No._____

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IN THE SUPREME COURT OF THE UNITED STATES

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BYRON CHINCHILLA

Petitioner

v.

GREG LEWIS, Warden,

Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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Stephanie Adraktas
Attorney for Petitioner
2625 Alcatraz Avenue, #233
Berkeley, CA 94705
(415) 699-1507
CJA Appointed Counsel for Petitioner

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Petitioner, Byron Chinchilla, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas relief in an unpublished order denying the petition for panel rehearing (App. 1), and an unpublished memorandum decision. App. 6. [1] The order adopting the magistrate judge's findings and recommendations and the judgment of the district court denying Chinchilla's habeas corpus petition are unreported. App. 16, 17. The magistrate judge's opinion is also unreported. App. 25

The California Court of Appeal affirmed the conviction and sentence in an unpublished decision. App. 64. The California Supreme Court denied review in an unpublished decision. App. 62.

JURISDICTION

The final judgment of the Court of Appeals was entered on August 3, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

In pertinent part, the Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right . . ."to have "the assistance of counsel" for his defense.

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[1] "App." refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit simultaneously with the Appellant's Opening Brief on Appeal. "CR" refers to the docket number of the Court of Appeals docket and "DCR" refers to the docket number of the federal district court docket.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

On September 16, 2010, Chinchilla and his co-defendant, Jorge Sotelo, were convicted in Orange County Superior Court of four counts of attempted premeditated murder, four counts of assault with a semiautomatic firearm, and one count each of shooting at an occupied motor vehicle, second degree robbery, street terrorism, carrying a concealed firearm as an active participant in a criminal street gang, and receiving stolen property. The jury also found true an allegation that a principal was personally armed with a firearm and that each offense was committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. The jury returned a not guilty verdict as to the robbery of Angel Huitron charged in Count 10. 1 CT 58-67. On April 15, 2011, Chinchilla was sentenced to four consecutive life terms with the possibility of parole, plus 80 years. 1 CT 74-75.

On December 27, 2012, the California Court of Appeal affirmed the judgment, but reversed portions of the sentence and remanded for resentencing. I ER 49. On March 13,

2013, the California Supreme Court denied review without comment or citation to authority. I ER 48. On August 13, 2014, the California Supreme Court denied Chinchilla's petition for a writ of habeas corpus without comment or citation to authority. I ER 47.

Chinchilla timely filed a petition for writ of habeas corpus in the district court on August 14, 2014. CR 1. June 1, 2016, the district court denied the petition on the merits and issued a certificate of appealability. I ER 1, II ER 71

STATEMENT OF FACTS

A. The Testimony of the Complaining Witnesses

On December 7, 2008, at about 1:15 a.m., two groups of young men were standing outside their cars immediately after leaving a party that had been "raided" by police officers. 1 RT 32, 2 RT 386. One group, Angel Huitron, his brother Efrain Huitron Novoa, their cousin Jonathan De La Torre, and friend Michael Ponce, were standing near Novoa's red Dodge Charger. The other group, consisting of Jose Gonzalez and two or three unnamed companions, were standing by a Honda Accord that was parked behind the Charger. 3 RT 478.

According to De La Torre, Chinchilla and Sotelo approached their group and Chinchilla slapped or punched Gonzalez and tried to grab his phone. De La Torre said that Gonzalez held on to the phone. 2 RT 387, 392. According to Ponce, Chinchilla took the phone and then smashed it or threw it on the ground. 2 RT 352.

When Huitron attempted to assist Gonzalez, Sotelo brandished a black semiautomatic handgun that had been in his waistband. Sotelo pulled back the slide, pointed the gun at the group and told them to get back, which they did. According to De La Torre, Chinchilla tried to go through all of their pockets but the men in the group slapped away his hands and did not allow themselves to be searched. 2 RT 399; 3 RT 487. De La Torre said that Chinchilla tried to grab Angel Huitron's keychain but Huitron grabbed it back. 2 RT 399. Chinchilla took De La Torre's Los Angeles Angels baseball cap. 2 RT 388.

According to Huitron, who admitted he had been drinking, Chinchilla went through the pockets of all four men. 2 RT 184-186, 208. Contrary to De La Torre's testimony, Huitron said Chinchilla took a key chain from him. Huitron could not remember if he got the key chain back. 2 RT 187. Huitron had a wallet in his pocket but Chinchilla did not take it. 2 RT 240.

As Chinchilla and Sotelo walked away, Sotelo said "you bitches just got smacked up" by "West Side Playboys." 2 RT 193. As Chinchilla and Sotelo walked toward Euclid Street, Huitron, Novoa, Ponce and De La Torre followed them in the Charger, at a speed of about 5-10 miles per hour. The others were behind them in the Accord. RT 245, 511, 520-522.

According to Huitron, the group was following Chinchilla and Sotelo because they wanted to see which way they would go. 2 RT 193-194. The group in the car was "pretty

angry" as they drove after Chinchilla and Sotelo, who were still on foot. 3 RT 480-481. Huitron was "really angry" and said he wanted to "get these guys." 3 RT 481.

De La Torre admitted the group followed Chinchilla and Sotelo with the Charger because they were mad and wanted to "teach them a lesson." 3 RT 494. He also wanted to get their license plate number. 3 RT 497.According to Ponce, his group was angry and they followed Chinchilla and Sotelo so they could "catch these guys and maybe get revenge on them." 2 RT 356. During the car chase, they were "pretty heated up," had "a lot of adrenaline" and were "pretty angry." 2 RT 356.

According to De La Torre and Ponce, none of them attempted to dial 911 or call the police. 2 RT 357; 3 RT 491-492. According to Huitron one of the men in his car did call 911 and spoke to a police officer. 2 RT 219.

When pressed by defense counsel as to why his group had decided to follow two men who were armed with a gun, Huitron said "Yeah I was afraid. But, like I said, I was under the influence of alcohol and I was mad and [his companions] are my family." 2 RT 217.

According to De La Torre, Sotelo and Chinchilla were walking in the middle of the street, with the car following behind them. 2 RT 404; 3 RT 486. When asked "Did you try to run [Sotelo and Chinchilla] over?" De La Torre replied. "Well, not really. We were just following them to see where they go." 2 RT 403.

During the chase, Sotelo turned around twice to look at the pursuing vehicle. The second time, he fired four shots at the car. The bullets hit a tire and the roof of the car. 2 RT 405-406. None of the occupants was hit. 2 RT 407. Huitron turned the Charger around and drove back in the direction of the party, where he knew there were some police officers. 2 RT 408.

B. Testimony of Independent Witness Sean Godoy

Sean Godoy, who was not associated with either the complaining witnesses or the defendants, saw the incident from his motorcycle as he drove up to an intersection. He saw Chinchilla and Sotelo "fleeing" around a corner, pursued by a slow moving "caravan" that included an orange car, the car behind it and a group of people who were walking next to the cars. Godoy saw Sotelo fire shots at the car that was pursuing him and Chinchilla. RT 511, 520-522.

C. The Police Investigation and Arrest of Chinchilla and Sotelo

The Charger pulled up next to Santa Ana Police Officer Sergio Gutierrez, who had heard the shots fired. 1 RT 31-43. The four men in the Charger told Officer Gutierrez that they had just been robbed and that one of the robbers fired a gun at them. 1 RT 42-43. There was a bullet hole in the front passenger side tire and damage to the roof on the driver's side. 1 RT 45-51.

Officer Gutierrez and his partner found Chinchilla and Sotelo a short distance away. They were getting into the back seat of a Toyota Camry. 1 RT 53-55. Chinchilla

was wearing an Angel's baseball hat. 1 RT 81. The officers found a semi automatic handgun on the ground underneath the rear door on the driver's side of the Camry. 1 RT 64-65, 67.

Huitron, De La Torre, Novoa and Ponce identified Chinchilla and Sotelo as the pair who had robbed and shot at them. Gun shot residue was found on Sotelo's hands but not on Chinchilla's. 3 RT 464-466. Four bullet shells found in the area where the shots were fired matched the caliber of the gun recovered next to the Camry. 2 RT 151-152, 3 RT 420-424.

Chinchilla told the police that he and Sotelo and two friends who were in the Camry had attended a party that had been broken up by police. Chinchilla admitted they were Playboys gang members. Chinchilla said he and his friends were in a parking lot talking to some girls after the party. He denied being involved in a robbery or a shooting. He also said he did not recall how he got the Angels baseball cap he had been wearing at the time of his arrest. When asked about the gun that was found by Camry, Chinchilla denied that he knew anything about it. 2 RT 159-161.

D. Gang Expert Testimony

Santa Ana Police Department Detective Clinton Achziger testified concerning the Playboy's gang and its primary criminal activities and some specific crimes necessary to establish the gang enhancements. 3 RT 548-616. Detective Achziger also testified that Chinchilla and Sotelo were both active Playboys gang members. Detective Achziger also

testified, hypothetically, that an incident like the charged incident would be committed for the benefit of the Playboys gang. 4 RT 661-663.

E. Co-Defendant Jorge Sotelo's Testimony

Sotelo testified that on the night of the charged incident, he had attended a party in Santa Ana with Chinchilla and two other friends. II ER 119-120. He admitted that he was a member of the Playboys gang. II ER 118. He and his friends were at the party for only about five minutes before the police "broke it up." II ER 121. He admitted he had placed a loaded gun in his car "for protection" before he went to the party. II ER 143-144. He did not tell Chinchilla about the gun. Id.

After police broke up the party, Sotelo left with his friends. As they were walking away from the party, they were "hit up" by a group of men. When asked where they were "from," Sotelo said they were from the LA Playboys. II ER 151-152. The men became angry and started trying to "harass" Chinchilla. II ER 126. When one of the taller men grabbed Chinchilla, Sotelo pulled out his gun and the entire group of men backed off. II ER 126-127, 153.

Sotelo insisted that he and Chinchilla did not rob the men. The reason he drew his gun was to get the aggressors to back off. II ER 132, 136. However, as he and Chinchilla were leaving, they said "Playboys" again and Chinchilla grabbed a baseball hat from the head of one of the men who had accosted them. II ER 127, 137-138, 155. As they were leaving, Sotelo put the gun away. II ER 128. Then, Sotelo, Chinchilla and the others

began to run because they were afraid the men were going to "jump" them. Sotelo called a friend and asked him to come and pick them up. When he looked back, he saw two cars approaching "pretty fast" and a group of people approaching on foot. II ER 129.

Sotelo estimated that the car carrying the men from the sidewalk encounter was traveling 20-25 miles per hour. II ER 129-130. Sotelo was scared and he fired four shots at the car. II ER 129, 163. He did not aim the gun at the passengers, he only aimed it at the car. II ER 145, 148. He admitted he wanted to kill the people in the car because he thought they were trying to "get" him. II ER 179.

F. Chinchilla's Motion For a New Trial

After the verdicts, Chinchilla made a motion for a new trial arguing, among other grounds, that the trial court had erred in failing to instruct the jury as to the lesser included offense of attempted voluntary manslaughter based on imperfect or unreasonable self defense. I ER 87. The trial court denied the motion. I ER 75.

G. Direct Appeal

Chinchilla appealed to the California Court of Appeal, which affirmed his conviction and sentence. I ER 49. With respect to Chinchilla's claim that trial counsel was prejudicially ineffective for failing to request that the jury be instructed as to the lesser included offense of attempted voluntary manslaughter due to imperfect or unreasonable self defense, the Court of Appeal declined to decide whether counsel's performance was professionally unreasonable. However, it held that the trial court erred in failing to so

instruct the jury. Nevertheless it held that defense counsel was not ineffective for failing to request the instruction because Chinchilla was not prejudiced. I ER 64.

The Court of Appeal reasoned that the jury "clearly rejected" Chinchilla's self defense claim when it convicted him of four counts of attempted premeditated murder. I ER 64. Moreover, the jury found that when Sotelo fired at the car, he did so with premeditation and deliberation, which demonstrated that the jury did not accept the defendants' self defense theory. I ER 64. The Court of Appeal found "This finding is inconsistent with a finding Sotelo believed, reasonably or unreasonably, he needed to defend himself from the car. Therefore, the factual question posed by the omitted instruction was necessarily resolved adversely to [the defendants] under other properly given instructions." I ER 64 .

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINIONS BELOW ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

This Court should grant certiorari because the decisions below are in conflict with this Court’s precedents concerning the right to effective assistance of counsel at trial. When a defendant alleges ineffective assistance of counsel, two elements must be proved: (1) counsel's performance was objectively unreasonable and (2) but for counsel's errors there is a "reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Here, trial counsel was prejudicially ineffective for failing to request a jury instruction as to a lesser included offense. Under California law, attempted premeditated murder can be reduced to attempted voluntary manslaughter due to imperfect self defense. That is, if the defendant actually but unreasonably believed that lethal force was necessary in self defense, the jury may convict him of the lesser charge of attempted voluntary manslaughter.

In this case, the trial court failed to instruct the jury as to the lesser included offense of attempted voluntary manslaughter due to imperfect or unreasonable self defense. The California Court of Appeal held correctly that the trial court's failure to instruct the jury as to the doctrine of attempted voluntary manslaughter due to imperfect self defense was error. However, as to Chinchilla's claim that his trial counsel was ineffective for failing to request that instruction, the Court of Appeal unreasonably held that Chinchilla was not prejudiced.

The Ninth Circuit held that trial counsel reasonably adopted an "all or nothing strategy," thereby forcing the jury to choose between a verdict of premeditated attempted murder or an all out acquittal on those counts. App. 11. The Court of Appeals' holding on that point is contrary to the record, its own published precedent and this Court's authorities concerning effective assistance of counsel. No reasonable attorney under the circumstances would have failed to request a lesser included offense instruction in this case.

As set forth in more detail below, the AEDPA does not bar relief on Chinchilla's claim because the California Court of Appeal unreasonably determined the facts and unreasonably applied *Strickland* when it held that Chinchilla was not prejudiced. This Court should review the prejudice issue de novo, because the Court of Appeal applied a state law standard when it analyzed the prejudice arising from the omitted instruction. Because the state court failed to apply the correct federal constitutional prejudice standard under *Strickland v. Washington*, 466 U.S. 668 (1984), AEDPA deference does not apply.

Moreover, the Court of Appeal's holding that Chinchilla was not prejudiced was objectively unreasonable under its own decision in *Crace v. Hertzog,* 798 F.3d 840 (9th Cir. 2015). *Crace* held that a state court was objectively unreasonable in holding that, so long as there is sufficient evidence to support a jury's verdict as to a greater offense, no prejudice results from a defense attorney's failure to request a lesser included offense instruction. Because the state court's prejudice analysis in this case was materially comparable to that in *Crace*, the decision in this case is in conflict with the Ninth Circuit's precedent as to the right to effective assistance of counsel. Accordingly, this Court should grant certiorari to resolve the conflict between the decision in this case and the decision in *Crace*.

ARGUMENT

I. THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of trial counsel requires proof that : (1) counsel's performance was objectively unreasonable and (2) but for counsel's error there is a "reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

"The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

II. TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE BECAUSE SHE FAILED TO REQUEST A JURY INSTRUCTION AS TO IMPERFECT SELF DEFENSE

A. The State Court of Appeal Held Correctly That The Trial Judge Should Have Instructed The Jury as to Unreasonable Self Defense and It Follows That Trial Counsel Was Professionally Unreasonable When She Failed to Request That Instruction

A defense attorney's performance is ineffective when she fails to request a jury instruction supporting the defense theory that counsel has selected and argued to the jury. *Breakiron v. Horn,* 642 F.3d 126, 140-141 (3rd Cir. 2011)(defense counsel was deficient when he failed to request a lesser included instruction as to offense of theft when instruction was supported by the evidence and the sole defense theory was that the defendant had committed the lesser crime).

In this case, the trial court instructed the jury as to self defense (II ER 456). Under California law, if there is substantial evidence of a defendant's belief in the need for self-defense, the court should also provide an imperfect self-defense instruction because the reasonableness of that belief is generally at issue. *People v. Ceja*, 26 Cal.App.4th 78, 85-86 (1994); *People v. De Leon*, 10 Cal.App.4th 815, 824 (1992).

The omitted instruction was CALCRIM 571:

Voluntary Manslaughter: Imperfect Self-Defense - Lesser Included Offense

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

1. The defendant actually believed that (he/she/ [or] someone else/ <insert name of third party>) was in imminent danger of being killed or suffering great bodily injury;

AND

2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

BUT

3. At least one of those beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

[If you find that <insert name of decedent/victim> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant knew that <insert name of decedent/victim> had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with <insert name of decedent/victim>, you may consider that threat in evaluating the defendant's beliefs.]

[Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.

CALCRIM 571

Here, the California Court of Appeal held correctly that the jury should have been instructed as to the defense of imperfect self defense because Sotelo's testimony provided sufficient evidence to support the instruction. I ER 63. The Court held:

> At trial, Sotelo testified he brandished his gun after one of the men attacked Chinchilla, and he denied either he or Chinchilla robbed them. He admitted Chinchilla took the baseball hat as they left. He also testified that when he and Chinchilla walked away, the car was coming at them pretty fast and he was

> scared and fired the gun. Needless to say, a car could be a deadly weapon. Thus, based on this evidence a jury could have concluded Sotelo fired the gun at the car to stop the driver who Sotelo thought was going to run them down. The jury could have concluded Sotelo actually and reasonably believed in the necessity of defending himself from imminent danger of death or great bodily injury. Although at the hearing on the new trial motion the court indicated this story was unbelievable, that was for the jury to decide, not the trial court.
>
> Based on this evidence, the jury could have also concluded Sotelo actually believed he had to defend himself from imminent danger of death or great bodily injury but that his belief was unreasonable. There was evidence from which the jury could conclude he believed he had to defend himself but his belief that firing a gun at a car that was slowly following him was unreasonable. Thus, based on the record before us, we conclude the trial court properly instructed the jury on self defense and erred in failing to instruct the jury on imperfect self defense.

I ER 63.

The Court of Appeal declined to decide whether trial counsel's performance was professionally inadequate when she failed to request an imperfect self defense instruction. I ER 64. However, because the trial court erred in failing to instruct the jury as to unreasonable self defense, it follows that it was professionally unreasonable for defense counsel to fail to request that instruction. This case is comparable to *Crace v. Hertzog*, 798 F.3d 840, (9th Cir. 2015), where trial counsel's conduct was professionally unreasonable when he failed to request an instruction for a lesser included offense that was supported by the trial evidence and would have supplied a basis for a verdict that would have avoided a third strike sentence. *Id* at 844-845, 852-853. Here, likewise, trial

counsel failed to request a jury instruction supporting the self defense theory that counsel herself had selected and argued to the jury. Because the trial judge would have been required to give the unreasonable self defense instruction upon request, trial counsel's failure to request that instruction was professionally unreasonable. *Crace* at p. 852.

B. Review of *Strickland's* Prejudice Prong Should Be De Novo Because The Court of Appeal Opinion Unreasonably Applied *Strickland* When It Held That There Was No Prejudice to Chinchilla's Defense

When a habeas corpus petition alleges ineffective assistance of counsel, the court must apply *Strickland's* prejudice standard and need not apply the *Brecht* standard. *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). [2] Prejudice exists if "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra,* at 694. The petitioner must show that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

When a state court unreasonably applies clearly established constitutional law or applies a standard that is contrary to the Supreme Court's constitutional decisions, the federal court must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." 28 U.S.C. § 2254 (d)(1);*Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Deck v. Jenkins,* 768 F.3d 1015, 1024 (9th Cir. 2014).

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[2] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Here, as set forth in more detail below, the Court of Appeal's analysis of the prejudice prong was erroneous for two reasons. First, the Court of Appeal failed to apply the *Strickland* prejudice test and second, under any standard, its analysis was objectively unreasonable because it assumed that the jury would have necessarily reached the same verdict even if the court had provided the omitted instruction.

As to Chinchilla's *Strickland* claim, the Court of Appeal held:

> If a defendant fails to show that he was prejudiced by counsel's performance, we may reject his ineffective assistance claim without determining whether counsel's performance was inadequate. (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) As we explained above, [the defendants] were not prejudiced by the trial court's failure to instruct the jury on imperfect self defense.

I ER 64.

The prejudice analysis to which the Court referred was based on the state law prejudice standard in *People v. Watson*:

> Any error in failing to instruct on imperfect self defense is subject to the harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (citation omitted). Under this test, we may reverse a conviction for failing to instruct only if after an examination of the record, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Ibid.*) We conclude it was not reasonably probable the result would have been different had the trial court instructed the jury on imperfect self defense.
>
> The jury clearly rejected [the defendants'] claim of self defense. The jury concluded Sotelo and Chinchilla robbed and assaulted the victims. Additionally, the jury concluded that

> when Sotelo fired the gun at the car, he did so with premeditation and deliberation. This finding is inconsistent with a finding Sotelo believed, reasonably or unreasonably, he needed to defend himself from the car. Therefore, the factual question posed by the omitted instruction was necessarily resolved adversely to Sotelo under other, properly given instructions.

I ER .

California courts have observed that, while the *Watson* and *Strickland* prejudice tests sound similar, they are not the same. *People v. Howard*, 43 Cal.3d 171, fn 4 (1987). The *Howard* court stated:

> The People urge that *Strickland's* reasonable probability standard is the equivalent of the *Watson* test which has traditionally been applied to most ineffective assistance claims. (*See People v. Fosselman* (1983) 33 Cal. 3d 572, 584 [189 Cal. Rptr. 855, 659 P.2d 1144].) While the language of the two tests is certainly similar (*Strickland*: "reasonable probability" vs. *Watson*: "reasonably probable"), *Strickland* specifically holds that the test is not to be interpreted as requiring a showing that a different result was "more likely than not." (466 U.S. at pp. 693-694 [80 L.Ed.2d at p. 697].) The *Watson* standard, on the other hand, has at least been applied in a manner closely approximating the "more likely than not" test. (Citations omitted).

Id.

Here, the Court of Appeal applied the *Watson* test and did not conduct a *Strickland* prejudice analysis. Accordingly, the Court of Appeal failed to apply the federal constitutional standard when it decided that Chinchilla was not prejudiced by counsel's error in failing to request an instruction as to imperfect self defense. Moreover, even if the Court were to find that the Court of Appeal applied the *Strickland* standard, its application

was objectively unreasonable because it assumed that, because the evidence was sufficient to support the verdict, the jury would have necessarily reached the same conclusions if it had been instructed as to imperfect self defense.

This Court's decision in *Crace* controls. In *Crace*, the Washington Court of Appeal reasoned that the jury must have found all of the elements of the charged crime beyond a reasonable doubt in order to convict the defendant. It concluded, therefore, that there was no error in failing to instruct the jury as to the lesser included offense. Specifically, "if the jury had thought the defendant guilty of murder beyond a reasonable doubt, it necessarily would have reached the same verdict even if had been instructed on lesser included offenses." *Crace* at p. 846.

This Court held that the Washington court's methodology was a "patently unreasonable" application of *Strickland*" and that "its decision in this case is thus unworthy of deference under the AEDPA. *Crace* at p. 847. This Court reasoned that because a jury convicted the defendant of a particular offense does not mean it could not have come to a different verdict if it had been provided with different instructions. In *Crace*, the Court pointed out that a properly instructed jury could have concluded that the evidence at trial was a "better fit" for the omitted lesser included offense. *Crace* at p. 847.

The Court of Appeal's analysis in this case is objectively unreasonable and unworthy of AEDPA deference for the same reasons. As in *Crace*, the state court assumed that because the jury had found true the elements of the offense and had rejected the claim

of self defense, it would necessarily have rejected the defendant's claim of unreasonable self defense if it had been properly instructed as to the elements of that defense. I ER 64. Because that reasoning was objectively unreasonable under *Crace*, AEDPA deference does not apply.

C. Chinchilla's Defense Was Prejudiced Under Any Standard Because the Omitted Instruction Was Crucial to the Jury's Understanding of the Lesser Included Offense

Under any standard of review, given the facts of this case, there is a reasonable probability that a jury that was presented with the alternative of finding that Chinchilla and Sotelo had honestly but unreasonably believed that they needed to fire at the car in self defense would have accepted that defense and found the defendants guilty of the lesser included offense of attempted voluntary manslaughter.

First, the prosecution witnesses claimed they had been robbed but Chinchilla and Sotelo had no robbery proceeds except (possibly) Huitron's key chain and De La Torre's baseball hat. If the two defendants had robbed four victims at gunpoint as they claimed, they would have taken their wallets, cell phone, money or other valuables.

The testimony about the robbery was contradictory. Ponce testified that Chinchilla grabbed and smashed his friend Jose Gonzalez's cell phone (3 RT 381) while De La Torre said Chinchilla never obtained the phone from Gonzalez. 3 RT 387, 392. De La Torre testified that the incident began with a gang "hit up," i.e, that Sotelo or Chinchilla had asked them what gang they were from. 3 RT 479. Angel Huitron, claimed they were not

asked about gang membership. 2 RT 239. De La Torre said he and his friends prevented Chinchilla from going through their pockets. 2 RT 399. Huitron said he did. 2 RT 184-186.

Moreover, the prosecution witnesses admitted they followed Chinchilla and Sotelo with their car as the two men left the area on foot. However, the witnesses knew that there were police officers at the party that they had just left. If the witnesses were actually afraid of Chinchilla and Sotelo as they claimed, it does not make sense that they would follow the armed men in their car.

Even if the jury believed that Chinchilla and Sotelo were the initial aggressors, it was uncontested that the shots were fired as they fled the scene on foot while the complaining witnesses, who outnumbered them by at least seven to two, followed on foot and in two cars. As the California Court of Appeal acknowledged, a car can be used as a deadly weapon. I ER 63.

According to Angel Huitron and independent witness Sean Godoy, there were two cars carrying at least seven people following Chinchilla and Sotelo. 2 RT 195, 245; 3 RT 508-509. Godoy described the scene as two people fleeing on foot followed by a "caravan" of vehicles and others on foot. 3 RT 509. A properly instructed jury could have reasonably concluded that Sotelo and Chinchilla honestly but unreasonably believed that they had to fire at the car in self defense.

Finally, given the testimony at trial, it strains credulity to believe that the prosecution witnesses were following Chinchilla and Sotelo in their car with peaceful intentions. Moreover, Sotelo fired at the car's tire and roof, which demonstrates that his intent was only to deflect the attack and defend himself and Chinchilla. There is a reasonable probability that a properly instructed jury would have concluded that the caravan following Chinchilla and Sotelo intended to attack them and that Chinchilla and Sotelo acted in an honest but unreasonable belief that they had to fire at the complaining witnesses in order to avoid death or serious bodily injury. For all of these reasons, this Court should find that trial counsel was prejudicially ineffective when she failed to request that the jury be instructed as to the lesser included offense of voluntary manslaughter due to imperfect self defense and grant the writ.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and grant the writ.

Dated: October ___, 2018.

Respectfully submitted,

/s/ Stephanie M. Adraktas

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Stephanie M. Adraktas, #215323
Attorney For Byron Chinchilla