No. 21-5596

IN THE

SUPREME COURT OF THE UNITED STATES

In Forma Pauperio

Carl William Frazier — PETITIONER
(Your Name)

vs.

The State of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Carl William Frazier
(Your Name)
California Medical Facility
PO Box 2000, BK-5374 N237L
(Address)
Vacaville, CA, 95696-2000
(City, State, Zip Code)
9165591827
(Phone Number)
My wife Christina

QUESTION(S) PRESENTED

1. In a murder case, may a defendant's inherently assaultive felonious conduct - ie, the use of a knife for the purpose of unreasonagle self-defense - afford a gasis for a sun suponte instruction on the lesser-included offence of invouluntary manslaughter, when there is substantial trial evidence that the defendant used the knife intending to keep a rapidly-approaching attacker (the victim) at bay but not intending to hit the attacker with the knife, and the defendant's failure to exercise "due caution and circumspection" resulted in an unintended, single, fatal knife wound?

2. In a murder case, does prejudicial, reversible error necessarily result from a trial court's failure to instruct sua sponte a jury on how to consider the mental state of a defendant who exhibits the absence of malice via a lack of "due caution and cicumspection" (criminal negligence) - when supported by substantial trial evidence - as an intermediate mental state (supporting a conviction for invoulntary manslaughter) between malice aforethought (supporting a conviction for murder) and actual innocence (supporting acquittal of murder)?

3. Did the trial court prejudicially violate petitioner's Fifth, Sixth, and Fourteenth Amendment rights by failing to instruct sua sponte the jury on the lesser - included offense of invouluntary manslaughter based on a petitioner's criminal negligence, which instruction was supported by substantial trial evidence?

4. Were petitioner's federal - due - process rights voilated because there was insufficient evidence to support a jury finding of deliberation and premeditation as to the murder charge?

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:

RELATED CASES

Federal Cases

Chapman v. California (1967) 386 U.S. 18 [87 S.Ct. 824, 17 l.Ed 2d 705]

Hedgpeth v. Pulido (2008) 555 U.S. 57 [129 S.Ct. 530, 172 L.Ed.2d 388]

Hicks v. Oklahoma (1980) 555 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175]

Jackson v. Virginia (1979) 443 U.S. 307 99 S.Ct. 2781, 61 L.Ed.2d 560]

Kentucky Dept of Corrections v. Thompson (1989) 490 U.S. 454 [109 S.Ct 1904, 104 L.Ed.2d 506]

Neder v. United States (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35]

Olim v. Wakinekona (1983) 461 U.S. 838 [103 S. Ct. 1741, 75 L.Ed.2d 813]

O'Sullivan v. Boerckel (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1]

State Cases
In re Christian S. (1994) 7 Cal. 4th 768

State Cases
In re Christian S. (1994) 7 Cal. 4th 768

People v. Abilez (2007) 41 Cal. 4th 472

People v. Anderson (1968) 70 Cal.2d 15

People v. Barton (1995) 12 Cal.4th 186

People v. Blakeley (200) 23 Cal. 4th 82

People v. Boatman (2013) 221 Cal.App.4th 1253

People v. Breverman (1998) 19 Cal.4th 142

People v. Brothers (2015) 236 CalApp.4th 24

People v. Bryant (2013) 56 Cal.4th 959

People v. Bryant (2013) 222 Cal.App.4th 1196

People v. Burroughs 1994) 35 Cal.3d 824

People v. Chun (2009) 45 Cal.4th 1172

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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

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

The opinion of the United States court of appeals 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 United States district 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.

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

The opinion of the highest state court to review the merits appears at Appendix D 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 _____ 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

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

The date on which the United States Court of Appeals decided my case was _____.

[ ] 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 05/18/2021. A copy of that decision appears at Appendix D.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Review is being sought herein, pursuant to rule 8.500 (b) (1) of the California Rules of Court, in order to secure uniformity of decision and/or to settle the important questions of California law that are posed in Issues 1 and 2.

In People v. Burroughs (1984) 35 Cal.3d 824, overruled on another ground in People v Blakeley (2000) 23 Cal. 4th 82, this Court declared: "We agree that the only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a Non inherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (Burroughs, supra, 35 Cal.3d at p. 835.) "'Due caution and circumspection' within the meaning of section 192 is equivalent to criminal negligence, which is conduct that is "'such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in other words, a disregard of human life or indifference to consequences."' (People v. Penny (1955) 44 Cal.2d 861,879.)" (Burroughs, supra, 35 Cal.3d at p 835, fn.9, italics added.)

In Blakel, this Court held that "when a defendant, acting with conscious disregard for life and the knowledge that the conducts is life-endangering, unintentionally but unlawfully kills while having an unreasonable but good faith belief in the need to act in self-defense," the defendant is guilty of voluntary manslaughter. (Blakeley, supara, 23 Cal4th at pp. 85, 88-89,91 (maj. Opn. Of Kennard, J.), italics added.) "in his dissenting opinion in case, Justice Mosk contends that a defendant who kills in unreasonable self-defense may sometimes be guilty of involuntary manslaughter. We have no quarrel with this view." (Id. At p 91 (maj. Opn.), bold italics added.)

In his dissent in Blakeley, Justice Mosk said:\"[A}n actor who entertains an actual, but unreasonable, belief in imminent danger of death or great bodily injury may happen not to harbor malice aforethought implied in a wonton disregard for human life. Wantonness, at least, may be lacking. To quote Flannel's 2 categorical statement....:"[M}allice [aforethought],' including, of course, implied malice aforethought, "cannot coexist with such [a} ...belief"...To quote Christian S.,3 which is categorical as well: A person "who acts with" an "actual belief in the necessity for self-defense does not act with the ...requir3ed" wantonness."

(Blakeley, supra, 23 Cal.4th at p. 99, fn. 2 (dis. Opn. Of Mosk, j.) origi Justice Mosk continued:

That an actual, but unreasonable, belief in imminent danger of death or great bodily injury may prove to be preclusive with respect to the mental state required for voluntary manslaughter, namely, a state of mind that amounts in fact to malice aforethought, leads to no untenable result. Surely, it does not grant any immunity to any actor who commits an unlawful killing. For practically by definition, an actor who entertains such belief acts "without due caution and circumspection" (Pen. Code, S 192, subd. (b).) Hence if he is guilty of nothing else, he must be guilty of involuntary manslaughter.

In People v. Bryant (2013) 56 Cal. 4th 959 ("Bryant 1"), this Court concluded that :a killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter." (Bryant I, supra, 56 Cal.4th at p. 970, italics added.) The Court reasoned:

STATEMENT OF THE CASE

Solely for the purposes of this Petition for Review (and subject to the objections in the rehearing petitin regaurdering the objections in the rehearing petition regarding the Opinion's omission or misstatement of material facts or issues), petitioner adopts the statements of the case and facts set forth in the "Background" section 2-7, of the Opinion. (Es. A, Opn., pp.2-7.)

Because there was insufficient evidence to satisfy the deliberation/premeditation requirement for first-degree murder, petitioner's federal due-process rights were violated, and the Court should modify the judgement to reduce the Count 1 conviction to second-degree murder.

The prosecution failed to sustain its burden of proving, beyond a reasonable doubt, each and every element required for conviction of first-degree murder with deliberation-and premeditation (Count 1), as is required by the due-process clauses of the Fourteenth Amendment, and of article I, sections 7, 15 and 24 of the California Constitution.5 (U.S. Const., 14th Amend.; Cal. Const., art. I, ss7,15& 24; Jackson v Virginia (1979) 443 U.s. 307, 317-320, 324, fn. 16 [99 S.Ct. 2781, 61 L.Ed.2d 560]; People v Rowland (1992) 4 Cal.4th 238, 269; People v. Jimenez (2019) 35 Cal.App.5th 373,391-392.) For the reasons which follow, based on the entire record, there was insufficient evidence to support the requirement that pettitioner deliberated and premeditated the murder of the victim (Curtis). Hence, the Supreme Court should modify the judgement to reduce the Count 1 crime from first-degree murder to second-degree murder.

A. The Anderson factors for deliberation and premeditation are not satisfied. 6

When viewed through the Anderson "optic," the trial evidence does not suffice to support the requirements for deliberation and premeditation:

As to the first Anderson factor or guideline, there is no evidence of any "planning" activity" "intended to result in [] the killing" of the victim (Curtis). (Anderson, supra, 70 Cal.2d at pp. 26-27.) There is no direct or circumstantial evidence, and no reasonable inference to be drawn from any trial evidence, either that petitioner brought along a knife with him, with the intent to kill Curtis, when driving to pick up a stranded and cold Curtis (and his "girlfriend" Castro); or that petitioner ever formed any intent to kill (or even harm or hit) Curtis before picking him pu. (See e.g., People v. Williams (2018)23 Cal.App.5th 396, 411.)

circumspection, inflicted an unintended, single, and fatal knife wond, the trial court should have instructed sua sponte on involuntary manslaughter.

Looking at the trial evidence in the light most favorable to the defense (People v. Millbrook: (2014) 222 Cal.App.4th 1122, 11137; People v. Turk (2008) 164 Cal.App.4th 1361, 1368, fn. 5; see also People v. Mentch (2008) 45 Cal.4th 274, 290), there was substantial trial evidence that petitioner believed he needed to continue to protect himself, without the benefit of his knocked-off glasses, from his rapidly-approaching attacker (Curtis), who was yelling out the intent to "whoop your ass," in the utter darkness outside of petitioner's crashed car. Petitioner song knife solely to ward off the attack.

Substantial evidence supported the sua sponte instruction on involuntary manslaughter

Viewed in the light most favorable to petitioner, the trial evidence supported a sua sponte instruction on involuntary manslaughter:

There was no prior "bad blood" or altercation of any kind between petitioner and victim. Petitioner, Curtis, and Castro spent at least an hour together, without incident, in petitioner's car, smoking and being under the influence of crack cocaine. The victim's autopsy revealed he had about three times the amount of cocaine metabolite that petitioner had in his. (1 RT 250-255, 291.)

When petitioner insisted that he needed to go home and get some sleep before rising for a job in the morning, and he needed to drop of Curtis and Castro, Curtis wanted to keep driving around and looking for more cocaine, became verbally and then physically belligerent, jumping atop petitioner, while petitioner was driving, causing petitioner's car to crash into bushes by a residential intersection. (3RT 726-731, 738, 760, 763-767, 836.)

Petitioner's criminally-negligent and circumspection." (AOB, pp. 97-98.) (Penny, supra, 44 Cal.2d at p. 879; Burroughts, supra, 35 Cal.3d at p. 835 & fn.9; Bryant I, supra, 56 Cal.4th at p. 966; Brothers, supra, 236 Cal.App.4th at p. 31; see also People v. McGee (1947) 31 Cal.2d 229, 238 ["if defendant, as he testified, discharged the pistol with intent to frighten, and not to shoot deceased, and such act was done in the exercise of defendant's right of self-defense, he could be found guilty of involuntary manslaughter."] italics added; People v. Benavides (2005) 35 Cal. 4th 69, 103 [explaining McGee.].)

Reversible federal constitutional and state-laws errors occurred.

The given instructions failed to inform the jury that it could not convict petitioner of murder, or voluntary manslaughter, with malice aforethought, and that it could only convict him of involuntary manslaughter for an "unlawful killing," if the prosecution failed to prove, beyond a reasonable doubt, malice aforethought- either express malice (specific intent to kill) or implied malice (conscious disregard for life). (Calcrim No. 580; (2020 ed.) p.357 [Imperfect self-defense is a 'mitigating circumstance' that 'reduces an international unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such homicide.'...However, evidence of imperfect self-defense may support a finding of involuntary manslaughter, where the evidence demonstrates the absence of (as opposed to the negation of) the elements of malice."]. Thus, the jury was never told, inter alia, that it had the further option of convicting petitioner of a criminal offense - I.e., involuntary manslaughter – instead of having to acquit him of (and set him free), if it did not find the requisite malice aforethought for, the greater offenses of murder and voluntary manslaughter.

When viewed through the Anderson "optic," the trial evidence does not suffice to support the requirements for deliberation and premeditation:

As to the first Anderson factor or guideline, there is no evidence of any "planning" activity" "intended to result in [] the killing" of the victim (Curtis). (Anderson, supra, 70 Cal.2d at pp. 26-27.) There is no direct or circumstantial evidence, and no reasonable inference to be drawn from any trial evidence, either that petitioner brought along a knife with him, with the intent to kill Curtis, when driving to pick up a stranded and cold Curtis (and his "girlfriend" Castro); or that petitioner ever formed any intent to kill (or even harm or hit) Curtis before picking him pu. (See e.g., People v. Williams (2018)23 Cal.App.5th 396, 411.)

The only solid and credible evidence (and reasonable inferences therefrom) in the People's case in chief concerning why, in the early morning hours, petitioner went to the trouble of picking up Curtis (instead of going back to sleep before going to work later in the morning), was that a fellow crack-cocaine user (Curtis) know to petitioner called and offered to put some money in petitioner's pocket in consideration for a ride, and that two of them might score and used "crack" cocaine together. (1RT 110-112, 114, 120,164,166, 184-185; 2RT 392-393, 401, 553-555, 566-569, 581; 3RT 627-630, 652-654.)

As to the second Anderson factor, there is no evidence of any "motive" for petitioner to kill (or even to harm) Curtis based on their "prior relationship and/or conduct." (Anderson, supra, 70 Cal.2d at p.27.) In her various accounts to police investigators and at trial, Castro consistently described petitioner as a "friend" of Curtis, and she said the two men were being "friendly" with one another in the car up until after they smoked together "crack" supplied by petitioner, and after they sought out more "crack' in the Empress Street area, near the tail-end of the ride around 5AM (Rt11, 113, 122, 188;2RT 388, 392-393, 553 565; I_CT 231.)

The record is devoid of any "motive" evidence of any "bad blood" or "beef" between the two men predating the incident. (See e.g., People v. Rivera (2019) 7 Cal.5th 306,325, People v. Wear (2020) 44 Cal.App.5th 1007, 1029.) That Curtis and petitioner spent almost a couple of nonviolent hours together, during the wee hours, looking for crack cocaine to buy and use together, between the time that petitioner picked up Curtis and Castro at the AM/PM store and the time of Curtis' death, speaks volumes regarding the lack of any prior motive on the part of the petitioner to kill Curtis.

As to the thrid Anderson factor, there is no evidence of any "facts about the nature of thek illing" from which the jury could reasonably infer that "the manner of killing was so particular exacting that [petitioner] must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (Anderson, supra, 70 Cal.2d at p.27.)

Incontrovertible and objective medical-expert evidence established that Curtis sustained, and died from, a single knife wound that caused a 3 ¼-inch-wide, "horizontal" "incisional" exterior wound or "laceration" - and not a "stab" wound (I.e., a wound whose interior depth is much greater than its length on the skin) - in the left side of the torso. (1RN 265-266, 272-274, 279, 290, 292-294; 3RT 374.) (See People v. Osband (1996) 13 Cal.4th 622, 682 [victim sustained a "stab wound" and not a "laceration"

(I.e. "as if [the victim] had brushed or pushed against a knife blade held parallel to the skin")].) The particular physical characteristics of Curtis; knife wound were also consistent with the explanation in Osband, supra, 13 Cal.4th at p.682, of a "laceration")as distinguished from a "stab") resulting from the victim "brush[ing] or push[ing] against a knife blade held parallel to the skin." there is no evidence that the petitioner the "targeted the victim's chest and heart.'

Further evidence of the lack of any "calculation" on the part of petitioner was the absence of petitioner's prescription glasses at the time of Curtis' fatal knife wound. Logically, someone who is missing glasses needed to see clearly another person at close range and in the dark (and see whether that person is or is not holding any weapon) at the critical moment of using a knife against that person has not made "a cold, calculated decision to kill." More reasonably likely explanations than a cold calculation are either: (1) that the knife is being used for self-protection (whether or not justified by the circumstances), or (2) that the knife is being used during "an unconsidered explosion of violence" (Pride, supra, 3 Cal.4th at pp. 247-248) or as "the result of mere unconsidered or rash impulse hastily executed." (People v. Thomas (1945) 25 Cal.2d 880, 900-901).

Here, the killing of Curtis occurred only after Curtis' violence inside of the car knocked petitioner's much –needed prescription glasses off his head, and petitioner was left to defend himself, using his blurry vision, outside the car. When the stabbing occurred, petitioner still did not have his glasses on. (1RT 231.) When the stabbing occurred, petitioner still did not have his glasses on. (1RT 203.) According to Castro, a "distraught" petitioner told her he could not dial 911 on his cell phone because "I can't see, I don't have my glasses," and asked for her help; Castro dialed the cell phone and handed it back to him to talk to the 911 operator. (1RT 144, 203; 2RT 559-560, 579-580; 3RT 643-644.)

Thus, without the benefit of clear vison, petitioner's swinging of the knife from side to side, in the space between Curtis and him, that caused a single side wound, cannot reasonably constitute "facts about the nature of the killing" from which the jury could reasonably infer that "the manner of killing was so particular and exacting that [petitioner] must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reson' which the jury can reasonably infer from facts of type (1) or (2)." (Anderson, supra, 70 Cal.2d at p.27.)

B. The victim's own unprovoked, violent provocations inside and outside of appellant's car sparked "an unconsidered explosion of violence" by petitioner that resulted in the victim's death.

Other circumstances beyond the Anderson factors also point to Curtis bringing on his own death by suddenly initiating unprovoked violence upon petitioner while petitioner was driving: The victim's provocations clearly sparked "an unconsidered explosion of violence' by petitioner and a killing that was not "calculated." (Pride, supra, 3 Cal.4th at pp. 247-248.)

Castro consistently said that it was her "boyfriend" Curtis alone who initiated unprovoked and sudden violence in the car: While petitioner was driving with his seat belt on and the car was still moving, Curtis leapt from the front passenger seat on top of petitioner, pinned him down, and got him in a "choke-hold" or "head lock."7 (1RT 128, 192-196, 213-214; 2RT 194-295, 402, 410, 556, 572-573, 575, 582; 3RT 632-635, 655-656.)

Because there is substantial evidence that, without intending to hit the victim with the knife, petitioner swung the knife solely to ward off his rapidly-advancing attacker and, without due caution or

an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life." (Id. At p. 970)

The Bryant Court declined to decide an alternative contention, not considered in the Court of Appeal, that "because assault with a deadly weapon is not an inherently dangerous felony, the trial court erred in failing to instruct the jury on the theory of involuntary manslaughter recognized in Burroughs, supra, 35 Cal.3d 824 [.]' (Bryant I, supra, 56 Cal.4th at pp. 970-971.)

In her concurring opinion in Bryant, Justice Kennard explained why "a killing during an assault with a deadly weapon is involuntary manslaughter." (Bryant I, supra, 56 Cal.4th at pp. 972-974 (conc. Opn. Of Kennard,J.) "[T]he felony of assault with a deadly weapon is not listed in section 189's enumerated felonies. Nor is that offense a Non assaultive felony inherently dangerous to life; rather, it is an assaultive felony to which, Chun4 said, the second degree felony-murder rule does not apply." (id. At p. 973 (conc. Opn. Of Kennard, J.).) "A killing during an assault with a deadly weapon can be murder if the prosecution proves that the defendant acted with malice aforethought, but the circumstances that a killing occurs during an assault with a deadly weapon does not make the killing murder. Because assault with a deadly weapons is not one of the felonies [specified in section 198]." (id. At p. 973 (conc. Opn. Of Kennard, J.), original italics.)

In the post-remand case in people v. Bryant (2013) 222 Cal.App.4th 1196 ("Bryant II"), a Court of Appeal concluded that "it is undisputed that there is no authority holding that an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of involuntary manslaughter." (Bryant II, supra, 222 Cal.App.4th at pp. 1200, 1206, bold italics added.) "[E]ven assuming that the jury instruction that Bryant proffers ...is a correct statement of the law, under binding authority, the trial court had no sua sponte duty to provide such instruction in this case." (Id. At pp. 1200-1201.) Under Flannel, supra, 25 Cal.3d at p. 681, the legal concept in the defense-sought instructions had "inadequate elucidation" and thus could not be considered a general principle of law requiring a sua sponte instruction. (Bryant II supra, 222 Cal.App.4th at pp. 1200, 1205-1206 [citing Bryant I, supra, 56 Cal.4th at p. 975 (conc. Opn. Of Kennard,J.)].)

After Bryant II another Colurt of Appeal has held that :when the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser include offense [of murder], even when the killing occurs during the commission of an aggravated assault." (People v. Brothers (2015) 236 Cal.App4th 24,35)

The Brothers court pointed to this Court's decisions in Burroughs and Bryant I as support for the proposition that section 192 does "encompass an unintentional killing in the course of a Non inherently dangerous felony committed without due caution of circumspection." (Brothers, supra, 236 Cal.App.4th at p. 31 [citing Burroughs, supra, 35 Cal.3d at p. 835, and Bryant I, supra, 56 Cal.4th at p.966].)

Under the authority of Chun and Bryant, "when the underlying felony is an assaultive crime, the assault merges with the homicide; and application of the felony murder rule is prohibited." (Brothers, supra, 236 Cal.App.4th at p.31 [citing Chun, supra, 45 Cal.4th at p. 1200, and Bryant I, supra, 56 Cal4th at p.966].)

The Brothers court took note of the holding in Bryant II that "[a]ssuming, without deciding, that an involuntary manslaughter instruction was warranted by the evidence, ... there was no sua sponte duty to

give the instruction because the rule had not been well clarified or understood prior to Bryant [1]." (Brothers, supra, 236 Cal.App4th at p.33 [explaining Bryant II, supra, 222 Cal.App.4th at p. 1205.)

The Brothers court agreed with the attorney general's "technically correct" contentions that Bryant I did not reach the issue of whether "a homicide committed without malice during the course of an inherently dangerous felony not otherwise amounting to felony murder was involuntary manslaughter"; and that Justice Kennard's concurring opinion in Bryant I "is not controlling." (Brothers, supra, 236 Cal.App.4th at p. 33.)

"However, if an unlawful killing in the course of an inherently dangerous felony without malice must be manslaughter (People v. Hansen [(19940] 9 Cal.4th [300'] 312) and the offense is not voluntary manslaughter (Bryant [I], supra, 56 Cal.4th at p. 970), the necessary implication of the majority's decision in Bryant is that the offense is involuntary manslaughter." (Brothers, supra, 236 Cal.App.4th at pp. 33-34, italics added.)

"Accordingly, an instruction on involuntary manslaughter must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felon." (Brothers, supra 236 Cal.App4th at p. 34) '"Such instructions are required only where there is "substantial evidence" from which a rational jury could conclude" the defendant committed the lesser, but not the greater, offense." (Id. At p. 34.)

Here, the Court of Appeal strongly implies that a defendant who is using a knife in unreasonable self-defense and thereby is engaging in "inherently dangerous assaultive felony conduct" is "satisfying the objective component of implied malice as a matter of law" and, therefore, cannot exhibit the requisite subjective mental state required for involuntary manslaughter. (Opn., pp. 13-14; Order denying rehearing, p.2.) the direct appeal has put squarely before the Court of Appeal substantial trial evidence of petitioner's subjective lack of malice and lack of "due caution and circumspection."

In short, the Supreme Court is being asked here to clear up this doctrinal confusion in decisional law and to declare that a sua sponte duty to instruct on involuntary manslaughter does exist in a murder case involving substantial evidence of an inherently dangerous assaultive felony being committed without express or implied malice and without due caution or circumspection; and to decide further that a trial court's failure to carry out that sua sponte instructional duty under such posited circumstances constitutes reversible state law and/or federal constitutional errors.

As to Issues 3 and 4, the petition is also being filed to exhaust state-reviewing-court remedies for federal habeas corpus purposes. (Cal. Rules of Court, rule 8.508; O'Sullivan v. Boerckel (1999) 526 U.S. 838, 843 [119 S.Ct. 1728, 144 L.Ed.2d 1].)

2(People v Flannel (1979) 25 Cal.3d 688.)

3(In re Christian S. (1994) 7 Cal.4th 768.)

(Blakeley, supra, 23 Cal.4th at pp. 98-99 (dis. Opn. Of Mosk, J.), italics added.)

4(People v. Chun (2009) 45 Cal.4th 1172, 1188-1189.)

REASONS FOR GRANTING THE PETITION

Petition should be granted because there was insufficient evidence to satisfy the deliberation/premditation requirement for first-degree murder, petitioner's federal due-process rights were violated. The Anderson factors for deliberation and premeditation were not met. The victim's own unprovoked vilent provocation inside and outside of the appellant's car sparked "an unconsidered explosion of vilence" by petitioner that resulted in his own death. There is submstatial evidence that without indending to hit the victim with the knife, petitioner woung the knife solely to ward off his rapidly advancing attacker and, without due caution or circumspection, inflicted an unintended, single, and fatal knife wound, the trial court should have instructed sua sponte on involuntary manslaughter.

Substantial evidence supports the sua sponte instruction on involuntary manslaughter. Reversible federal consitiuional and state law erors occurred.

This case shows that the law is being applied incosistantly when it comes to sua sponte instruction to the jury.

Review is being sought herein, pursuant to rule 8.500 (b) (1) of the California Rules of Court, in order to secure uniformity of decision and/or to settle the important questions of California law that are posed in Issues 1 and 2.

In People v. Burroughs (1984) 35 Cal.3d 824, overruled on another ground in People v Blakeley (2000) 23 Cal. 4th 82, this Court declared: "We agree that the only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a Non inherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (Burroughs, supra, 35 Cal.3d at p. 835.) "'Due caution and circumspection' within the meaning of section 192 is equivalent to criminal negligence, which is conduct that is "'such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in other words, a disregard of human life or indifference to consequences.'" (People v. Penny (1955) 44 Cal.2d 861,879.)" (Burroughs, supra, 35 Cal.3d at p 835, fn.9, italics added.)

In Blakel, this Court held that "when a defendant, acting with conscious disregard for life and the knowledge that the conducts is life-endangering, unintentionally but unlawfully kills while having an unreasonable but good faith belief in the need to act in self-defense," the defendant is guilty of voluntary manslaughter. (Blakeley, supara, 23 Cal4th at pp. 85, 88-89,91 (maj. Opn. Of Kennard, J.), italics added.) "in his dissenting opinion in case, Justice Mosk contends that a defendant who kills in unreasonable self-defense may sometimes be guilty of involuntary manslaughter. We have no quarrel with this view." (Id. At p 91 (maj. Opn.), bold italics added.)

In his dissent in Blakeley, Justice Mosk said:\"[A}n actor who entertains an actual, but unreasonable, belief in imminent danger of death or great bodily injury may happen not to harbor malice aforethought implied in a wonton disregard for human life. Wantonness, at least, may be lacking. To quote Flannel's 2 categorical statement....:"[M}allice [aforethought],' including, of course, implied malice aforethought, "cannot coexist with such [a} ...belief"...To quote Christian S.,3 which is categorical as well: A person "who acts with" an "actual belief in the necessity for self-defense does not act with the ...requir3ed" wantonness."

(Blakeley, supra, 23 Cal.4th at p. 99, fn. 2 (dis. Opn. Of Mosk, j.) origi Justice Mosk continued:

That an actual, but unreasonable, belief in imminent danger of death or great bodily injury may prove to be preclusive with respect to the mental state required for voluntary manslaughter, namely, a state of mind that amounts in fact to malice aforethought, leads to no untenable result. Surely, it does not grant any immunity to any actor who commits an unlawful killing. For practically by definition, an actor who entertains such belief acts "without due caution and circumspection" (Pen. Code, S 192, subd. (b).) Hence if he is guilty of nothing else, he must be guilty of involuntary manslaughter.

In People v. Bryant (2013) 56 Cal. 4th 959 ("Bryant 1"), this Court concluded that :a killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter." (Bryant I, supra, 56 Cal.4th at p. 970, italics added.) The Court reasoned: "A defendant who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either

Moreover, the trial court's failure to instruct with CALCRIM No. 580, in the face of substantial evidence supporting these instructions, "violated petitioner's constitutional rights to have the jury determine every material issue" (People v. Abilez (2007) 41 Cal.4th 472, 515; People v. Cook (2006) 39 Cal.4th 566,596.)

The prosecution's case was not an open and shut one: The jury labored in its deliberations about 6 hours over two days. (1 CT 272-275, 300.) (People v. Woodward (1979) 23 Cal.3d 329, 341.)

Castro, the sole eyewitness, who smoked "crack" in the car with Curtis and petitioner shortly before Curtis's fatal knifing happened, was anything but a model witness for the prosecution, giving materially inconsistent and uncertain accounts – to law enforcement and defense investigators and at trial – of what happened inside and outside the care, and regarding who said or did what, where and when, Yet, Castro's and petitioner's accounts dovetailed as to key fact:

(1) that Curtis initiated and unprovoked and violent physical altercation inside the car that included a choke hold that might "choke out" petitioner, while petitioner was still driving;

(2) that petitioner's knife struck Curtis' left side during that continuing altercation;

(3) that petitioner's knife struck Curtis' left side during that continuing altercation;

(4) that the entire event was pretty quick;

(5) that petitioner was in shock in the aftermath; and

(6) that Castro dialed 911 on petitioner's cell phone because he could not see without his glasses.

Because the federal constitutional errors here cannot be considered harmless beyond a reasonable doubt, reversal of the judgement as to Count 1 is required. (Neder, supra, 527 U.S. at pp. 4, 12-13, 15; Flood, supra, 18 Cal.4th at p. 481; Chun, supra, 45 Cal.4th at p. 1201.)

Even under the Watson state-law prejudice standard, reversal would still be required for the very same reasons: There was at least a "reasonable chance" of a more favorable trial outcome - I.e., an involuntary manslaughter verdict of guilty, or a not-guilty or hung-jury result (Soojian, supra, 190 Cal.App.4th at pp. 519-521) on the murder charge – than the murder verdict did occur. (Braverman, supra, 19 Cal.4th at p. 178.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl W. Frazier

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