IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF KINGS

IN RE ADORA PEREZ, *Petitioner, on Habeas Corpus.* THE PEOPLE OF THE STATE OF CALIFORNIA, *Real Party in Interest.*	Case No.: Related Kings County Superior Court Case No.: 18CM-0021

PETITION FOR WRIT OF HABEAS CORPUS; MEMORADUM OF POINTS AND AUTHORITIES

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Introduction

The Kings County District Attorney charged petitioner Adora Perez with murder because she suffered a stillbirth. The prosecution's theory was that Ms. Perez's use of methamphetamine during her pregnancy caused the death of her fetus. But even if her drug use had caused her stillbirth, Ms. Perez could not have been convicted of murder. Ms. Perez's counsel provided ineffective assistance by failing to advise her of this defense and failing to challenge the lawfulness of the charge.

In California, no pregnant woman has ever been convicted of murder based on the outcome of her pregnancy. Even prosecutions under such circumstances are all but unheard of. The plain text of Penal Code section 187 bars such prosecutions, and the legislative history of that statute confirms that the Legislature never intended to permit women who suffer pregnancy loss to be prosecuted for murder. In addition, abundant authority strongly suggests that such a murder prosecution would, even if authorized by statute, be unconstitutional.

Despite the extreme novelty of the District Attorney's charging theory and the gigantic statutory and constitutional red flags, Ms. Perez's attorneys took no meaningful steps to challenge the prosecution. Ms. Perez's first attorney advised her that if her use of methamphetamine had caused the stillbirth then she was guilty of murder and would be convicted at trial. While attempting to find evidence of an alternative cause of death - an effort that was irrelevant to the meritorious defense that could have been presented to the court - he negotiated a plea bargain.

Ms. Perez, having been advised she had no viable defense and thus not realizing that she could not legally be convicted of murder, pled no contest to voluntary manslaughter. After her plea, two additional attorneys failed to address the deficiencies of her plea based on predecessor counsel's ineffective assistance.

Reasoning, incorrectly, that Ms. Perez had already gotten a break by avoiding a murder conviction, the trial court imposed the maximum sentence. As a result of her stillbirth, Ms. Perez is now serving 11 years in prison.

Ms. Perez's plea was not knowing, voluntary and intelligent and was in violation of her right to competent counsel and due process under the Sixth and Fourteenth Amendments and the California Constitution.

Petition for Writ of Habeas Corpus

Petitioner Adora Perez respectfully petitions this court for a writ of habeas corpus and by this verified petition sets forth the following facts and reasons for issuance of the writ:

1. On December 30, 2017, Petitioner Adora Perez was thirty-seven weeks pregnant and went into labor. She travelled to a nearby hospital but upon examination her doctors could detect no fetal heartbeat. At around 10:00 p.m., Ms. Perez's fetus was stillborn. A treating doctor later estimated that the fetus had been dead for 12 to 18 hours prior to delivery.
2. Deputies of the Kings County Sheriff were dispatched to the hospital. Ms. Perez's OB-GYN informed police that he attributed the miscarriage to methamphetamine use during the pregnancy. He supported his conclusion by providing law enforcement confidential medical information from Ms. Perez's hospital file. Within two or three hours of the stillbirth, Ms. Perez was interviewed by police. She acknowledged having used methamphetamine during her pregnancy and was thereafter arrested.
3. 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." (Exhibit C, Complaint and First Amended Complaint, p.

130.)[1] On that date, Ms. Perez appeared in the Kings County Superior Court. Arraignment was continued to January 5 and Ms. Perez was held without bail. (Exhibit A, Reporter's Transcripts of Proceedings, pp. 6-7; Exhibit B, Minute Orders, p. 116.)

4. On January 5, 2018, the arraignment and bail review were continued to January 12. (Exh. A, pp. 11-14; Exh. B, p. 117.) A prosecutor expressed a belief that the murder charged could only be second degree. (Exh. A, p. 11.)

5. On January 12, 2018, in proceedings before the Honorable Robert S. Burns, attorney Robert Stover was appointed to represent Ms. Perez. (Exh. A, p. 19.) Mr. Stover noted that the case was "pled as a second degree" but suggested bail might depend on whether or not the District Attorney pursued first degree murder charges; Judge Burns informed Mr. Stover that "in the State of California you don't allege a degree." (*Ibid*.) Mr. Stover expressed his intention to move for an independent forensic examination and said he needed to notify County Counsel because the fetal remains were still in the custody of the coroner. (*Id*. at pp. 20-21.) Mr. Stover entered a not guilty plea and set the matter for a "motion in regards to discovery and an independent forensic examination" for January 31. (*Id*. at p. 20.) Part of the reason for the continuance was that

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[1] Exhibits A - I in support of this petition are in a concurrently filed separate volume; citations are to the page numbers that run consecutively throughout that volume. (Cal. Rules of Court, rules 8.74, 8.384, 8.486.)

District Attorney Keith Fagundes had assigned the case to himself but was not present to discuss bail or discovery issues. (*Ibid*.)

6. On January 31, 2018, the matter was continued to February 8. (Exh. A, pp. 26-27.) On February 8, Mr. Stover informed the court that he and the District Attorney had worked out logistical issues related to the examination of "evidence" in the custody of the Sheriff. (*Id*. at p. 31.) The District Attorney noted that he would be working with Mr. Stover and the deputy coroner, because "obviously this child needs to be laid to rest, but there is realities [sic] of this process." (*Id*. at p. 33.) Mr. Stover also implied that the bail review should be continued because the complaint had not designated first or second degree murder; Judge Burns again pointed out that in California a degree of murder is not alleged on the complaint. (*Id*. at pp. 31-32.) The matter was continued to March 1. (*Id*. at p. 33.)

7. On March 1, 2018, Mr. Stover noted ongoing negotiations with the prosecution, and the preliminary hearing and bail review were continued to March 7. (Exh. A, pp. 37-38.) On March 7, Mr. Stover noted a "possible resolution" and continued the matter to March 21. (*Id*. at p. 42.) On March 21, Mr. Stover again noted a "potential for a resolution," continued the preliminary hearing to March 26, and took the bail review hearing off calendar. (*Id*. at p. 46.)

8. On March 26, 2018, the District Attorney filed an Amended Complaint that added a count two, voluntary

manslaughter, in violation of Penal Code section 192, subdivision (a). (Exh. A, p. 50; Exh. C, p. 132.) Mr. Stover stated that he had discussed the matter with Ms. Perez, and even though the facts of the case did not "match" the charge of manslaughter, Ms. Perez intended to plead to that charge pursuant to *People v. West* (1970) 3 Cal.3d 595 "to avoid the greater penalties that may be imposed as to the initial Count 1 in this matter." (Exh. A, p. 51.) The plea bargain was "open"; Ms. Perez would be sentenced to either 3, 6, or 11 years, at the discretion of the court. (*Id*. at pp. 51, 53.) Judge Burns confirmed that Ms. Perez was pleading no contest to manslaughter even though the facts did not support that charge, in order to "avoid the possibility of getting that life sentence on the murder case because of the death of your fetus." (*Id*. at p. 52.)

9. Ms. Perez pled no contest to voluntary manslaughter. Mr. Stover joined in the waiver of her constitutional and statutory rights and consented to the plea. (*Id*. at pp. 59-60.) At the court's request, Ms. Perez again confirmed that she was entering the no contest plea, even though she was not actually guilty of voluntary manslaughter, in order "to avoid the conviction in Count 1…" (*Id*. at p. 61.)

10. The factual basis offered in support of the plea was that:

> Ms. Perez presented at Hanford Community Hospital on December 31st, 2017. She was pregnant with an unborn child. When the child was eventually delivered, the child was stillborn. The primary contributing factors to the child's death were asphyxiation from a

> placental detachment and a toxic level of methamphetamine within the fetus. Those were both based on Ms. Perez's admitted use of methamphetamine during the term of the pregnancy and were the primary contributing factors to the death of the fetus.

(Exh. A, p. 61.)

11. Sentencing in the matter was set for May 8, 2018. On that date, attorney Melina Benninghoff substituted in as counsel in place of Mr. Stover and sentencing was continued. (Exh. A, pp. 71-72.)

12. On May 29, 2018, Ms. Benninghoff filed a motion to withdraw the plea. That motion argued that Mr. Stover had failed to investigate the possibility that something other than methamphetamine use might have caused the stillbirth. (Exhibit D, Motion to Withdraw Plea and Opposition, p. 139.) Specifically, the motion contended that counsel had failed to investigate whether placental abruption resulted from either medical malpractice or incorrect vacuum procedures, or whether a C-section should have been performed. (*Ibid*.) Ms. Benninghoff reiterated those arguments at the June 15 hearing on the motion to withdraw the plea. (Exh. A, pp. 84-86.)

13. The motion to withdraw the plea was denied. (Exh. A, pp. 92-93.) The court sentenced Ms. Perez to the upper term of 11 years. (*Id*. at pp. 109-110.) One of the reasons the court provided for selecting the upper term was that by entering her plea Ms. Perez avoided a potential life sentence for murder based on "fetus homicide." (*Id*. at p. 109.) The court

noted that the lesser manslaughter charge could not have resulted after trial because manslaughter does not apply to a fetus. (*Ibid*.)

14. Ms. Perez filed a notice of appeal and requested a certificate of probable cause, which was granted. (Exhibit E, Notice of Appeal with Certificate of Probable Cause, pp. 153-154.) Her appointed appellate counsel, Michele Douglass, filed a no-issue 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). (Exhibit H, Opinion in Case F077851, pp. 163-165.)

15. Ms. Perez's plea was not knowing, intelligent, and voluntary. She accepted a manslaughter conviction in order to avoid a murder conviction without knowing that such murder conviction was legally impossible. As will be detailed in the attached Memorandum of Points and Authorities, neither California law nor the United States Constitution permit a woman to be prosecuted for murder based on the outcome of her pregnancy. Even if Ms. Perez's methamphetamine use had been the primary cause of the stillbirth, she still could not have been lawfully convicted of murder.

16. Ms. Perez was denied her right to the effective assistance of counsel under the Sixth Amendment. Mr. Stover did not recognize that neither California law nor the United States Constitution permit a woman to be prosecuted for murder

based on the outcome of her pregnancy. Mr. Stover incorrectly advised Ms. Perez that she would be convicted of murder if the People proved that methamphetamine use caused the stillbirth. (Exhibit F, Declaration of Adora Perez, p. 158; ¶ 1.) He failed to recognize and advise Ms. Perez of a meritorious defense and took no steps to dismiss a fundamentally impossible charge. (*Ibid*; Exhibit G, Declaration of Matthew Missakian and Email, pp. 160-165.)

17. Prior to Ms. Perez's no contest plea, Mr. Stover advised Ms. Perez that if a jury determined her methamphetamine use was a cause of the death of her fetus then she would be convicted of murder. (Exh. F, p. 158; ¶ 1.) Other than negotiating the plea bargain, his work on the case consisted of seeking evidence that something other than methamphetamine might have caused the fetal death. (Exhibit G, Declaration of Matthew Missakian and Email, pp. 160-165.) Mr. Stover never filed any motions or otherwise challenged the incorrect legal assumption on which the murder charge rested. He never made the meritorious argument that even if methamphetamine use had caused the death of the fetus, Ms. Perez could still not be convicted of murder.

18. Mr. Stover also failed to advise Ms. Perez that even if California law and the United States Constitution did permit a woman to be prosecuted for murder based on a stillbirth, a murder conviction still required prove of malice. (Exh. F, p. 158; ¶ 1.) Ms. Stover never advised Ms.

Perez that she could not be convicted of murder unless a jury determined beyond a reasonable doubt that she knew her conduct endangered the life of her fetus and that she acted with conscious disregard for the life of her fetus. (*Ibid*., see *People v. Soto* (2018) 4 Cal.5th 968, 974.) Ms. Perez would not have pled no contest to the lesser charge of manslaughter had she known that murder requires proof of malice (in this case, implied malice.) (Exh. F, p. 158, ¶ 2.)[2]

19. Ms. Benninghoff also rendered ineffective assistance. She filed a motion to withdraw the plea based on the claim that Mr. Stover failed to investigate alternative causes for the fetal death. (Exh. D, pp. 135-142.) Her argument assumed and implied that if the stillbirth *was* caused by methamphetamine use, then there had been a murder. (*Ibid*.) Thus, like Mr. Stover, Ms. Benninghoff overlooked a legal argument that would have prevailed: Ms. Perez's plea was not knowing, intelligent and voluntary because it was entered to avoid a possible murder conviction, when in fact, unbeknownst to Ms. Perez (and her attorneys), such murder conviction was legally impossible.

20. On appeal, Ms. Douglass also rendered ineffective assistance. Since a certificate of probable cause had been granted, she could have challenged the validity of the plea on direct appeal. (Exh. E, p. 154.) The appellate record established that Ms. Perez's plea was not knowing,

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[2] There has never been an allegation that Ms. Perez intended for her fetus to perish; the prosecution's murder theory was always implied malice. (Exh. A, p. 11.)

intelligent and voluntary because it was entered to avoid a possible murder conviction. In fact, and unbeknownst to Ms. Perez, such murder conviction was legally impossible. Instead of raising that meritorious (and clearly nonfrivolous) issue on appeal, Ms. Douglass filed a *Wende* brief. (Exh. H, pp. 167-168.)

21. Mr. Perez is entitled to relief on habeas corpus because her plea was not knowing, intelligent and voluntary and was the result of the constitutionally ineffective assistance counsel, and because her conviction and sentence violate due process.

22. This petition is timely. Prior to communicating with current counsel in approximately April of 2020, Ms. Perez was ignorant of the fact that neither California law nor the United States Constitution permit a woman to be prosecuted for murder based on the outcome of her pregnancy, and the fact that a murder conviction requires the prosecution to prove malice. This petition is being filed as soon thereafter as reasonably possible under the circumstances. Counsel had to contact Ms. Douglass to obtain the appellate record and review that record. Counsel had to contact Mr. Stover to discuss what defenses he considered and how he had advised Ms. Perez. Counsel had to contact Ms. Benninghoff to discuss her motion to withdraw the plea and to obtain the case file. Counsel had to exchange multiple letters and have multiple phone calls with Ms. Perez to clarify what occurred in the lower court

and how she was advised. Counsel had to request and obtain transcripts of eight hearings that were not part of the original appellate record. Counsel had to then research and draft this petition. This entire process was slowed by the COVID-19 pandemic, during which many of the individuals counsel needed to confer with and/or obtain documents from were less available. Under the circumstances, this petition is being presented without substantial delay. (See *In re Reno* (2012) 55 Cal.4th 428, 459-460.) Even if it could be said that there was substantial delay, petitioner has demonstrated good cause for such delay. (*Ibid*.) Finally, even if there was substantial delay without good cause, this petition should still be considered on its merits because Ms. Perez is actually innocent and her conviction and sentence are the fundamentally unfair result of gross constitutional errors. (*Ibid*.)

23. Ms. Perez is currently in the custody of the California Department of Corrections and Rehabilitation, under inmate number WG0595, at the Central California Women's Facility in Chowchilla.

24. On October 29, 2020, petitioner filed a motion to recall the remittitur in her original appeal, Fifth District Court of Appeal case number F077851. To date, the Court of Appeal has made no ruling regarding that motion. Other than that motion, no petition or motion seeking related relief has been filed in any court.

WHEREFORE, petitioner respectfully asks that this court:

1. Issue a writ of habeas corpus, reverse petitioner's conviction, and/or issue an order to show cause why this Court should not reverse petitioner's conviction;
2. Grant whatever further relief this Court finds appropriate in the interests of justice.

Dated: February 16, 2021 Respectfully Submitted,

By_____

Matthew Missakian

Matthew Missakian
LAW OFFICE OF C. MATTHEW MISSAKIAN, INC.

Mary McNamara
Audrey Barron
SWANSON & MCNAMARA

Attorneys for Petitioner Adora Perez

Verification

I, Matthew Missakian, declare:

I am co-counsel for petitioner, authorized to practice law in California, and authorized to file this petition. I have read the Petition for Writ of Habeas Corpus of petitioner Adora Perez. All facts asserted and not support by citations to exhibits are true of my own personal knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 16th of February, 2021 at Long Beach, California.

_____

Matthew Missakian

Memorandum of Points and Authorities

I.
A woman may not be prosecuted for or convicted of murder based on the outcome of her pregnancy.

A. Introduction

The primary question presented by this petition is purely legal: can a woman be prosecuted for murder based on the outcome of her pregnancy? The answer to that question is no. Even if Ms. Perez's use of narcotics caused her fetus to be stillborn, murder prosecution under these circumstances is not authorized by Penal Code section 187. The Legislature amended section 187 with the intention of permitting fetal murder prosecutions against third parties, not pregnant women. Furthermore, if section 187 were read to permit murder prosecution when a woman's fetus is stillborn, it would be unconstitutional.[3]

B. Penal Code section 187 does not authorize a mother to be prosecuted for murder based on the outcome of her pregnancy.

(1) The Legislature added "fetus" to section 187 to authorize murder prosecutions against third parties; it did not intend to permit murder prosecutions against expectant mothers.

Prior to 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

[3] All section references are to the Penal Code unless otherwise noted.

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 murder for the death of 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, precludes prosecution 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.

(§ 187, subd. (b).)

In construing section 187, this 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 basic principles of statutory construction, then, the present case turns on whether the Legislature, when it expanded section 187 to include malicious killings of a fetus, intended to permit a woman to be prosecuted for murder based on the outcome of her pregnancy. Both the history of the statute and its plain terms make clear the Legislature did not intend to permit such prosecutions. The Legislature amended section 187 only to remedy the injustice that was brought to light by *Keeler* and intended to make murder applicable only when a third party, acting with malice, kills a fetus.

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, 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 –

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 primary author of the amendment to section 187, State Assemblyman W. Craig Biddle, executed an affidavit in 1990 and explained that the amendment was not intended to subject a pregnant woman to murder prosecution based on the outcome of her pregnancy. He explained that the purpose of his legislation "was explained to the Legislature." (Exhibit I, Declaration of W. Craig Biddle, pp. 168, ¶ 4). That explained purpose 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.

(*Ibid*., 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.) Assemblyman Biddle's sworn affidavit reflects exactly this history, as it describes what was "explained

to the Legislature" and what "no Legislator ever suggested." It therefore warrants consideration.

Case law subsequent to the amendment of section 187 reaffirms that the Legislature never contemplated a mother being charged with murder for the death of her own fetus. *People v. Davis, supra*, 7 Cal.4th 797 traced the legislative and judicial history of the statute, noted that it "criminalizes the killing of a fetus without the mother's consent," and interpreted the statute based on the fact that pregnant women have a privacy interest in their own pregnancies that third party attackers do not. (*Id*. at pp. 807, 810 ["when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb"].) This language and analysis are inconsistent with the suggestion that a mother could be prosecuted for murder based on the outcome of her own pregnancy, in which she has a privacy interest.

(2) Reading section 187 as permitting a mother to be prosecuted for the death of her fetus would lead to absurd results.

In prosecuting Ms. Perez for the murder of her own fetus based on her drug use, the Kings County District Attorney may have reasoned that subdivision (b)(3) does not contemplate a woman who solicits, aids, abets, or consents to her own acts. Alternatively, he may have reasoned that the subdivision (b)(3) exclusion only applies when the fatal act was a deliberate abortion. Either reading would lead to absurd results.

If the District Attorney's theory is that the subdivision (b)(3) exclusion does not apply because a woman cannot solicit,

aid, abet, or consent to her own acts, that would mean that a woman could be guilty of murder if she performs an act that results in the death of her fetus, but not if she arranges to have a third party perform that same act. Under this reading of the statute, a woman could be subject to fetal murder prosecution if she throws herself down the stairs to terminate her fetus, but not if she asks somebody to push her. Under this reading of the statute, a woman could be subject to fetal murder prosecution if she ingests narcotics, but not if she asks somebody else to inject the needle or light the pipe. These outcomes are absurd and could not have been intended by the Legislature.

If, on the other hand, the People's theory is that subdivision (b)(3) only provides immunity where the act was intended to abort the fetus, then a woman who does not intend to harm her fetus may be prosecuted for murder while a woman who deliberately terminates the life of her fetus has immunity from prosecution. This is absurd because it permits murder prosecution only when there is a *less* culpable state of mind. A woman who recklessly uses narcotics (or smokes too much, drives too fast, or skies down too steep a mountain) and thereby endangers her fetus could be prosecuted for murder despite intending her fetus no harm, while a woman who deliberately ends the life of her fetus has immunity.

In addition, construing subdivision (b)(3) as applying only when a woman consents to an act of a third party that was intended to terminate the pregnancy is incompatible with the black letter law holding that in cases of murder "malice may be

express or implied." (§ 188; see *People v. Brown* (1995) 35 Cal.App.4th 708, 714.) If subdivision (b)(3) provides immunity only when the act was intended to terminate the pregnancy, that would mean the Legislature intended to create a particular class of murders that *require* implied malice yet *cannot* be committed with express malice – and did so sub rosa, without expressly saying so.[4]

The absurdity of these outcomes suggest that the Legislature never intended the statute to be so applied. (*People v. Leiva* (2013) 56 Cal.4th at p. 506; *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [courts must "reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results."].)

The Legislature's intent in adding "or fetus" to section 187 is clear. The Legislature wanted to make sure that a *third party* who attacks or otherwise imperils a pregnant woman and kills the fetus could be convicted of the murder of that fetus. This logical interpretation of section 187 is demonstrated by countless cases so applying it (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.*

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[4] As has already been explained, this reading of subdivision (b)(3) is also inconsistent with its plain language, which makes fetal murder inapplicable if the fatal act is solicited, aided, abetted, or consented to by the mother – with no language requiring that fetal death be the *intended* consequence of the act.

Bunyard (2009) 45 Cal.4th 836, 840) and the absence of any published case in which section 187 was used to prosecute a pregnant woman for her own pregnancy outcome.

Even if Ms. Perez's use of methamphetamine while pregnant caused the death of her fetus, the murder prosecution was still barred by the plain language of section 187 as properly interpreted to give effect to the intent of the Legislature.

C. If section 187 permitted murder prosecution of women based on their pregnancy outcomes it would be unconstitutional.

If section 187 did purport to treat women who experience pregnancy loss as murderers, it would be unconstitutional. The murder prosecution of Ms. Perez violated the ex post facto, due process, privacy, and equal protection provisions of the California and United States constitutions.[5]

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

No California statute declares and gives notice that a pregnant woman's actions, inactions or circumstances prior to giving birth can constitute the murder of her own fetus. To the

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[5] Of course, at the intersection of the statutory construction question and constitutional question lies the rule that courts construe legislation to be constitutional if possible. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373 [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…"].)

contrary (as discussed above) section 187 indicates exactly the opposite: the mother of the fetus *cannot* be prosecuted for murder based on her own acts causing the loss of a pregnancy. (§ 187, subd. (b).) Furthermore, there has never been an appellate case (published or unpublished) establishing that pregnant women can be prosecuted for murder based upon their own reckless conduct causing pregnancy loss.

Thus, a novel and strained reading of section 187 that would permit a murder prosecution based on a pregnancy outcome would violate the state and federal constitutional prohibitions against ex post facto laws. (Cal. Const., art 1, § 9; U.S. Const., art. I, § 10; *People v. Davis, supra*, 7 Cal.4th at p. 811; *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; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353 [84 S. Ct. 1697, 12 L. Ed. 2d 894].)

(2) Permitting women to be prosecuted for 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, supra,* at p. 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 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 law and sought to apply the murder statute to Ms. Perez's acts on the theory that they caused fetal death. If section 187 was 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 similar statutes were unconstitutionally vague. In *Commonwealth v. Welch* (1993) 864 S.W.2d 280, 283, 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, what if a fetus dies because a pregnant woman smokes, takes painkillers, enjoys downhill skiing, drives over the speed limit, or fails to wear the prescription glasses that she needs to see the dangers of the road? (*Commonwealth v. Welch, supra,* 864 S.W.2d 280 at p. 283.) In such scenarios, would section 187 permit a woman to be prosecuted for murder? Nothing in the text of section 187 provides a valid basis for distinguishing the above-noted behaviors from drug addiction. Thus, section 187, if interpreted to allow women to be prosecuted for murder based on their pregnancy outcomes, would be unconstitutionally vague because it would leave it up to law enforcement to decide when a mother's conduct constitutes fetal murder. As *Welch* explained:

> 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.)

The same concerns were raised by *Kilmon v. State* (2006) 394 Md. 168, 177-178 [905 A.2d 306, 311-312], which warned of prosecutions for

> the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to

> smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.

The unconstitutional vagueness and the "slippery slope" problem of section 187, as applied here, is demonstrated by the fact that the Kings County District Attorney has seen fit to prosecute pregnant women for their stillbirths while virtually no other district attorney or law enforcement authority in California has ever done so. "Although the [void for vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-358 [103 S. Ct. 1855, 75 L. Ed. 2d 903], citing *Smith v. Goguen* (1974) 415 U.S. 566, 584.) The novel and unprecedented application of the statute by the Kings County District Attorney suggests that

the statute, if read to permit what he has done here, does not provide the clarity constitutionally mandated for consistent law enforcement.

How many of the thousands of women in California who suffer a stillbirth and miscarriage each year and who have engaged in some level of risky conduct - or merely become pregnant despite knowing the risk of stillbirth - will be subject to criminal prosecution? Judicially rewriting section 187 to make it applicable to the circumstances of Ms. Perez's case would run afoul of the state and federal constitutional guarantees against vague criminal statutes.

(3) Subjecting a woman to a murder charge because she attempts to bring a fetus to term would violate her 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 252, 275; see *Cleveland Bd. of Edu. v. LaFleur* (1974) 414 U.S. 632, 639.) If section 187 applied to Ms. Perez based on her stillbirth, it would impose a broad duty of care on 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.[6]

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[6] 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).

(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 murder prosecutions based on pregnancy outcomes, 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., Gov. 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 and therefore require 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.

II.
Petitioner is entitled to relief on habeas corpus because her conviction and sentence were the product of the ineffective assistance of counsel.

A. Introduction

Ms. Perez pled guilty to manslaughter – a crime that both parties and the court agreed she did not commit – so as to avoid the risk of being convicted of murder. However, for all the reasons explained above, she could never have been convicted of murder. Counsel rendered ineffective assistance by failing to recognize and advise Ms. Perez of the available defenses, and by failing to take any action to challenge the legality of the murder prosecution and seek its dismissal. Because ineffective assistance rendered Ms. Perez's plea not knowing, intelligent, and voluntary, habeas relief is warranted.

B. A plea bargain accepted without the effective assistance of counsel is unconstitutional.

The Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution guarantee criminal defendants the right to be represented by counsel. (*People v. McKenzie* (1983) 34 Cal.3d 616, 626.) "It has long been recognized that the right to counsel is the right to effective assistance of counsel." (*Ibid.*; see *People v. Ledesma* (1987) 43 Cal.3d171, 215; *Strickland v. Washington* (1984) 466 U.S. 668, 685-686 [104 S. Ct. 2052; 80 L. Ed. 2d 674].) A defendant is entitled to the effective assistance of counsel during plea negotiations. (*Lafler v. Cooper* (2012) 566 U.S. 156, 165 [132 S. Ct. 1376, 182 L. Ed. 2d 398]; *In re Alvernaz* (1992) 2 Cal.4th 924,

933; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1133.) "The pleading - and plea bargaining - stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions. [Citations.] It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*Alvernaz* at pp. 933-934; see *Vargas* at p. 1134.)

Defense counsel is obligated to investigate all defenses and explore the factual bases for such defenses and the applicable law. (*In re Neely* (1993) 6 Cal. 4th 901, 919; *People v. Plager* (1987) 196 Cal. App. 3d 1537, 1543.) This obligation is not negated by a possible guilty plea. "Counsel by advising his client to plead guilty cannot be permitted to evade his responsibility to adequately research the facts and the law." (*In re Hawley* (1967) 67 Cal.2d 824, 828.) Counsel being "ignorant of a crucial defense" is ineffective assistance. (*Ibid*.) A defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial. (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 933.)

Where ineffective assistance results in a defendant's decision to plead guilty, he or she is entitled to relief on habeas corpus and the opportunity to withdraw the plea. (*In re Alvernaz*, *supra,* 2 Cal.4th at p. 934, citing *Hill v. Lockhart* (1985) 474 U.S. 52 [88 L.Ed.2d 203, 106 S. Ct. 366].)

C. Trial counsel rendered ineffective assistance.

Here, Ms. Perez pled no contest to manslaughter (a crime that all parties and the trial court agreed she did not commit) to avoid the possibility of a conviction for murder. (Exh. A, pp. 51-52, 61, 109.) Her counsel was ineffective for failing to recognize and advise her that her conduct did not constitute murder, and for failing to take any steps to challenge the murder charge. (Exh. F, p. 158, ¶ 1; Exh. G, pp. 160-161, ¶¶ 2-6.)

In *People v. Maguire* (1998) 67 Cal.App.4th 1022, the defendant pled no contest to five counts related to his use of another's identity and was sentenced to prison. (*Id.* at p. 1027.) In consolidated appeal and habeas proceedings, the defendant contended that the alleged facts underlying two of the charges did not constitute the crime alleged; the defendant had been charged with submitting false financial information under section 532, but his alleged conduct – providing false information on a rental application – did not satisfy that statute. (*Ibid.*)

After confirming that the defendant was correct that submitting false financial information to a potential landlord did not constitute a violation of the charged statute, the reviewing court also concluded counsel's performance fell below the objective standard of reasonableness:

> "Defendant's counsel's evaluation of the law should have revealed that there was no factual basis to support counts II and V. Defendant's counsel should have taken appropriate steps to challenge the legal sufficiency of these two counts, such as filing a motion to dismiss them. At a minimum, defendant's counsel should

> have provided defendant with an accurate evaluation of the law, thereby affording defendant a clear means of assessing the disposition being offered to him by the trial court."

(*People v. Maguire*, *supra*, 67 Cal.App.4th at p. 1030.)

In so holding, the Court of Appeal rejected the People's argument that defense counsel could not have anticipated that the statute would be interpreted so as to render the defendant's conduct outside its scope. (*People v. Maguire*, *supra*, 67 Cal.App.4th at p. 1031.) Constitutionally sufficient representation did not require counsel to be so prescient. Rather, counsel was ineffective for failing "to inform defendant of the dearth of legal authority" on the issue, and for failing to discuss the pros and cons of filing a motion to dismiss. (*Ibid*.) Because the defendant was denied the effective assistance of counsel when he entered his plea, his habeas corpus petition was granted. (*Id*. at p. 1032.)

Similarly, in *In re Williams* (1969) 1 Cal.3d 168, counsel failed to recognize that even if the defendant's alleged conduct were found true, the defendant still had not actually committed the crime charged. (*Id*. at pp. 170-171.) This failure was ineffective assistance, and the defendant's guilty plea was invalid. (*Ibid*.) It did not matter that the plea was part of a negotiated bargain that led to a misdemeanor instead of possible felonies. Because the defendant had no idea that he had a legal defense to certain charges, he could not possibly have intended to bargain that defense away. (*Id*. at p. 177.) The Court of Appeal pointed out that the defendant had been convicted of a crime he did not commit and was sentenced to more years in prison than

he could possibly have received for the crimes with which he could have lawfully been convicted. (*Id*. at p. 178.) Under these circumstances, the court refused to "believe that petitioner bargained away his right to be tried and sentenced pursuant to the terms of the California Penal Code, rather than under some ad hoc arrangement between the district attorney and the deputy public defender who was unaware of a defense basic to the case." (*Ibid*.) "The 'benefit of the bargain' . . . must necessarily have been no more than an illusion" because the bargain assumed that the defendant could have been convicted of the crimes charged in the first place. (*Id*. at p. 177.)

Finally, in *People v. Johnson* (1995) 36 Cal.App.4th 1351, the defendant entered a plea bargain and accepted a 20-year sentence because he had been advised that he was facing a possibility of 35 or 38 years. (*Id*. at p. 1354.) In fact, his maximum sentence was 27 years. (*Id*. at p. 1355.) His habeas corpus petition was granted. The plea was not knowing, intelligent and voluntary – the plea bargain was attractive to the defendant only because counsel's failure led him to believe that he was avoiding a possible 35 or 38 years, when that was not actually so. (*Id*. at p. 1357-1358.)

The present case cannot be distinguished from those discussed above. Mr. Stover's only approach to defending against the murder charge was to seek evidence that might undermine the prosecution's claim that Ms. Perez's methamphetamine use caused the fetus to die. (Exh. F, p. 158, ¶ 1; Exh. G, pp. 160-161, ¶¶ 2-6.) He failed to conduct the basic legal research that would

have alerted him to the fact that even if methamphetamine was the cause of death, there was still no murder. When counsel fails to "research the law . . . in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel." (*People v. Pope* (1979) 23 Cal.3d 412,426; see *People v. Ibarra* (1963) 60 Cal.2d 460, 464 [counsel has a duty to carefully investigate defenses of fact and law]; *In re Williams, supra*, 1 Cal.3d at p. 176 [counsel ineffective for failing to be aware of case law].) The record contains clear evidence of Mr. Stover's intent to seek an alternative medical explanation for the fetal death by conducting an autopsy or similar examination. (Exh. A, pp. 20-22, 33.) Conspicuously lacking is any indication that he was aware of a far better available defense: even if Ms. Perez's drug use did cause her fetus to die, that did not constitute murder. The declarations filed in support of this petition confirm what is evident from the record: Mr. Stover simply overlooked the critical, meritorious defense. (Exh. F, p. 158, ¶ 1; Exh. G, pp. 160-161, ¶¶ 2-6.)

Counsel's performance cannot be justified by the absence of case law confirming that a woman cannot be subject to a murder charge based on her pregnancy outcome. A review of the very short text of section 187 would have put counsel on notice that the prosecution's theory rested on what was, at the very least, a strained and dubious interpretation of the statute. If the text of the statute did not make the infirmity of the prosecution apparent enough, the sheer novelty of the prosecution should

have alerted counsel to the need to for further research. Counsel should have recognized and advised Ms. Perez that there are *zero* examples of pregnant women in California being charged and convicted with murder after a stillbirth. (*People v. Maguire*, *supra*, 67 Cal.App.4th at p. 1031 [even where specific application of statute had not previously been clarified, counsel was ineffective for failing to advise defendant of the "dearth of legal authority" supporting the prosecution's theory].)

Finally, since *no* California case has ever endorsed such a prosecution, competent counsel would have considered authority from other jurisdictions, and discovered the compelling arguments that, no matter what section 187 purports to allow, prosecuting women for murder based on their pregnancy outcomes is unconstitutional. (See § I-C, *supra*, pp. 29-36.)

Furthermore, any attempt to excuse counsel's failure to challenge the murder charge would disregard that there was absolutely nothing to lose by doing so. Ms. Perez was facing the single most serious charge that exists - murder. The court and both parties recognized that she could not have been convicted of manslaughter. (Exh. A, pp. 51-52, 61, 109.) In fact, it is unlikely that she could have been charged with *any* crime. Under these circumstances, the failure to take any steps to challenge the murder charge could not possibly be excused as a reasonable tactical decision. (*People v. Maguire*, *supra*, 67 Cal.App.4th at p. 1031 [even if scope of statute was unclear, counsel should, at a minimum, have moved to dismiss].) There was simply no reason

not to make a motion to dismiss based on the arguments articulated herein.

Finally, counsel was ineffective for failing to advise Ms. Perez that *even if* a woman could be convicted of murder if her narcotics use caused a stillbirth, the prosecution still had to prove malice. "'Malice is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life . . . In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another." (*People v. Palomar* (2020) 44 Cal.App.5th 969, 974, citations and punctuation omitted.) Counsel never advised Ms. Perez about the malice requirement. (Exh. F, p. 158, ¶ 1.) To the contrary, he repeatedly told her that if her use of narcotics was a cause of the stillbirth, that alone was enough to convict her of murder. (*Ibid*.) Ms. Perez pled guilty to a lesser charge while being ignorant of a second extremely well-founded and compelling defense: even if her narcotics use did cause the stillbirth, and even if that fact could sustain a murder charge, Ms. Perez was still not guilty of murder unless the prosecution could prove she had been aware that methamphetamine use endangered the life of her fetus and she consciously disregarded that risk.

D. Motion counsel rendered ineffective assistance.

Attorney Benninghoff made the same error as Mr. Stover. She was retained to pursue a motion to withdraw the plea. (Exh. A, p. 71.) She argued that prior counsel had failed to investigate

the medical aspects of the case. (Exh. A, p. 107-109; Exh. D, pp. 135-142.) Specifically, she argued that prior counsel failed to assess whether or not "medical malpractice" or "incorrect vacuum procedures," rather than methamphetamine, caused the placental abruption, and whether or not a C-section should have been performed. (Exh. D, p. 139.) In so arguing, Ms. Benninghoff made the same legal error as Mr. Stover: her motion assumed and implied that *if* the fetal death had been caused by Ms. Perez using narcotics, then there had been a murder. She failed to make the legal argument that would have prevailed: Ms. Perez's plea was not knowing, intelligent and voluntary because she had entered her plea to avoid a murder charge without knowing that her conduct could never have led to a murder conviction. This was ineffective assistance. (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1357 [counsel appointed to file motion to withdraw plea rendered ineffective assistance by failing to identify prior counsel's errors; error was prejudicial because it "deprived defendant of his best argument" to get plea withdrawn].)

E. Appellate counsel rendered ineffective assistance.

Generally, "the writ [of habeas corpus] will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Reno* (2002 55 Cal. 4th 428, 490.) This rule is no bar to relief here. If the appellate record established a basis for relief on direct appeal, then appellate counsel rendered ineffective assistance for not seeking such relief.

The validity of petitioner's plea could have been challenged on appeal because a certificate of probable cause was granted. (Exh. E, p. 154.) Once that certificate was granted, appellant counsel was not limited to the issues upon which it was based. (*People v. Johnson* (2009) 47 Cal.4th 668, 676; *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1178-1180.)

A judgment based upon a plea must be reversed "[w]here a defendant's plea is 'induced by misrepresentations of a fundamental nature…'" (*People v. Hollins* (1993) 15 Cal.App.4th 567, 574.) Here, the fundamental misrepresentation that induced Ms. Perez's no contest plea was the misrepresentation that if she did not accept the lesser charge she could be convicted of murder. 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 murder. (Exh. A, pp. 51-52, 61, 109 [acknowledgement by counsel and court at plea hearing that facts did not support manslaughter charge and that Ms. Perez was entering plea to avoid murder charge]; see *People v. Dennis, supra,* 17 Cal.4th at pp. 505-506 [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 narcotics. (Exh. A, p. 51-52 [court stating plea was to avoid possibility of life for murder because of death of fetus], 61 [factual basis for plea is that petitioner's use of narcotics caused her fetus to be stillborn]; Exh. C, pp. 130, 132 [complaint and amended complaint identifying murder victim as a human fetus]; Exh. D,

pp. 144-148 [prosecution brief describing facts and fetal homicide theory of murder].)

If, as petitioner has established herein, the prosecution's murder theory could never have resulted in a murder conviction, then surely the appellate record confirmed that petitioner's plea was not knowing, intelligent and voluntary; nobody would knowingly and voluntarily accept a manslaughter conviction to avoid a murder conviction that, in fact, could never have happened. Thus, the appellate record established both an unlawful plea (induced by the ineffective assistance of trial counsel) and prejudice.

Appointed counsel on appeal has a duty to review the entire record, "thoroughly research the law," and to present any "nonfrivolous issues." (*People v. Cole* (2020) 52 Cal.App.5th 1023, 1038.) Petitioner respectfully contends that the legal argument presented herein cannot possibly be deemed frivolous. There has never been an California appellate case, published or otherwise, suggesting that a pregnant woman *can* be subject to a murder charge based on her pregnancy outcome. The complete absence of authority to support the District Attorney's legal theory should have alerted appellate counsel that challenging it was not frivolous. As has already been discussed, the text of section 187 should have alerted appellate counsel that the District Attorney had, at a very minimum, stretched that statute to a suspect degree. Arguing that such stretching went too far would have been anything but frivolous. Furthermore, given the novelty of the prosecution, competent counsel would have recognized that if

the prosecution was within the scope of section 187, then that statute was vulnerable to a constitutional challenge.

It does not matter whether appellate counsel was oblivious to this issue or recognized it and decided incorrectly that raising it would be frivolous. Either way, counsel rendered ineffective assistance. (*In re Smith* (1970) 3 Cal.3d 192, 202 [appellate counsel's inexcusable failure to raise assignments of error that "arguably might have resulted in reversal" constituted ineffective assistance]; *Smith v. Robbins* (2000) 528 U.S. 259, 282-285 [upholding *Wende* procedure that requires counsel to discover and raise nonfrivolous issues].) Therefore, Ms. Perez may not be denied relief on the basis that this claim could have been raised on direct appeal, because if that is so then she was denied the right to the effective assistance of counsel on appeal. (*Smith*, at pp. 202-203; *In re Reno*, *supra*, 55 Cal.4th at pp. 490-491; *In re Harris* (1993) 5 Cal.4th 813, 834.)

Of course, if appellate counsel's decision to file a *Wende* brief can be excused because something not in the appellate record (such as the declarations and additional transcripts submitted in support of this petition) is deemed essential to the argument made herein, and the relief sought herein could therefore not have been granted on direct appeal, then the failure to raise this issue on direct appeal is no bar to relief. (*In re Harris* (1993) 5 Cal.4th 813, 828 [habeas corpus provides an avenue of relief when direct appeal is inadequate].)

III.
Petitioner's conviction and sentence violate due process.

Even if Ms. Perez's conviction and sentence were not the product of the ineffective assistance of counsel, habeas relief would be warranted because they violate due process. Ms. Perez committed no crime and yet was improperly charged with murder, and as a result is serving eleven years for manslaughter - another crime she also did not commit.

Due process precludes the state from punishing a person factually innocent of the charged crime. (*In re Sakarias* (2005) 35 Cal.4th 140, 160) "There is no credibility in a justice system that allows the potential for actual innocence to be the victim of process duly followed. We must act when guilt is clearly called into question and the probability of innocence becomes a matter of reality rather than speculation." (*People v. Ebaniz* (2009) 174 Cal.App.4th 743, 754.) "Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. [Citations.]" (*Ibid*., quoting *People v. Duvall* (1995) 9 Cal.4th 464, 474.) Where undisputed facts establish that a defendant's conduct did not satisfy the required elements of the crime charged, a conviction violates due process. (*In re Williams, supra*, 1 Cal.3d at pp. 175-176.)

"If the statute under which a defendant is convicted does not prohibit the conduct proved, a writ of habeas corpus will issue." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 153, citing *In re Zerbe* (1964) 60 Cal.2d 666, 668, *In re Bevill* (1968) 68 Cal.2d 854, 863.) "A conviction where no evidence supports the

offense charged has been held to violate the due process provisions of the Fourteenth Amendment." (*Ibid*., citing *Thompson v. Louisville* (1960) 362 U.S. 199, 206 [4 L.Ed.2d 654, 80 S.Ct. 624]; *Shuttlesworth v. Birmingham* (1965) 382 U.S. 87, 93-95 [15 L.Ed.2d 176, 86 S.Ct. 211].)

During a trial, a prosecutor's misunderstanding of law need not be in bad faith to constitute prosecutorial error and result in a denial of due process. (*People v. Centeno* (2014) 60 Cal.4th 659, 666; *People v. Hill* (1998) 17 Cal.4th 800, 823.) That same principle must apply to a charging decision. Assuming the Kings County District Attorney's murder filing was not in bad faith (i.e., assuming the District Attorney genuinely believed that Ms. Perez's conduct could constitute murder under section 187 and the state and federal Constitutions), it was still wrong. As a result of a criminal charge that was legally untenable from the outset, Ms. Perez pled guilty to a crime that everybody agrees she did not commit, to avoid a conviction that could never have happened.

Furthermore, trial courts are obligated to uphold a defendant's due process rights when accepting and implementing a plea bargain. (*People v. Scheller* (2006) 136 Cal.App.4th 1143, 1152.) Incorrect statements by a court may constitute a violation of due process. (*People v. Goodwillie* (2007) 147 Cal.App.4th 695 [due process violation where court misadvised defendant regarding conduct credits he would earn].) Here, the trial court played a role in the due process violation. By repeatedly confirming that Ms. Perez was accepting a manslaughter

conviction in order to avoid a possible murder conviction and by accepting the prosecution's proffered factual basis (Exh. A, pp. 51-52, 61), the court strongly suggested to Ms. Perez that the prosecution's legal theory was valid and could result in a murder conviction. In other words, the court offered Ms. Perez implied but unmistakable confirmation that she might actually be convicted of murder if she did not accept the lesser charge. This was incorrect.

Ms. Perez is now serving eleven years in prison when the undisputed facts of her case conclusively establish that she committed no homicide crime at all. It would be difficult to imagine a more egregious violation of due process. Relief on habeas corpus is warranted.

CONCLUSION

For all the foregoing reasons, petitioner respectfully asks this court to grant her the relief prayed for in this petition for writ of habeas corpus.

Dated: February 16, 2021

Respectfully Submitted,

By_____
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief has been prepared using 13 point Century Schoolbook typeface. The brief consists of 11,920 words as counted by the Microsoft Word word processing program, including the cover, tables, this certificate, and signature block. (Cal. Rules of Court, rules 8.384, 8.204.)

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on February 16, 2021.

_____
Matthew Missakian