No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NESTOR ALEGRIA HERNANDEZ,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT
No. H046124

PETITION FOR A WRIT OF CERTIORARI (RULE 14)

Steven Schorr (SBN # 126312)
Law Office of Steven Schorr
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On behalf of Petitioner,
NESTOR ALEGRIA HERNANDEZ

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TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Pursuant to Rule 39 of the Supreme Court of the United States, petitioner, Nestor Hernandez, respectfully requests leave to file a petition for writ of certiorari in forma pauperis. In making this application, petitioner notes that he has proceeded in forma pauperis in state court and has been represented by appointed counsel in both the California Court of Appeal and the California Supreme Court. These facts are memorialized in the attached declaration of counsel.

Petitioner's declaration in support of this motion is attached hereto.

Law Office of Steven Schorr,
Attorney and Counselor

Respectfully submitted,

Dated: January 12, 2021

By: /s/ Steven Schorr

Attorney for Petitioner
Nestor Hernandez

Declaration of Steven Schorr

I am an attorney licensed to practice in California. I am a member of the bar of this court. I am the attorney of record for petitioner Nestor Alegria Hernandez.

The facts stated in this declaration are within my personal and firsthand knowledge. If called as a witness in this action, I could and would testify competently under oath to the following facts.

At present, petitioner is incarcerated in the California state penitentiary at San Quentin. Petitioner has been in custody since May 29, 2016.

On July 19, 2018, petitioner filed a notice of appeal. On September 24, 2018, I was appointed by the California Court of Appeal to represent petitioner. I have remained petitioner's counsel of record to this time.

Petitioner has proceeded in forma pauperis in state court. In support of this motion, I have attached hereto petitioner's "Affidavit Accompanying Motion For Permission To Appeal In Forma Pauperis."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 12th day of January, 2021, at Discovery Bay, California.

Law Office of Steven Schorr,
Attorney and Counselor

Respectfully submitted,

Dated: January 12, 2021

By: /s/ Steven Schorr

Attorney for Petitioner
Nestor Hernandez

Affidavit of Nestor Hernandez

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NESTOR HERNANDEZ, Petitioner,

VS.

STATE OF CALIFORNIA, RESPONDENT

AFFIDAVIT ACCOMPANYING MOTION FOR
PERMISSION TO APPEAL IN FORMA PAUPERIS

I, NESTOR HERNANDEZ, am the petitioner in the above-entitled case. In support of my motion to proceed in forma pauperis, I state that, because of my poverty, I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. sec 1746; 18 U.S.C. sec. 1621.)

Executed on: 12-24, 2020

Nestor Alegna Hernandez

(Signature)

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income Source	**Average monthly amount during the past 12 months**	**Amount expected next month**
	You	**You**
Employment	$ 0	$ 0
Self-employment	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0
Interest and dividends	$ 0	$ 0
Gifts	$ 0	$ 0
Alimony	$ 0	$ 0
Child support	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0
Unemployment payments	$ 0	$ 0
Public assistance (such as welfare)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly income	$ 0	$ 0

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
	N/A		

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
	N/A		

4. How much cash do you and your spouse have? $_____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
		$ 0	$ 0
N/A		$ 0	$ 0
		$ 0	$ 0

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	**Other real estate (Value)**	**Motor Vehicle #1 (Value)**
		Make & Yr. 0
	N/A	Model: 0
		Registration # 0

Motor Vehicle #2 (Val.)	**Other Assets (Value)**	**Other assets (Value)**
Make & Yr. 0		
Model: 0	N/A	
Registration #: 0		

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
	N/A	

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
	N/A	

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home mortgage payment) (include a lot rented for mobile home Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments) Homeowner's or renter's	$ 0 $ 0	$ 0 $ 0

Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments) (specify):_____	$ 0	$ 0
Installment payments	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Credit Card (name):_____	$ 0	$ 0
Department store (name):_____	$ 0	$ 0
Other:_____	$ 0	$ 0
Alimony, maintenance, and support, paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify):_____	$ 0	$ 0
Total monthly expenses	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? $ 0

If yes, state the attorney's name, address, and telephone number:

Note: The Attorney was contracted by my parents for me.

N/A

STEVEN SCHORR
P.O. Box 1931, DISCOVERY BAY, CA 94505
Tel. (925) 418-9540

11. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? $ 0.00

If yes, state the person's name, address, and telephone number:

N/A

12. Provide any other information that will help explain why you cannot pay the docket fee for your appeal.

I am in prison and have no income and no assets

13. State the address of your legal residence.

San Quentin State Prison
San Quentin, CA

Your daytime phone number: ( ) N/A

Your age: 38 Your years of schooling: College

Petition for Writ of Certiorari

QUESTIONS PRESENTED

1. Does California law violate the Equal Protection Clause of the Fourteenth Amendment by allowing jury instruction on involuntary manslaughter as a lesser included offense of murder in all murder prosecutions where substantial evidence supports such instruction, except for homicide prosecutions arising out of intoxicated driving?
2. In California murder prosecutions arising out of intoxicated driving, does the unavailability of jury instruction on the lesser included offense of involuntary manslaughter as a matter of state law violate the Due Process Clause of the Fourteenth Amendment ?

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal in case number H046124 appears as Appendix A.

The unreported order of the California Supreme Court denying a petition for review in case number H046124 appears as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on June 18, 2020. A timely petition for review was denied on August 26, 2020. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States 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 offence 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."

Section 1 of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A jury convicted petitioner Nestor Alegria Hernandez of second degree murder, California Penal Code section 187(a)(1)[1], driving under the influence of alcohol and causing injury to another, California Vehicle Code section 23153(a), and driving under the influence of alcohol with a blood alcohol level of 0.08% and causing injury.

[1] All statutory references herein are to California statutes and, specifically, to the California Penal Code unless otherwise noted.

California Vehicle Code section 23153(b); count 3. The jury found true allegations he had suffered two prior driving under the influence convictions, California Vehicle Code section 23152 (b), and had a blood alcohol level of 0.15% or more. § 23578. (1 CT 385, 387–388, 391; 9 RT 812–813.)

The court sentenced Hernandez to state prison for a total term of 15 years to life. (2 CT 465–466, 469; 10 RT 851.)

Hernandez appealed. (2 CT 471.) On appeal, he argued the court prejudicially erred by denying his request to instruct on involuntary manslaughter as a lesser included offense of murder. (AOB 27–54.) He specifically maintained California's exclusion of "acts committed in the driving of a vehicle" from its definition of involuntary manslaughter, see California Penal Code section 192(b), denied him (1) the equal protection of the laws and (2) his due process right to a fair trial. (AOB 28–49.) The Court of Appeal affirmed the judgment. (Appendix A; OPN 2, 17.)

Thereafter, petitioner filed a timely petition for review in the California Supreme Court on July 22, 2020. The petition for review raised the aforementioned contentions of federal constitutional error. (Petition for Review, pp. 8, 13–22.) On August 26, 2020, the California Supreme Court denied the petition. (Appendix B.) The judgment became final upon issuance of the remittitur on August 27, 2020.

STATEMENT OF FACTS

From roughly noon until 5:00 p.m. on May 29, 2016, petitioner Hernandez and his father, Gerardo Alegria, ate lunch at a restaurant where they each drank one beer. They then went to a second restaurant where they ate appetizers and each drank two beers. (3 RT 200–202, 208, 229–233.)

When they left the second restaurant, Hernandez was driving his black truck, and Alegria was a passenger in the front seat. (3 RT 172–173, 200, 270–271; 4 RT

342.) According to Alegria, Hernandez was "driving normally" when they approached an intersection and suddenly saw a car there, even though the traffic light facing them was yellow. (3 RT 216; see 3 RT 240.)

At about 5:30 p.m., Mark Nishizaki was stopped at a red light, facing west. (3 RT 151–154.) A green Honda Accord driven by Carmencita Manaois was stopped at the same intersection, facing north. (4 RT 335.) After waiting there for about a minute, the Honda slowly entered the intersection to make a left turn and proceed westward. (3 RT 154.) Nishizaki, who still had a red light, saw a black pickup truck driving east, but he could not tell the color of the traffic signals facing Manaois or the truck. (3 RT 155–156.) The truck "looked like it was going quite fast." (3 RT 153, 155.) It struck the Honda in the intersection without appearing to brake, slow down, or swerve to avoid hitting it. (3 RT 155,159.) The truck came to rest on light rail tracks; the Honda went off the road and down a slight embankment. (2 RT 77–79, 87, 95, 98, 101; 4 RT 330; see 3 RT 267.) The Honda's front end and driver's side were severely damaged in the collision. (3 RT 273.) Manaois was pronounced dead at the scene. (2 RT 98, 105–107; see 5 RT 546–548.)

Officer Kenia Soto spoke to Hernandez at the crash site, as well as in an ambulance and at the hospital. (4 RT 337–338, 346, 394.) He said the Honda pulled out in front of him to make a turn while the traffic light facing him was yellow. (4 RT 346–347, 405.) At the hospital, he said he had been at a bar in Sunnyvale and had consumed four to six bottles of beers. (4 RT 379.) He thought the other car was going fast when it pulled out of nowhere and turned in front of him. (4 RT 386–388.) He estimated he was going 35 to 40 miles per hour at the time of the collision. (4 RT 386.) A traffic investigator using high definition video calculated the truck was traveling 65 miles per hour when it hit the Honda. (5 RT 552, 559–565.) The speed limit there was either 40 or 45 miles per hour. (5 RT 565–566; but see 5 RT 563, 567; see also AOB 23, n. 6.)

Blood drawn from Hernandez about two hours after the accident had a blood alcohol concentration of 0.279 percent. (4 RT 365–369; 5 RT 458, 463–468, 483–487.) A toxicologist opined that a person matching Hernandez' relevant characteristics would have had a blood alcohol concentration of between 0.299 and 0.319 at the time of the collision and would have been "too impaired to drive a motor vehicle safely." (5 RT 505–512.)

Hernandez suffered a prior misdemeanor conviction in 2004 for driving with a blood alcohol concentration of 0.08 percent or more. See Cal. Veh. Code § 23152(b). (3 RT 255–259, 263–264; 4 RT 435–436, 438; 6 RT 599.) In 2012, he pled guilty to violating California Vehicle Code section 23152, subdivision (b) with a prior driving-under-the-influence conviction. (6 RT 599–600.)

Defense Case

Hernandez came to the United States from Mexico about 20 years before the accident. His parents remained in Mexico. He financially supported them for about seven years before bringing them to the United States and helping his father get a job. (6 RT 606–608.)

One of Hernandez' employers described him as someone who cared about and was very aware of his responsibility to others. (6 RT 615, 623.) A second employer said he was "a very good, caring, responsible human being." (6 RT 629.)

REASONS FOR GRANTING CERTIORARI

I. CALIFORNIA LAW VIOLATES THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BY REQUIRING ITS COURTS TO INSTRUCT ON INVOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE IN ALL MURDER PROSECUTIONS WHEN SUBSTANTIAL EVIDENCE WARRANTS BUT PRECLUDING SUCH INSTRUCTION, EVEN WHEN SUPPORTED BY SUBSTANTIAL EVIDENCE, SOLELY IN MURDER PROSECUTIONS WHERE INTOXICATED DRIVING RESULTS IN A HOMICIDE

A. Introduction

In *Beck v. Alabama*, 447 U.S. 625 (1980) *(Beck)*, this Court held that due process requires a state court to give a lesser-included offense instruction in capital cases "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction." *Id.* at 638. The Court perceived such a risk where the state "created an 'artificial barrier' preventing the jury from considering a non-capital verdict other than a complete acquittal." *Id.* The decision thereby established the "rule that a State may not erect a capital-specific, artificial barrier to the provision of instructions on offenses that actually are lesser included offenses under state law." *Hopkins v. Reeves*, 524 U.S. 88, 97–98 (1998).

Beck acknowledged that "the nearly universal acceptance of the rule [entitling defendants to a lesser included offense instruction] in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck*, 447 U.S. at 637. Nevertheless, the Court has never extended that safeguard to non-capital, murder prosecutions.

Respectfully, petitioner asks the Court to consider extending the rule announced in *Beck* to such prosecutions where state law creates an "artificial barrier" that

operates to preclude one class of murder defendant, but no other, from any possibility of receiving a lesser included offense instruction otherwise supported by the evidence.

California law invariably produces this result by allowing prosecution for second degree murder of defendants whose intoxicated driving results in death, see *People v. Watson*, 30 Cal.3d 290 (1981) *(Watson)*, but defining involuntary manslaughter to exclude "acts committed in the driving of a vehicle." See sec. 192, subd. (b). In this manner, it erects an "artificial barrier" that "enhances the risk of an unwarranted conviction" and thereby denies such defendants their right to due process and equal protection of the laws. Nevertheless, both in the unpublished decision in this case and in two published decisions, appellate courts in California have upheld the barrier in the absence of controlling federal authority to the contrary. See *People v. Wolfe*, 20 Cal.App.5th 673 (2018) (*Wolfe*); *People v. Munoz*, 31 Cal.App.5th 143 (2019) (*Munoz*).

Accordingly, there is a compelling reason for the Court to grant certiorari. It should do so since a California court "... has decided [these] important question[s] of federal law" in his case and the questions "ha[ve] not been, but should be, settled by this Court." U.S. Supreme Court Rules, rule 10, subd. (c).

B. Summary of Pertinent Law

California's trial courts are "required to give instructions on all lesser offenses necessarily included within the filed charges, when there is substantial evidence supporting a conviction for a lesser offense, regardless of whether the parties request such instructions or even oppose them." *People v. Breverman*, 19 Cal.4th 142, 154–155 (1998). State law has long-recognized that manslaughter, both voluntary and involuntary, is a lesser-included offense of murder. *People v. Sanchez*,

24 Cal.4th 983, 989 (2001) (*Sanchez*), citing, *inter alia*, *People v. Gilmore*, 4 Cal. 376 (1854); see also *People v. Thomas*, 43 Cal.3d 818, 824 (1987). Its statutes "... separate criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." *People v. Rios*, 23 Cal.4th 450, 460 (1990). Thus, California murder defendants are generally entitled to have their juries instructed on manslaughter where the evidence warrants.

In 1945, California first amended its manslaughter statute to provide for a special type of manslaughter based on deaths that result from the driving of a vehicle. Cal. Stats 1945, ch 1006, sec. 1. The statute imposed graduated penalties of increasing severity depending on whether the driver was intoxicated and whether or not he or she drove with or without gross negligence. See secs. 191.5, 192. As a consequence, California's general manslaughter statute no longer applies to vehicular manslaughter. Sec. 192, subd. (b).

In 1981, the California Supreme Court approved charging persons whose intoxicated driving resulted in death with second degree murder under an implied malice theory. *Watson*, 30 Cal.3d at 295–299. The state's current statute defines gross vehicular manslaughter while intoxicated to preclude any judicial construction that would "prohibit[] or preclud[e] a charge of murder ... upon facts showing malice consistent with the holding [in] ... *Watson*...." Cal. Penal Code sec. 191.5(e).

In *Sanchez*, *supra*, the state's high court further held that gross vehicular manslaughter while intoxicated is not a lesser included offense to murder charged under the implied malice theory authorized in *Watson*. The court reasoned that the elements of vehicular manslaughter, which necessarily include the use of a vehicle, are not strictly included in the elemental definition of murder. *Sanchez*, 24 Cal.4th at 997.

More recently, California appellate courts have held that the exclusion of the more general forms of manslaughter from the offense of vehicular manslaughter, as provided for in section 192, subdivision (b), does not have the effect of denying *Watson* murder defendants the equal protection of the laws or the due process right to a fair trial. *Wolfe*, 20 Cal.App.5th at 684–690; *Munoz*, 31 Cal.App.5th at 160–162.

In *Wolfe*, the court held instruction on involuntary manslaughter as a lesser included offense to a *Watson* murder was correctly refused "because the crime does 'not apply to acts committed in the driving of a vehicle.'" *Wolfe*, 20 Cal.App.5th at 686, quoting Cal. Penal Code sec. 192(b). The court reasoned the statutory language prohibiting the lesser offense did not violate equal protection principles. *Id.* at 684–690.

Munoz similarly rejected an equal protection challenge, in part because it found the vehicular manslaughter statutes rationally related to a legitimate legislative purpose. *Munoz*, *supra*, 31 Cal. App. 5th at 160–162. The court further determined that excluding manslaughter instructions in vehicular manslaughter cases "does not implicate a fundamental right." *Id.* at 160, 162. It was able to reach this conclusion since this Court "... 'has expressly refrained from recognizing a federal constitutional right to instructions on lesser included offenses in noncapital cases.'" *Id.* at 160, quoting *People v. Breverman*, *supra*, 19 Cal.4th at p. 165.

C. California Denies *Watson* Murder Defendants the Equal Protection of the Laws

In his state appeal, petitioner maintained the trial court erroneously denied his request for instruction on involuntary manslaughter as a lesser included offense of implied malice murder. AOB 27–54. He further asserted the error denied him equal

protection under the law and his due process right to a fair trial. U.S. Const., Amends. V, XIV. He argued *Wolfe* and *Munoz* were wrongly decided. (AOB 46–50; ARB 22–24.) The Court of Appeal rejected these contentions. (OPN 6–9.)

To state an equal protection claim in California[2], a litigant must make a threshold showing that a classification adopted by the state affects in an unequal manner two or more groups of persons similarly situated for purposes of the law challenged. *Cooley v. Superior Court* 29 Cal.4th 228, 253 (2002). If the litigant makes this threshold showing, the court considers whether the Legislature has a constitutionally sufficient reason for treating the groups differently. *Munoz*, *supra*, 31 Cal.App.5th at 162. Courts subject laws to heightened scrutiny if they affect a fundamental right. *Ibid.* If not, the law in question is generally upheld as long as the disparate treatment is rationally related to a legitimate governmental purpose. *Ibid.*

In this case, the Court of Appeal found it unnecessary to address whether petitioner had made the threshold showing. (OPN 7.) In its view, the claim would fail even if the statutory scheme treated similarly situated defendants differently because (1) defendants do not have a fundamental right to an involuntary manslaughter instruction and (2) the statutory scheme has a rational basis. (OPN 7–8.)

In light of this determination, a grant of certiorari in this case is necessary to settle the important federal question of whether the U.S. Constitution guarantees murder defendants a fundamental right to instruction on lesser included offenses in non-capital cases. Resolution of this issue in the specific context presented by this case is needed because the combined effect of section 192, subdivision (b) and the

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[2] Equal protection analysis under the California Constitution is substantially the same as under the United States Constitution. *Manduley v. Superior Court*, 27 Cal.4th 537, 571–572 (2002).

implied malice, second degree murder theory authorized under *Watson* creates an "artificial barrier" to jury consideration of involuntary manslaughter as a lesser included offense to a *Watson* murder. This result denies *Watson* murder defendants equal protection of the laws since all other murder defendants are entitled to have their juries consider lesser included offenses before reaching a verdict. *People v. Breverman*, *supra*, 19 Cal.4th at 154–155.

By definition, a *Watson* murder necessarily involves driving a vehicle while intoxicated. Under *Sanchez* , the crime most closely related factually to a *Watson* murder — gross vehicular manslaughter while intoxicated — is not necessarily included in the generic crime of "murder." Under section 192, subdivision (b), the general manslaughter statute excludes killings committed in the driving of a vehicle from the definition of "manslaughter." As a result, reading subdivision (b) of section 192 to preclude involuntary manslaughter instruction in a *Watson* murder case categorically denies defendants in such cases a chance to have their juries consider any alternative to convicting them of second degree murder or acquitting them.

In this important respect, *Watson* defendants are treated differently from all other murder defendants in California. The latter are entitled to instruction on applicable manslaughter theories as a lesser offense to murder where the evidence warrants. Only *Watson* murder defendants are barred from ever receiving such instruction even when substantial evidence otherwise supports a lesser included offense theory. By operation of law, therefore, these murder defendants, and only these defendants, are denied protection against an "all-or-nothing" outcome. Thus, review is necessary to ensure that the full panoply of constitutional protections are accorded to all persons in the State of California who are charged with and tried for murder under the implied malice theory authorized under *Watson*.

Accordingly, and for all of the foregoing reasons, this Honorable Court should grant the writ .

II. REVIEW IS NECESSARY TO DETERMINE IF CALIFORNIA LAW DENIES DUE PROCESS OF LAW TO DEFENDANTS CHARGED WITH MURDERS INVOLVING INTOXICATED DRIVING BY PRECLUDING JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER IN SUCH PROSECUTIONS

By precluding any possible lesser offense instruction in *Watson* prosecutions, the interplay of statutory and case law in California described in the preceding section results in an unfair "all or nothing" choice that creates an "artificial barrier" to a reliable outcome. The dissenting justice in *Sanchez* recognized this. She criticized "... the majority's holding ... [that] trial courts may not instruct on vehicular manslaughter as a lesser included offense of murder" because it meant that juries in those cases would "... face the difficult and troubling all-or-nothing choice between a murder conviction and an acquittal." *Sanchez*, *supra*, 24 Cal.4th at 1001, dis. opn. of Kennard, J. Consequently, the decision, in her view, would "... deny juries 'the opportunity to consider the full range of criminal offenses established by the evidence.' [Citations.]" *Ibid.* The subsequent holdings in *Wolfe* and *Munoz* further cemented into place the unavailability of a lesser offense option in *Watson* cases by eliminating involuntary manslaughter as a lesser included crime to such murders.

Under *Beck*, consigning a defendant's jury to such a "troubling all-or-nothing choice" amounts to a clear due process violation in capital cases. *Beck*, *supra*, 447 U.S. at 638. Thus, a grant of certiorari is necessary to resolve whether placing a jury in that position similarly violates due process protections in non-capital murder prosecutions.

In petitioner's state appeal, he argued it is fundamentally unfair to consign only *Watson* defendants to juries that will always, and necessarily, face an all-or-nothing decision when weighing their culpability for murder. (AOB 31–36.) The "all or

nothing" choice resulting from the "artificial barrier" to a lesser offense instruction erected by state law deprived him of a fair trial with a reliable outcome for the same reason it does so in *Beck*, he maintained.

The Court of Appeal rejected the contention. In part, it based its ruling on a determination that the statutory scheme does not implicate a fundamental right. (OPN 9.) It reasoned that, absent infringement of a fundamental right, the Legislature may remedy the problem of drunk-driving homicides as it sees fit. (OPN 9–10.)

Thus, the issue herein squarely presents the question of whether the federal constitution guarantees defendants in non-capital murder prosecutions a fundamental right to instruction on necessarily included lesser offenses as a matter of due process. On this question, the federal circuit courts of appeals are divided. The Third Circuit has extended *Beck* to non-capital cases. See *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027–28 (3rd Cir. 1988). The Fifth, Ninth, Tenth and Eleventh Circuits have all declined to do so. See *Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *Trujillo v. Sullivan*, 815 F.2d 597, 602 (10th Cir. 1987); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987). Taking a middle approach, the First, Sixth, Seventh and Eighth Circuits have held that the failure to give an instruction on a lesser-included offense does not violate the Constitution unless it amounts to a fundamental miscarriage of justice. See *Robertson v. Hanks*, 140 F.3d 707, 710 (7th Cir. 1998), citing *Nichols v. Gagnon*, 710 F.2d 1267, 1269 (7th Cir. 1983); *Tata v. Carver*, 917 F.2d 670, 671 (1st Cir. 1990); *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990) (en banc); *Deberry v. Wolff*, 513 F.2d 1336, 1338 (8th Cir. 1975). In light of this significant split in authority, the Court should grant certiorari to settle the question.

Accordingly, petitioner respectfully submits the Court should grant his petition and issue writ of certiorari to address and resolve this question: Does the federal constitution's due process guarantee afford murder defendants in non-capital prosecutions the right to jury instructions on all necessarily included lesser offenses supported by substantial evidence?

CONCLUSION

This Honorable Court should grant certiorari on the presented questions. Certiorari is warranted and necessary. Granting it would allow the Court to consider and determine whether California's legal regime violates the equal protection and due process rights of *Watson* murder defendants.

Law Office of Steven Schorr,
Attorney and Counselor

Respectfully submitted,

Dated: January 12, 2021

By: /s/ Steven Schorr

Attorney for Petitioner
Nestor Hernandez

Appendix A

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NESTOR ALEGRIA HERNANDEZ, Defendant and Appellant.	H046124 (Santa Clara County Super. Ct. No. C1638927)

Defendant Nestor Alegria Hernandez was convicted by jury trial of second degree murder (Pen. Code § 187, subd. (a)(1)), driving under the influence of alcohol and causing bodily injury (Veh. Code, § 23153, subd. (a)), and driving with a blood alcohol concentration of 0.08 percent or more and causing bodily injury (Veh. Code, § 23153, subd. (b)). The jury also found true allegations that defendant had suffered two prior driving under the influence of alcohol convictions (Veh. Code, § 23152, subd. (b)), and that defendant had a blood alcohol concentration of 0.15 percent or more (Veh. Code, § 23578). The trial court sentenced defendant to 15 years to life in state prison.

On appeal, defendant argues that the trial court prejudicially erred: (1) by denying his request to instruct on involuntary manslaughter as a lesser included offense of murder, (2) by declining a defense request to modify CALCRIM No. 520 [First or Second Degree Murder With Malice Aforethought], and (3) by sustaining a hearsay objection to

testimony by defendant's father about a statement made by defendant. We find no prejudicial errors and affirm the judgment.

I. Background

A. Current Offenses

On May 29, 2016, at around noon, defendant and his father went to a restaurant to eat lunch. They then went to another restaurant to eat "[s]ome appetizers" and drink beer. At some point, they left the second restaurant. Defendant was driving his black Ford F-150 truck.

At about 5:30 p.m., Mark Nishizaki was driving west on Tasman Drive in Santa Clara. He stopped at a red traffic light at the intersection of Tasman Drive and Lick Mill Boulevard. A green Honda Accord was also stopped at the intersection. The Honda was heading north on Lick Mill Road. The Honda waited at the intersection for about one minute, and then moved slowly into the intersection to make a left turn onto Tasman Drive, heading west. There were no other vehicles in the area, and Nishizaki still had a red light. Nishizaki then noticed a black pickup truck driving eastbound on Tasman Drive. The truck "looked like it was going quite fast." Nishizaki's traffic light was still red. Approximately three to six seconds after first seeing the truck, the truck struck the Honda in the intersection. The truck did not appear to brake, slow down, or swerve to avoid hitting the Honda.

The Honda landed at the bottom of an embankment. Its front end and driver's side were severely damaged in the collision. The driver, Carmencita Manaois, was pronounced dead at the scene. Firefighters had to use hydraulic sheers to remove Manaois's body from the passenger side of the vehicle because the passenger compartment was "severely smashed" from the collision.

The truck came to rest on its side. Bystanders pulled defendant and his father out of the truck. When police officers arrived on the scene, defendant's father was lying on the ground unconscious with a bleeding head injury. Defendant "was hovering" in the area. He was "visibly . . . upset" and "hysterical."

Officer Kenia Soto spoke with defendant at the crash site, when defendant was in an ambulance, and at the hospital. Their interactions were recorded by Officer Soto's body camera, and the recording was played at trial. Defendant was initially hysterical and crying and did not answer any questions. After calming down in the ambulance, defendant told Officer Soto that the traffic light had been yellow, and that the Honda had pulled out in front of him to make a turn. He also admitted to having been at a bar in Sunnyvale. He did not remember at what speed he had been driving.

At the hospital, defendant stated that he had been drinking beer at a bar in Sunnyvale and had consumed between four and six beers. He now said that he had been driving at between 35 and 40 miles per hour. Defendant also said he "thought" that the other vehicle "was going fast" as it "pulled out of nowhere" and turned in front of him. Defendant, however, admitted to being at fault for the accident. Defendant stated "he didn't want his father to drive, because his father had been drinking, so he drove" after they left the restaurant. Officer Soto asked defendant if he had considered calling someone to pick them up, or calling "a taxi or Uber." "He said, no, he didn't think about that." Officer Soto asked defendant about the color of the traffic signal. Defendant said he could not remember the color of the signal.

Officer Soto also spoke with defendant's father at the hospital. Defendant's father said that he had been drinking with defendant at a bar, but that he could not remember anything about the collision. Officer Soto asked defendant's father if he "felt safe . . . being the passenger and hav[ing] the defendant drive the vehicle home from the bar." He replied, "no, not really."

At around 7:27 p.m. on the day of the accident, a phlebotomist at Valley Medical Center drew a sample of defendant's blood. The blood alcohol concentration of the sample was 0.279 percent. An expert in toxicology and forensic alcohol analysis determined that a person matching defendant's relevant characteristics would have had a blood alcohol concentration of between 0.299 and 0.319 at the time of the collision. The expert calculated that to reach that blood alcohol concentration, such an individual would have had to consume between nine and 12 "standard" drinks.[1] The expert opined that such an individual "would be too impaired to drive a motor vehicle safely."

The intersection involved in the crash was monitored by high definition surveillance cameras. A traffic investigator used the high definition video to calculate that defendant's truck was travelling 65 miles per hour when it hit the Honda. The speed limit was 40 miles per hour.

The traffic signal at Tasman Drive and Lick Mill Boulevard was "on demand," meaning that the signal changes color when it senses traffic waiting. Before turning from green to red in any direction, it was programmed to show about four and a half seconds of yellow. For added safety, the traffic signal was also programmed to show between a half-second to a full-second of red in all directions before it showed green in any direction.

B. Prior Offenses

At around 12:40 a.m. on October 30, 2004, Santa Clara County Sheriff Lieutenant Dale Unger observed a vehicle travelling at a high rate of speed. Lieutenant Unger followed the vehicle at a speed of 90 miles per hour. The vehicle was swaying into the shoulder and into the adjacent lane. Lieutenant Unger stopped the vehicle, which was

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[1] A "standard" drink was defined as "one and a half ounces of 40 percent alcohol," "5 ounces of wine" at "12 percent" alcohol, or "12 ounces of beer" at "five percent" alcohol.

driven by defendant. Defendant's breath had a strong odor of alcohol, he had "glassy . . . or glazed eyes," and he had difficulty performing the finger dexterity test. He failed three field sobriety tests and was arrested for driving under the influence. He later pleaded guilty to misdemeanor driving with a blood alcohol concentration of 0.08 percent or more (Veh. Code, § 23152, subd. (b)) and misdemeanor driving without a valid driver's license (Veh. Code, § 12500, subd. (a)).

At around 1:40 a.m. on April 7, 2012, California Highway Patrol Officer Janean Reynolds responded to a report of a collision. Officer Reynolds found that a silver Jeep Liberty had collided with a concrete island in the middle of the road and continued to drive on the dirt shoulder for 300 to 400 feet, before going down a 10- to 12-foot dirt embankment. The Jeep's engine was still running when Officer Reynolds arrived. It appeared to Officer Reynolds that the driver, defendant, had tried to drive away from the scene before becoming stuck in an area covered with brush and small trees. Defendant failed multiple field sobriety tests and a preliminary alcohol screening, and was arrested. He later pleaded guilty to misdemeanor driving with a blood alcohol concentration of 0.08 percent or more (Veh. Code, § 23152, subd. (b)), and admitted to having suffered a prior driving-under-the-influence conviction.

C. Defense Case

Defendant's father testified that defendant came to the United States from Mexico about 20 years ago. Defendant financially supported his parents in Mexico for six or seven years. Defendant eventually brought his parents to the United States and helped his father get a job. Defendant's father testified that the traffic signal was yellow when they passed through it.

An individual who employed defendant as an electrician described him as someone who cared about others and was very aware of his responsibility to others.

Another person who had also employed defendant described him as "a very good, caring, responsible human being."

II. Discussion

A. Equal Protection: Involuntary Manslaughter Instruction

Defendant argues that his equal protection rights were violated when the trial court refused his request to instruct on involuntary manslaughter.

1. Background

"Generally, involuntary manslaughter is a lesser offense included within the offense of murder. [Citation.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) However, Penal Code section 192, subdivision (b), which defines the crime of involuntary manslaughter, states: "This subdivision shall not apply to acts committed in the driving of a vehicle." Thus, "although involuntary manslaughter is usually a lesser included offense of murder [citations], in the context of drunk driving it is not." (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1082.)

Notwithstanding Penal Code section 192, subdivision (b), in the trial court defendant requested an instruction on involuntary manslaughter as a lesser included offense of second degree murder. He contended that not giving an involuntary manslaughter instruction violated his equal protection rights, and that there was no constitutionally valid reason to treat a defendant who uses a vehicle as an instrumentality of murder differently than a defendant who uses some other instrument. He also contended that failing to instruct on involuntary manslaughter violated his due process rights. The trial court declined to give the requested instruction.

2. Analysis

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,'

which is essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439.) Equal protection under the state Constitution is substantially the same as equal protection under the federal Constitution. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-572.) An equal protection challenge requires a threshold showing that "'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) If this threshold showing is made, "'a court must next ascertain whether the Legislature has a constitutionally sufficient reason to treat the groups differently.'" (*People v. Munoz* (2019) 31 Cal.App.5th 143, 162 (*Munoz*).) "As a general matter, laws 'will be upheld as long as there is any "'"rational relationship between the disparity of treatment and some legitimate governmental purpose,"'" even if the rational basis for that law never was articulated by—or even relied on by—the Legislature.'" (*Ibid.*) "However, if the law 'affects a fundamental right,' . . . courts will subject it to heightened scrutiny." (*Ibid.*)

Defendant contends that "members of his class of implied malice murder defendants" who used a vehicle to commit the unlawful killing "are denied any opportunity to have their jury instructed on manslaughter or involuntary manslaughter as lesser-included offenses of implied malice murder." This is in contrast, he further contends, with "the class of defendants charged with implied malice murder based upon acts committed by means other than driving a vehicle," who "are not subjected to an absolute ban on manslaughter or involuntary manslaughter as lesser-included offenses."

We need not address whether plaintiff has shown disparate treatment of similarly situated groups. Even if we were to assume that the statutory scheme treats similarly situated defendants differently, defendant's equal protection claim still fails because: (1)

defendant does not have a fundamental right to an involuntary manslaughter instruction, and (2) there is a rational basis for the statutory scheme.

Defendant identifies the fundamental right at issue as "personal liberty," because it exposes defendant "to a potentially longer prison term" than other similarly situated defendants. However, our high court has held that a defendant "'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.'" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (*Wilkinson*).) In addition, the United States Supreme Court has "expressly refrained from recognizing a federal constitutional right to instructions on lesser included offenses in noncapital cases." (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) Contrary to defendant's arguments, to find that the asserted right was a fundamental right "would be incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment." (*Wilkinson*, at p. 838.)

Because the statutory scheme at issue does not involve a fundamental right, we consider whether there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Here, the Legislature could reasonably conclude that not allowing for involuntary manslaughter in cases where a vehicle is the instrumentality of murder would further the legitimate governmental purpose of discouraging drivers from driving while intoxicated. (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 690 ["[T]he Legislature's charging scheme is rationally related to a legitimate governmental purpose: to appropriately punish—and also perhaps to discourage—people from engaging in the highly dangerous conduct of driving under the influence."]; *Munoz*, *supra*, 31 Cal.App.5th at p. 160 [concluding that "the Legislature reasonably could distinguish unintentional homicides committed in the driving of a vehicle from other unintentional homicides."].) Because there is a rational relationship

between the statutory scheme and a legitimate governmental purpose, defendant has failed to establish a violation of his equal protection rights.

B. Due Process: Involuntary Manslaughter Instruction

Defendant argues that the trial court's refusal to give the jury an involuntary manslaughter instruction violated his due process rights under the federal and state Constitutions. He contends that it was fundamentally unfair for the jury to be presented with an "all or nothing" choice of either convicting him of second degree murder or acquitting him.

"The federal and state Constitutions prohibit the state from depriving any person of life, liberty, or property without due process of law. (U.S. Const., 14th Amend., § 1, Cal. Const., art. 1, § 7.)" (*Wolfe*, *supra*, 20 Cal.App.5th at p. 691.) "'"'Unless application of a statute impinges upon "fundamental rights,"'"' it survives a substantive due process challenge so long as '"'the application is procedurally fair and reasonably related to a proper legislative goal.'"' [Citation.]" (*Munoz*, *supra*, 31 Cal.App.5th at p. 159.) "The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398 (*Hale*).)

Defendant's due process challenge to the exclusion of vehicular homicides from the involuntary manslaughter statute fails for the same reasons as his equal protection challenge. As we have explained, the statutory scheme at issue does not implicate a fundamental right. Further, the statutory scheme is reasonably related to the legitimate governmental purpose of punishing and deterring the operation of a motor vehicle while intoxicated. In addition, there is another valid rationale for creating the separate vehicular manslaughter statutes, namely to create a wider range of penalties for an all-

too-common form of homicide. The fact that, as a consequence of this statutory scheme, courts no longer must instruct on either involuntary or vehicular manslaughter as a lesser included offense of murder committed while driving a vehicle does not render the scheme invalid. Absent the infringement of a fundamental right, the Legislature may address a problem as it sees fit despite the "availability of less drastic remedial alternatives" without violating due process rights. (*Hale*, *supra*, 22 Cal.3d at p. 398.)

In short, the exclusion of vehicular homicides from the involuntary manslaughter statute does not violate due process, and the trial court did not err in declining to give an involuntary manslaughter instruction.

C. CALCRIM No. 520

Defendant argues that the trial court erred by declining his request to modify CALCRIM No. 520 to clarify the meaning of implied malice. He argues that this error violated his federal due process rights.

1. Background

CALCRIM No. 520 provides that a conviction for first or second degree murder requires proof that the defendant committed an act that caused the death of another person and proof of malice aforethought, which may be express or implied. As modified for this case, the instruction explains that a defendant acts with implied malice if: (1) "he intentionally committed an act;" (2) "the natural and probable consequences of the act were dangerous to human life;" (3) "at the time he acted, he knew his act was dangerous to human life;" and (4) "he deliberately acted with conscious disregard to human life." The instruction also explains: "An act causes death if the death is the direct, natural and probable consequence of the act and death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (Italics added.)

Defendant requested to add the following pinpoint language to the instruction: "For the purpose of defining the second element of implied malice, an act is dangerous to life when there is a high probability it will result in death." The court rejected defendant's request to modify the instruction. The court determined that the phrase in the CALCRIM instruction—"the natural and probable consequences of the act were dangerous to human life"—reflected the same standard as in defendant's proposed instruction. In light of this, the court did not see "a good reason to depart from the CALCRIM" instruction.

2. Analysis

A defendant "has a right to an instruction that pinpoints the theory of the defense." (*People v. Mincey* (1992) 2 Cal.4th 408, 437, italics omitted.) The trial court may, however, "properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 30.) We apply the de novo standard of review when determining whether the trial court erred in refusing to give a requested pinpoint instruction. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

Our Supreme Court has explained that the concept of implied malice can be phrased in two ways. (*People v. Watson* (1981) 30 Cal.3d 290, 300.) First, implied malice exists "when a person does '"'an act, the natural consequences of which are *dangerous to life*, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'". . . '" (*Ibid.*, italics added.) Stated differently, malice may be implied when a person "does an act with a *high probability that it will result in death* and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]" (*Ibid.*,

italics added; see also *People v. Dellinger* (1989) 49 Cal.3d 1212, 1219 [the two definitions of implied malice state "one and the same standard"].)

In *People v. Nieto Benitez* (1992) 4 Cal.4th 91 (*Nieto Benitez*), the California Supreme Court rejected the argument that the standard implied malice instruction was faulty because it did not state "a requirement that [the] defendant commit the act with a *high probability* that death will result. [Citation.]"[2] (*Id.* at p. 111.) The *Nieto Benitez* court confirmed that the instruction stated an "equivalent" standard by requiring that the defendant commit "an act whose 'natural consequences' are dangerous to life." (*Ibid.*; see also *People v. Cleaves* (1991) 229 Cal.App.3d 367, 378 (*Cleaves*) [the phrase "'high probability of death'" and the phrase "'dangerous to human life'" are "synonymous" and "alternative definitions for the same concept"].)

Here, defendant argues that the trial court should have given the requested instruction to clarify "what it means for an act to have natural and probable consequences that are 'dangerous to human life.'" He contends that *Nieto Benitez* differs from the instant case because the defendant in that case did not object to the language or request any clarification of the instruction. This distinction, however, is not meaningful. Although *Nieto Benitez* did not involve a request for a pinpoint instruction but rather the claim that such an instruction should have been given sua sponte, *Nieto Benitez* confirms that the phrase "dangerous to human life," as used in CALCRIM No. 520 to describe the nature of the required act, is "synonymous" with the phrase "'high probability of death,'" which defendant requested that the court give. (*Cleaves*, *supra*, 229 Cal.App.3d at

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[2] The instruction considered in *Nieto Benitez* was CALJIC No. 8.31, which provided: "'Murder of the second degree is the unlawful killing of a human being when: [¶] 1. The killing resulted from an intentional act, [¶] 2. *The natural consequences of the act are dangerous to human life*, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act it is not necessary to prove that the defendant intended that the act would result in the death of a human being.'" (*Nieto Benitez*, *supra*, 4 Cal.4th at p. 100, italics added.)

p. 378.) Because the requested pinpoint instruction was duplicative of the language already in the CALCRIM instruction, the trial court did not err in declining to give the pinpoint instruction.[3]

D. Hearsay Objection

Defendant argues that the trial court erroneously sustained a hearsay objection during the defense's cross-examination of defendant's father. Defendant contends that the elicited evidence was admissible as nonhearsay, circumstantial evidence of defendant's state of mind. Even if it was hearsay, defendant further contends that it was admissible as an exception to the hearsay rule under Evidence Code section 1250. The Attorney General concedes that the trial court "misapplied the hearsay rules," but contends that the statement was nevertheless inadmissible hearsay evidence, that it was not relevant for the nonhearsay purpose offered, and that even if excluded in error, the error was harmless.

1. Background

Defendant's father was called as a witness for the prosecution. During cross-examination, defense counsel asked him, "Do you recall [defendant], as you got up to leave, telling you that he would drive, because he thought you had too much to drink?" The prosecutor objected on hearsay grounds. Defense counsel asserted that the purpose of eliciting the evidence was "not for the truth, but goes to [defendant's] state of mind," namely, that it was circumstantial evidence of defendant's subjective intent in choosing to drive. The trial court sustained the hearsay objection.

The parties later discussed the ruling outside the presence of the jury. Defense counsel elaborated that the evidence he attempted "to elicit goes directly to [defendant's]

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[3] Because there was no instructional error under state law, defendant's federal due process claim is unavailing.

state of mind; that is, if he's expressing that he's driving in order to keep his father from driving, because he was too dangerous, because he drank[, then] [t]hat is circumstantial evidence that his intent was not one that can be described by implied malice." The trial court explained, however, that the evidence was subject to exclusion under Evidence Code sections 1251 and 1252. Under Evidence Code section 1251, subdivision (a), the court determined that because "the declarant is the defendant . . . [h]e's not unavailable as required by that section." The court further found that "the statement was not made under circumstances that indicate . . . trustworthiness." The court noted that defendant's father had never previously testified to this at trial or at the preliminary examination, or mentioned it when he was being interviewed by police. The court also cited the "witness's attitude when testifying," "[t]he fact that [defendant's father] has no driver's license and wouldn't have been driving, and the fact that [defendant's father] testified that in his mind . . . defendant was fine to drive and/or only had two beers" at the restaurant. According to the court, "all the circumstances indicate that this is the statement that has the potential to be fabricated," and thus it is not "trustworthy enough to be admitted for the purpose stated."

2. Analysis

We apply "the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question . . . ." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) "'[W]hen a trial court's decision rests on an error of law, that decision is an abuse of discretion.' [Citation.]" (*People v. Patterson* (2017) 2 Cal.5th 885, 894.)

"'Hearsay evidence' 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." (Evid. Code, § 1200, subd. (a).) "'Under this definition . . . a statement that is

offered for some purpose other than to prove the fact stated therein is not hearsay.'" (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068.)

Defendant contends that the challenged statement was not hearsay. We disagree. The statement was hearsay because it was an express out-of-court statement of defendant's belief and it was offered to prove the truth of that belief. Defense counsel asked defendant's father if he recalled defendant "telling [him] that he would drive, because he thought [defendant's father] had too much to drink." Defendant argues that the statement was not offered "for its truth but rather its relevance as non-hearsay, circumstantial evidence going to [defendant's] mental state at the time he decided to drive." However, the only way the statement was relevant for that purpose was if *the statement was true*—i.e., that defendant *actually* believed that he should drive because his father was too intoxicated to drive. The challenged statement was predicated on defendant's stated belief that he "thought" his father had too much to drink and should not drive. Thus, the trial court correctly concluded that the statement was hearsay.

Evidence Code section 1250 provides a hearsay exception for "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) . . . ." In order for this exception to apply, the statement must not have been made under circumstances indicating a "lack of trustworthiness" (Evid. Code, § 1252), and must be offered either "to prove the declarant's state of mind, emotion, or physical sensation," or "to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).) A prerequisite to this exception is that the declarant's mental state or conduct be placed in issue. (*People v. Noguera* (1992) 4 Cal.4th 599, 621.) In a murder prosecution predicated on implied malice, a defendant's "state of mind" is placed in issue, as the prosecution must prove an "intent to do a dangerous act" (*People v. Spector*

(2011) 194 Cal.App.4th 1335, 1396), "the natural consequences of which are dangerous to human life." (*People v. Swain* (1996) 12 Cal.4th 593, 602.)

Here, the statement was admissible under the exception to the hearsay rule for statements of a declarant's then existing state of mind. The challenged testimony concerned a statement made by defendant that he would drive "because he *thought* [defendant's father] had too much to drink." (Italics added.) Under Evidence Code section 1250, the statement was admissible as it was offered to prove defendant's state of mind, which was at issue because the second degree murder charge required proof that defendant acted with implied malice.

In finding the testimony inadmissible, the trial court misapplied Evidence Code sections 1251 and 1252, neither of which were applicable. First, Evidence Code section 1251 involves statements of a "declarant's *previously existing* mental or physical state," and is applicable only to mental or physical states that existed "prior" to the statement. (Italics added.) In this case, defendant's statement was about his *then existing* state of mind. Accordingly, Evidence Code section 1251, subdivision (a)'s requirement that the declarant be "unavailable" was inapplicable. Evidence Code section 1250 has no corresponding unavailability requirement. Second, under Evidence Code section 1252, "[e]vidence of a statement is inadmissible . . . if the statement was made under circumstances such as to indicate its lack of trustworthiness." This requirement applies to the declarant, not to the witness who relates the statement to the trier of fact. (*People v. Riccardi* (2012) 54 Cal.4th 758, 821, abrogated on another point by *People v. Rangel* (2016) 62 Cal.4th 1192.) In this case, the trial court erroneously determined that the statement was inadmissible because the witness, defendant's father, lacked credibility and thus the statement lacked trustworthiness.

Although the trial court erred in excluding the evidence, the error was not prejudicial. "It is . . . well settled that the erroneous admission or exclusion of evidence

does not require reversal except where the error or errors caused a miscarriage of justice. [Citations.] '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

Here, it is not reasonably probable that the jury would have reached a result more favorable to defendant had defendant's statement, as testified to by his father, been admitted. Significantly, a virtually identical statement came into evidence when Officer Soto testified that defendant had told her "he didn't want his father to drive, because his father had been drinking, so he drove." Defense counsel referred to this evidence during closing argument, reminding the jury that there was evidence that defendant drove because he thought his father was too drunk to drive. The erroneously excluded statement was therefore cumulative of other admitted evidence. Under the applicable standard of review, the erroneous exclusion of defendant's statement to his father was harmless.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Elia, J.

Appendix B

Court of Appeal, Sixth Appellate District - No. H046124

S263469

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

NESTOR ALEGRIA HERNANDEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice