No. S268092

# In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Respondent,*

v.

ADORA PEREZ,
*Defendant and Appellant.*

Fifth Appellate District, Case No. F077851
Kings County Superior Court, Case No. 18CM-0021
The Honorable Robert S. Burns, Judge

## ANSWER TO PETITION FOR REVIEW

ROB BONTA (SBN 202668)
*Attorney General of California*
RENU R. GEORGE (SBN 262310)
*Senior Assistant Attorney General*
KARLI EISENBERG (SBN 281923)
*Supervising Deputy Attorney General*
*MARTINE N. D'AGOSTINO (SBN 256777)
*Deputy Attorney General*
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
Telephone: (510) 879-0292
Fax: (510) 622-2270
Martine.Dagostino@doj.ca.gov
*Attorneys for Plaintiff and Respondent*

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## ISSUES PRESENTED

The issues presented, as stated in the petition, are as follows:

1. Do Penal Code section 187 and/or the state and federal constitutions permit a pregnant woman to be prosecuted for murder when she suffers a stillbirth and the prosecution alleges such stillbirth was caused by drug use?

2. Did the Court of Appeal err when it denied appellant's application to recall the remittitur in her case, preventing appellant from challenging the voluntary manslaughter conviction she accepted entirely because of her mistaken belief that her stillbirth could have resulted in a conviction for murder?

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal denied appellant Perez's unopposed application to recall the remittitur on the ground that her "claims are more appropriately raised by way of a petition for writ of habeas corpus in the superior court." (Order (Mar. 29, 2021) 1.) The court justified its ruling on the ground that in habeas "the parties have the option to present additional evidence relevant to appellant's claims and develop a more complete record." (*Ibid.*)

In respondent's view, this matter is more appropriately viewed as presenting questions of law. It is undisputed that appellant was charged with murder (Pen. Code, § 187) for allegedly killing her own fetus through drug use, and to avoid imprisonment on that offense, pleaded guilty to manslaughter (Pen. Code, § 192) for the same. Appellant contends (and respondent agrees) that a woman's actions or inactions that lead

to the death of a fetus while still in the womb do not constitute manslaughter or murder.[1] It is already well settled that manslaughter lies only for the killing of a "human being," and not a fetus. And it seems equally clear that a woman cannot commit the crime of murder of her own fetus, as actions to which a pregnant woman consents are expressly outside the statute's scope.

Where, as here, an appellant contends that the undisputed facts do not constitute a crime, and that her sentence was unauthorized when imposed, if appellant's view of the law is correct, recall of the remitter is appropriate. (*People v. Mutch*, (1971) 4 Cal.3d 389, 396-397; see also *People v. Richardson* (June 10, 2021, No. A157529) __ Cal. App. 5th __ [2021 WL 2373548].) Accordingly, respondent submits that the most straightforward approach to resolving this case would be for the Court to grant the petition and transfer the matter to the Court of Appeal so that court may analyze in the first instance the proper reach of Penal Code section 187.

Respondent acknowledges, however, that recall of a remittitur is a rare event. Appellant may, of course, file a petition for writ of habeas corpus in the superior court. And, indeed, appellant has done so.[2] Through those proceedings, appellant may assert that the superior court acted in excess of

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[1] *See* Letter Br. of the Attorney General, Case No. S265209 (Nov. 5, 2020).

[2] Appellant filed a petition for habeas corpus on February 16, 2021, and on April 29, 2021, the People filed an informal response.

jurisdiction, and present additional evidence relevant to her ineffective assistance of counsel claims. Like a grant-and-transfer, habeas would provide the lower courts an opportunity to address the proper scope of section 187, which may obviate the need for this Court to intervene.

Because these paths are available to appellant to resolve her claims, including her claim that Penal Code section 187 does not criminalize the actions or inactions of a pregnant woman that result in the death of her fetus, plenary review should be denied.

If, however, the Court elects to grant plenary review, respondent stands ready to brief the relevant issues in full.

## STATEMENT OF THE CASE

On December 31, 2017, at a Kings County hospital, appellant suffered a stillbirth, meaning her fetus died while still in the womb. (Opn. (Mar. 29, 2019) 2.)[3] "Based on physical signs the baby exhibited, a doctor estimated that the baby died between 12 and 18 hours earlier." (*Ibid.*) A Hanford police officer was called to the hospital, and was "advised that the stillbirth may have resulted from illegal drug abuse[.]" (*Ibid.*) "The doctor believed the baby died from extensive drug use by Perez and he advised the officer that Perez tested positive for methamphetamine and THC." (*Ibid.*) Other evidence confirmed appellant's longstanding and recent drug use. (*Ibid.*)

[3] The facts in this paragraph are taken from the Court of Appeal's opinion following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

The district attorney charged appellant with murder under Penal Code section 187. (1 CT 1.) In the criminal proceedings, appellant's court-appointed counsel did not challenge whether section 187 applied. Appellant pleaded "no contest" to an amended complaint alleging a violation of Penal Code section 192, subdivision (a), voluntary manslaughter.[4] (*Id.* at pp. 55-72.) Appellant accepted the plea because her counsel and the court advised her that she was facing a life sentence for murder. (*Id.* at pp. 58-59.) Appellant confirmed on the record that "the reason for [the plea]" and her acceptance of a manslaughter conviction was "to avoid the possibility of getting the life sentence on the murder case." (*Id.* at p. 59.) Appellant's counsel also confirmed that appellant entered the voluntary manslaughter plea to avoid the murder conviction. (*Id.* at p. 58.) The trial court recognized that appellant could not "factually . . . be" guilty of voluntary manslaughter and confirmed that appellant "enter[ed] into that plea to avoid [a] conviction" for murder under section 187. (*Id.* at p. 68.)

In that same plea hearing, the prosecutor explained what facts would have been proven "had this matter proceeded to trial." (1 CT 68.) According to the prosecutor, the facts would have shown that appellant was pregnant. (1 CT 68.) "When the child was eventually delivered, the child was stillborn." (*Id.*) The "primary contributing factors" to the fetus's death was "asphyxiation from a placental detachment and a toxic level of

[4] Appellant's counsel explained that she had agreed to this lesser plea under *People v. West* (1970) 3 Cal.3d 595. (1 CT 58.)

methamphetamine within the fetus." (*Id.*) The court found a "factual basis" for the murder charge and concluded that the plea "falls within the meaning of *People v. West*." (*Id.* at pp. 68-69.)

After the plea, appellant retained private counsel to move to withdraw the plea on the basis of ineffective assistance of trial counsel. (1 CT 73-78.) Appellant's new attorney argued that prior counsel had failed to investigate whether some factor other than drug use had caused fetal death. (*Ibid.*) The court denied the motion. (1 CT 91.) In June 2018, the court sentenced appellant to the maximum term, 11 years. (1 CT 96.)

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 438, on direct appeal, appellant's counsel filed a brief stating that there were no arguable issues to assert. After its independent review, the Court of Appeal reached the same conclusion and affirmed the judgment on March 26, 2019. (*People v. Perez*, March 26, 2019, F077851 [nonpub. opn.].)

In October 2020, appellant filed an application to recall the remittitur in the Court of Appeal on the ground that appellate counsel had rendered ineffective assistance of counsel for failing to challenge the scope of Penal Code section 187. (*People v. Perez*, Oct. 21, 2020, F077851.) The Attorney General filed a non-opposition to the application. (*Ibid.*) On March 29, 2021, the Court of Appeal denied the application to recall the remittitur, stating that the claims would be "more appropriately raised by way of a petition for writ of habeas corpus in the superior court." (*Ibid.*) The court reasoned that appellant would "have the option

to present additional evidence relevant to [her] claims and develop a more complete record" in habeas proceedings. (*Ibid.*)

On February 19, 2021 (prior to the Court of Appeal's order denying the application to recall the remittitur), appellant filed a petition for writ of habeas corpus in Kings County Superior Court. (*In re: Adora Perez* (Super. Ct. Kings County, No. 21W-0033A).)

## LEGAL BACKGROUND

Appellant was charged with murder under Penal Code section 187. It provides that "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought." (Pen. Code, § 187, subd. (a). The Legislature added reference to the killing of a fetus in 1970 in the wake of this Court's decision in *People v. Keeler* (1970) 2 Cal.3d 619. In that case, the Court held that the defendant, who intentionally killed the fetus being carried by his ex-wife, could not be prosecuted for murder under section 187 because the fetus was not a "human being." (*Id.* at pp. 625, 639.) In extending section 187 to cover the killing of a fetus, the Legislature at the same time included important limitations. Specifically, section 187:

> ...shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:
>
> (1) The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.

> (2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
>
> (3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(Pen. Code, § 187, subd. (b).)[5]

To respondent's knowledge, there is no published court of appeal decision addressing whether a pregnant woman's own actions that result in the death of her fetus before birth can constitute murder.[6]

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[5] At the time of the 1970 amendment, Penal Code section 275 provided that a woman who solicited a drug and took it with the intent to procure a miscarriage, except as provided in the Therapeutic Abortion Act, was guilty of a felony. Section 275 was repealed in 2000. (Stats. 2000, ch. 692 (S.B. 370), § 2.)

[6] To date, there is no published court of appeal decision addressing whether section 187 can apply to a pregnant woman's actions or inactions that result in the death of her fetus, and the issue has divided the trial courts. In 2019, the Kings County Superior Court permitted the prosecution of a woman charged with murder for her own pregnancy loss. (See Pet. at p. 17, citing *People v. Becker* (Oct. 15, 2020, F081341) [nonpub. opn.].) The trial court concluded that section 187 covered such conduct. (*Ibid*.) The court ultimately dismissed the charge for lack of evidence of mens rea. Other courts have concluded that section 187 does not permit the prosecution of a mother for drug use during pregnancy resulting in stillbirth. The County of Siskiyou Superior Court, for example, held that a woman may not be charged with an offense under section 187 for the death of her child caused by alleged drug use during pregnancy. (*People v.*

Penal Code section 192, subdivision (a)—to which appellant pleaded guilty—provides in relevant part that "[m]anslaughter is the unlawful killing of a human being without malice … upon a sudden quarrel or heat of passion." It is well established that the killing of an fetus cannot constitute manslaughter, because a fetus is not a "human being" as defined in that statute. (*People v. Dennis* (1998) 17 Cal.4th 468, 506.) As this Court observed in *Dennis*, while, "[a]fter *Keeler*, the Legislature amended section 187 specifically to include as murder 'the unlawful killing of ... a fetus....'" it "made no similar amendment to section 192's definition of manslaughter as 'the unlawful killing of a human being without malice.'" (*Ibid.*) "There is no crime in California of manslaughter of a fetus." (*Ibid.*)

**ARGUMENT**

Appellant requests that the Court grant plenary review to "confirm that a pregnant woman may not be prosecuted or convicted of murder based on the outcome of her pregnancy" under Penal Code section 187. (Pet. 14-25.) In respondent's view, while the issue is an important one, the Court's intervention is not required at this time. The lower courts are well positioned to construe the statute in the first instance, and a

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*Jones* (Super Ct. Siskiyou County, 1993, No. 93-5).) Similarly, the County of San Benito Superior Court dismissed murder charges under section 187 against a woman who experienced a stillbirth, alleged to have been a result of drug use. (*People v. Jaurigue* (Super. Ct. San Benito County, 1992, No. 18988), order filed Aug. 21, 1992.)

well-reasoned, published decision from the Court of Appeal may adequately settle the issue without further review by this Court.

To be clear, respondent agrees with appellant that a pregnant woman cannot be prosecuted or convicted of murder of her fetus based on the outcome of her pregnancy. In briefest summary, when the Legislature amended Penal Code section 187 in 1970 to include the death of a fetus, it did not intend to sweep in a woman's own actions that might result in a miscarriage or stillbirth. This reading follows from the language of section 187, subdivision (b)(3), as a woman necessarily consents to an act that she herself voluntarily undertakes, and the larger statutory context as it existed at that time. It also reflects that the amendment was a response to *Keeler*, where a third-party's violence against a pregnant woman resulted in the fetus's death. (*Keeler*, *supra*, 2 Cal.3d at pp. 623, 628, 639.) That specific impetus is further evidence that the Legislature did not mean to criminalize the actions or inactions of pregnant women that might result in fetal death. And practical considerations also suggest that the Legislature did not intend extend section 187's reach to pregnant woman. Fear of criminal liability and imprisonment would deter women with addiction disorders from seeking out necessary, and sometimes lifesaving, healthcare. And it would place unnecessary law enforcement scrutiny on miscarriage and stillbirth events—which are relatively common occurrences. Such scrutiny could have disproportionate criminal

justice impacts, as the rates of miscarriage and stillbirth vary dramatically by race and ethnicity.[7]

Still, in respondent's view, the Court's intervention is not necessary at this time. The lower courts in this case have not yet addressed the scope of section 187, and there are at least two available paths for those courts to consider the issue.

The most efficient path may be for the Court to grant the petition "[f]or the purpose of transferring the matter to the Court of Appeal" (Cal. Rules of Court, rule 8.500, subd. (b)(4)), to consider whether to recall the remittitur on the ground that the superior court imposed judgment in excess of its jurisdiction.[8] "As a general rule, an error of law does not authorize the recalling of a remittitur." (*Mutch*, *supra*, 4 Cal.3d at p. 396.) "An exception is made, however, when the error is of such dimensions

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[7] See Sudeshna Mukherjee, et al., *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study* (2013) 177 Am. J. of Epidemiology 11, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3664339/pdf/kws393.pdf> [as of May 27, 2021]; Data & Statistics, Centers for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/stillbirth/data.html> [as of May 27, 2021].

[8] This framing differs from the way appellant requested relief below: In her application, appellant argued that recall of the remittitur was proper because she had been denied the effective assistance of appellate counsel; she did not cite *Mutch*. (*People v. Perez*, Oct. 21, 2020, F077851, *supra*.) That should not prevent the Court from granting and transferring to the Court of Appeal to consider the *Mutch* argument, as recall of a remittitur requires consulting the "equities." (*In re Serrano* (1995) 10 Cal.4th 447, 450; *In re Grunau* (2008) 169 Cal.App.4th 997, 1005.)

as to entitle the defendant to a writ of habeas corpus." (*Ibid.*) That type of error, justifying remittitur, is available "if there is no material dispute as to the facts relating to [defendant's] conviction and if it appears that the statute under which [defendant] was convicted did not prohibit [defendant's] conduct." (*Ibid.*)

The Court of Appeal did not consider that separate ground for recalling the remittitur. And that basis for recalling the remittitur may very well allow appellant to reopen her appeal. It is undisputed that the factual basis presented by the district attorney to support the murder charge against appellant alleged that her actions caused the stillbirth of her own fetus. (See *ante* at pp. 11-4; see also 1 CT 69.) As discussed, it is settled that the killing of a fetus cannot constitute manslaughter. And there are compelling arguments that a woman's actions or inactions that result in the miscarriage or stillbirth of her own fetus cannot constitute murder. It therefore appears that appellant was charged with, and convicted of, conduct that is not—and was not—a crime. In this highly unusual and troubling circumstance, this Court may grant review, transfer the matter to the Court of Appeal, and allow that court to consider in the first instance whether judgment was imposed "in excess of jurisdiction." (*Mutch*, *supra*, 4 Cal.3d at 396; *c.f. People v. Harris* (2018) 22 Cal.App.5th 657, 661 [recall of remittitur not available where sentence was legal when imposed; distinguishing *Mutch*]; see also *People v. Richardson* (June 10, 2021, No. A157529) __ Cal. App. 5th __ [2021 WL 2373548] [granting "jurisdictional challenge"

and vacating negotiated plea to a charge of "human trafficking of a minor for a sex act" when it was "abundantly clear *on the record* that the victim" was "'27' years old (an adult and not a minor)"].)

Alternatively, as the Court of Appeal observed, appellant may also raise the issue of the proper scope of Penal Code section 187 "by way of a petition for writ of habeas corpus in the superior court" where appellant may assert both that the superior court acted in excess of jurisdiction and present additional evidence relevant to her ineffective assistance of counsel claims. (*People v. Perez*, March 29, 2021, F077851, *supra*.) Appellant already has filed a petition for writ of habeas corpus in superior court (see *In re: Adora Perez*, *supra*) and informal briefing by the parties is now complete. Those pending proceedings offer the trial court (and the Court of Appeal, if necessary) the opportunity to consider whether the circumstances of appellant's case constitute an offense under section 187.

Habeas proceedings may of course offer a mechanism for addressing appellant's ineffective assistance of counsel claims, to extent they are necessary to the resolution of this matter. Appellant contends that her appellate counsel rendered ineffective assistance of counsel by failing to argue on appeal that her plea had been induced by misrepresentations regarding the scope of section 187. (Pet. 28.) That claim may benefit from the development of additional record evidence. And because habeas proceedings offer an adequate opportunity to resolve both the factual and legal issues presented in the petition, this Court may deny the petition without prejudice to appellant seeking relief

from any future proceedings. (*See Ex parte Byrnes* (1945) 26 Cal. 2d 824, 827 ["the writ may be used to present questions of law that . . . are so important as to justify an extraordinary remedy"]).

## CONCLUSION

Respondent agrees that appellant should have a meaningful opportunity to seek relief. But, in respondent's view, the Court's plenary consideration of the issues appellant presents in her petition is not immediately required.

Respectfully submitted,

ROB BONTA
*Attorney General of California*
RENU R. GEORGE
*Senior Assistant Attorney General*
KARLI EISENBERG
*Supervising Deputy Attorney General*

/S/ MARTINE D'AGOSTINO

MARTINE D'AGOSTINO
*Deputy Attorney General*
*Attorneys for Respondent*

June 11, 2021

## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13 Point Century Schoolbook font and contains 3,126 words.

ROB BONTA
*Attorney General of California*
RENU R. GEORGE
*Senior Assistant Attorney General*
KARLI EISENBERG
*Supervising Deputy Attorney General*

/S/ MARTINE D'AGOSTINO

MARTINE D'AGOSTINO
*Deputy Attorney General*
*Attorneys for Plaintiff and Respondent*

June 11, 2021

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: ***People v. Perez***
Case No.: **S268092**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 11, 2021, I electronically served the attached **ANSWER TO PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on June 11, 2021, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Criminal Appeals Clerk
Kings County Superior Court
Clerk of the Court
1640 Kings County Drive
Hanford, CA 93230-5997

Kings County District Attorney's Office
1400 West Lacey Boulevard
Hanford, CA 93230

Mary McNamara
Audrey Barron
Swanson & McNamara LLP
300 Montgomery St. Suite 1100
San Francisco, CA 94104

Matthew Missakian
Law Office of C. Matthew Missakian,
Inc.
5150 E. Pacific Coast Highway
Suite 200
Long Beach, California 90804

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 11, 2021, at Sacramento, California.

| Bryn Barton | **/s/ *Bryn Barton*** |
|---|---|
| Declarant | Signature |

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