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COURT OF APPEAL OF THE STATE OF

CALIFORNIA FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ADORA PEREZ, Defendant and Appellant.	Court of Appeal No. F077851 Superior Court 18CM-0021 (Kings County)

APPLICATION TO RECALL REMITTITUR ON APPEAL PURSUANT TO CALIFORNIA RULE OF COURT 8.272(C)(2)

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INTRODUCTION

Adora Perez suffered a stillbirth on December 30, 2017. Alleging that Ms. Perez's drug use during pregnancy caused the stillbirth, the Kings County District Attorney charged Ms. Perez with murder under section 187.[1] But that statute explicitly provides that no person "who commits an act that results in the death of a fetus" can be guilty of murder where "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus." Unambiguous legislative history underscores lawmakers' intent to exempt mothers from prosecution for their own acts that result in fetal death.

The District Attorney thus prosecuted Ms. Perez under a theory that the text and legislative history of the murder statute plainly do not condone.[2] But neither Ms. Perez's court-appointed counsel nor her subsequently-retained private counsel ever pointed out this glaring error at the trial level. Instead, as revealed in the change of plea transcript (made part of the appellate record) the DA, the court, and Ms. Perez's counsel all agreed that maternal drug use was a valid theory for a fetal murder prosecution. The plea transcript also shows that Ms. Perez pled no contest to manslaughter solely in order to avoid a murder conviction and potential life sentence premised on this impermissible theory.

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[1] Unless otherwise noted, all statutory references are to the California Penal Code.

[2] Ms. Perez does not concede that drug use in fact caused the stillbirth of her fetus. For purposes of this motion, Ms. Perez argues that, even assuming her drug use did cause the stillbirth, she could not legally be convicted of murder.

The Attorney General's recent *amicus* brief filed in the writ of prohibition proceedings in *Becker v. Superior Court* (F081341) underscores how obvious and egregious the legal errors were in Ms. Perez's case. There, the Attorney General argued in support of prohibition of a section 187 prosecution in circumstances identical to those of Ms. Perez because the plain language and legislative intent of the statute demonstrate that section 187 does not apply to a woman whose own acts might cause a pregnancy loss.

Despite the clarity of the law and the manifest error exposed in the plea transcript, on appeal, counsel failed to argue that Ms. Perez could not have possibly committed the crime she was charged with. Nor did appellate counsel argue that her plea was not knowing or voluntary because it was based on the incorrect advice that she was exposed to a murder conviction. Nor did counsel argue that Ms. Perez received ineffective assistance when her trial counsel failed to seek dismissal of the complaint on statutory and constitutional grounds and failed to advise Ms. Perez that she could not legally be convicted of murder. Having missed all of these issues on appeal, appellate counsel instead filed a *Wende* brief, thereby robbing Ms. Perez of the effective assistance of appellate counsel to which she was entitled.

Recall of the remittitur is appropriate where counsel's errors are "of such dimensions as to entitle the defendant to a writ of habeas corpus." (*People v. Mutch* (1971) 4 Cal.3d 389, 396.) Because counsel's ineffectiveness completely foreclosed Ms.

Perez's ability to appeal, this application requests that the Court recall the remittitur, reinstate the appeal, and set a new briefing schedule so that Ms. Perez may have the appeal that she was denied.

FACTUAL BACKGROUND

On December 30, 2017, Petitioner Adora Perez suffered a stillbirth in a hospital in Hanford, California. Deputies of the Kings County Sheriff were dispatched to the hospital and spoke with Ms. Perez's OB-GYN, who attributed the stillbirth to methamphetamine use during the pregnancy. (1CT 29; 1CT 5.) On January 3, 2018, the Kings County District Attorney ("the DA") 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.)

Section 187(b)(3) provides that no person "who commits an act that results in the death of a fetus" can be guilty of murder where "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus." The State's theory that Ms. Perez was guilty of murder because her own use of methamphetamine caused the death of her fetus was thus barred by the plain language of the statute. At the trial level, however, Ms. Perez's court-appointed counsel filed no motions or otherwise challenged the incorrect legal theory underlying the prosecution.

That the DA premised the murder charge solely on drug use causing fetal death was clearly established on the record at the change of plea hearing. Also clearly established at the change of plea hearing was the reason for Ms. Perez's plea to

manslaughter – it was solely to avoid conviction on the murder charge. At the change of plea hearing, counsel and the court agreed that the DA had prosecuted Ms. Perez 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 DA, 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 fetuses, (see *People v. Brown* (1995) 35 Cal.App.4th 1585, 1592); *People v. Dennis* (1998) 17 Cal.4th 468, 515) 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 [acknowledgement by counsel and court at plea hearing that facts did not support manslaughter charge, and petitioner was entering plea to avoid murder charge].) Accordingly, on March 26, 2018, Ms. Perez consented to a plea bargain whereby the DA dismissed the murder charge in exchange for Ms. Perez's pleading no contest to voluntary manslaughter in violation of section 192, subdivision (a). (1CT 20.)

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 raise the statutory exemption for

acts consented to by the mother, and thus failed to argue Ms. Perez's plea was invalid as a result. Instead, the primary basis for this motion was the allegation that court-appointed counsel had failed to investigate whether some factor other than Ms. Perez's alleged drug use had caused fetal death. (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.)

In approximately April of 2020, Ms. Perez first learned that her three previous attorneys had all overlooked the critical legal issue in her prosecution for murder which is that, even if Ms. Perez's methamphetamine use had caused the death of her fetus, she had not committed the crime of murder under

California law.

ARGUMENT

A woman cannot be convicted of murder when her drug use causes the death of her fetus. A murder conviction in these circumstances is prohibited by the clear language of section 187 and the legislative history makes clear lawmakers' intent to exempt mothers from the reach of the murder statute for acts they consent to. Even if the statute could somehow be read to permit convicting a pregnant woman of murder when her actions result in the death of her fetus, it would be unconstitutional. Neither of Ms. Perez's trial attorneys recognized this critical issue. As a result, Ms. Perez entered a plea of no contest to the lesser offense of manslaughter, even though the court and prosecutor acknowledged that Ms. Perez did not actually commit manslaughter, with the trial court explicitly noting that she did so only to avoid a conviction for murder.

Based on the appellate record alone, Ms. Perez's appellate counsel could have and should have argued that because Ms. Perez pled to manslaughter based on the incorrect premise that she was exposed to a murder conviction, her plea was not knowing or voluntary. Appellate counsel also should have argued that trial counsel rendered ineffective assistance by failing to seek dismissal of the complaint and by failing to advise Ms. Perez that she could not be convicted of murder. Because appellate counsel failed to identify these arguable and non-frivolous issues, she rendered ineffective assistance of counsel to Ms. Perez and deprived her of any meaningful appeal. The court is empowered

to correct this miscarriage of justice by recalling the remittitur, reinstating the appeal, and setting a new briefing schedule.

I. THE COURT IS EMPOWERED TO RECALL THE REMITTITUR WHEN APPELLATE COUNSEL RENDERS INEFFECTIVE ASSISTANCE

California Rules of Court, rule 8.272, subdivision (c)(2) provides that, for good cause shown, an appellate court may recall a remittitur. California cases recognize that in a criminal case, recall of the remittitur is an available remedy when an appellate lawyer's ineffective assistance of counsel has resulted in an appellant's forfeiture of review. (See e.g., *In re Serrano* (1995) 10 Cal.4th 447, 457, 458; *In re Martin* (1962) 58 Cal.2d 133, 137, 139; *People v. Granau* (2008) 169 Cal.App.4th 997, 1002-1003, 1008.) As a general rule, an error of law does not authorize the recalling of a remittitur. (*People v. Randazzo* (1957) 48 Cal.2d 484, 488.) "An exception is made, however, when the error is of such dimensions as to entitle the defendant to a writ of habeas corpus." (*People v. Mutch* (1971) 4 Cal.3d 389, 396.)

II. A WOMAN CANNOT LEGALLY BE CONVICTED OF MURDER FOR SUFFERING A STILLBIRTH, NO MATTER THE CAUSE

The record at the change of plea hearing is clear: Ms. Perez pled no contest to manslaughter in order to avoid a murder conviction under section 187 and a potential life sentence. But the plain language of section 187 precludes conviction of Ms. Perez based on the DA's sole theory of the facts, i.e., that her own

actions caused fetal death. In addition, the legislature clearly intended that only third parties acting without consent, not pregnant women themselves, could be convicted of fetal murder. And 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.

A. The Attorney General's Office agrees that 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, the Supreme 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* – it made the death of a fetus a murder only when a third party, acting with malice, kills the fetus without the mother's consent.

The California Attorney General agrees. In October 2019, Kings County charged a second woman, Chelsea Becker, with fetal murder based on her alleged drug use during pregnancy causing her to suffer a stillbirth. Counsel for Ms. Becker, recognizing that section 187 does not 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's Office took the highly unusual step of filing an amicus brief in support of Ms. Becker's writ.[3]

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, Ex. 1 at p. 11.) 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

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[3] Concurrent with this application, appellant has filed a request for judicial notice ("Appellant's RJN") of the California Attorney General's brief in the *Becker* matter, as well as a 1990 declaration of State Assemblyman W. Craig Biddle.

subdivision (b)(3)." (*Id*. at p. 12.) 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. 13.) In addition, the brief raised the concern that the DA's interpretation of section 187 "would subject all women who suffer a pregnancy loss to the threat of criminal investigation and possible prosecution for murder." (*Id.* at p. 14-15.)[4]

It is clear that 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, Ex. 2 at p. 22-23, ¶ 4, emphasis added.)

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[4] On October 15, 2020, the Court denied Ms. Becker's writ without prejudice to bringing a future writ once the facts of her case are established by the record. (*Becker v. Superior Court*, F081341.)

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 fetal death. (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 fetal death.

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.

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 DA, 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.[5]

i. 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 DA's theory would

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[5] 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…"].)

change this settled law and 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 Columbia* (1964) 378 U.S. 347, 353 [84 S. Ct. 1697, 12 L. Ed. 2d 894].)

ii. 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"].)

As set forth above, both the plain text and legislative history of section 187 exempt mothers from prosecution for

murder based on their own acts causing fetal death. The prosecution in this instance ignored that clear law and seeks to apply the murder statute to Ms. Perez's acts on the theory that they caused fetal death. If section 187 is somehow read as applying to a mother's acts causing fetal death, it would be void for vagueness because it would expose pregnant women to limitless exposure to murder charges.

Other state courts have held that prosecutions of pregnant women under similar statutes were unconstitutionally vague for this very reason. In *Commonwealth v. Welch* (1993) 864 S.W.2d 280, 283,[6] the Supreme Court of Kentucky addressed an attempt 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, goes downhill skiing, drives over the speed limit, or fails to wear the prescription glasses she needs to

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

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, any reading of the statute that would permit the DA's attempt to apply section 187 in Ms. Perez's case would run afoul of the state and federal constitutional guarantees against vague criminal statutes.

iii. 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 it has a compelling interest in this interference, much less that section 187 is the least invasive means to achieve the state's 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.[7]

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[7] 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.

iv. 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 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

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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).

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.

III. APPELLATE COUNSEL'S INEFFECTIVE ASSISTANCE WARRANTS RECALL OF THE REMITTITUR

Because a woman cannot be legally convicted of murder when her actions cause a stillbirth, appellate counsel should have argued on appeal that Ms. Perez's plea was not knowing and voluntary and that her trial counsel rendered ineffective assistance of counsel in failing to seek dismissal of the murder charge on statutory and constitutional grounds and in failing to properly advise her that she could not be legally convicted of murder. Instead of raising these arguable issues on appeal, counsel filed a *Wende* brief, effectively stripping Ms. Perez of her right to appeal. Undersigned counsel submits that this clear ineffective assistance of counsel warrants recall of the remittitur.

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 (manslaughter) 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* (1998) 17 Cal.4th 468, 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 manslaughter was not knowing or voluntary because it was induced by the misrepresentation that she could be convicted of murder. (See *In re Brown* (1973) 9 Cal. 3d 679, 682, internal citations omitted [issues reviewable on an appeal following a guilty plea include those "raised by a claimed ineffectiveness of trial counsel" or that "a plea [was] obtained by a claimed

misrepresentation."].) In addition, appellate counsel failed to argue that trial counsel was ineffective in failing to advise Ms. Perez that she could not be convicted legally under Section 187 and in failing to seek dismissal of the case on statutory and constitutional grounds. (*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"].) These issues far exceed the minimal threshold of being arguable and nonfrivolous. By failing to address them, appellate counsel deprived Ms. Perez of effective assistance.

Courts have recalled the remittitur – with 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*, 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. (*People v. Valenzuela* (1985) 175 Cal.App.3d 381, 394 overruled on unrelated grounds by *People v. Flood* (1998) 18 Cal.4th 470). 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.

Similarly, in *People v. Rhoden*, the California Supreme 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. (*People v. Rhoden* (1972) 6 Cal.3d 519, 527). 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 [finding 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 that Ms.

Perez's plea was not voluntary as a result. A certificate of probable cause had been granted, 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.

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* (1970) 3 Cal.3d 192, 200.) Ms. Perez had been sentenced to 11 years in prison; 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 be convicted of murder. Similarly, no tactical reason can explain appellate counsel's failure to argue that trial counsel should have sought dismissal of the complaint against Ms. Perez and should have advised Ms. Perez that she could not be legally convicted of murder under section 187.

Ms. Perez was prejudiced by counsel's ineffective assistance; because appellate counsel failed to argue that Ms. Perez's plea was not knowing and voluntary and that trial counsel rendered ineffective assistance in the ways described above, Ms. Perez's conviction stood and she lost any ability to seek further appellate review or federal habeas relief. It is respectfully submitted that this Court can and should correct the prejudice to Ms. Perez by granting the motion to recall the remittitur and reinstating her appeal based on the ineffective assistance of appellate counsel.

CONCLUSION

For all these reasons set forth above, undersigned counsel request that the Court recall the remittitur and reinstate Ms. Perez's appeal.

DATED: October 21, 2020

Respectfully submitted,

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/S/ Mary McNamara

By Mary McNamara
Attorneys for
Appellant Adora Perez

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this application has been prepared using 13 point Century Schoolbook New typeface. In its entirety, the brief consists of 6,996 words as counted by the Microsoft Word word processing program, up to and including the signature lines that follow the application's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 21, 2020

/S/ Audrey Barron

_____

Audrey Barron

DECLARATION OF SERVICE

Fifth Appellate District

People v. Perez

Case No. F077851

I, Kelsey Schur, declare that I am a citizen of the United States, over the age of 18 years, not a party to the above-entitled action, and have a business address at 300 Montgomery St. Suite 1100, and that on October 21, 2020, I served copies of **APPLICATION TO RECALL REMITTITUR ON APPEAL PURSUANT TO CALIFORNIA RULE OF COURT 8.272(C)(2)** in the above-entitled action by depositing copies thereof in sealed envelopes, postage fully prepaid, in the United States Mail at San Francisco, California, addressed as follows or via Truefiling as follows:

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Chowchilla, CA 93610

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 21, 2020 at San Francisco, California.

/S/ Kelsey Schur

_____

Kelsey Schur