal.App.4th 575, 577; *People v. Marlin* (2004) 124 Cal.App.4th 559, 563; *People v. Bunyard* (2009) 45 Cal.4th 836, 840.) By contrast, there are no cases in which section 187 was used to convict a pregnant woman for her own actions causing a stillbirth.

In summary, even if Ms. Perez's use of methamphetamine while pregnant caused the death of her fetus, the plain language of section 187 and the legislative intent behind the statutory amendment make clear that she could not have been legally convicted of murder. Yet, as the appellate record made abundantly clear, nobody informed her of that fact, and so she accepted a manslaughter convicted to avoid a murder conviction that never could have occurred.

B. If section 187 permitted a murder conviction of a woman based on her actions causing a stillbirth, it would be unconstitutional.

Even if the plain language of section 187 could be ignored and the statute could be read as permitting a murder conviction of a mother whose own acts resulted in fetal death, any such interpretation would be unconstitutional. Thus, in addition to

missing the plain reading and legislative intent arguments, appellate counsel failed to identify that, as applied by the Kings County District Attorney, a murder conviction of Ms. Perez would have violated the *ex post facto*, due process, privacy, and equal protection provisions of the state and federal constitutions.[6]

(1) Permitting section 187 to apply to Ms. Perez would constitute *ex post facto punishment*.

As set forth above, section 187 plainly states that a woman *cannot* be convicted of murder of a fetus based on acts to which she consents, which inherently includes her own acts. (§ 187, subd. (b).) No appellate case (published or unpublished) holds otherwise.

Thus, any reading of section 187 that would permit the murder conviction of Ms. Perez under the District Attorney's theory would violate the state and federal constitutional prohibitions against *ex post facto* laws. (Cal. Const., art 1, § 9; *People v. White* (2017) 2 Cal.5th 349, 385 ["an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law."]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [same]; *Bouie v. City of*

[6] Of course, courts construe legislation to be constitutional if possible. (*Shealer v. City of Lody* (1944) 23 Cal.2d 647, 653 [if "a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety…"].)

Columbia (1964) 378 U.S. 347, 353 [84 S. Ct. 1697, 12 L. Ed. 2d 894].)

(2) Permitting women to be convicted of murder based on their conduct while pregnant would render section 187 unconstitutionally vague.

A statute violates due process if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 56.) "The basic premise of the void-for-vagueness doctrine is that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. Thus, a criminal statute must be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (*In re Andre Purdue* (2013) 221 Cal.App.4th 1070, 1077, internal citations and punctuation omitted; see also *City of Chicago v. Morales* (1999) 527 U.S. 41, 58 ["the fair notice requirement's purpose is to enable the ordinary citizen to conform his or her conduct to the law"].)

Other state courts have held that prosecutions of pregnant women under similar statutes were unconstitutionally vague because they expose pregnant women to limitless exposure to murder charges. In *Commonwealth v. Welch* (1993) 864 S.W.2d 280, 283,[7] the Supreme Court of Kentucky addressed an attempt

[7] The Supreme Court of Kentucky held the offense of criminal child abuse did not extend to defendant's pregnancy and use of drugs.

to prosecute a woman for child abuse based upon her drug use while pregnant. The court reviewed the decisions of several states and concluded:

> All of these cases address statutes similar in effect to the present one, and all conclude that, properly construed, the statutes involved do not intend to punish as criminal conduct . . . [actions of] an expectant mother . . . All of these cases point out in one way or another that to construe the statute involved otherwise makes it *impermissibly vague*…

(*Id*. at p. 283, emphasis added.)

As *Welch* asks, is it murder if a fetus dies because a pregnant woman smokes, enjoys downhill skiing, drives over the speed limit, or fails to wear the prescription glasses she needs to see the dangers of the road? (*Commonwealth v. Welch, supra,* 864 S.W.2d 280 at p. 283.)

> If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new 'crimes.' ... In short, the District Attorney's interpretation of the statutes, if validated, might lead to a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior—a plainly unconstitutional result that would, among other things, render the *statutes void for vagueness*.

(*Id*. at p. 282, internal citations omitted, emphasis added.)

In sum, the District Attorney's interpretation of section 187 in Ms. Perez's case ran afoul of the state and federal constitutional guarantees against vague criminal statutes.

(3) Subjecting a woman to a murder conviction because her actions cause a stillbirth would violate her constitutional right to privacy.

Both the California and U.S. Constitutions protect autonomy and confidentiality in making intimate decisions about childbearing and access to health care. The state may not intrude into these protected spheres without demonstrating a compelling justification and that no less invasive means exist to achieve that objective. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 340–41.)

Decisions about parenthood "are clearly among the most intimate and fundamental of all constitutional rights." (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal. 3d at 275; *Cleveland Bd. of Edu. v. LaFleur* (1974) 414 U.S. 632, 639.) If section 187 applied to Ms. Perez under the charged facts, it would impose a broad duty of care for every pregnant woman in California. As discussed above, criminal liability for miscarriage or stillbirth could result from a wide range of conduct. By threatening prosecution of pregnant women as they make daily decisions required to balance their health and their obligations to employers, family members and others, section 187 would significantly burden a core freedom secured by the right to privacy: the freedom to make childbearing decisions free of unwarranted governmental interference.

The state could not demonstrate that section 187 is the least invasive means to achieve some state interest. Even if the

state's interest in maximizing fetal survival overrides all other competing interests of the pregnant woman—which it does not—prosecution and incarceration of women for their judgments during pregnancy would not actually further any interest in fetal welfare. Instead, the threat of criminalization deters pregnant women from obtaining medical care, undermining their ability to give birth to healthy infants.[8]

(4) A criminal statute that targets women violates Equal Protection.

Any law that targets one sex—or one race, or one religion—is inherently and unconstitutionally discriminatory. If section 187 were interpreted to permit prosecution of people for outcome of their own pregnancies, then it would be unconstitutionally targeted at women. (Cal. Const., art. 1, §7; U.S. Const., 14th Amend.)

California courts have recognized that imposing differential burdens on pregnancy or potential pregnancy constitutes

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[8] Clear evidence establishes that women who desire drug treatment and prenatal care are dissuaded from seeking it when faced with the threat of prosecution and its attendant harms for themselves, their pregnancies, their future children, and their families. *See* Southern Reg'l Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and parenting Women 6* (1993); S.C. Roberts & A. Nuru-Jester, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMEN'S HEALTH ISSUES 193 (2010); Ass'n of Women's Health, Obstetric & Neonatal Nurses (AWHONN), *Optimizing Outcomes for Women with Substance Use Disorders in Pregnancy and the Postpartum Period*, 48 J. OF OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 583 (2019).

unlawful sex discrimination. (See *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517 [holding that company's "fetal protection program" that treated differently people of childbearing capacity violated prohibition on sex discrimination].) Indeed, California has statutorily defined "sex discrimination" in many contexts to include "[p]regnancy or medical conditions related to pregnancy." (See, e.g., Cal. Gov't Code § 12926(r)(1)(A).)

If section 187 were interpreted to apply in Ms. Perez's case, then it would impose a differential burden on pregnancy, requiring the state to demonstrate a compelling state interest in the differential burden that is necessary to further the law's purpose. (See, e.g., *Sail'er Inn* (1971) 5 Cal.3d 1, 17–20.) As set forth above, the state would not be able to meet this burden.

All of the aforementioned arguments could and should have been raised in Ms. Perez's direct appeal. Review should be granted to establish that when a pregnant woman suffers a stillbirth that was allegedly caused by drug use, she may not be charged and convicted of murder.

II.
The appellate record conclusively established reversible error, without need for additional evidence; review should be granted to confirm that in such circumstances recall of the remittitur is appropriate and necessary.

The Court of Appeal denied Ms. Perez's application to recall the remittitur, which would have allowed her to raise the aforementioned legal errors with the murder prosecution and

the glaring infirmity of her plea bargain and conviction, based on its conclusion that such claims would be more appropriately raised on habeas corpus. Ms. Perez respectfully disagrees that any additional evidentiary record was necessary to confirm that appellate counsel failed to raise meritorious issues and that the error was prejudicial. Review should be granted to establish that in such circumstances recall of the remittitur is not only appropriate but necessary, and to permit the important legal questions raised in this case to be promptly addressed on appeal.

In order to render effective assistance, appellate counsel must "discuss the legal issues with citations of appropriate authority, and argue all issues that are arguable." (*People v. Feggans* (1967) 67 Cal.2d 444, 447–448; see also *People v. Cole* (2020) 52 Cal.App.5th 1023, 1038 [appointed counsel on appeal has a duty to review the entire record, "thoroughly research the law," and to present any "nonfrivolous issues"].) Because a certificate of probable cause was requested and granted, Ms. Perez's appellate counsel could have argued any appealable issue, including challenging the validity of the plea. (1CT 100; Pen. Code, § 1237.5; *People v. Johnson* (2009) 47 Cal.4th 668, 676; *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1178-1180) [once a certificate of probable cause is granted, appellant counsel is not limited to the issues it was based upon].)

Here, the appellate record conclusively established that Ms. Perez pled no contest to a crime she did not actually commit (voluntary manslaughter) specifically to avoid the possibility of a conviction for a crime she could not have committed – murder.

(1CT 58-59 [acknowledgement by counsel and court at plea hearing that facts did not support manslaughter charge, and petitioner was entering plea to avoid murder charge]; see *People v. Dennis*, *supra*, 17 Cal.4th at p. 515 [manslaughter does not apply to fetus].) The appellate record also conclusively established that the only factual theory for the murder charge was that Ms. Perez caused the death of her fetus by using methamphetamine. (1CT 1, 17 [complaint and amended complaint identifying murder victim as fetus], 5 [bail review report describing facts], 29-31 [probation report describing facts], 59 [court stating plea was to avoid possibility of life for murder "because of the death of your fetus"]; 68 [court accepts as factual basis for plea that, if the case had proceeded to trial, People would have proved that petitioner's use of methamphetamine caused fetus to be stillborn]; 82-83 [People's brief describing facts and "feticide" murder theory].)

But appellate counsel failed to argue that Ms. Perez's plea to voluntary manslaughter was not knowing, intelligent and voluntary because it was induced by the misrepresentation (made by both the court and counsel) that she could be convicted of murder. (1CT 58, 59-60; see *In re Brown* (1973) 9 Cal. 3d 679, 682 [issues reviewable on an appeal following a guilty plea include that "a plea [was] obtained by a claimed misrepresentation."]; *People v. Everett* (1986) 186 Cal.App.3d 274, 279 [claims of ineffectiveness of trial counsel before a guilty plea are "cognizable on appeal where there is an adequate record for review"]; *People v. Johnson* (1995) 36 Cal.App.4th 1351 [plea

bargain was attractive to defendant only because he believed he was facing nearly 40 years in prison, which was not true]; *People v. Maguire* (1998) 67 Cal.App.4th 1022, 1027 [counsel ineffective for failing to recognize that even if the defendant's alleged conduct were found true, the defendant still had not actually committed the crime charged]; *In re Williams* (1969) 1 Cal.3d 168, 170-171 [plea invalid based on ineffective assistance where even if defendant's alleged conduct were found true he had not committed the charged crime].)

This issue far exceeded the minimal threshold of being arguable and nonfrivolous. It was, in fact, meritorious. By failing to raise it, appellate counsel deprived Ms. Perez of effective assistance. There is no additional record that could be developed that would change this conclusion. The record is clear.

Courts have recalled the remittitur – with, as here, a letter of non-opposition by the Attorney General – when appellate counsel deprived the defendant of effective assistance by failing to address legal challenges to a conviction. For example, in *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 394 (overruled on unrelated grounds by *People v. Flood* (1998) 18 Cal.4th 470), a defendant convicted of murder and assault with a deadly weapon sought to recall the remittitur based on the ineffective assistance of his appellate counsel, and the Attorney General affirmatively declined to oppose the motion. The defendant's appointed appellate counsel failed to challenge the sufficiency of the evidence supporting the defendant's conviction, despite the fact that none of the eyewitnesses at trial identified the defendant as

the person who shot the victim. (*Id*.) Appellate counsel also failed to argue that the defendant's conviction for assault with a deadly weapon was invalid because the jury was not instructed on the elements of simple assault. (*Id*. at p. 392.) The court held that because appellate counsel failed to address these "arguable issues," the defendant "was denied the effective assistance of appellate counsel to which he was constitutionally entitled and is therefore entitled to have his appeal determined anew." (*Id*. at p. 394.) The court therefore recalled the remittitur and reinstated the appeal.

Perhaps even more on point, in *People v. Rhoden* (1972) 6 Cal.3d 519, 527, this court ordered the recall of the remittitur in part based on appellate counsel's failure to argue that the defendant's actions did not fall "within the meaning" of the kidnapping statute. (*Ibid*.) The court found that counsel rendered ineffective assistance because, "despite the extreme gravity of defendant's [charges], his court-appointed counsel on appeal appears to have accorded him only pro forma assistance." (*Id*. at p. 524; see also *In re Smith* (1970) 3 Cal.3d 192, 200 [appellate counsel rendered ineffective assistance when he failed to argue that an unduly-suggestive lineup deprived the defendant of due process and holding that although these issues "might not have compelled reversal, counsel's failure to raise the issue is not justified, nor does the possibility of defeat render the omission any the less a denial of effective appellate assistance."].)

Just as appellate counsel in *Rhoden* was ineffective in failing to argue that the defendant's conduct did not fall "within

the meaning" of the kidnapping statute, appellate counsel here was ineffective in failing to argue that Ms. Perez's conduct did not fall "within the meaning" of the murder statute, and, as a result, her plea was clearly not knowing, intelligent and voluntary. A certificate of probable cause had been granted (1CT 100), so the validity of the plea was open to challenge. Appellate counsel had a duty to review and research the law. At a minimum, she should have reviewed the very short text of section 187, which would have told her that Ms. Perez's actions could not have resulted in a legal conviction under section 187, subdivision (b)(3). Appellate counsel also should have recognized that any conviction of Ms. Perez under section 187 would have been unconstitutional, as discussed above. Moreover, counsel should have recognized that in California, there are no examples of fetal murder convictions being sustained where the defendant is the mother. That alone should have sounded the alarm that Ms. Perez's conviction warranted close scrutiny.

Finally, appellate counsel could and should have challenged the judgement on due process grounds. Due process precludes the state from punishing a person factually innocent of the charged crime. (*In re Sakarias* (2005) 35 Cal.4th 140, 160.) Where undisputed facts establish that a defendant's conduct did not satisfy the required elements of the crime charged (or in this case, *any* crime) a conviction violates due process. (*In re Williams, supra*, 1 Cal.3d at pp. 175-176.)

No tactical reason can explain appellate counsel's failure to raise these critical issues. Appellate counsel is bound to raise

any arguable and nonfrivolous issue, not just those she deems to "compel[] reversal." (*In re Smith*, *supra*, 3 Cal.3d at p. 200.) Ms. Perez had been sentenced to 11 years in prison. If any of the aforementioned arguments had prevailed on appeal, Ms. Perez would have been guilty of *nothing*. There was nothing to be lost and everything to be gained by arguing that her plea was not knowing and voluntary because it was based on the incorrect premise that she could legally have been convicted of murder, that it was the product of ineffective assistance, and/or that it violated due process.

Finally, Ms. Perez was clearly prejudiced by appellate counsel's ineffective assistance. For the legal reasons detailed herein, Ms. Perez's respectfully contends her judgment would have been reversed on appeal had the proper challenges been raised.

Ms. Perez respectfully contends the Court of Appeal erred by concluding that additional evidence was necessary to resolve Ms. Perez's claims. There is no evidence that would change the conclusion that Ms. Perez's appellate counsel rendered ineffective assistance and deprived her of a meaningful appeal. No additional evidence is necessary to establish that her plea was not knowing, intelligent and voluntary and that the judgment is a violation of due process. Review should be granted to clarify that in such circumstances recall of the remittitur is not only appropriate but necessary, to confirm that a pregnant woman who suffers a stillbirth cannot be prosecuted for murder, and to swiftly remedy the injustice that has occurred in this case.

CONCLUSION

For all the foregoing reasons, Ms. Perez respectfully asks this court to grant review, to reverse the lower court's decision not to recall the remittitur, and to permit review of the important legal questions raised by this case.

Dated: April 8, 2021

Respectfully Submitted,

/S/ Matthew Missakian

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this petition has been prepared using 13 point Century Schoolbook typeface. In its entirety, the brief consists of 6,963 words as counted by the Microsoft Word word processing program, up to and including the signature lines that follow the Brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 8, 2021

/S/ Matthew Missakian

_____

Matthew Missakian

APPENDIX A
3/29/2021 Order of the Court of Appeal

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADORA PEREZ, Defendant and Appellant.	F077851 (Kings Super. Ct. No. 18CM0021) **ORDER**

BY THE COURT:*

Appellant's "Request for Judicial Notice," filed on March 26, 2021, is granted.

This court is in receipt of appellant's "Application to Recall Remittitur …," filed on October 29, 2020. Although the Attorney General does not oppose appellant's application, we conclude appellant's claims are more appropriately raised by way of a petition for writ of habeas corpus in the superior court. On habeas, the parties have the option to present additional evidence relevant to appellant's claims and develop a more complete record. Therefore, the "Application to Recall Remittitur …," is denied.

Levy, A.P.J.

* Before Levy, A.P.J., Detjen, J. and Peña, J.

DECLARATION OF SERVICE

People v. Perez
Court of Appeal No. F077851

I, Matthew Missakian, declare that I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, have a business address at 5150 E. Pacific Coast Hwy., Suite 200, Long Beach 90804, and an email address of matthew@missakian-law.com, and that on April 8, 2021 I served copies of **PETITION FOR REVIEW** in the above-entitled action by depositing copies thereof in sealed envelopes, postage fully prepaid, in the United States Mail at Long Beach, California, or via email/Truefiling, addressed as follows:

Court of Appeal: pursuant to notification from the Supreme Court, submission of this petition for review through TrueFiling constitutes service on the Court of Appeal.

Office of the Attorney General: SacAWTTrueFiling@doj.ca.gov

Kings County District Attorney
1400 West Lacey Blvd.
Hanford, CA 93230

Michele Douglass: mad136590@aol.com

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8th day of April, 2021, at Long Beach, California

/S/ Matthew Missakian

Matthew Missakian