NO. 21-6672

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TREVOR JIM BISHOP,

Petitioner

,v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the Fifth Appellate Court of California

PETITION FOR WRIT OF CERTIORARI

TREVOR JIM BISHOP NO.BF0708

Pro Se
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QUESTION PRESENTED

Whether the majority opinion erred not only as to the substantive admissibility of the other acts evidence, but whether the majority also erred procedurally in relying on a theory of admissibility that the prosecution strategically waived at trial, the waiver at which the defense relied on in formulating its own strategy. Whether the reappointment order was reversible error. The court determined a sufficient conflict existed, therefore the court was required to relieve trial counsel, and trial counsel could not properly be reappointed. Whether the prosecutor's closing argument violated petitioner's state and federal due process rights. Whether hearsay was improperly admitted by victims father.

LIST OF PARTIES

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:

Central California Appellate Program
5th Appellate Court of California
2150 River Plaza Drive, Ste. 300
Sacramento, CA 95833

The Honorable Tom Ward
District Attorney Office
221 South Mooney Blvd Suite 224
Visalia, CA 93291

Clerk of the Superior Court, Tulare County
221 South Mooney Blvd Suite 124
Visalia, CA 93291

RELATED CASES

Tulare County Case No. VCF280823A Hon. Joseph A. Kalashian
Court of Appeals 5th Appellate District of California, Appeal No. F076745

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Trevor Jim Bishop respectfully requests the issuance of a writ of certiorari to review the judgment of the unpublished decision of the Court of Appeal, Fifth Appellate District, filed on June 30, 2021.

DECISION BELOW

The opinion of the Court of Appeal, Fifth Appellate District of California on the merits appears at Appendix A to the petition and is unpublished.

The opinion of the highest state court of California to review the on the merits appears at Appendix B to the petition and is unpublished.

JURISDICTION

The Fifth Appellate District entered judgment on June 30, 2021. Petitioner's petition for review to the California Supreme Court was denied on September 29, 2021. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the California Supreme Court Judgment.

CONSTITUTIONAL AND CALIFORNIA STATUTORY PROVISIONS INVOLVED

FEDERAL RULE INVOLVED

Federal Rule of Evidence 404(b). Character Evidence; Crimes or Other Acts

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

California Evidence Code 1109. Evidence of Character, Habit, or Custom

(a) (1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the

defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(3) Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code.

(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

(d) As used in this section:

(1) "Abuse of an elder or dependent person" means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering.

(2) "Child abuse" means an act proscribed by Section 273d of the Penal Code.

(3) "Domestic violence" has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

California Evidence Code 352.

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

STATEMENT OF THE CASE

I. The Government's Circumstantial Case that Petitioner Assaulted JH.

D.H. (Mother) and J.H. (Father)[1] were married and had two children, JH., who was three years old in March 2013, and BH., who was one year old at that time. The parents were married in 2008 and separated in June 2012.

Mother met Petitioner in 2012 and eventually moved into a house with Petitioner. Petitioner began babysitting the children while Mother worked in or around January 2013.

On March 21, 2013 at approximately 11:48 a.m., Petitioner, JH, and BH were seen entering a Walmart store in Visalia.[2] Upon leaving Walmart, Petitioner and the two children saw the children's maternal grandfather. There was a brief conversation took place and JH responded coherently when spoken too. The grandfather testified JH appeared clean, did not appear to be in any type of distress, and no markings were noticed on JH. Petitioner did not mention to the grandfather that anything had happened to Jimmy.[3] Petitioner and the children were seen leaving the parking lot shortly after 12:08 p.m.

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[1]Petitioner refer to some persons by first names, initials, or descriptive designations. In addition, Petitioner refer to law enforcement personnel by their titles at the time of events.

[2]Visalia Police Detective Juan Saenz obtained the store's surveillance video and described it for the jury. The video recording was also played for jurors.

[3]The grandparents saw JH the night before. He was eating dinner and he sang a song. Everything seemed fine.

At approximately 1:28 p.m., Petitioner carried an unconscious JH into an urgent care facility in Visalia. JH's pupils were fixed and dilated, his arms and legs were stiff and rolled in. Medical personnel deemed the situation life threatening and JH was transfer from the urgent care facility to a hospital emergency room

Petitioner provided an injury history to the paramedic and stated that JH had slipped and fallen in the bathtub earlier at about 8:30 or 9:00 a.m. JH did not lose consciousness, was acting normally after the fall, and only had one episode of vomiting several hours later in the truck on their way home. Upon arriving at home, Petitioner instructed JH to go to his room and change clothes. Several minutes later, Petitioner heard a sound, rushed into the room and JH was on the floor, none responsive. Petitioner picked JH up, grabbed BH, and rushed to the closest urgent care. Due to the unknown injury, JH was placed in full circle spinal immobilization and on a backboard. JH arrived at the emergency room at 1:42 p.m.

JH was then taken by ambulance to the regional hospital in Fresno for surgery. Visalia Police Detective Daniel Ford arrived at regional hospital just after JH's surgery. Ford and an evidence technician photographed JH's injuries.[4] Ford noted that some of the bruises on JH's legs were consistent with what would expect to see on a child that age. There was a bruise on JH's right shin, just above the ankle. There were three linear bruises on JH's inner right thigh.

JH remained at the regional hospital for 10 days. JH did not regain consciousness and was transported to a children's hospital in Madera. JH remained at

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[4] The photographs were shown to the jury.

children's hospital for approximately two months. JH's condition did not improve, and JH's Father was informed to seek hospice care. Father declined, and took JH home, and cared for JH for nine months. JH began hospice care at Father's home pending availability in a hospice facility. JH was admitted to hospice on February 10, 2014, his feeding tube was removed, and he passed away on February 19, 2014.

DIRECT APPEAL

On direct appeal, Petitioner raised the following issues: whether the other acts evidence in this case exceed the limits placed on Evidence Code section 1109 by Evidence Code section 352, and the state and federal constitutions; whether or not the prosecution's waiver of section 1109 theory at trial, but the Attorney General pursued that theory on appeal, was a strategic choice by the prosecution to significantly alter the defense strategy to present evidence on Petitioner's positive character traits; and whether the Court should revisit California case law concerning "battered child syndrome," given significant shifts in recent years from the medical community on diagnosing causes of infant and young child head injury.

Despite the prosecution waiving the section 1109 theory during trial and the Attorney General resurrecting the section 1109 theory on direct appeal, the majority upheld the section 1109 theory on direct appeal, affirming the admission of the other acts evidence under Evidence Code section 1109, as evidence of prior acts of domestic violence admissible for propensity purposes. The dissent explained in a 100-page opinion, that the admission of the extensive character evidence in Petitioner's case pushed section 1109 beyond the breaking point, violating

Evidence Code section 352 and the state and federal constitutions. The dissent further explained the majority decision is a prime example of just how far lower courts have strayed from the underlying principle that other acts evidence should be prohibited, and that a person should be tried for the conduct with which he is accused, not for unrelated past acts that are highly likely to turn the jury against him and distract from the real issues. (People v. Harris (1998) 60 Cal.App.4th 727, 737 ["A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is."] [quotations and citation omitted].)

During trial., the jury had to determine and resolve an extremely difficult question, what caused the child's head injury. This question could not even be agreed upon by the prosecution's medical experts, so is it fair to assume it could not be reasonably determined by a jury with no expert medical knowledge? One prosecution medical expert testified the child's subdural hematoma necessarily occurred from a violent impact. However, the prosecution's second medical expert blatantly disagreed, stating emphatically on the record and to the jury, thathe had no earthly idea how the subdural hematoma got there, and what he did know is that it didn't get there from an external trauma.

Despite the clear difference in medical opinions by the prosecutions own experts, one being contradictory to the prosecutions theory of how the child was injured, the jury was presented with a detailed narrative of the petitioner's character and previous bad acts from a time period, approximately 8 to 10 years prior to the incident to which the petitioner was charged, and entirely unconnected to this case. The superior court allowed the prosecution to present extensive

evidence and testimony that detailed "Bishop's habit of keeping multiple, loaded guns around, manipulative personality, evident affinity for the confederate flag, habit of punching holes in walls, penchant for picking fights with strangers, generally disrespectful attitude, runaway temper, illicit liaisons with women, and his preference for dating 'stripper-looking' women in skimpy clothes, among other things.", as noted in the decent. (Dissent. Op. 65.)

The dissent also stated that during trial, the prosecutor raised the theory of other acts evidence under Evidence Code section 1109, but chose not to pursue that theory. Instead the prosecutor elected to admit the other acts evidence under Evidence Code section 1101 only. The prosecution elected this theory so she could present a broader array of character evidence under section 1101, because she knew that if she pursued other acts evidence under a section 1109 theory, it would allow the defense to present a significant amount of positive propensity evidence on Petitioner's behalf. On direct appeal, even though the prosecution strategically waived the section 1109 theory at trial, the Attorney General resurrected the theory on appeal, and the Court of Appeal adopted that theory as the sole basis for upholding admission of the evidence.

I. The Superior Court's Ruling Allowing the Prosecution to Introduce, under Evidence Code section 1109, Evidence Concerning Petitioner's character and prior bad acts then removing that request to pursue actions under Evidence Code section 1101.

During pretrial, the prosecution notified Petitioner that it intended to introduce evidence under Evidence Code section 1109 then chose not to purse that intention and instead introduced evidence under Evidence Code section 1101, thus

preventing the defense from presenting evidence of positive character traits and good acts.

The prosecution invoked Evidence Code section 1109, then withdrew that request and pursued Evidence Code section 1101 only in support of that argument, and repeatedly pointed to shared similarities of character evidence and bad acts to show to the jury that the Petitioner was not of good character and had a history of bad acts therefore, was responsible for the act to which he was charged.

Assuming the superior court's ruling allowing the other acts, evidence was correct, the prosecution's evidence presented to the jury went far beyond the limitations that were placed on the evidence by the superior court. During trial, the superior court imposed two basic limitations on the prosecution's other acts evidence: 1) the admissible evidence was limited to violence or threats of violence toward cohabitants, and 2) the permissible inquiry was not a generalized inquiry into petitioner's character or past relationships, but rather the evidence needed to be focused on specific permissible incidents.

Despite these limitations, the evidence the prosecutor repeatedly questioned from those who testified violated both limitations. Specifically, the prosecution elicited from the witness and presented to the jury the following:

• Evidence that petitioner was kicked off his rugby team for being too violent.

• Dan Norton's testimony that petitioner "treated everyone with a demeaning attitude" and "disrespect."

For reasons explained at length in the dissenting opinion, the erroneous

admission of the other acts evidence was not harmless. (Dissent. Op. 84-100.) The other acts evidence was a very detailed and specific part of the prosecution's case against Petitioner that was presented to the jury. The other evidence of guilt as to the cause of the child's injury was not so overwhelming against Petitioner, mainly because the prosecution's experts starkly disagreed about the cause of the child's injuries. Therefore, the prosecution relied heavily on Petitioner's past character and bad acts.

• Evidence that petitioner cheated on prior girlfriends and dated "whores" and "bikini dancers."

• Evidence of petitioner's drinking and gun ownership.

• Testimony from both O'Callaghan and Oiler about petitioner's general bad character, temper, and combativeness. All this evidence went well beyond the limitations imposed in the superior court's ruling.

The misconduct committed by the prosecution violated the superior court's pretrial order limiting the other acts evidence. It is prosecutorial misconduct "to elicit or attempt to elicit inadmissible evidence in violation of a court ruling." (People v. Silva (2001) 25 Cal.4th 345, 373.) As explained previously, the prosecutor violated the court's pretrial order by presenting a wide variety of evidence that went far beyond the restrictions and scope the superior court placed on the other acts evidence.

The violations of the court's pretrial order constituted misconduct. Although defense counsel objected to the admissibility of the other acts evidence for any purpose during pretrial proceedings, he failed to object to the testimony described

above during the trial. This objection could have been based on grounds that the testimony and presentation of evidence violated the limitations the superior court had placed on the other acts evidence. Counsel's failure to object forfeited the issue for purposes of appeal, counsel's failure to object was ineffective assistance of counsel. This ineffective assistance claim is cognizable on direct appeal, especially where the record indicates no conceivable legitimate tactical purpose for counsel's act or omission. (People v. Everett (1986) 186 Cal.App.3d 274, 279; People v. Diaz (1992) 3 Cal.4th 495, 558.) When counsel has objected to evidence on one ground but fails to object to the same evidence on a different ground, "there is no reason" why counsel should not have objected on the other ground if it was meritorious. (People v. Asbury (1985) 173 Cal. App.3d 362, 365-366.) That is the fact in this case. The defense failed to object on the other acts evidence, which he had done previously, based off Evidence Code section 1101. Defense counsel could have also objected to other acts evidence based off Evidence Code section 1109 and provided no conceivable tactical reason for failing to object again on the ground that the evidence the prosecutor elicited had violated the superior court's pretrial ruling. Further, as explained in the dissenting opinion, this was a close case primarily because of the conflict in the opinions of the prosecution's two main medical experts, and thus the admission of the other acts evidence was prejudicial to the Petitioner.

Critically, these inferences of past bad behavior and character did not require a preliminary finding that the earlier incidents were actually bad acts perpetrated by Petitioner. Instead, according to the prosecution, the jury could

infer Petitioner's character and guilt solely because the proposed bad acts testified to were part of Petitioner's character and temperament.

In this sense, the prosecution's reliance on Evidence Code section 1101 theory differed from the proposed Evidence Code section 1109 theory originally presented by the prosecution, which prevented the defense from providing positive character and good acts, allowing the jury to only hear unpunished bad acts and inferring something based on the defendant's proposed commission of bad acts.

The evidence concerning Petitioner's character and bad acts made up a significant portion of the prosecution's case. The prosecution's entire evidentiary presentation of the other bad acts and character took about took more than four days and spans about 1,600 transcript pages, while the evidentiary presentation of the medical evidence and testimony of experts concerning the injury to the child took only about a day and a half - amounting to just over 400 pages of transcript, or a quarter of the prosecution's case – were devoted to testimony based off character and other bad acts evidence. Three witnesses testified exclusively about character, proposed unfounded exclusive conduct, and other proposed unfounded incidents of bad acts. Two medical experts testified about the injuries to the child, however, they could not agree on the cause of the injury.

The jury deliberated for several hours over a few days. It ultimately returned a guilty verdict. The superior court sentenced Petitioner to second degree murder for a sentence of 15 years to life and assault to a child for a sentence of 25 years to life due to California law and sentencing guidelines, Petitioner was given the higher of the

two sentences.

II. The Appellate Court's Affirmance of the Superior Court's Ruling.

On appeal, Petitioner challenged the superior court's admission of the evidence concerning other acts evidence. The majority of 5th Appellate Court affirmed the superior court decision with a dissent disagreeing with the superior court and indicating Petitioner is deserving of a new trial. It acknowledged (obliquely) that the other acts evidence based off Evidence Code section 1109, even though waived by the prosecution at trial formed the basis of the Appellate court's decision. And it appeared to endorse the other acts evidence as it was applied by the superior court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERITIORARI

I. The Court Should Grant Certiorari to Clarify the Proper Scope and EvidentiaryUtility of Evidence Code section 352 and use of other acts evidence under Evidence Code section 1109 and Federal Rule of Evidence 404(b).

This Court should review both the substantive and procedural issues as to the other acts evidence. Apart from the other acts issue, this case also presents an important opportunity to revisit California case law concerning "battered child syndrome." The basis for California's current case law rests on outdated science that does not account for a significant shift in the medical community in recent years as to diagnosing the causes of infant head injury

This Court should clarify the limits that exist, pursuant to Evidence Code section 352 and the state and federal constitutions, on the use of other acts evidence under Evidence Code section 1109 and Federal Rule of Evidence 404(b).

A. This case provides an opportunity for this Court to set an outer limit on the use of propensity evidence under section 1109 and Federal Rue of Evidence 404(b), by demonstrating the circumstances under which such propensity evidence is so extensive and inflammatory that it requires reversal of a conviction.

As the dissenting opinion explained, this Court previously upheld the constitutionality of Evidence Code sections 1108 and 1109 only because Evidence Code section 352 supposedly provides a failsafe for excluding propensity evidence when its prejudicial effect outweighs its probative value. (Dissent. Op. 71 [citing People v. Falsetta (1999) 21 Cal.4th 903, 907, 917-918.) The Falsetta Court "saved section 1108 from constitutional infirmity by . . . assuming the trial court would" apply section 352 to exclude overly inflammatory evidence. (People v. Nguyen (2010) 184 Cal.App.4th 1096, 1119.) Falsetta set forth factors for courts to use in applying section 352 in this context. But this Court has not provided more specific guidance about what factual scenarios involving sections 1108 or 1109 evidence would run afoul of the Falsetta factors and constitutional limits. This case provides an ideal opportunity for this Court to provide that more specific guidance, for several reasons.

As the dissent discussed, one of the major problems with the 1109 evidence in this case is that, "This is not a situation where evidence of one or more prior uncharged domestic violence offenses, in streamlined form, was admitted, as is generally the case when section 1109 is utilized to admit propensity evidence." (Dissent. Op. 66.) Rather, the evidence of the 1109 incidents was "interwoven" with "clearly extraneous and inadmissible aspects of this evidence," resulting in the prosecution presenting an "undifferentiated mass of evidence of personality traits,

various irrelevant and inflammatory details, and prior bad conduct." (Dissent. Op. 66-67.) Specifically, the evidence as to discrete 1109 incidents was interwoven with evidence about "Bishop's habit of keeping multiple, loaded guns around, manipulative personality, evident affinity for the confederate flag, habit of punching holes in walls, penchant for picking fights with strangers, generally disrespectful attitude, runaway temper, illicit liaisons with women, and his preference for dating 'stripper-looking' women in skimpy clothes, among other things." (Dissent. Op. 65.) Future cases will present this same dilemma, of potentially admissible 1108 or 1109 evidence interwoven with a plethora of inadmissible details and circumstances.

This case demonstrates this Court's guidance is needed to address the appropriate breadth and context for 1109 evidence. Another problem warranting this Court's analysis is the question of whether 1109 evidence actually demonstrates a relevant propensity when it is dissimilar to the charged crime. As the dissent painstakingly explained, the charged crime here was an unarmed assault on a young child, but the 1109 evidence involved a wide range of "qualitatively distinct" subjects that "bore no resemblance" to the charged crime, including gun possession, threats to an adult girlfriend, allegiance to the confederate flag, infidelity, excessive drinking, contempt and, combativeness toward strangers, abuse of dogs, and numerous other issues. (Dissent. Op. 75-82.)

Even if the majority opinion was correct that some or all of this evidence could technically qualify as evidence of "domestic violence" as that term is defined in section 1109, the question remains whether it has any significant probative

value to the charged crime. At least one court of appeal decision has pointed out this same problem, in the context of sex offenses under section 1108. (People v. Earle (2009) 172 Cal.App.4th 372, 397.)

As with domestic violence offenses under section 1109, a wide variety of disparate offenses can qualify as sex offenses under section 1108, but that does not mean all such offenses have probative value for propensity purposes in every case charging a sex crime. (Id. at p. 399 ["a propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a different act"] [emphasis in original].)

This Court's guidance is needed to clarify the propensity analysis applicable to dissimilar other acts that nonetheless technically qualify as domestic violence or sex offenses. The above arguments are the strongest reasons for granting review as to the other acts issue. For purposes of completeness and to exhaust the issue for future litigation, petitioner also offers the following short explanation as to how the evidence in this case should have been excluded under the Falsetta factors and the state and federal constitutions.

B. The evidence should have been excluded under the Falsetta factors.

1. The other acts evidence has very minimal relevance because of its dissimilarity to the charged crime.

Falsetta indicates courts should consider the "relevance" of other acts evidence, as well as its "similarity to the charged offense." (People v. Falsetta, supra, 21 Cal.4th at p. 916-917.)

For reasons previously explained, the evidence in this case has very minimal

relevance because it is dissimilar to the charged crime. The other acts evidence involves adults unconnected to the charged crime, and much of it involves the context of a romantic relationship in which petitioner was allegedly trying to intimidate a romantic partner so she would not leave him. The charged crime involves a three-year-old child and no analogous context of attempting to intimidate a romantic partner.

2. The other acts evidence is remote.

Falsetta directs courts to consider the "possible remoteness" of other acts evidence. (People v. Falsetta, supra, 21 Cal.4th at p. 916-917.) The probative value of the other acts evidence in this case is further reduced by its remoteness. All the events described in the other acts evidence occurred years before, with different people and in different places. The lack of a close temporal connection severs a probative connection to the charged crime.

3. The other acts evidence had a low "degree of certainty of its commission."

Falsetta directs courts to consider the "degree of certainty" that the other acts were actually committed. (People v. Falsetta, supra, 21 Cal.4th at p. 916-917; People v. Kerley (2018) 23 Cal.App.5th 513, 537.) The degree of certainty is highest when the uncharged acts resulted in a conviction. (See People v. Johnson (2010) 185 Cal.App.4th 520, 533.) Uncorroborated testimony about uncharged acts has lower probative value than testimony that is corroborated. (People v. Ewoldt, supra, 7 Cal.4th at p. 407-408.)

Katie Oiler's testimony had a low "degree of certainty of its commission"

simply because the inflammatory incidents she described, incidents in which petitioner supposedly beat her, pointed a gun at her, threatened her, beat Jason Todd, and beat dogs— never resulted in charges or convictions. She was the only prosecution witness who testified about these events; the prosecution presented no corroborating evidence to establish the events. (Dan Norton testified about injuries to his dog, but he did not witness petitioner physically harming any dog.) Further, although Oiler claimed the abuse occurred in 2009 and said she severed ties with petitioner in early 2010, photographic evidence produced at trial showed petitioner and Oiler together at a football game in 2011. Oiler's testimony thus put the jury in the position of first resolving a highly disputed and emotionally charged he said-she said between Oiler and petitioner, and then using that same highly disputed series of events to resolve a second, also highly disputed controversy about whether petitioner harmed the victim in this case.

4. There was a significant burden in defending against the other acts evidence.

For similar reasons, petitioner faced a difficult burden in defending against Oiler's allegations. The Oiler allegations forced counsel to also defend against old, unwitnessed, unreported allegations of domestic violence from a location many miles away and from several years previous. Given the physical distance and the age of the accusations, the Oiler allegations by themselves would have involved a time-consuming investigation and trial preparation process. Layering that investigation and preparation on top of the allegations for the charged crime left counsel in an exceedingly difficult position.

5. The unfair prejudice was heightened by the fact that petitioner had never been punished for the other acts.

Finally, case law is clear that other acts evidence is more likely to cause unfair prejudice if the other acts never resulted in prosecution, conviction, or punishment. "[T]he concern is that a jury might convict a defendant to punish him for the uncharged acts, rather than because the evidence is sufficient to prove the charged crime." (People v. Kerley, supra, 23 Cal.App.5th at p. 539.) This concern is reduced if the jury is told that the uncharged acts resulted in actual convictions and a prison term. (People v. Falsetta, supra, 21 Cal.4th at p. 917.) This ensures "that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses." (Ibid.; see also People v. Balcom (1994) 7 Cal.4th 414, 427 [no prejudice where jury was aware that defendant had served a prison term for the prior act].)

As mentioned previously petitioner was never prosecuted for any of the highly inflammatory incidents Oiler described. Such circumstances weigh against admissibility under section 352.

II. This Court should review whether the prosecution strategically waived the 1109 theory at trial, thus foreclosing that theory on appeal.

In relying on Evidence Code section 1109 to uphold the admission of the other acts evidence, the Court of Appeal relied on the familiar principle that an appellate court can affirm a trial court's decision on a different theory than the trial court relied upon. (Op. 41.)

Thus, although the trial court admitted the evidence under section 1101, not

1109, the Court of Appeal relied solely on section 1109. While it is generally true that a reviewing court can rely on a different theory than the trial court, this Court should review whether this case presents an exception to the general rule, because here the prosecution strategically waived the 1109 theory.

As the dissent explained, the prosecutor considered section 1109 but then "strategically prioritized" section 1101, apparently because she believed section 1101 would permit a "far broader swath of character and prior act evidence." (Dissent. Op. 60-61.) The prosecutor thus made a strategic election not to rely on section 1109, and, as the dissent explained, this election resulted in a waiver that should foreclose reliance on the 1109 theory on appeal. Moreover, the defense relied on the prosecutor's strategic choice in formulating the defense strategy.

Here, the record establishes that if the superior court had admitted the other acts evidence for propensity purposes under section 1109, it is reasonably likely petitioner would have presented multiple character witnesses to attest to a variety of character traits raised by the other acts evidence, such as his treatment of dogs, kindness to children, and other positive traits. Defense counsel raised this possibility at the in limine hearing, indicating to the court that he wanted to present evidence as to petitioner's positive treatment of his dogs. However, the Court disallowed such evidence for propensity purposes was getting close to just saying he's a guy of good character or good nonviolence.

A letter filed with the court after trial further demonstrates that there was a wide variety of positive character evidence available to trial counsel. After trial, in explaining several complaints about defense counsel's performance, petitioner

complained counsel had failed to present testimony from multiple ex-girlfriends who were interviewed by a defense investigator and would have contradicted the prosecution's other acts evidence. (Appendix C.) Contrary to the prosecution's witnesses, these ex-girlfriends would have testified petitioner was "considerate, kind, and not violent." (Appendix C.) Petitioner's letter also complained counsel had failed to present testimony from a witness who would have testified petitioner used to babysit her 2-3 year-old son who had Down's Syndrome, and that petitioner was "always kind, understanding, and gentle." (Appendix C.) Other witnesses were prepared to testify about petitioner's positive treatment of his younger brother, who also has Down's Syndrome. (Appendix C.) Petitioner's overall complaint was that the jury heard "only negative things" about him and did not hear "positive things about me from people who know me best." (Appendix C.)

Thus, contrary to what the majority concluded, this is not a garden variety case of a reviewing court applying a different theory than the relied upon by the trial court. Here, the theory relied upon by the reviewing court is one that was strategically waived by the prosecutor at trial, the waiver of which also molded the defense's strategy. This Court should review whether typical principles of appellate review apply under these circumstances.

III. Based on new scientific developments in the field of infant head trauma, this Court should revisit California case law concerning "battered child syndrome."

A. Factual and procedural background

Before trial, the defense moved the superior court to exclude the medical opinion testimony characterizing the child's injuries as having been the result of

non-accidental trauma, abusive head trauma, or any similar terminology. The agreed court stating that such terms would be admissible only if the jury was clear "those are medical terms," and the court stated it would instruct the jury to that effect. The court failed to give the jury that instruction. The prosecution's medical expert witnesses, cross-examination of those medical experts, and closing argument relied heavily on use of these terms.

B. This Court should revisit California case law on "battered child syndrome."

The concept underlying the terminology used in this case stems from the case law on "battered child syndrome." In 1971, the Court of Appeal held that an expert could testify that the presence of certain criteria indicated a child was not injured by accidental means. (People v. Jackson (1971) 18 Cal.App.3d 504, 506-07.) The Court said the following criteria make up the battered child syndrome: (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect. (Id. at p. 506.)

Affirming the prosecution's expert testimony in Jackson that the victim in that case demonstrated battered child syndrome, the Court of Appeal stated that the syndrome is "based upon an extensive study of the subject by medical science." (People v. Jackson, supra, 18 Cal.App.3d at p. 507.) The Court stated that, "An expert medical witness may give his opinion as to the means used to inflict a

particular injury, based on his deduction from the appearance of the injury itself." (Ibid. [citation].) The Court said the "lack of scientific certainty does not deprive the medical opinion of its evidentiary value." (Ibid. [citation].) But Jackson—and specifically its confidence in the "extensive study of the subject by medical science"—was decided long before scientists, courts, and commentators began to acknowledge serious problems with the scientific support for the kind of medical opinion given in this case. As a starting point, the DNA exoneration era has shown that misleading forensic evidence has led to wrongful convictions in a significant number of cases. In nearly half of the more than 375 cases where DNA evidence later exonerated wrongly convicted U.S. criminal defendants, forensic evidence contributed to the underlying convictions. (See Innocence Project, DNA Exonerations in the United States, available at https://www.innocenceproject.org/dna-exonerations-in-the-unitedstates/ [last visited October 11, 2020].)

Most cases involving the kind of injury as evidenced in this case—a subdural hematoma—do not have DNA evidence, but do suffer from the same problem of potentially unreliable scientific evidence. The prosecutions' one expert relied on the claim that the subdural hematoma could only have come from either a major car accident or non-accidental injury, and, since there was no car accident, the cause had to be non-accidental injury. However, research has recently shown that scientific opinion is outdated and extremely unreliable. (See, e.g., Deborah Tuerkheimer, Anatomy of a Misdiagnosis, N.Y. Times, Sept. 20, 2010, available at http://www.nytimes.com/2010/09/21/opinion/2ltuerkheimer.html; Emily Bazelon,

Shaken Baby Syndrome Faces New Questions in Court, N.Y. Times, Feb. 2, 2011, available at http://www.nytimes.com/2011/02/06/magazine/ 06baby-t.html.)

Medical research now shows there are many accidental and natural causes of subdural hematoma, including but not limited too prenatal conditions, congenital malformations, venous thrombosis, genetic and metabolic disorders, clotting disorders and infectious disease. (See Lori Frasier et al., Abusive Head Trauma in Infants and Children: A Medical, Legal, and Forensic Reference. GW Medical Publishing, Inc. (2006) 129- 226; Kent P. Hymel, et al., Intracranial Hemorrhage and Rebleeding in Suspected Victims of Abusive Head Trauma: Addressing the Forensic Controversies, 7 Child Maltreatment 329, 333-37 (2002); Plunkett, Fatal Pediatric Head Injuries Caused by Short-Distance Falls, 22 Am. J. Forensic Med. Pathology 1 (2001); P.E. Lantz & D.E. Couture, Fatal Acute Intracranial Injury, Subdural Hematoma, and Retinal Hemorrhages Caused by a Stairway Fall, 56 J. of Forensic Sci. 1648 (2011); see also K.A. Kim, et al., Analysis of Pediatric Injuries Caused by Short- Distance Falls, 23 Am. J. Forensic Med. & Path. 1 (2001); J.R. Hall, et al., The Mortality of Childhood Falls, 29 J. Trauma 1273 (1989); P. Steinbok, et al., Early hypodensity on computed tomographic scan of the brain in an accidental pediatric head injury, 60 Neurosurgery 689 (2007).

Medical research has further shown that a finding of abuse cannot be automatically be assigned to a caretaker who was present at the time the symptoms manifested. Previously, experts believed that it was not possible for a child to experience any "lucid interval" (i.e., a period where the child appears well and functioning) between the injury and onset of symptoms, and that the blame for

the child's collapse or death could therefore be assigned to the person with custody of the child at the time when the symptoms manifested. (See, e.g., Keith A. Findley et al., Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right, 12 Hous. J. Health L. & Pol'y 209 (2012); Deborah Tuerkheimer, The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts, 87 Wash. U. L. Rev. 1,18 (2009).) The prosecution's experts in this case opined that a lucid interval was essentially impossible here.

However, scientific research now shows that a child may experience a period of lucidity that lasts hours, or even days, between the time of the injury and the onset of symptoms. (Kristy Arbrogast, et al., Initial Neurologic Presentation in Young Children Sustaining Inflicted and Unintentional Fatal Head Injuries, 116 Am. Acad. Pediatrics 180 (2005) ["Although infrequent, young victims of fatal head trauma may present as lucid . . . before death."].) Since the identification of this medical research, the actual timing of the presentation of symptoms cannot be relied upon with any certainty to infer the actual timing of injury. Additionally, when the findings are due to a natural disease or metabolic condition, the process may have started long before the appearance of symptoms or collapse. Courts around the country have responded to the changing science. At least three justices on the U.S. Supreme Court have indicated they have serious concerns with the research concerning SBS/AHT.

In Cavazos v. Smith (2011) 565 U.S. 1,13 Justice Ginsburg—joined by Justices Breyer and Sotomayor— cited a plethora of scientific studies, including a 2010 study in the respected Journal of Forensic Medicine & Pathology which

stated,...small, asymptomatic [subdural hematomas] from the normal trauma of the birth process can spontaneously re-bleed or re-bleed with minimal forces, enlarge, and then present with clinical symptoms and [subdural hematoma, retinal hemorrhages, and neurologic dysfunction] ... [This situation] mimic[s] child abuse, and we believe many such infants in the past have been mistakenly diagnosed as victims of child abuse, when they were likely not. (Id. at p. 15 [brackets in original] [quoting Miller & Miller, Overrepresentation of Males in Traumatic Brain Injury of Infancy and in Infants with Macrocephaly, 31 Am. J. Forensic Med. & Pathology 165, 170 (2010)].)

The justices further cited a study diagnosing the mechanism in many cases involving subdural hematoma "is not possible, because these are unwitnessed injuries that may be incurred by a whole variety of mechanisms solely or in combination." (Cavazos v. Smith, supra, 565 U.S. at p. 13-14 [quoting Minns, Shaken Baby Syndrome: Theoretical and Evidential Controversies, 35 J. Royal College of Physicians of Edinburgh 5, 10 (2005)].) Consistent with the above, both federal and state courts have overturned convictions and questioned findings obtained through expert testimony utilizing the outdated science. (People v. Bailey (N.Y. Sup. Ct. 2014) 47 Misc.3d 355, 374; Del Prete v. Thompson (N.D. 111. 2015) 10 F.Supp.3d 907, 931, 957, n.10; State v. Edmunds (Wis. Ct. App. 2008) 308 Wis.2d 374, 391-92; Vanek v. Wofford, No. CV 14-4427-AG (KK), 2016 WL 6783340, at *10 (CD. Cal. July 26, 2016), report and recommendation adopted, No. CV 14-4427-MWF (KK), 2016 WL 6781086 (CD. Cal. Nov. 15, 2016).

Given the above updated medical research and decisions, courts ruling today

face a very different body of scientific evidence than that faced by the Jackson Courtin 1971, when the court accepted the "battered child syndrome" as "based upon an extensive study of the subject by medical science." (People v. Jackson, supra, 18 Cal.App.3d at p. 507.) Since Jackson, the scientific evidence has shifted drastically, to a point there is now significant doubt about whether and when a child's closed head injury can be deemed "abusive" or "non-accidental." This Court should thus revisit California case law concerning "battered child syndrome."2 IV.

IV. Both issues as to the other acts evidence raise important questions likely to recur in future cases.

As to the first issue, this Court's guidance is needed to set an outer limit, pursuant to Evidence Code section 352 and the state and federal constitutions, on the admissibility of other acts evidence under Evidence Code section 1109. As the dissent explained, even if a limited portion of the other acts evidence was admissible under section 1109, the potentially admissible evidence here was interwoven with extensive inadmissible character evidence about a wide range of topics. This Court should review how lower courts should address such interwoven evidence. Additionally, the 1109 evidence here was dissimilar to the charged crime, calling into question whether it revealed any propensity relevant to the charged crime. This Court should address how section 1109 operates under such circumstances. This Court should also revisit California case law concerning "battered child syndrome." That case law is now outdated in light of a significant shift in the medical community concerning the causes of infant head injury.

This Court should grant review in this case to provide guidance on how to

apply the other acts evidence, as refenced in Evidence Code section 1109, an issue that has confounded, and will continue to confound, the lower courts. The lower courts, however, including the superior court, construe the other acts evidence far more broadly.

The problem is that to conclude that all of the other act incidents were the product of design or character requires the inference that the incidents are connected to, or dependent on, each other. After all, if the incidents are independent, the odds that any one of them hda particular cause are the same each time the incident occurs.

To avoid confusion and subjective judgment of the Petitioner's character, it is important to keep focus on the crime for which he was charged, not for crimes that were unfounded, unreported and uncharged. The presentation of character and other bad acts evidence allowed the jury to presume that all of the incidents, charged and uncharged, were the product dfPetitioner's character.

Presentation of the other bad acts or character evidence allow the jury to assume there is a connection between the incidents, and that connection is the Petitioner. A jury that is presented other acts evidence of bad acts and character allow the jury to infer from evidence of repeated acta rea that the charged actus reus was no accident unavoidably uses a Petitioner's history to make inferences about character and ultimately his guilt

For this reason, under a proper application of Evidence Code 1109, other acts evidence is basically irrelevant. The other acts evidence suggests only that one or some, but not all, of the alleged incidents were intentional and part of the

Petitioner's character, and because it is incapable of singling out any particular incident as intentional, it leaves the jury to speculate about which was intentional and which was not.

Because the lower courts are not properly applying the other acts evidence specifically Evidence Code 1109, this Court's review is warranted and is to set an outer limit as to the admissibility of supposed prior acts of domestic violence for propensity purposes under section 1109. The majority opinion erred not only as to the substantive admissibility of the other acts evidence; the majority also erred procedurally—as the dissent explained—in relying on a theory of admissibility that the prosecution strategically waived at trial, the waiver of which the defense relied on in formulating its own strategy. Furthermore, the lower court violated Federal Rule of Evidence 404(b) by entering evidence to show past uncharged conduct in an attempt to how the jury Petitioner's character and show that on this particular occasion the Petitioner acted in accordance with the character.

V. Petitioner's right to conflict-free counsel under the state and federal constitutions was violated.

After trial, the superior court relieved trial counsel and appointed conflict counsel in order to investigate and litigate a new trial motion, based in part on ineffective assistance of counsel. Conflict counsel reviewed the case and stated she would not litigate a new trial motion because she did not find any suitable grounds for such a motion. The court then relieved conflict counsel and reappointed the public defender for sentencing.

The reappointment order was reversible error. Once it determined that a

sufficient conflict existed to appoint conflict counsel to investigate petitioner's ineffective assistance of counsel claims, the court was required to relieve trial counsel, and trial counsel could not properly be reappointed. (*See, e.g., People v. Hines* (1997) 15 Cal.4th 997, 1024; *accord People v. Smith* (1993) 6 Cal.4th 684, 695; *People v. Daniels* (1991) 52 Cal.3d 815, 848; *People v. Sanchez* (2011) 53 Cal.4th 80, 90.) Reappointing trial counsel violated petitioner's right to conflict free counsel under the state and federal constitutions. (U.S. Const., amend. VI; Cal. Const., art. I, §15; *People v. Friend* (2009) 47 Cal.4th 1, 46.) Requiring a defendant to proceed with conflicted counsel during a critical stage of the proceedings is a structural defect that requires reversal. (*Mickens v. Taylor* (2002) 535 U.S. 162, 171.)

VI. Conflict counsel provided ineffective assistance by failing to adequately investigate and argue petitioner's new trial claims, and by advocating against petitioner.

At the *Marsden* hearing, petitioner presented a 14-page new trial request detailing investigation he felt should have been performed, witnesses that should have been called, lines of inquiry not pursued on examination and cross-examination, and objections not made. The superior court appointed conflict counsel to investigate these allegations.

Petitioner argued in the Court of Appeal that, although many of petitioner's new trial allegations relied on evidence outside the record, conflict counsel did not venture outside reviewing the paper record. Defense counsel has a duty to thoroughly investigate before making strategic choices. (*See, e.g., In re Clark* (1993) 5 Cal.4th 750, 800 [Lucas, C.J., concurring opinion]; *People v. Jones* (2010) 186

Cal.App.4th 216, 236-243; *People v. Ledesma* (1987) 43 Cal.3d 171, 221; *Strickland v. Washington* (1984) 466 U.S. 668, 690-691.) Petitioner's rights in that regard were violated. Further, conflict counsel violated petitioner's rights by informing the superior court that she "did not find any legal grounds to file a motion for new trial." She also joined the prosecutor's argument that trial counsel should be reappointed for sentencing. Counsel "must not argue the case against his client." (*People v. Feggans* (1967) 67 Cal.2d 444, 447; *accord In re Smith* (1970) 3 Cal.3d 192, 197; *People v. Cropper* (1979) 80 Cal.App.3d 716, 720.)

VII. The superior court erred in permitting cross examination of petitioner that was beyond the scope of the direct examination, in violation of petitioner's statutory and constitutional rights.

Petitioner's direct examination was confined to the charged offenses and did not address the other acts evidence. On cross examination, over a defense objection, the superior court permitted the prosecutor to cross-examine petitioner at length about the other acts evidence. Under Evidence Code section 773, cross-examination is limited to matters within the scope of the direct examination.

Further, a defendant who chooses to restrict direct examination to specific subjects does not waive the constitutional privilege against self-incrimination as to other subjects. (See, e.g, *People v. Wilson* (2008) 44 Cal.4th 758, 799; *People v. Munoz* (1984) 157 Cal.App.3d 999, 1025-1026; *People v. Tealer* (1975) 48 Cal.App.3d 598, 604.) Cross-examination that goes beyond the scope of the direct violates the privilege against self-incrimination. (*Ibid.*; *Malloy v. Hogan* (1964) 378 U.S. 1, 3, 8; *Murphy v. Waterfront Commission* (1964) 378 U.S. 52, 55; *accord Miranda v. Arizona* (1966) 384 U.S. 436, 464.)

Here, the superior court's decision permitting cross examination beyond the scope of the direct violated petitioner's statutory and constitutional rights and requires reversal.

VIII. The prosecutor's closing argument violated petitioner's state and federal due process rights.

The following arguments by the prosecutor violated petitioner's state and federal due process rights:

- Encouraging jurors to consider the limited purpose other acts evidence for criminal propensity. Evidence ostensibly admitted under Evidence Code section 1101 for non-predisposition purposes cannot properly be used to prove predisposition or propensity. *(People v. Barnwell* (2007) 41 Cal.4th 1038, 1056; *In re Jones* (1996) 13 Cal.4th 552, 582; *see People v. Rist* (1976) 16 Cal.3d 211, 219.)
- Urging jurors to be influenced by sympathy for the victim and his family. Urging jurors to be swayed in favor of conviction based upon sympathy for a complainant or complainants is improper. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1406; *People v. Kipp* (2001) 26 Cal. 4th 1100, 1130; *People v. Fields* (1983) 35 Cal.3d
- Vouching for prosecution witness Oiler as to her claims concerning petitioner's alleged animal abuse. (*E.g. United States v. Combs* (9th Cir. 2004) 379 F.3d 563, 574-576.) Vouching for witnesses is improper. (*United States v. Young* (1985) 470 U.S. 1, 18-19; *accord Berger v. United States* (1935) 295 U.S. 78, 88-89.)

- Disparaging petitioner. This invited jurors to decide the case based on a consideration other than the evidence. (*See, e.g., In re Winship* (1970) 397 U.S. 358, 364; *People v. Frazier* (2001) 89 Cal.App.4th 30, 35-36.)
- Asserting unpresented evidence of guilt. Arguing facts not in evidence is not proper. (*United States v. Young* (1985) 470 U.S. 1, 18-19; *Berger v. United States* (1935) 295 U.S. 78, 88-89.)
- Shifting the burden of proof to the defendant. Shifting or misstating the reasonable doubt standard violates due process. (*See, e.g., Humphrey v. Cain* (5th Cir. 1998) 138 F.3d 552, 553;*Humphrey v. Cain* (5th Cir. 1997) 120 F.3d 526, 530-531;*Dunn v. Perrin* (1st Cir. 1978) 570 F.2d 21, 23, 24;*People v. Hill* (1998) 17 Cal.4th 800, 829-830; *People v.Bell* (1989) 49 Cal.3d 502, 538; *People v. Babbitt* (1988) 45 Cal.3d 660, 704.)

The above arguments by the prosecutor, either individually or cumulatively, violated petitioner's state and federal due process rights and require reversal.

IX. The superior court erroneously admitted hearsay in violation of petitioner's statutory rights and his state and federal due process rights.

The victim's father testified that, the second-to-last time his children visited his home in February 2013, the victim threw a tantrum when told it was time to go home back to his mother. The victim allegedly refused to answer when asked what was wrong. On arrival at his maternal grandparents' home, the victim allegedly cheered up.

The above testimony constituted inadmissible hearsay. The reported communication did not narrate, describe, or explain anything the victim may have

perceived. (Evid. Code, §1240, subd.(a).) There was also no evidence establishing the victim was under the stress or excitement caused by perceiving an exciting, precipitating event when the statement was made. (Evid. Code, §1240, subd.(b).) The improper admission of this evidence also violated petitioner's state and federal confrontation and due process rights. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 791; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *see, e.g., Reno v. Flores* (1993) 507 U.S. 292, 316 [O'Connor, J., conc. op.]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80; *Meachum v. Fano* (1976) 427 U.S. 215; *Wolff v. McDonnell* (1974) 418 U.S. 539; *Howard v. Grinage* (6th Cir. 1996) 82 F.3d 1343, 1349-1353.)

CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,
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Pro Se

December 14, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this writ of certiorari uses a century schoolbook 12 font and contains 9,107 words, based on the word-count feature of my word-processing program.

DATED: December 14, 2021.