No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Cameron Brown — PETITIONER
(Your Name)

vs.

People of the State of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Court of Appeal of the State of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Cameron Brown, Inmate Number AY0556
(Your Name)

Centinela State Prison, PO Box 931
(Address)

Imperial, CA 92251
(City, State, Zip Code)

None
(Phone Number)

STATEMENT OF QUESTIONS

We are presenting the following primary questions for review:

1. Is the defendant illegally/wrongfully convicted due to double jeopardy violation?
2. Is it a due process violation and/or a double jeopardy violation to retry a defendant on the basis of statements made in declarations generated by the prosecutor after a trial is completed, when the statements in the prosecutor's declarations contradict what is reported in the court proceedings and recorded in the trial transcript?
3. When the Court declares a mistrial and afterwards discovers: 1) the jury is unanimous on the charged crime, 2) the jury has voted on it, 3) there are no guilty votes for it, does the Court abort the trial prematurely and subject the defendant to a double jeopardy violation, when he discharges the jury instead of receiving their verdict on the charged crime because he has already declared a mistrial?

Following subsidiary questions came out events that spawned the primary questions:

1. Is it legally possible to include jury instructions for lesser included offenses which are ruled out by the evidence for the charged offense; is it a violation of due process and/or double jeopardy protections when the evidence supporting the charged crime rules out the lesser included offenses? Is it legally possible for a prosecutor to present two theories to a jury, one supporting the charged crime and one supporting the lesser included offenses, when the two theories are supported by contradictory underlying facts, making the two theories inconsistent at their core and mutually exclusive; is it a violation of due process and/or double jeopardy protections when a prosecutor presents two such inconsistent and contradictory theories to a jury?
2. Is it legally valid to use emotional appeal on a jury to make up for lack of evidence?

PARTIES TO THE PROCEEDING

First Trial:

Defendant Cameron Brown was represented by Mark J. Geragos, Eugene P. Harris, and Lara Yeretsian, with the law firm of Geragos and Geragos, a retained counsel.

The People of the State of California were represented by Craig Hum, Deputy District Attorney, for the Los Angeles District Attorney.

Court was Presided Over by Hon. Mark S. Arnold, Judge for Superior Court of the State of California, the County of Los Angeles.

Second Trial:

Defendant Cameron Brown was represented by Eugene P. Harris, and Lara Yeretsian, with the law firm of Geragos and Geragos, a state appointed counsel.

The People of the State of California were represented by Craig Hum, Deputy District Attorney, for the Los Angeles District Attorney.

Court was Presided Over by Hon. Michael E. Pastor, Judge for Superior Court of the State of California, the County of Los Angeles.

Third Trial:

Defendant Cameron Brown was represented by Aron Laub, with Aron Laub Law Offices, a state appointed counsel.

The People of the State of California were represented by Craig Hum, Deputy District Attorney, for the Los Angeles District Attorney.

Court was Presided Over by Hon. George G. Lomeli, Judge for Superior Court of the State of California, the County of Los Angeles.

Appeal to California Court of Appeal:

Defendant Cameron Brown was represented by John Steinberg, appointed by the Court of Appeal under Appellate Project Independent Case System.

The People of the State of California were represented by Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

In the Court of Appeal of the State of California, Second Appellate District, Division Eight.

Appeal to Supreme Court of California:

Defendant Cameron Brown was represented by John Steinberg, appointed by the Court of Appeal under Appellate Project Independent Case System.

The People of the State of California were represented by Plaintiff and Respondent.

In Supreme Court of California.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITIED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review judgment below.

OPINIONS BELOW

For case from **state courts**:

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Eight appears at Appendix A to the petition and

is unpublished.

CITATIONS OF REPORTS AND ORDERS ENTERED BY COURTS

- On July 20, 2004, defendant Cameron Brown was indicted by a Grand Jury, in the Superior Court of Los Angeles County, for murder, and special circumstances that the offense was committed for financial gain and by means of lying in wait.
- One May 30, 2006 a jury trial commenced. On August 4, 2006, the jury commenced deliberations. On August 14, 2006 the trial Court declared a mistrial after the jury announced it was hopelessly deadlocked.
- On July 10, 2009, a retrial commenced. On September 15, 2009, the jury commenced deliberations. On October 5, 2009, the trial Court declared a mistrial after the jury announced it was hopelessly deadlocked; then the Court discovered the jury was not deadlocked on the charged crime, and then discharged the jury.
- On March 18, 2015 a third trial commenced. On May 12, 2015, the jury commenced deliberations. On May 13, 2015, the jury returned verdicts finding the defendant guilty of first degree murder, and that the offense was committed for financial gain and by means of lying in wait.
- On September 18, 2015, the defendant was sentenced to life in prison without the possibility of parole.
- On September 18, 2015, the defendant filed a notice of appeal.
- On October 18, 2017, the California Court of Appeal, Second Appellate District, Division Eight, affirmed the judgment in an unpublished opinion.
- On October 18, 2017 after decision of the Court of Appeal, the defendant filed a Petition for Review in the Supreme Court of California
- On January 31, 2018, the Supreme Court of California denied the petition.

BASIS FOR JURISDICTION IN THIS COURT

The judgment for which review is being sought was entered on May 13, 2015, when the defendant was convicted of first degree murder.

The defendant filed a notice of appeal on September 18, 2015, with the California Court of Appeal, Second Appellate District, Division Eight. On October 18, 2017, the California Court of Appeal affirmed the judgment in an unpublished opinion. A copy of the decision is found at Appendix A

The defendant filed a Petition for Review in the Supreme Court of California on October 18, 2017. On January 31, 2018, the Supreme Court of California issued an order denying the petition for review. A copy of the order denying the petition for review is found at Appendix B

The statutory provision that confers jurisdiction on this Court is 28 U.S.C. SS1257(a).

THE CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The constitutional provision treaties, statutes, ordinances, and regulations involved in the case are listed below:

The Fifth Amendment to the US Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Downum v United States, 372 U.S. 734 (1963) – see Appendix

United States v. Jorn 400 U. S. 470 (1971) – see Appendix

STATEMENT OF THE CASE

The defendant in this case was convicted of first degree murder for the death of his 4-year old daughter. He is challenging the conviction on the basis that the third trial violated the Fifth Amendment to the US Constitution, and Article I, Section 15, which protects him against double jeopardy, a protection which Benton v. Maryland 395 U.S. 784 (1969) at 796, held is "fundamental to the American scheme of justice."

There were three trials in this case. A different judge presided over each of the three trials. The defendant was represented by retained counsel in the first trial. The court appointed the same attorney in the second trial, and appointed a different attorney in the third trial.

The central issue in all three trials was whether the defendant's daughter's fall was accidental, or whether the defendant threw her off the cliff. The prosecution contends that the defendant murdered her by throwing her off the cliff. The defense contends that she slipped and fell to her death. The following account shows that double jeopardy attached at the end of the second trial, making the third trial and the conviction which resulted illegitimate and illegal.

The defendant was charged with one count of first degree murder. According to testimony by the prosecution's biomechanical expert, Dr. Wilson Hayes, the crime of first degree murder had been committed *to the exclusion of all other possibilities.* (Court Report's Transcript (CRT hereafter), Page 6982, Line 7 to Page 6983, Line 1) Dr. Hayes didn't say it was just one possibility. He said it was a certainty – *the only possible way the fall could have occurred* is if the defendant physically picked his daughter up and threw her off the cliff. (CRT, Page 9456, Lines 12-14, 17-18)

The biomechanical expert's report and testimony are the only evidence which support a homicide. The medical examiner, Dr. Ogbonna Chinwah, testified that he could not determine that this was a homicide based on injuries. (CRT, Page 6217, Lines 2-7) His conclusion that this was a homicide is based on other things that had nothing to do with injuries, and were totally outside of medical opinion. (CRT, Page 7333, Lines 1-5, 17-18) He did not make an independent decision, but deferred to others to make his determination (Autopsy Report, Section 12, Pages 7-8) six months after he performed the autopsy. (Autopsy Report, Section 15) (What's more, the factor which led the other to make a determination of homicide was proven false by the second trial. Therefore, the manner of death was arrived at by erroneous means.)

The California due process provision requires instructions for lesser included offenses. The Supreme Court of the State of California has consistently stated that whether a lesser offense is necessarily included must be based on the statutory elements and the accusatory pleading without regard to the evidentiary presentation. (People v Ortega (1998) 19 Cal.4th 686, 698) Accordingly, the jury was instructed on two lesser included offenses of second degree murder and involuntary manslaughter.

Deputy DA Craig Hum succinctly expressed the people's theory for first degree murder in his opening statements: "This case is about the murder of a little four-year-old girl, who was killed by her father...The defendant murdered Lauren by taking her on a hike to Inspiration Point in Rancho Palos Verdes and throwing her from a 120-foot cliff into the Pacific Ocean below." (CRT, Page 2450, Lines 24-26; Page 2451, Lines 1-4) Yet, when you break it down to the very essence of the evidence, even though about fifty witnesses testified for the prosecution, only three witnesses dealt with what

actually happened that afternoon and whether or not the defendant physically picked up his daughter and threw her off a cliff. (CRT, Page 7331, Lines 16-25) The prosecution presented mostly character assassination with witnesses to testify to the defendant's character at different points of his life, and to testify to events in which he was upset or angry, (CRT, Page 7329, Lines 11-24) and witnesses, most of which were County employees, to testify that he was emotionally shut down immediately after the event and infer it was somehow proof of guilt. (CRT, Page 7331, Lines 5-15)

The prosecution also alleged that the defendant left the hiking trails and took his daughter to a little piece of land that juts out from the main body of land and slopes down toward the ocean, and with this they introduced a second theory. Their evidence for the allegation that the defendant and his daughter were on that slope includes "impressions in the dirt" that the crime lab analyst determined were NOT footprints (CRT, Page 8516, Lines 18-24, Page 852, Lines 18-24) and comments from several officers, all of which are problematic, and all of which were first introduced years after the incident occurred. (CRT, Page 3640, lines 7-28, Page 3641, Lines 16-24 – this is one example, there is such an example for all the officers) The prosecution also relied on testimony of a deputy sheriff, who was not an expert, to establish that the impressions were shoe impressions. (CRT Page 6345, Lines 8-28; Page 6369, Line 28 to Page 6370, Line 11) Using the allegation that the defendant took his daughter to the sloped area, the prosecution introduced the theory that the defendant intentionally took his daughter to the most dangerous area on top of Inspiration Point and allowed her to run around on a slope that, the prosecution alleges, any reasonable person would know was inherently dangerous to human life.

The prosecution's main theory that the defendant threw his daughter off a cliff was the basis to charge and indict him, and with it the prosecution pursued a first degree murder conviction. With first degree murder California requires a lesser included offense of second degree murder "without regard to the evidentiary presentation." Thus the prosecution used their secondary theory that the defendant took his daughter to the sloped area and allowed her to run around to pursue an implied malice theory for second degree murder.

The prosecution's two theories are NOT based on rational inferences from ambiguous evidence that could result in multiple theories. These two theories are supported by contradictory and mutually exclusive underlying facts, making the two theories inconsistent at their core. As a consequence, problems arose at the end of the trial, which resulted in the prosecutor taking extraordinary steps to get another shot at convicting the defendant. These steps resulted in prosecutorial overreaching and bad faith conduct by the prosecutor. (United States v. Jorn, 400 U.S. 470 (1971))

After deliberating for twelve days the jury announced it was hopelessly deadlocked. The Court found that the jury was split with six votes for some degree of murder and six votes for involuntary manslaughter. (CRT, Page 13535, Line 23 to Page 13537, Line 6) Without inquiring if the six votes were for first degree or for second degree murder, the Court declared a mistrial. (CRT, Page13540, Lines 1-19) Immediately after declaring the mistrial the Court discovered that: 1) the jury was hung on the lesser included offenses, with six votes for second degree murder and six for involuntary manslaughter; and 2) the jury was unanimous on the charged crime of first degree murder and there were no guilty votes for it. (CRT, Page13540, Line 20 to

Page 13541, Line 7) The Court had inquired before he declared the mistrial and found that the jury had voted on the charged crime of first degree murder. (CRT, Page 13535, Line 23 to Page 13536, Line 7) At that point the Court discharged the jury. "I declared a mistrial. That is the current state of affairs. So thank you," the Court said, and released the jury. (CRT, Page 13543, Lines 10-12)

The jury gave the Court two contradictory statements, 1) that they had not reached a unanimous verdict on any charge, 2) that they were not deadlocked on first degree murder. This contradiction reveals an issue that was noted several times during that afternoon's proceedings: the issue that the jury was confused over what "verdict" means. This confusion is exemplified by the jury's communications at the end of deliberations. The jury informed the bailiff that they had reached a verdict, and they sent a note to the Court saying they had reached a "non-unanimous verdict." (CRT Page 13523, Line 22 to Page 13524, Line 15). "Obviously there is a real misunderstanding of the nature of a verdict," the Court said. (CRT Page 13525, Lines 23-24.) The jury's confusion over what constitutes a verdict was expressed several more times that afternoon (CRT, Page 13527, Lines 21-24; Page 13538, Lines 11-12, 20-23; Page 13535, Lines 23-27; Page 13540, Lines 20-22).

The way the jury used the word verdict in the note is revealing. The note said that they were at a "non-unanimous verdict." All twelve jurors had voted guilty on one of the lesser offenses. Additionally, when the Court asked the foreman, "Juror 7, I want to clarify in my own mind, in a very cautious way, has the jury reached a unanimous verdict on any charged crime or lesser included crime in this case?" The foreman answered simply, "No." Yet later when the Court asked if they were

deadlocked on the charged crime, the foreman answered very definitely, "No, the jury was not deadlocked on that." Could it be that the foreman told the trial Court that they had not come to a unanimous "verdict" because they believed verdict necessarily meant a guilty verdict?

In addition, the Court expressed his own confusion over the jury's confusion. The Court responded to the jury's contradictory statements by declaring, "Then I am confused" (CRT, Page 13541, Line 8). Such a response screams for clarification. It requires instruction from the Court to clear up the confusion, and once cleared up to reconvene the jury and give them the opportunity to complete their verdict on first-degree murder. The Court had not lost jurisdiction since the jury was still sitting in the jury box. Instead of clearing up the jury's confusion, however, the Court immediately dismissed the jury, ruling he had lost jurisdiction simply because he had uttered the word "mistrial." These events occurred on October 5, 2009. (Appendix D)

California has a partial verdict rule. (It was upheld by the California Supreme Court in People v Aranda (S214116), 219 Cal.App.4th 764) following this Court's passage of Blueford v Arkansas (2012) 566 U.S.). Thus in California a defendant may be retried only on those offenses which a jury fails to come to a unanimous decision. Had the Court received the jury's unanimous decision on the charged offense of first degree murder, the defendant could have only been retried on the lesser included offenses of second degree murder and involuntary manslaughter. When the evidence for the charged crime supports the lesser included offenses, there is no issue. In this case however, the evidence for the charged crime rules out the lesser included offenses. Consequently the prosecution needed the charged offense to retry the defendant.

The Court declared a mistrial before inquiring if the six votes were for first degree or second degree murder, and when he subsequently learned the jury was not deadlocked on the charged offense he discharged the jury instead of receiving their verdict on it. In this way the Court gave the prosecutor a more favorable opportunity to convict. This raises the primary question: Did the Court abort the trial prematurely by dismissing the jury instead of receiving their verdict on first degree murder? (United States v. Jorn 400 U. S. 470 (1971)) A judge must temper the decision whether or not to abort the trial by considering the importance to the defendant of being able finally to conclude his confrontation with society through the verdict of a tribunal that he might believe is favorable to him. (Downum v United States, 372 U.S. 734 (1963)) "declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict [is an] examples when jeopardy attaches." Downum v. United States, also held, "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,'" quoting United States v. Coolidge, 25 Fed. Cas.622, 623 (1815). The term for these extraordinary and striking circumstances is "manifest necessity." (Richardson v. United States (1984) 468 U.S. 317, 323-324.) Discharging a jury that is still sitting in the jury box just because the Court uttered the word "mistrial" before he learned the jury was not deadlocked on the charged crime does not constitute very extraordinary and striking circumstances nor does it produce a manifest necessity to discharge the jury. Therefore, double jeopardy attached.

What the prosecutor was compelled to do next because of California's partial verdict rule makes the unfeasibility of presenting two conflicting theories clear. Had

he been able to retry the defendant on both the charged offense and lesser included offenses, he would have been able to obscure the problem. (This is not a small issue in the face of Blueford v. Arkansas which held that in states which do not have a partial acquittal rule, if the jury deadlocks on a lesser included offense without formally returning a verdict of not guilty on the greater offense, the defendant may be retried on both the greater and lesser offenses. Alternatively, California's partial verdict rule of Stone v. Superior Court, supra, 31 Cal.3d 503, requires the Court to give the jury the opportunity to return a partial verdict of acquittal on the greater offense before the court may declare a mistrial. California also requires instructions for lesser included offenses without regard to the evidentiary presentation; and this makes it possible for prosecutors to present two contradictory and mutually exclusive theories, as was done in this case. California attorneys accept it, without question, as law. California's partial verdict rule offers defendants some protection against such conflicting theories. If California adopts Blueford v. Arkansas that protection will be gone, thus obscuring the problems conflicting theories produce and making it easier for prosecutors to retry defendants on conflicting theories.) Since this prosecutor was bound to California's partial verdict he had to resort to extreme measures to retry the defendant.

The next hearing on the matter was held on January 28, 2010. The defense filed a Motion to Dismiss. In response, the prosecutor submitted to the Court, in conjunction with his Opposition to the defense Motion to Dismiss, a "declaration" over his own signature, which is nothing more than a sworn statement, in which he asserted that a former juror, now discharged from the trial, called him later in the day on October 5, 2009, after the trial had concluded and informed him that the jury vote

as reported in the court proceedings and recorded in the trial transcript was somehow incorrect, and that the "true" outcome should have been one juror voting for first degree, six for second degree, and five for involuntary manslaughter.

The prosecutor went on to say that this former juror volunteered to contact the other former jurors, and instruct them to call the prosecutor as well. Five more former jurors contacted the prosecutor in the next few days.

At that point the prosecutor took a proactive approach. He states that instead of bringing this matter to the Court's attention, he himself – the prosecutor – prepared and sent each of these former jurors "Jury Declarations" which he asked them to sign and return to him. The declarations were nothing more than sworn statements, of the same sort as the one he submitted over his own name. The declarations stated that the six-six outcome as recounted in the court proceeding was somehow incorrect and that the "correct" outcome was one-six-five. In this way the jury impeached its own verdict with the prosecutor's help.

These activities produced the primary question: Is it a due process violation and/or a double jeopardy violation to retry a defendant on the basis of what is stated in declarations that are generated by the prosecutor after the trial is completed, when the statements in the prosecutor's declarations contradict what was reported in the court proceedings and recorded in the trial transcript? (Summers v. United States, 11 F.2d 583, 586 (4th Cir. 1926)) "After a verdict has been rendered, and the jury, after being discharged, have separated, the jury cannot be recalled to amend their verdict."

We also call into question the prosecution's approach, as it relates to the primary questions. Since he was light on evidence for his main theory, and evidence

for his secondary theory was nonexistent, the prosecutor relied on emotional appeal to make up for what he lacked in evidence and convince the jury. The prosecutor himself conveyed as much with his response to the jury's final question during deliberations.

The question is not recorded in the trial transcript. Instead the Court asked counsel to review it in written form. (CRT, Page 12301, Lines 18-28) Yet, it is clear from the discussion that followed that the question had to do with the site visit and the feelings the site visit generated; and the crux of the question was: are the feelings generated by the site visit evidence. (CRT, Page 12302, Line 1 to Page 12308, Line 12) The ensuing discussion about the question covered the following points. These excerpts capture the gist of the discussion regarding the jurors' question:

> "I think the answer is yes," the prosecutor responded. "I mean the whole purpose of going out to the location was to have them see and understand the area and the dangerousness of the location. And certainly, the dangerousness of the location and their feelings about that is relevant to both the first and the second, and particularly with regard to an implied malice second."
>
> Defense counsel responded, "What is not evidence, as stated in the jury instruction, is emotions and any emotional feeling or emotional reaction is not to be used."
>
> "I would disagree with that because I think that especially when we are talking about - - again, if we are talking about an implied malice second degree murder, their feelings about the location are important. Their feelings with regard to the dangerousness, their feelings with regard to whether or not the defendant would recognize the danger, all of that is appropriate evidence for them to consider when they are making a determination as to whether or not there was implied malice," Mr. Hum said. "Their feelings with regard to the location, I think, is appropriate evidence.
>
> "The danger to which Mr. Harris refers is the gut, visceral, emotional response," the Court said.
>
> And the prosecutor responded, "I guess the problem I have is what feelings about the location that we visited would not be appropriate for them to consider?"
>
> "Well, I think that is -- the jury instruction, I think, is very clear that you are not to bring in emotion in terms of making decision. I think the

> problem I have with Mr. Hum's argument is that he is attaching feelings, the phrase "feelings," to ... an emotional reaction. That is a feeling that should not be taken into consideration," defense counsel responded.
>
> "Their emotional response, their visceral response to being out there, is certainly something that they can consider in evaluating the behavior of the defendant," the prosecutor said. (CRT, Page 12302, Line 1 to Page 12308, Line 12)

Considering their emotional, visceral response when making their decision is what the prosecutor is advocating for. This encapsulates what he was obviously aiming to achieve, considering the strategy he employed. The prosecutor's strategy was as follows. Throughout the trial he presented mostly character assassination, with which he viciously demonized the defendant, with the purpose to appeal to the juror's emotions. (CRT, Page 7330, Lines 13-27) He coupled that with constant repetition that the defendant took his daughter to the sloped area and he delivered that allegation with great dramatic flair. Plus he added a good measure of histrionics. At the end of the trial the jury was taken to the site and shown the sloped area. Even though there is no credible evidence that the defendant and his daughter were on that slope, and it is the defense's position that they were NOT on the slope, (CRT, Page 10318, Line 20 to Page 10322, Line 22) the prosecutor carried on like it was an established fact. Immediately after the site visit the jury was sent to deliberate.

Apparently the emotional appeal worked. The prosecutor did not convince the jury that the defendant physically picked his daughter up and threw her off a cliff, the only allegation he had some modicum of evidence for, weak and faulty as it was. The fact that none of the jurors voted for first degree murder attests to that. And it is no surprise; the prosecutor did not put much effort in convincing the jury of his main theory. His emphasis was on character assassination and the demonization of the

defendant; the constant repetition of the allegation that the defendant took his daughter to the sloped area, an allegation that he delivered with great dramatic flair; and histrionics. In other words his emphasis was on emotional appeal, which he used to make up for lack of evidence. Obviously the emotional appeal convinced the jury, despite the lack of evidence. The six-six split between the two lesser included offenses makes that clear.

A further indication of the importance that emotional appeal played on the jury's decision making process is indicated by what the foreman told the Court with regard to the jury's final question discussed above on pages 17-18. The foreman told the Court that "most felt until they had an answer to the question they couldn't continue deliberations." (CRT, Page 12320, Lines 3-4) They could not go on with deliberations until they had the answer to that question – the question that the Court avoided putting on the record, but the prosecutor's initial response to it was:

> "The whole purpose of going out to the location was to have them see and understand the area and the dangerousness of the location. And certainly, the dangerousness of the location and their feelings about that is relevant to both the first and the second, and particularly with regard to an implied malice second." (CRT, Page 12302, Lines 2-8)

"The location," could only mean the sloped area since the prosecutor never acknowledged the possibility the fall could have originated anyplace else – despite his lack of evidence. "And the dangerousness of the location," he went on. "And their feelings about that is relevant ... particularly with regard to an implied malice second." (He is concerned about "an implied malice second" even though his evidence to charge and indict the defendant rules it out.) In this passage the prosecutor makes it clear that his position was that the jury's feelings were relevant particularly to

implied malice second. He had no evidence to support second degree murder, so he appealed to the jury's emotions to make up for what he lacked in evidence.

Even though the prosecution's main theory that the defendant threw his daughter off the cliff got this case into court, the prosecutor put a lot of emphasis on his conflicting, secondary theory for second degree murder. In the end the jury split over the two lesser offenses, for which there was no real evidence. That would have been the end of the matter, had it not been for the emotional appeal.

The jury devoted over two months to this case (from late July to early October, 2009) and for over two months the prosecutor zealously subjected them to a significant amount of emotionally appeal. As this was a high-profile case in Los Angeles, immediately after the proceedings of October 5, 2009 there was a press conference in the front of the courthouse. During this press conference, it was pointed out that since no juror had voted for first degree murder, the charge would have to be dismissed. And since the evidence for the charged crime in the indictment ruled out the lesser included offenses, the defendant would thus have to be released. This almost certainly must have caused dismay among some of the jurors, given that the defendant had been so viciously demonized by the prosecutor for the past two, plus, months. With the jury declarations the juror's dismay was relieved and it made it possible for the prosecutor to retry the defendant one more time. An important connection is that the emotional appeal spawned the juror declarations, which led to the third trial.

We are seeking review of state-court judgments of federal questions. The question, did the Court aborted the trial prematurely, (United States v. Jorn, 400 U.S. 470 (1971)); (Downum v United States, 372 U.S. 734 (1963)) was first raised in the

defense's Motion to Dismiss, and heard at the post trial hearing held in the Superior Court of the State of California, The County of Los Angeles, on January 28, 2010. The question regarding the jury declarations (Summers v. United States, 11 F.2d 583, 586 (4th Cir. 1926)) was first raised at the same post trial hearing held on January 28, 2010 when the prosecutor submitted his declarations. The question asking if the defendant was illegally/wrongfully convicted due to a double jeopardy violation (Fifth Amendment to the US Constitution) was first raised in the defendant's post conviction appeal. The defendant was convicted on May 13, 2015 and sentenced on September 18, 2015. The defendant appealed the conviction, filing a Notice of Appeal on September 18, 2015. On October 18, 2017, the California Court of Appeal affirmed the judgment in an unpublished opinion.

Underpinning the primary questions are the subsidiary questions: 1) Is it legally possible to include jury instructions for lesser included offenses which are ruled out by the evidence for the charged offense, 2) Is it legally valid to use emotional appeal on a jury to make up for lack of evidence. The subsidiary questions are intrinsic to the primary questions because without the subsidiary issues, the primary questions would not have come about.

On January 28, 2010, the Court's response to the declarations was simply, "The Court is prepared and does consider the declarations at hand in evaluating the motion." (CRT, Page 25, Lines 15-17) And then he stated that even if the Court should strike and not consider for any purpose any declarations, the result would be the same. (CRT, Page 25, Lines 20-21)

The Court went on to say that his conclusion was that the jury had not reached a verdict on either the charged offense or the lesser included offenses. He justified that by saying he gave the Stone instruction, which "made very clear to the fact finder the protocol and procedure by which it would evaluate the charged offense and any lesser included offense." (CRT, Page 2, Lines 1-17) After making that statement, he gave an account of everything that happened in the courtroom up to, but not including, his asking about the exact nature of the split. His account excluded everything that happened in regard to his asking about the split vote, and in addition, his account left out the fact that the jurors voted on all the possible charges. (CRT, Page 26, Line 18 to Page 29, Line 4)

The following facts were omitted from the Court's account: 1) The jurors voted on the following possible charges: murder in the first degree, murder in the second degree, involuntary manslaughter, and not guilty of all charges. 2) The Court inquired about the exact nature of the split. 3) The jury foreman reported that there were six votes for involuntary manslaughter and six votes for second degree murder. 4) The Court asked, "Did the jury reach any verdict as to the charged count of murder in the first degree or is the jury deadlocked on that." The jury foreman responded, "No, the jury was not deadlocked on that." (CRT, Page 13535, Line 28 to Page 13536, Line 7; Page 13540, Line 20 to Page 13541, Line 7) "Then I am confused," the Court responded. (CRT, Page 13541, Line 8).

These omitted facts made the outcome crystal clear, because it was stated orally in the courtroom exactly what happened and what the verdict was. However, the Court excluded these facts from his account and pretended like they never happened.

Consequently, instead of dealing with the facts the Court's argument engaged in *what could have been if* – if he had stopped asking questions sooner – and he pretended that's what happened. He argued that he wasn't required to ask about the split. "The jury was provided with Stone," he said. "I made my inquiry. As far this Court is concerned that was all that would have been required. And I think it was a solid basis for my simply saying, 'Thank you, you are excused." (CRT, Page 27, Lines 9-18) Even if that is true, the problem is that is NOT what happened.

The Court did not address the primary question regarding the Court aborting the trial prematurely, at the post trial hearing held on January 28, 2010. This question was not addressed by the trial Court at any instance. (Appendix C)

Shortly after the January 28, 2010 hearing the state appointed new counsel for the defendant. The new counsel said that he preferred to take the case to trial, rather than appeal the double jeopardy violations. At the beginning of the case the defendant was represented by the Public Defender, who later became a witness for the defense. Because of the public defender's status as a defense witness, the new counsel was a private attorney who also had a contract with the state. This private, state appointed attorney had his own private clients to attend to, which caused him to keep putting this case off. Finally in 2015, nearly five full years after his appointment, the Court said enough, and set a date for the trial. The attorney was not prepared for trial.

On March 18, 2015 the third trial commenced. The jury started deliberating on May 12, 2015 and on May 13, 2015, the jury returned verdicts finding the defendant guilty of first degree murder, and of special circumstances of committing the offense for financial gain and by means of lying in wait. The defendant was convicted, in large

part because of ineffective counsel. On September 18, 2015, the defendant was sentenced to life in prison without the possibility of parole. The defendant appealed the conviction, filing a Notice of Appeal on September 18, 2015. On October 18, 2017, the California Court of Appeal affirmed the judgment in an unpublished opinion. (Attached, see Appendix A)

The defendant's appeal addressed all three of the primary questions we have raised herein. The appeal Court overlooked California case law regarding an implied verdict and the jury's confusion about exactly what verdict means, and agreed with the trial Court that since the trial Court gave the Stone instruction, then the jury must have unable to reach a unanimous verdict on first degree murder. (Page 32)

The appeal Court also found that the trial was not aborted prematurely. Again, overlooking California case law regarding implied verdicts and the jury's confusion over what verdict means, the appeal Court ruled there was no verdict, therefore the trial Court was not required to inquire further, after the court had declared a mistrial. (Page 33)

The appeal Court further found that the juror declarations are admissible and further confirm that there was no verdict on first degree murder. (Page 36)

On October 18, 2017 after the decision of the Court of Appeal, the defendant filed a Petition for Review in the Supreme Court of California, again addressing the question we've been discussing herein. The Supreme Court of California issued an order denying the Petition for Review, without comment on the appeal. The order denying the Petition for Review was filed on January 31, 2018. (Attached, see Appendix B)

REASONS WHY THIS COURT SHOULD HEAR THIS CASE

Why should this Court hear this case?

- With regard to the first primary questions: "Is the defendant illegally/wrongfully convicted due to double jeopardy violation;" This Court should hear the case because a lower court has decided, and a state court of last resort has sanctioned the departure of an important question of federal law from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power

- With regard to the second primary questions: "Is it a due process violation and/or a double jeopardy violation to retry a defendant on the basis of statements made in declarations generated by the prosecutor after a trial is completed, when the statements in the prosecutor's declarations contradict what is reported in the court proceedings and recorded in the trial transcript;" This Court should hear the case because a lower court has decided, and a state court of last resort has sanctioned the departure of an important question of federal law, in a way that has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

- With regard to the third primary questions: "When the Court declares a mistrial and afterwards discovers: 1) the jury is unanimous on the charged crime, 2) the jury has voted on it, 3) there are no guilty votes for it, does the Court abort the trial prematurely and subject the defendant to a double jeopardy violation, when he discharges the jury instead of receiving their verdict on the charged crime because

he has already declared a mistrial;" This Court should hear the case because a lower court has decided, and a state court of last resort has sanctioned the departure of an important question of federal law, in a way that conflicts with relevant decisions of this Court.

- With regard to the first subsidiary question: "Is it legally possible to include jury instructions for lesser included offenses which are ruled out by the evidence for the charged offense; is it a violation of due process and/or double jeopardy protections when the evidence supporting the charged crime rules out the lesser included offenses; is it legally possible for a prosecutor to present two theories to a jury, one supporting the charged crime and one supporting the lesser included offenses, when the two theories are supported by contradictory underlying facts, making the two theories inconsistent at their core and mutually exclusive, is it a violation of due process and/or double jeopardy protections when a prosecutor presents two such inconsistent and contradictory theories to a jury;" this is an important question of federal law that has not been, but should be, settled by this Court.

- With regard to the second subsidiary question: "Is it legally valid to use emotional appeal on a jury to make up for lack of evidence;" a lower court decision on this matter has departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cameron Brown

May 1, 2018