No. 20-5462

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SMITH ELLISON, Jr., — PETITIONER
(Your Name)



vs.

ROBERT NEUSCHMID, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Uinted States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SMITH ELLISON, Jr., BB-4955
(Your Name)

CSP-Solano C16-168L P.O. Box 4000
(Address)

Vacaville California 95696
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

Whether Petitioner is entitled to a certificate of appealability to appeal a denial of the Motion for Reconsideration.

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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## TABLE OF AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

## OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 11, 2020.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## STATEMENT OF THE CASE

On September 28, 2016, a Riverside County Superior Court jury found Petitioner guilty of second degree murder. The jury also found allegations that Petitioner personally and ["alleged"] intentionally discharged a firearm and proximately caused great bodily injury or death to another person. 2 Clerk's Transcript on Appeal ("CT") 353-54. On November 4, 2016, the trial court sentenced Petitioner to forty years to life in state prison. 2 CT 390-91.

Petitioner appealed his conviction and sentence to the California Court of Appeal. On October 12, 2018, the California Court of Appeal remanded the matter for resentencing to allow the trial court to decide whether to exercide its discretion to strike the firearm use enhancement and affirmed the judgment in all the other respects. A Petition for Review was denied on January 16, 2019. On March 22, 2019, the trial court declined to strike the firearm used enhancement.

Petitioner also sought to collaterally attack his conviction by filing a habeas corpus petition in the Riverside County Superior Court. That petition was denied on June 13, 2017. Petitioner then filed a habeas petition in the California Court of Appeal, which was denied on November 9, 2017 for want of record.

## STATEMENT OF FACTS

On the afternoon of April 17, 2015, Petitioner fatally shot his 28-year-old son Jason in the chest with a 9 mm handgun. The shooting took place at [Petitioner's] rural home in Mead Valley, near a shed used to store all-terrain vehicle, ATVs.

At the time of the shooting, Jason and Petitioner were arguing about an ATV that was on Petitioner's property and that Jason often rode. Petitioner and Jason were in the process of completing paperwork for Petitioner to transfer ownership of the ATV to Jason. Petitioner had a confrontational in-person interaction with Jason earlier in the day and knew that Jason would be coming to his property to get the ATV to go riding with friends. Before Jason arrived at the property to get the ATV, Petitioner took the key out of the ATV, so Jason could not take it, and he armed himself with a handgun. Petitioner claimed at trial that he armed himself because he was planning to feed his animals and wanted to protect himself from snakes, coyotes and wild dogs, not because he was expecting a confrontation with Jason.

When Jason arrived with his friends at Petitioner's property, he called Petitioner to say he was there to get the ATV, but Petitioner did not open the driveway gate for him, Jason jumped the fence and walked to the ATV shed while his friends waited outside the driveway gate. Petitioner and Jason met near the ATV shed, out of view of Jason's friends.

One of Jason's friends testified that he heard Jason repeatedly stating to Petitioner, "Take it, take it," presumably referring to paperwork to transfer ownership of the ATV, and repeatedly calling Petitioner a "son of a bitch." Jason's friends then heard a single

gunshot and shortly thereafter saw Jason walking part of the way down the driveway toward them before saw collapsing. According to one friend, Jason said, "The son of bitch finally shot me." Petitioner appeared from behind the shed and then walked into the house, where he called 911 and reported that he shot his son. Petitioner did not open the driveway gate for Jason's friends, who drove away to a place with better cellphone reception and called 911.

When law enforcement officers arrived several minutes later, Petitioner was kneeling in the driveway with his arms wrapped around Jason. Petitioner appeared to be emotionally distraught and was crying, Jason died shortly thereafter as a result of a gunshot wound to the left side of his chest, which went through his lung and perforated his pulmonary artery, causing significant internal bleeding. Jason was not armed during the confrontation with Petitioner.

An iformation charged Petitioner with second degree murder (Pen. Code § 187, subd. (a)), and alleged that Petitioner personally and intentionally discharged a firearm in committing the murder (id., §§ 12022.53, subd. (d), 1192.7, subd. (c)(8).)

During trial, Petitioner testified on his own behalf, claiming that he shot Jason in self-defense. According to Petitioner, during the confrotation near the ATV shed, Jason was "raving" and curssing and told Petitioner "I am gonna kick your ass." Petitioner testified that he was scared of Jason, and although he repeatedly told Jason that he was armed, Jason kept coming toward him and was "totally out of control." According to Petitioner, when Jason raised a fist to hit him, Petitioner fired his gun because he was in fear for his life.

At trial, as a result of a series of evidentiary rulings by the

trial court, the jury heard evidence presented by the People of numerous acts of violence that Petitioner perpetrated against Jason, as well as against other family members, including Petitioner's other children, his stepchildren and his wife. The incidents apanned a long period of time and included firing a gun or threatening to fire a gun at other family members during confrontations.

REASON FOR GRANTING THE PETITION

JUSTICE SONIA SOTOMAYOR, PLEASE READ THE FOLLOWING, IT SHOWS THAT PETITIONER SHOT HIS SON IN SELF-DEFENSE:

THE DAY OF THE SHOOTING

On April 17, 2015, Jason and his friends were gathered at the home of Harry's mother, Tracy Hayes. (4RT 716, 721.) They were either preparing for a camping trip or going dirt bike riding. (4RT 715-716, 721-723; 5RT 888, 889; 6RT 998, 999.) Jason called petitioner and asked if he would take them to pick up the dirt bikes. (5RT 889, 890; 6RT 1001.) Petitioner arrived at Tracy's house about 20 minutes later. (4RT 722, 723, 5RT 723, 890.) Jason, Harry and Marquis were outside and Tracy was inside with Ja'Leece. (5RT 736, 737.) Petitioner confronted Harry about going onto this property, kicking up rocks all over the yard with the dirt bike and shooting guns. (5RT 738, 739, 789-790, 791.) Petitioner was upset about it and Harry let him talk because he knew they messed it up. (5RT 790.) Jason intervened and told petitioner not to come over there and fuss at his friends. (5RT 739, 791.)

Petitioner and Jason began arguing with the argument escalating. (5RT 740, 792, 793, 891.) Jason was aggressive to petitioner (5RT 892.) Petitioner was holding Ja'Leece and Jason told petitioner to put her done and leave. (5RT 740, 792, 793, 6RT 1003.) Petitioner told Jason to walk up and get the bikes. (5RT 792, 793, 893, 6RT 1003.) Tracy testified petitioner told Jason to come and get his shit right now because he did not want Jason back on his property because he felt he did not know how to respect it. (5RT 741.)

Jason and his friends left a few minutes later to go get the

bikes. (5RT 793, 795, 893, 894.) Jason, Andre and Marquis took Jason's car, with Ja'Leece in the backseat, and Harry followed on his motorcycle. (5RT 794, 796.) When Jason arrived at the ranch, they parked outside the electronic gate. (5RT 799, 897.) Jason called petitioner to ask him to open the gate. (5RT 897, 898.) Petitioner refused. (5RT 899, 6RT 1010.) Jason got out of the car and hopped the gate. (5RT 900.) He said he was going to get the bikes. (5RT 805, 805.) Harry, Marquis and Andre waited below. (5RT 901; 6RT 1010.) There was evidence Jason had a piece of paper in his hand. (5RT 800, 900; 6RT 1011.)

Jason walked up toward the house and disappeared from view when he reached the ATV shed. (5RT 805.) About 20 seconds later, a single gun shot ran out (5RT 807), which according to Marquis, flew by his ear (6RT 915.)

Harry testified that after Jason went around the ATV shed, he heard Jason say several times, "Take it. Take it....[T]ake it, you son of a bitch." (5RT 806, 807, 10RT 1743.) He did not hear any other voice except Jason's. (5RT 807.)

After the gun shot, Jason walked from around the ATV shed toward the bottom of the driveway. (5RT 808, 6RT 919.) Jason was holding his shirt up in the front telling Harry to come get him. (5RT 807.) According to Harry, Jason said, "The son of a bitch finally shot me." (5RT 807.) Harry was yelling at Jason to make it to the gate. (5RT 810, 811.) Jason said he could not walk anymore and he collapsed in the driverway. (5RT 810, 812; 6RT 920, 1014, 1015.) According to Marquis, before he fell, Jason said, get my daughter out of here. (6RT 922.) Jason died from a gunshot wound to the chest. The Forensic Pathologist testified. (7RT 1230,1215).

## ARGUMENT

### I

### THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOW THE PROSECUTION TO INTRODUCE ALMOST UNLIMITED EVIDENCE OF PRIOR CONDUCT AS PROPENSITY EVIDENCE" UNDER CAL. EVID. CODE § 1109.

Over defense counsel's objection, the trial court permitted the prosecution to introduce petitioner's entire history as a husband and father under the umbrella of Evidence Code section 1109 as evidence of other "domestic violence" In this regard, the trial court allowed the jury to hear what amounted to about 19 instances of prior conduct by petitioner, along with general testimony from petitioner's children and other witnesses that petitioner controlling, emotionally abusive, a strict and disciplinariant and an "asshole."

Most of the evidence, namely, the evidence regarding petitioner's parenting style, his conduct with Juanita and his minor children, the threats made around Thanksgiving 2014, and two shotgun incidents (2014 and 2015) with DeQuen, were expressly allowed under section 1109 as evidence of petitioner's propensity to commit "domestic violence." (1RT 35, 39, 45, 46, 50, 94-95, 104-105-108-109.) The two shotgun incidents with DeQuen were also allowed under section 1101, subdivision (b), as evidence of intent, motive and/or common plan. (1RT 36-37.) The incidents involving Maurice and the incident involving Crystal and her baby, which were excluded in limine due to their comulative and overly prejudicial nature, came in under section 1103 to rebut defense evidence that Jason had a propensity for violence, as did the incident with Little Smitty while growing up. (1RT 31, 44, 46 50; 9RT 1686.)

While most of the evidence challenged herein was expressly admitted under section 1109, it was listed on CALCRIM No. 375 as "uncharged act" for the jury to consider under section 1101, subdivision (b), as evidence of intent,

motive or common plan. (2RT 342-343.) Nevertheless, the prosecutor expressly relied on the totality of the prior conduct evidence when arguing to the jury "what type of person" petitioner was (13RT 2342), how he acted in the past with his family (13RT 2337), that he was a violent and abusive person when it came to his children and his family, and thus guilty of the charged offense (13RT 2344, 2346, 2361-2362.)

The evidence pertaining to petitioner's parenting style and his treatment of his children while they were growing up did not qualify as "domestice violence" within the meaning of section 1109. Moreover, the majority of the prior conduct evidence was too remote and violated either the express five or ten year limitation set forth in section 1109, such that the trial court abused its discretion in admitting the evidence pursuant to this statute. Petitioner further contends the prior conduct evidence was too dissimilar to the charged offense of malice murder to justify its admission as propensity evidence under section 1109. Where the prior conduct evidence was cumulative, and where it comprised the bulk of the People's case against petitioner, it is highly likely that the evidence prejudiced the jury against petitioner and distracted the jury from its main inquiry of determining petitioner's guilt for the charged offense. In sum, the admission of the propensity evidence constituted and abuse of discretion and denied petitioner his right to a fundamentally fair trial, in violation of his right to due process of law. (U.S. Const. 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

California law has long precluded the use of evidence of a person's character as a basis for an inference that he acted in conformity with that character on a particular occasion. (§ 1101, subd. (a); People v. Ewoldt, (1994) 7 Cal.4th 380, 393.) This long standing rule exists in order to reduce the risk that a "jury will convict for crimes other than those charged - or that, uncertain of guilt, it will convict anyway because a bad person deserves

punishment. . . ." (Old Cheif v. United States (1997) 519 U.S. 172, 181 [117 S.Ct 644, 136 L.Ed.2d 574]).

Pursuant to Federal Rules of Civil Procedure Rule 60 (b) (3), the District Court's decision was a fraud, because it ignored the law. This Court should grant the present Motion for Reconsideration. And order the state Court to reduce the second degree murder conviction to voluntary manslaughter or to involuntary manslaughter because petitioner shot at his son in self defense.

**A. The Trial court abused its discretion by admitting evidence relating to Petitioner's "parenting style and [discipline] of his children" because such evidence was time-barred under Section 1109.**

During the course of the in limine hearing on the prior conduct evidence, defense counsel argued the evidence the People sought to introduce did not qualify as domestic violence. (1RT 26.) In this regard, defense counsel argued: But I think what you need to do is, you need to look at each of the - what these family members has to say in the incidents that [the prosecutor] is trying to get in. Some of them just don't have anything to do with violence or anything like that. Just a stern father, he screamed at me, or something like that. And if that were the case, I'd be on trial, Your Honor. I think we'd all be on trial if we were parents." (1RT 26.)

When discussing the evidence proffered via Crystal, defense counsel argued the evidence was so prejudicial the trial court should hold a section 402 hearing to make a preliminary determination before the information was heard by the jury. (1RT 48, 49, 50.) The trial court declined. (1RT 49, 50.) When discussing the evidence proffered via Jennifer, defense counsel questioned whether all of the conduct qualified as domestic violence under the Family Code. (1RT 99, 100.) During the course of trial, and during Jennifer's testimony in particular, defense counsel further objected that parental discipline did not amount to domestic violence. (2RT 290.)

The gravamen of the People's case was that petitioner was controlling and this case was a culmination of a history of petitioner's abuse of his children. In support of its history, the prosecution was allowed to introduce a significant amount of prior conduct evidence involving petitioner's minor children. However, there was no preliminary determination by the trial court or showing by the People as to how the conduct amounted to domestic violence. Petitioner contends the conduct evidence the People sought to introduce and did introduce was not domestic violence as contemplated by section 1109. The trial court therefore erred in allowing this evidence.

The trial court also abused its discretion in allowing the admission of evidence relating to petitioner's parenting style and the discipline of his children, where the trial court acted in excess of its statutory authority under section 1109. This would include the additional incident with DeQuen when he was 17, when he heard petitioner fire a shotgun as he ran away. (4RT 562-571.) This is because the plain language of section 1109 limits domestic violence evidence relating to children to events which occurred less than five years before the charged offense. Pretrial, defense counsel objected to the prior conduct evidence, arguing that section 1109 has a "time stamp" and the proffered evidence fell outside the five-year limitation period. (1RT 19, 34-35.) For the most part, the trial court proceeded under the mistake belief the time limit for prior conduct in this instance was 10 years before the charged offense. (1RT 19, 106, "As it relates to 1109, if it's prior domestic violence and it's within that ten-year period, it's admissible subject to 352 as well, of course.") However, section 1109 provides for a five year time period.

Subdivision (d) of section 1109 states that "domestic violence" has the meaning set forth in Penal Code section 13700, and suject to section 352, "domestic violence" has the further meaning as set forth in Section 6211 of

the Family Code, if the act occurred no more than five years before the charged offense. Subdivision (e) of section 1109 provides that, "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

Thus, under section 1109, "domestic violence" perpetrated against a spouse, cohabitant, or coparent may be admissible if it occurred not more than 10 years before the charged offense, unless the trial court determines the admission of the evidence serves the interest of justice. (§ 1109, subd. (d), (e); Pen. Code § 13700, subd. (d).) "Domestic violence" perpetrated against a child of the defendant or "any other person related by consanguinity or affinity within the second degree" is admissible only if it occurred no more than five years before the charged offense. (§ 1109, subd. (d), (e); Fam. Code, § 6211, subd. (e), (f).

Here, all of the evidence pertaining to petitioner's parenting or other conduct involving his children while the children were growing up, was improperly admitted pursuant to section 1109 because these acts occurred more than five years before April 17, 2015, the date of the charged offense, such that they did not qualify as "domestic violence" under section 1109, as that term is defined by Family Code section 6211. This includes evidence petitioner disciplined Crystal with a quirt when she was 16 (2RT 255, 335) (she was 43 at the time of trial) (2RT 335); evidence Little Smitty was disciplined with an extension cord while growing up (2RT 260) (Little Smitty was 47 at the time of trial) (4RT 545; People's Exhibit 5); evidence petitioner slapped Jennifer when she was 16 (3RT 462, 478) (Jennifer was 32 at the time of trial) (2RT 455) evidence petitioner physically punished DeQuen when he was growing up (4RT 544, 555, 556), disciplined DeQuen with an extension cord (4RT 554), and fired a shotgun when DeQuen was 17 (4RT 562, 563, 571) (Dequen was 44 at the rime of

trial) (4RT 544); and evidence petitioner slapped Jason off a horse when Jason was 17 (4RT 577, 578) (Jason was 28 at the time of his death) (RT 339). This would also include the general testimony as to Petitioner's parenting style as strict and controlling while the children were growing up.

Because all of this conduct occurred more than five years before the charged offense, it was inadmissible under section 1109.

Petitioner was prejudiced by the admission of the above evidence. Therefore, the District Court's decision on December 18, 2019, when it denied with prejudice Petitioner's Federal Petition for Writ of Habeas Corpus committed a fraud under Federal Rules of Civil Rule 60 (b) (3). And now petitioner is requesting that this Court grantshis Motion for Reconsideration.

**B. The conduct involving Petitioner's minor children lacked probative value.**

The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. (People v. Fruits (2016) 247 Cal.App. 4th 188, 202.) Here, the challenged evidence should have been excluded because it was too dissimilar to the charged offense of murder and thus had insufficient probative value to justify its admission. The trial court erred in determining otherwise.

The People relied on the prior conduct evidence to argue petitioner was violent and abusive toward his children and "did the same thing" to Jason (13RT 2346) and he had to be held accountable for causing the suffering of his children (13RT 2361-2362). However, as described above, the record shows that with regard to the prior conduct, petitioner was disciplining his minor child due to misconduct. Such evidence was minimally probative of the charged conduct involving a confrontation between petitioner and his adult son. It could not have evidenced an increase in any propensity to commit domestic violence where DeQuen indicated the physical discipline became less frequent

as the children grew older (5RT 558), and the evidence showed only one incident of physical discipline involving Jennifer or Jason who were petitioner's younger children (3RT 465, 473; 4RT 578, 684).

### C. The Trial Court Erred In Admitting Domestic Violence Evidence Involving Petitioner's Wife Where The Evidence Was Presumptively Inadmissible. It Was Cumulative And Had Little Probative Value

The trial court excluded in limine DeQuen's observations of domestic violence against Juanita (1RT 31), finding the evidence more prejudicial than probative, but allowed Jennifer to testify to her observations of petitioner alapping Juanita (1RT 104-105, 1RT 109; (3RT 464.) When the issue of domestic violence involving Juanita came up again during Crystal's testimony in the People's case-in-chief, the trial court excluded the evidence, finding it was cumulative and too remote. (2RT 289-291.) When the People sought to introduce domestice violence involving Juanita under section 1103, the trial court excluded it. (RT 1682.) The jury was instructed it could consider the domestic violence involving Juanita of petitioner's propensity to commit domestic violence. (2RT 280.)

First the evidence of petitioner slapping Juanita in the car or any other time was presumptively inadmissible because the conduct occurred more than 10 years before the charged offense. In this regard, section 1109, subdivision (e), provides, "evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." The car slap incident occurred when Jennifer was 14 or 15 (3RT 530) in which case it occurred about 17 years before the charged offense. The second slap incident occurred while the family was living in Duarte (2RT 280), in which case it occurred almost 30 years before the charged offense. The Magistrate Judge committed fraud under Fed.Rule Civ. Procedure Rule 60 (b) (3). Reconsideration is warrented.

II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE PROSECUTION TO ELICIT EVIDENCE OF JASON'S EXTRAJUDICIAL STATEMENTS THAT PETITIONER WOULD CAUSED HIS DEATH, WHERE THE STATEMENTS AMOUNTED TO IMPERMISSIBLE HEARSAY FOR WHICH NO EXCEPTION APPLIED AND THEY WERE IRRELEVANT TO ANY DISPUTED ISSUE IN THE CASE

During trial, the prosecutor was allowed to place before the jury several statements allegedly made by Jason to various individuals that if he died, it would be because of his father. (1RT 125, 126.) At issue here are the statements Jason made to Samantha a few months before his death that if he ever left this world, it would be at the hands of his father, and the statements made to Shelly and Annette Scott six or seven years before his death, that petitioner would be the one to take his life. (1RT 107, 126.)

In admitting Jason's extrajudicial statements, the trial court was ostensibly admitting the evidence under section 1250, in which case the evidence would come in for the truth of the matter asserted; namely, that petitioner would kill Jason. (1RT 127-131; 9RT 1690-1693.) The prosecutor originally argued, however, that Jason's statements were nonhearsay and circumstantial evidence of Jason's state of mind. (1CT 125.) The jury was instructed the evidence was offered to show "Jason's state of mind at the time the statements were made." (2CT 268.)

Inasmuch as the trial court found the statements admissible under section 1250, this was error, as the statements were ["testimonial hearsay"] to which no exception applied. Moreover, whether admitted as direct evidence of Jason's state of mind under section 1250 (hearsay subject to the state-of-mind exception to the hearsay rule) or as circumstantial evidence of state of mind (nonhearsay), Jason's extrajudicial statements that his father would be the death of him or his father would be the one to kill him, were irrelevant. In any event, they should have been excluded under section 352 because any

marginal relevance was substantilly outweighed by their prejudicial effect.

### A. Jason's Extrajudicial Statements That His Father Would Be The One To Take His Life Were Statements Of Fact Which Did Not Declare A Then-Existing Mental, Emotional Or Physical State Such That The Statements Were Inadmissible Under Section 1250

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) Hearsay is generally excluded "because . . . [of the] particular difficulties in assessing the credibility of statements made outside the jury's presence." (People v. Cudjo (1993) 6 Cal.4th 585, 608, citing Chambers v. Mississippi (1973) 410 U.S. 284, 298 [93 S.Ct. 1038, 35 L.Ed.2d 297].) The jury cannot observe the declarant's demeanor at the time of the out-of-court statement, and cannot properly assess the credibility of the statement. (Cudjo, at p. 508.) Hearsay is not admissible unless it qualifies under an exception to the hearsay rule. (People v. Lewis (2008) 43 Cal.3d 415, 497.)

### B. Jason's Statements That His Father Would Be The One To Take His Life Did Not Circumstantially Show Jason Harbored Any Fear of Petitioner

The contested statements not only failed to directly declare a mental or emotional state, the statements likewise did not circumstantially evidence any mental state such as fear. A statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. (People v. Ortiz, supra, 38 Cal.App.4th at p. 389.) It is not received for the truth of the matter stated, but rather whether is true of not, the fact such statement was made is relevant to a determination of the declarant's state of mind. (Ibid.)

However, a hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for

admitting the statement. (People v. Joablonski (2006) 37 Cal.4th 774, 820.) The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute. (Id, at pp. 820-821.) In any event, whether admitted under section 1250 as a hearsay exception, or as nonhearsay evidence, statements showing the declarant's state of mind are admissible only if they have some tendency to prove or disprove a disputed fact that is of consequence to the case. (People v. Riccardi, supra, 54 Cal.4th at pp. 814-815; see §§ 210, 350.)

Courts have found that a defendant's claim of self-defense may place the victim's state of mind at issue. (See People v. Romero (2007) 149 Cal.App.4th 29, 37-38.) Inasmuch as the evidence here was proffered to show Jason's then existing state of mind, namely that Jason was actually afraid of petitioner and thus to rebut petitioner's claim that Jason was the ["aggressor"] and he acted in self-defense (9RT 1692), the admission was error. This is because Jason's statement that petitioner would be the one to kill him had no tendency in reason to prove Jason harbored any fear of petitioner, rather, it was simply an assertion of fact by Jason that his father would one day kill him.

In this regard, Jason never expressed that he feared his father. To the contrary, there was evidence of numerous confrontations between petitioner and Jason, yet there was no evidence that Jason ever backed down, retreated or showed that he was afraid of his father in any manner. Instead, the evidence showed Jason hit petitioner with a stick (4RT 579), he physically restrained petitioner (5RT 774, 775), he was younger, stronger and significantly larger than petitioner (5RT 774), and he stood up

to petitioner in front of his friends (5RT 739, 791). On this record, Jason's statements that his father would be the one to kill him did not speak circumstantially to any fear of petitioner, and likewise had no tendency in reason to show that Jason was in any way apprehensive on the day of his death toward petitioner. Therefore admitting the evidence to show circumstantially that Jason acted in conformity with any fear of petitioner was error.

**C. Jason's Extrajudicial Statements That Petitioner Would Be The One To Kill Him Were More Prejudicial Than Probative Warranting Their Exclusion**

In any event, the extrajudicial statements should have been excluded under section 352 because any marginal relevance was substantially outweighed by their prejudicial. The prejudice referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (People v. Karis (1988) 46 Cal.3d 612, 638.) Here, because Jason's statements that his father would be the one to kill him did not, for the reasons discussed above, speak circumstantially to any fear of his father, but instead constituted an assertion of fact, the statements could only be considered for the truth of the matter asserted. A factual assertion that petitioner would be the one to kill Jason is the type of evidence likely to evoke an emotional bias against petitioner as an individual because it had the tendency to cast him as a very unsympathetic person.

**D. Admission Of The Evidence Was Prejudicial In This Case**

The People's case was entirely circumstantial and the case was close. There was substantial evidence which, it believed, corroborated petitioner's version of the events; namely, that Jason

was acting irrationally, petitioner was afraid of Jason, he felt threatened by Jason, and he fired in self-defense. At the very least, there was substantial evidence which could have supported a finding petitioner acted in unreasonable self-defense or in the heat of passion upon provocation. Jason's beyond the grave statements that petitioner would kill him could only serve to bolster the People's reliance on this Jason's statements during rebuttal argument compounded its prejudicial impact, where the prosecutor reminded the jury that Jason told Samantha, Annette, and Shelly that his father would take his life. (13RT 2410, 2411.) Therefore, absent the error, more than an abstract possibility of a more favorable result exists, such that the error cannot be deemed harmless. (College Hospital Inc., v. Superior Court, supra, 8 Cal.4th at p. 715.)

Petitioner's request for reconsideration must be granted because the District Court Magistrate Judge committed a fraud on December 18, 2019, when it denied the Petitioner's Federal Petition for Writ of Habeas Corpus. The Magistrate Judge knew that the trial Prosecutor presented testimonial hearsay in this case to convict petitioner illegally. Thus, a great injustice had been perpetrated against Petitioner. In the interest of justice, petitioner's conviction of second degree murder must be reduced to voluntary manslaughter or to involuntary manslaughter. Because the latter of the two, petitioner is guilty. This United States Supreme Court should grant the Certificate of Appealability.

## III

## THE TRIAL COURT WRONGFULLY PRECLUDED PETITIONER FROM PRESENTING RELEVANT EVIDENCE OF REMORSE IN SUPPORT OF HIS DEFENSE THEREBY DENYING PETITIONER HIS CONSTITUTIONAL RIGHT TO FULLY PRESENT A DEFENSE AND SUBJECT THE PEOPLE'S CASE TO MEANINGFUL ADVERSARIAL TESTING

During trial petitioner was precluded from introducing various pieces of evidence which spoke to both petitioner's mental state (i.e., lack of malice), and which supported petitioner's defense that Jason was the aggressor and petitioner acted in self-defense.

First, petitioner sought to introduce statements he made at the scene shortly after the shooting; namely, the statements, "I'm sorry," "Come on, Jason," and "Stay with me" (9RT 1503), which he made as he was holding Jason in his arms and crying. Petitioner sought to introduce this evidence in support of his defense that he did not act with malice, and also to rebut certain inferences raised by the People during the taking of evidence that petitioner did not care if his son died. (10RT 1746.) The trial court disallowed this evidence, finding evidence of remorse irrelevant, and further finding petitioner's statements were inadmissible hearsay. (7RT 1322-1227; 10RT 1758-1762.)

Second, the trial court precluded petitioner from testifying as to how he felt when he learned that Jason had died from his injuries, on the ground the evidence was irrelevant. (11RT 1896, 1897.) Petitioner contends evidence of remorse was relevant to the issue of his mental state and thus, relevant to the jury's determination of the degree of the offense. Furthermore, petitioner's statements at the scene immediately following the shooting were admissible pursuant to section 1240. For these reasons the trial court erred in precluding petitioner from introducing evidence of his extrajudi-

cial statements as well as his testimony that spoke to his remorse and regret for his conduct. The trial court's foreclosure of this evidence encroached on petitioner's ability to corroborate his theory of the case, thereby violating petitioner's constitutional right to a fair trial, to present a complete defense, and to subject the prosecution's case to meaningful adversarial testing. (See Crane v. Kentucky (1986) 476 U.S. 683, 690-691 [106 S.Ct. 2142, 90 L.Ed.2d 636] United States Constitution Fifth, Sixth and Fourteenth Amendments.; California Constitution article I, section 15.)

Judgments of conviction have been reversed where a defendant's ability to present relevant evidence in support of his only defense had been unduly restricted. (See generally Crane v. Kentucky, supra, 476 U.S. 683; People v. Thurmond (1985) 175 Cal.App.3d 865, 874.)

The People argued in limine that all of petitioner's statements made after the shooting should be excluded because they were self-serving and they did not qualify as spontaneous statements within the meaning of section 1240. (1CT 129; 1RT 79-80.) This included petitioner's 911 call which, after the defense strenuously litigated the issue, the trial court eventually allowed under section 1240. (1RT 85-87.) During these colloquies, defense counsel argued repeatedly that petitioner's demeanor was relevant to the issue to whether he acted with malice. (7RT 1321-1325; 9RT 1501.)

After defense counsel apprised that it would be putting on a defense (7RT 1302), the prosecutor objected to defense counsel's plans to call the responding officers to testify to petitioner's demeanor at the scene and statements he made at the scene when he was cradling his son, crying and emotionally upset. (7RT 1304-1307,

1321, 1322, 1324, 1327.)

Relevant here, the defense sought to introduce statements petitioner made in Deputy Provost's presence, including (1) He jumped on me, I shot my son (1CT 206), and (2) "I am sorry," "Come on, Jason," "Stay with me," and "Hang in there," which petitioner said while cradling Jason (9RT 1503). Defense counsel argued the evidence was highly relevant in light of the plethora of conduct and propensity evidence and the People's theory that petitioner was a cold-hearted disciplinarian. (7RT 1325.) Defense counsel also argued petitioner's statements made to Jason while he was cradling him were not hearsay and instead tended to negate malice and were relevant to the issue of self-defense. (7RT 1325, 1326, 1328.) Defense counsel argued the evidence showed an unexpected incident, and it negate intent to kill and was thus highly relevant. (7RT 1326.) Defense counsel further argued it would be grossly unfair for the trial court to exclude evidence of how petitioner acted and his state of mind at the time law enforcement arrived. (7RT 1323.) The prosecutor argued that whether petitioner loved his son and whether or not he had regret was irrelevant. (7RT 1307.)

Petitioner's Motion for reconsideration should be granted because the decision of the judges on December 18, 2019, was a fraud under Federal Rules of Civil Procedure Rule 60 (b) (3). The Magistrate Judge and the Judge ignored the law when they denied petitioner's Federal Petition for Writ of Habeas Corpus on December 18, 2019. Now petitioner requests that this Court grants his Motion for reconsideration and reduce the second degree murder conviction to voluntary manslaughter or to involuntary manslaughter.

### A. Petitioner's Statements And Feelings Of Remorse Spoke To His State Of Mind And Were Highly Relevant To The Issue Of Malice

Muder is "the unlawful killing of a human being . . . with malice aforethought." (Pen Code, § 187.) Malice aforethought is required for any murder. (In re Thomas C. (1986) 183 Cal.App.3d 786, 794-795; see Pen. Code, §§ 187-189.) Malice can be either express or implied. (Pen. Code, § 188.) It is express when the evidence shows that the defendant harbored a "deliberate intention" to kill. (Pen. Code, § 188; In re Thomas C., at p. 795.) It is implied when either (1) there was no "considerable provocation" from the victim, or (2) the circumstances of the killing show "an abandoned or malignant heart.) (Pen. Code, § 188.) Implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another. (People v. Knoller (2007) 41 Cal.4th 139, 143.) The standard is subjective, meaning, the defendant must have actually appreciated the risk involved. People v. Autry (1995) 37 Cal.App.4th 351, 358; see also Knoller, at p. 157 [defendant must know his conduct endangers another yet act with a conscious disregard for life].)

The issue of remorse is relevant to a murder defendant's mental state, here, malice aforethought. In People v. Michaels (2002) 28 Cal.4th 486, 528, the California Supreme Court recognized that while absence of remorse is irrelevant to prove that a defendant committed a homicide, it may indeed be relevant to the issue of a defendant's mental state, in determining the degree of the homicide or the existence of special circumstances. In People v. Burden (1977) 72 Cal.App.3d 603, 620, the reviewing court noted that, "A

defendant's lack of concern as to whether the victim lived or die died, expressed or implied, has been found to be substantial evidence of an 'abandoned and malignant heart' by the appellate courts of this state." There, the defendant was convicted of second degree murder on an implied malice theory following the starvation death of his five-month-old son. (Id. at p. 606.) Statements defendant made to police after the child's death that he knew the child was literally starving to death, but did nothing "because he 'just didn't care'" were relevant evidence supporting the jury's finding the defendant had acted with "'wanton disregard for human life'" in the weeks before the child's death. (Ibid.) Just as lack of remorse or concern is relevant to defendant's mental state, so too would the converse be true.

Here, Petitioner's statements, "I'm sorry," "Come on, Jason," "Stay with me," and "Hang in there," made minutes after the shooting evidenced his regret and remorse for having his son, and were therefore relevant to the jury's determination of whether petitioner committed murder. These statements evidenced petitioner's remorse, regret and concern for his son's welfare, and were relevant to Petitioner's defense that he did not act with a malignant heart. Petitioner's statements were therefore highly relevant to establish he neither intended to kill Jason, nor did he act with a conscious disregard for life when he shot Jason.

Likewise, Petitioner's testimony as to how he felt after he learned Jason had died of his injuries, spoke to petitioner's remorse as was therefore relevant to the issue of malice. The evidence would have shown petitioner was distraught and repentant about having shot Jason. It was error for the trial court to

preclude petitioner from testifying to how he felt after learning that Jason had died, where the testimony would have further established petitioner's remorse and anguish over his conduct.

Moreover, the prosecutor elicited testimony from Deputy Provost, suggesting that petitioner was doing nothing to tend to Jason's wounds or to save Jason's life, thus suggesting a lack of concern for Jason's welfare. (10RT 1751.) The jury was entitled to consider this evidence in deciding whether petitioner murdered Jason. (See People v. Burden, supra, 72 Cal.App.3d at p. 620.) The precluded evidence was therefore relevant to rebut the negative impression created by the prosecutor's questions. It was also relevant to rebut the People's theory that petitioner had wanted for years to kill his son. (7RT 1321.)

In sum, the precluded evidence was relevant to the issue of Malice. It was thus in turn critical to petitioner's defense that he did not murder Jason. The trial court's finding that this evidence was irrelevant was error.

The United States District Court committed fraud on December 18, 2019, when it denied Petitioner's Federal petition for Writ of Habeas Corpus. The fraud has been proven under Fed. Rules of Civ. Proc. Rule 60 (b) (3). The Second degree murder conviction must be reduced to voluntary manslaughter or to involuntary manslaughter because one of the two latter, petitioner is guilty.

**B. The Exclusion Of This Evidence Was Prejudicial And Violated Petitioner's Federal Constitutional Right To Present A Complete Defense**

Petitioner's defense rested on whether the jury believed Jason was the aggressor and whether petitioner acted with malice when

he shot Jason. The People's case of murder was circumstantial. Their case rested on the notion that petitioner was a violent and controlling man who shot Jason because he felt disrespected. (13 RT 2341, 2346-2349.) Evidence of petitioner's remorse and his concern for Jason's well being spoke to his mental state and the element of malice. The exclusion of evidence vital to a defendant's defense constitutes a denial of a fair trial in violation of constitutional due process requirements. (See Chambers v. Mississippi, supra, 410 U.S. at p. 302; accord, Crane v. Kentucky, supra, 476 U.S. at p. 691; U.S. Const. 5th, 6th, 14th Amends.)

IV

THE TRIAL COURT WRONGFULLY PRECLUDED PETITIONER FROM PRESENTING EVIDENCE OF JASON'S PRIOR ACT OF VANDALISM WHERE THE EVIDENCE SHOWED JASON'S PROPENSITY FOR VIOLENCE AND WAS RELEVANT TO PETITIOINER'S CLAIM OF SELF DEFENSE, THEREBY VIOLATING PETITIONER CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE

Petitioner case rested on self-defense and Jason's propensity for violence was central to petitioner's defense. As further evidence of Jason's propensity for violence, the defense sought to introduce evidence that as part of a domestic violence incident against Tashianna, Jason vandalized Tashianna's car several hours later with a baseball bat. The trial court excluded this evidence, finding inadmissible under section 1103, subdivision (b), as evidence of a character trait for violence, because section 1103 spoke only to instances of violence against a person, and not against property. (8RT 1449.) This was error. Nothing in the plain language of section 1103 limits evidence of a victim's character or a trait of character only to instances of violent conduct perpetrated against a person. In any event, the vandalism of Tashianna's car was part of the domestic violence against Tashianna. The evidence was also highly probative to petitioner's defense and showed Jason's propensity for sustained violence. The trial court therefore abused its discretion in excluding this evidence.

Moreover, the exclusion of this evidence significantly encroached on petitioner ability to corroborate his defense, thereby violating his constitutional right to due process, to present a complete defense and to subject the prosecution's case to meaningful adversary testing. (See Crane v. Kentucky, supra, 476 U.S. at

pp. 690-691; U.S. Const., 5th, 6th & 14th Amends; Cal. Const., art. I, § 15.)

Prior to the start of the defense case-in-chief, defense counsel indicated he would be eliciting from Tashianna evidence that Jason physically assaulted her. (8RT 1399.) The prosecutor was concern that Tashianna would testify to an incident when Jason returned the day after assaulting her to vandalize her car with a baseball bat, for which he was subsequently convicted of vandalism. (8RT 1398-1399.) The prosecutor argued, "I don't see any propensity for violence on an automobile as having any relevance for the 1103 argument. . ." and requested the portion of the incident be excluded. (8RT 1399-1400.) Defense counsel argued that the physical altercation took place at 2 a.m., and the vandalism followed at 8 a.m., such that the vandalism was part and parcel to and a continuum of the physical violence Jason visited upon Tashianna, and it showed Jason's propensity for violence. (8RT 1400, 1401, 1402, 1404, 1406, 1407.) Defense counsel argued it was relevant in two ways. First, it spoke to the pool cue incident the people introduced which occurred four days later and showed why Jason was mad and did not want Tashianna to take his daughter. (8RT 1400, 1403.) Second, it was relevant to the events on the day of the shooting where Jason and petitioner argued at Tracy's house, and Jason remained angry at his father when he went to get the ATV. (8RT 1446-1447.)

The trial court found Jason's physical altercation with Tashianna admissible under section 1103. (8RT 1399.) However, the trial court ruled the subsequent vandalism was inadmissible because it was perpetrated upon a thing, and not a person. (8RT

Defense counsel argued section 1103 which allows evidence of a victim's violent character makes no distinction between violence visited upon a person or an object. (8RT 1406, 1407.) Citing to People v. James (2010) 191 Cal.App.4th 478, defense counsel argued that particularly in a domestic violence situation, the destruction of personal property is a threat of violence to the owner of the property. (13RT 1442, 1443.) After protracted colloguy, and further research by the trial court, the trial court reiterated its ruling that section 1103 only spoke to instances of violence as it relates to aggression against a person, and not against property. (8RT 1449.) The trial court further found, even if its ruling was incorrect, the evidence was cululative and more prejudicial and thus precluded by section 352, where the trial court "already allowed three instances of 1103" involving Tashianna, and this would be a fourth. (8RT 1449, 1450.)

**A. The Preclusion Of The Evidence Was Prejudicial**

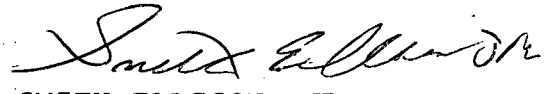
The trial court committed prejudicial error when it denied petitioner the opportunity to establish the gravity of Jason's propensity for violence, thereby precluding the jury from hearing and evaluating relevent evidence on petitioner only defense. The evidence was also relevant to the jury's determination of the degree of the crime, where it was also instructed on heat of passion manslaughter and imperfect self-defense. (2CT 285, 571.) The trial court's error therefore resulted in a violation of petitioner's Constitutional right to due process, a fair trial and to present a complete defense. (See Chambers v. Mississippi, supra, 410 U.S. at 302; accord, Crane v. kentucky, supra, 476 U.S. at p. 691 U.S. Const. 5th, 6th 14th Amends. Reversal under federal law is required.

## CONCLUSION

Petitioner requests that the Certificate Of Appealability should be granted in the interest of justice. Because he needs to appeal his wrongful conviction of second degree murder. Petitioner is only guilty of either voluntary manslaughter or involuntary manslaughter. The reason petitioner was convicted of second degree murder was because the trial prosecution presented irrelevant prejudicial evidence that it did not have to do anything with the crime in question. The second degree murder conviction is a void conviction. And this Court should fix it.

DATED: July 1, 2020

Respectfully submitted,



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