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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARVIN TRAVON HICKS, Defendant and Appellant.	No. _____ (2d. Crim. B259665) (Sup.Ct.No. MA058121)

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Marvin Travon Hicks respectfully requests that this Court review the partially published decision of the Court of Appeal, Second Appellate District, Division Five, affirming his conviction of second-degree murder and related offenses based on a vehicle collision while petitioner was driving under the influence of PCP. The decision was filed December 23, 2015, and a copy of it is attached hereto as Exhibit A.

STATEMENT OF ISSUES FOR REVIEW

1. In *Missouri v. McNeely* (2013) 569 U.S. ___ [133 S.Ct. 1552; 185 L.Ed.2d 696], the United States Supreme Court resolved a split of authority to hold that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every drunk driving case sufficient to justify conducting a blood test without a warrant. Does a nonconsensual warrantless blood draw performed before *McNeely* in a drunk driving prosecution come within the good faith exception to the exclusionary rule? If not, did exigent circumstances exist in this case to permit petitioner's blood being drawn without his consent and without a warrant?

2. Where a drunk driver is retried for implied malice murder after a jury deadlocks on that charge but convicts him of vehicular manslaughter, is he entitled to have the second jury be made aware that he was charged with both crimes and convicted of the former one in his first trial? In *People v. Batchelor* (2014) 229 Cal.App.4th 1102, the court answered this question in the affirmative, holding: "The circumstance that the first jury was unable to reach a verdict on the murder charge should not properly be an opportunity to retry the case in a new posture, giving the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished. In other words, the People may not have their cake and eat it too. Defendant was in fact charged with both murder and manslaughter, and convicted of the latter offense in his first trial; we see no appropriate reason why both of defendant's juries should not have been aware of that circumstance." In the published portion of its opinion, the court below disagreed.

WHY REVIEW SHOULD BE GRANTED

Review is sought pursuant to California Rules of Court rule 8.500 (b)(1), to settle important questions of law and provide uniformity of decision.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the facts as presented by the Court of Appeal in its opinion, including those from the hearing on petitioner's suppression motion.

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE FEDERAL CONSTITUTIONAL ERROR BY DENYING PETITIONER'S MOTION TO SUPPRESS THE RESULTS OF A NONCONSENSUAL BLOOD DRAW TAKEN WITHOUT EXIGENT CIRCUMSTANCES

Petitioner filed a Penal Code section 1538.5 motion to suppress the blood drawn from him in the emergency room without a warrant or exigent circumstances in violation of the Fourth Amendment (1CT 42-28). After hearing, the court denied the motion on the grounds that exigent circumstances excused the lack of a warrant (2RT B6-B10), and the results of the blood draw were accordingly admitted into evidence to prove THC and PCP intoxication (5RT 3616-3622, 4220). Petitioner's convictions must be reversed because the blood draw was an unreasonable search under the circumstances of this case and the police were not entitled to rely on California authority giving blanket authority to conduct such searches, as whatever authority existed was a misinterpretation of

United States Supreme Court precedent.

A. The State was required to prove the existence of exigent circumstances

As a general rule, the Fourth Amendment requires a search warrant before a person is searched. There are several exceptions to the warrant requirement, the one in question here being the exigent circumstance of the risk of imminent destruction of evidence (*Mincey v. Arizona* (1978) 437 U.S. 385, 394).

The legal test for determining whether there are exigent circumstances is totality of the circumstances of the specific case. (*Schmerber v. California* (1966) 384 U.S. 757, 768, 770-772; *Missouri v. McNeely* (2013) 569 U.S. ___ [133 S.Ct. 1552; 185 L.Ed.2d 696].) In *McNeely*, the United States Supreme Court noted that it has applied the totality of circumstances test in numerous cases going back to 1931 (*Id.* at p. 1559 [citing numerous decisions].)

It is crucial to recognize that the *Schmerber* court did not establish a *per se* test justifying the warrantless drawing of blood in drunk driving cases. Rather, in *Schmerber*, where the defendant, driving drunk, had caused a collision, the court upheld the warrantless seizure of his blood under the "special facts" of that case. (*Id.* at p. 771.) In 2013, the Supreme Court reaffirmed *Schmerber* in *Missouri v. McNeely, supra,* which merely refined *Schmerber*'s holding by noting that courts today can issue search warrants remotely by means of telephonic or electronic communications (*id.* at p. 1562) and emphasizing that whether there are exigent circumstances always depends on the "facts and circumstances of the particular case" (*id.* at p. 1560). Contrary to the misinterpretations of a number of courts,[1]

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1 These case are *People v. Jimenez* (2015) 242 Cal.App.4th 1337, *People v. Harris (2015) 234 Cal.App.4th* 671,*People v. Youn* (2014) 229 Cal.App.4th 571, *People v. Rossetti* (2014)

the *McNeely* decision did not establish a new federal constitutional rule; rather, the legal test of totality of the circumstances has remained unchanged, in drunk driving and other cases, for the last century. Therefore, retroactivity of any possible new constitutional rule is not in issue in the present case.

The California decisions holding that *McNeely* does not apply retroactively to pending cases on appeal and that the officers in those cases were entitled to rely in good faith upon binding authority or department policy granting blanket authorization for warrantless blood draws in drunk driving cases should be disapproved. They have relied upon previous California court decisions that misinterpreted *Schmerber* as permitting the warrantless seizure of blood without a specific finding of exigent circumstances. Since the federal constitutional test has, since *Schmerber*, been totality of the circumstances, and since this issue turns on federal constitutional law as decided by the United States Supreme Court in *Schmerber* and *McNeely*, a totality of circumstances test should be applied to this case. Rather than excusing police reliance on an assumed blanket authorization under the good faith exception to the exclusionary rule per *Davis v. United States* (2011) 564 U.S. 285, the sole question should be whether, under the circumstances of *this case*, the state was entitled to force a blood draw in order to prevent the imminent destruction of evidence.

B. No exigent circumstances existed to justify the warrantless blood draw.

First, the court below relied on the circumstance of the "metabolization of alcohol in the bloodstream . . ." (2 RT B8.) While that is a relevant factor, it alone

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Cal.App.4th 1070 and *People v. Jones* (2014) 231 Cal.App.4th 1257.

does not justify the search here. The officers correctly believed that petitioner was under the influence of PCP; one of them testified that the drug takes about nine hours to leave a person's system (2RT A27-30). But the prosecution presented no evidence that the PCP in petitioner's system would have been eliminated within the time it would have taken to obtain a search warrant by telephone or mail (see Pen. Code § 1526(b)(2)). Furthermore, as the Supreme Court ruled in *McNeely, supra*, 133 S.Ct. 1552, 1563, the natural dissipation of alcohol in the bloodstream does *not* create a *per se* emergency; the *McNeely* decision upheld the state court's granting of a defense motion to suppress the results of a warrantless blood draw in a drunk driving prosecution. Similarly, the "metabolization of alcohol" factor cannot justify a warrantless search under the totality of circumstances here.

The second factor the court below relied on in finding exigency was that a delay in the legal blood draw could cause the results of later tests to be contaminated by any medications given in the interim (2RT B8). The only factual basis for that reasoning was the testimony of the phlebotomist that a blood draw was preferable before patients were administered any type of medication (2RT A6). This is not a valid reason for finding an emergency situation because, as the trial court itself recognized, the phlebotomist was neither a doctor nor nurse and did not testify as to her training or education (2RT B11). An expert may testify only to matters within her area of expertise (Evid. Code §§ 801-803). There was absolutely no expert testimony offered to prove that any type of pain medication would have contaminated a PCP test result, nor any evidence of the likelihood that such medication would even be administered. Any "contamination" exigency was based purely on speculation, under circumstances where the prosecution could easily have called witnesses to establish a true risk that delay in executing the

blood draw would cause contamination of tests that would indeed probably be given, but chose not to.

Third, the trial court repeatedly mentioned that petitioner was "combative" when he was in the emergency room, and was a danger to the deputies and the phlebotomist (2RT B8-9). While that may have been true, it does not justify the deputies' failure to obtain a search warrant on the grounds of exigency. On the contrary, the deputies and medical staff could easily have waited a brief period of time until petitioner calmed down to take a legal blood draw. His combativeness had nothing to do with how long it would have taken to obtain a search warrant electronically, another question on which the prosecution presented no evidence.

In sum, without any evidence of how long it would have taken for the deputies to obtain a warrant, pure speculation on whether delaying the blood draw would interfere with petitioner's treatment (if any) and reliance on combativeness that came and went with petitioner in the period after the collision, the totality of circumstances fell short of showing an emergency situation excusing compliance with the warrant requirement.

C. Reversal is required

When federal constitutional error occurs, reversal is required unless the state shows that the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18). The *Chapman* standard applies where, as here, unlawfully seized evidence is admitted at trial (*People v. Tewksbury* (1976) 15 Cal.3d 953, 972).

In this case, the blood test results were key evidence in the proof that petitioner was driving under the influence of PCP. Petitioner's PCP use was heavily relied on by the prosecutor to obtain his conviction of second-degree

murder. Accordingly, that conviction must be reversed.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ADVISE THE SECOND JURY THAT PETITIONER HAD ALREADY BEEN CONVICTED OF GROSS VEHICULAR MANSLAUGHTER

At petitioner's first trial, he was convicted of gross vehicular manslaughter while intoxicated, but the jury deadlocked on the murder charge. Petitioner's second trial began on September 22, 2014, one week after the Fourth District Court of Appeal's opinion in *People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1116-1118.

In *Batchelor*, the defendant killed his passenger in a collision resulting from his driving under the influence of alcohol. He was convicted of gross vehicular manslaughter but, as here, the jury deadlocked on the murder charge. In a second trial, he was convicted of second-degree murder on an implied malice theory (*id.* at pp. 1105-1108). On appeal, the *Batchelor* court held that the trial court committed reversible error because it refused to advise the second jury that the defendant had been convicted of manslaughter in the first trial, thus giving the jury the "false impression" that the defendant would be unpunished for the death if he were not convicted of murder (*id.* at pp. 1116-1117).

Based on that decision, petitioner's trial counsel requested that the court below advise the second jury that petitioner had been convicted of gross vehicular manslaughter at his first trial (4RT 2710-2717). That request was denied. For the reasons explained below, denial of petitioner's request to inform the second jury of his previous manslaughter conviction was error, requiring reversal of his

conviction of second-degree murder.

A. The *Batchelor* decision

While the underlying facts in *Batchelor* differ somewhat from those here, the relevant procedural history of the two cases is virtually identical, thus the same principles apply. The *Batchelor* court noted that gross vehicular manslaughter is a lesser related offense of murder and that under *People v. Birks* (1998) 19 Cal.4th 108, the trial judge therefore had no duty to instruct on it over the prosecutor's objection (*Batchelor, supra,* at p. 1116). But the court went on to distinguish the *Birks* rule, which is founded on the principle of noninterference with the prosecutor's *charging* decision, from the concerns implicated in the present situation which have no impact on the prosecutor's decision of what offenses to bring to trial. It concluded that instruction on the lesser related offense was proper where it served to diminish the risk that the jury would factor in a false impression in reaching its verdict, make the second jury aware of nothing more than what the first jury had been aware of, and not interfere with the prosecutor's task in any way:

> "Defendant's request that the second jury be instructed on gross vehicular manslaughter was properly denied. Defendant had already been tried and convicted of that offense. The second jury therefore could not appropriately be asked to render a verdict with respect to gross vehicular manslaughter, and it would make no sense to instruct on the elements of that offense.
>
> "Nevertheless, nothing in defendant's request to inform the jury of his conviction on the charge of gross vehicular manslaughter in his first trial interfered in any way with the prosecution's broad discretion to decide what offenses to charge. The People chose to charge both murder and manslaughter in the information. The circumstance that the first jury was unable to reach a verdict on the murder charge should not properly be an opportunity to retry the case in a new posture, giving the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished. In other words, the People may not have their cake and eat it too. Defendant

> was in fact charged with both murder and manslaughter, and convicted of the latter offense in his first trial; we see no appropriate reason why both of defendant's juries should not have been aware of that circumstance.
>
> "We conclude the trial court erred by instructing defendant's second jury in a manner that gave the jury the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder. There are likely many ways the trial court could have appropriately dispelled that false impression. Under the unusual circumstances of this case, perhaps the most straightforward way to do so would have been to inform the jury of the results of the first trial, and to emphasize that its only task, left unresolved by the first trial, was to consider whether the elements of the single remaining offense had been proven beyond a reasonable doubt. (*People v. Batchelor, supra,* 229 Cal.App.4th at pp. 1116-1117.)

B. Standard of review

Appellate review of an instructional issue does not entail any deference tothe trial court. Instructional claims are subject to an "independent" or "de novo standard of review" (*People v. Manriquez* (2005) 37 Cal.4th 537, 581, 584.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

C. The *Batchelor* reasoning is correct; the opinion below rejecting it is unsoundly reasoned

Although the *Batchelor* court concentrated on the prosecutor's jury argument to find the refusal to instruct prejudicial, it found error without resort to any exploitation of that error by the prosecutor. The instruction should have been given on request because without it the jury would have naturally had the false impression that the defendant would go unpunished if he were not convicted of murder and would therefore likely have considered punishment, or the lack of it,

in deciding the issue of guilt. In other words, contrary to the court of appeal's published decision in the present case, informing the jury that petitioner had already been convicted of manslaughter would have diminished, rather than created, the risk that unwarranted speculation about punishment would influence the verdict (see slip opin. at p. 26). Moreover, the court of appeal's other reason for rejecting *Batchelor* is similarly off the mark: its stated concern that the instruction could have *prejudiced* petitioner rather than enhanced his chance of receiving a fair verdict (slip opin. at p. 26) presumes that the judiciary is in a better position to assess what would be of benefit to a defendant than is his trial counsel who is charged with the task of promoting his best interests. At issue here is not whether the *Batchelor* instruction must be given in all cases with the procedural posture shared by *Batchelor* and the present case, but whether it should be given when defense counsel has determined that it would be helpful to his client and therefore makes a request for it. The Court of Appeal's rejection of *Batchelor* is unsoundly reasoned.

D. The error was prejudicial

The key issue at petitioner's second trial was whether he acted with implied malice when he drove his car on the day of the accident. A finding of implied malice requires that the defendant "actually appreciate the risk involved, i.e. a subjective standard." (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.)

The evidence of implied malice was not overwhelming. The first jury was unable to reach a unanimous verdict on the murder charge, most likely because of petitioner's psychotic state when he began driving. Petitioner smoked PCP in the morning before he got in his car to drive to see his son later in the afternoon. According to the prosecution's own witnesses, petitioner engaged in bizarre

behavior while he was driving just before the accident. the deputies testified that he was growling at them like a dog. Those facts show that petitioner may not have actually appreciated the risk of driving that day.

The *Batchelor* court summarized a number of cases involving alcohol-related homicides and implied malice. (*Id.* at pp,. 1113-1115.) The court noted that there were at least four relevant factors for upholding a murder conviction based on driving under the influence, one of which was a *pre-drinking* intent to drive (*id.* at pp. 1114-1115.)

Here, petitioner smoked PCP in the morning , but there was no evidence of a pre-intoxication intent to drive later that day. He obviously had a severe adverse reaction to the PCP, causing him to act irrationally, which is likely why the first jury deadlocked on the murder charge while determining that he did commit gross vehicular manslaughter.

Significantly, in the second trial the jury was not allowed the same perspective; they faced an all-or-nothing choice of either murder or no crime at all, with no hint that those weren't the sole poles defining petitioner's fate. That is exactly why the trial court's error was prejudicial. It is reasonably probable that the second jury was given a "false impression that a failure to convict defendant of murder would leave him unpunished for his actions . . ." (*Batchelor* at p. 1118), actions with results so horrendous that the Court of Appeal itself mentioned them as somehow relevant to the question of prejudice, which they are not (see slip opin. at p. 26, citing the "functional decapitation" of the 2-year old victim as part of the reason why any error was harmless). Petitioner's murder conviction should therefore be reversed and remanded for new trial.

CONCLUSION

For the foregoing reasons, review should be granted. If review is not granted, petitioner requests that the court of appeal's opinion be ordered unpublished.

DATED: January 29, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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WORD COUNT CERTIFICATION
People* v. *Marvin Travon Hicks

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 3,347 words.

NANCY GAYNOR

EXHIBIT A

OPINION OF THE COURT OF APPEAL

Filed 12/23/15

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARVIN TRAVON HICKS, Defendant and Appellant.	B259665 (Los Angeles County Super. Ct. No. MA058121)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Kathleen Blanchard, Judge. Affirmed.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.110 and 8.1110, this opinion is certified for publication with the exception of **BACKGROUND and DISCUSSION, parts A and B.**

INTRODUCTION

Defendant and appellant Marvin Travon Hicks (defendant) was convicted of second degree murder (Pen. Code, § 288.7, subd. (a)[1]) in connection with a vehicular death. At his first trial, defendant was convicted of gross vehicular manslaughter while intoxicated, and the jury deadlocked on the charge of second degree murder. At the second trial for second degree murder, the trial court refused to advise the jury that defendant had been convicted of gross vehicular manslaughter, a lesser related offense, in his first trial. We hold in the published portion of this opinion that the trial court did not err in refusing to give that advisement and affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

a) The Events Related to the Fatal Vehicle Accident

On December 6, 2012, Kim Thomas and John Alvarez saw defendant driving a black Toyota in a reckless fashion on public streets in the City of Lancaster. Thomas testified that a black Toyota stopped approximately "two car lengths before [a] stop sign"; the driver of the vehicle appeared to talk to someone, even though no one else was in the vehicle; the driver went forward, stopped abruptly, and then made a turn at a "high rate of speed"; the vehicle traveled at approximately 25 miles an hour and other cars were passing it; the vehicle sped by Thomas's car at a "high rate of speed"—estimated to be 65 or 70 miles an hour; the vehicle was stopped and blocked traffic lanes; the driver exited the vehicle and pushed it while appearing to talk to himself and wave his hands; and the

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[1] All statutory citations are to the Penal Code unless otherwise noted.

driver hit and kicked the vehicle, entered the vehicle, and then drove it at a "pretty fast" rate of speed.

Alvarez testified that the black Toyota blocked traffic; passed Alvarez's vehicle at a high rate of speed; and went into the lanes of oncoming traffic attempting to pass cars. Alvarez called 911 and reported that there was a "fairly reckless driver on Sierra Highway," and that the vehicle was "actually crossing the double yellow line into oncoming traffic."

At approximately 5:00 p.m., Los Angeles County Sheriff's Deputy Thomas Kim was driving in an unmarked detective's car, traveling northbound on the Sierra Highway. Deputy Kim looked in his rear view mirror and saw a black Toyota approaching at "a high rate of speed"—estimated at over 100 miles an hour—and allowed the vehicle to pass him. Deputy Kim saw the Toyota enter the lanes for oncoming traffic for approximately three seconds in order to pass vehicles. Deputy Kim accelerated to 70 to 75 miles an hour but was unable to pass the vehicles that defendant had passed. Deputy Kim said that the Toyota ran a red light without the brake lights appearing lit, causing some cars that had entered the intersection to quickly apply their brakes. Deputy Kim broadcasted over his radio, "I just had a car [that he described as a "black Toyota Solara two door"] blow past me going over 100 miles an hour driving on the wrong side of the street and blowing red lights, and going northbound on Sierra Highway just north of Avenue K."

Los Angeles County Sheriff's Sergeant Eric Eitner was off duty and in a personal vehicle on Avenue J. He testified that a black car driving northbound on the Sierra Highway went through an intersection at approximately 100 miles an hour and did not appear to have its brakes applied. He said that there was "a lot of traffic out there," and several drivers belatedly applied their brakes.

Los Angeles County Sheriff's Deputy Gustavo Munoz responded to a dispatch about the black Toyota. Deputy Munoz and his partner, Los Angeles County Sheriff's Department Deputy Giovanni Lampignano, were in a marked patrol car.

Deputy Lampignano saw a black Toyota run a red light at a high rate of speed, lose traction, and come to a stop on the southbound curb of the road. Deputy Lampignano activated the lights and sirens on the patrol vehicle and positioned it behind the Toyota.

Deputy Lampignano gave defendant commands, and defendant gave the deputies a "blank stare" and growled at them. Defendant then restarted his car, accelerated, and sped off. He attempted to make a left turn and was accelerating and braking "real quickly" in a jerking motion. A motorcyclist "almost lifted his bike to get it out of the path" of defendant's vehicle.

Deputy Lampignano had to "jump" back into the patrol car because defendant's vehicle came within two feet of him at a "high rate of speed." The deputies pursued defendant in their patrol car, activating the light and sirens. On three occasions, defendant veered into oncoming traffic for a few seconds, requiring cars to swerve to avoid collisions with the Toyota. Defendant ran a red light, and thereafter the deputies lost sight of the Toyota.

Candyce Bailey was on Avenue I traveling eastbound, and as she waited to make a left turn into a shopping center, she saw a dark sedan coming towards her. The car then veered around Bailey, coming within two or three inches of her vehicle. A short time later, she saw a police car in pursuit of a Toyota followed by five or six police cars with the lights and sirens activated.

At about this time, Tina Ruano and her daughter, Madison Ruano,[2] were in Tina's blue Lexus. Tina approached the intersection of 10th Street West and Avenue I; the traffic light was red. When the light turned green, Tina entered the intersection. She does not remember anything that happened next "other than a black car coming from by right side . . . ." Defendant's Toyota had been in a violent collision with Tina's Lexus. Tina regained consciousness while she was being taken to a hospital in an ambulance.

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[2] Because Tina Ruano and Madison Ruano share the same surname, we refer to them by their first names. The parties agree that Madison was two years old at the time of the incident.