SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TOMMY ADRIAN TRUJEQUE, Defendant and Appellant.	(Los Angeles County Superior Court No. VA048531-01)

~~FILED UNDER SEAL~~

ARGUMENT I PAGES 38-56, OF APPELLANT'S OPENING BRIEF

Appeal from the Judgement of the Superior Court of the State of California for the County of Los Angeles

HONORABLE PATRICK COUWENBERG, JUDGE

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DEATH PENALTY

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UNDER SEAL

I.

APPELLANT'S DEATH SENTENCE IS UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PRIOR-MURDER SPECIAL CIRCUMSTANCE IS BASED ON AN INVALID CONVICTION FOR SECOND DEGREE MURDER THAT WAS OBTAINED IN VIOLATION OF DOUBLE JEOPARDY

Appellant's death sentence rests on an invalid prior murder conviction.[1] The 1971 second degree murder conviction on which the prior-murder special circumstance (Pen. Code, § 190.2, subd. (a)(2)) was based was obtained in violation of double jeopardy because appellant had already been adjudicated and sentenced as a juvenile for the lesser offense of manslaughter when a juvenile court judge ordered a rehearing de novo, set aside the prior adjudication and found him unfit for juvenile court. Appellant was then transferred to superior court to be tried as an adult for the same offense, resulting in his second degree murder conviction. The precise procedures under which the rehearing de novo was granted and appellant was transferred to adult court were subsequently held unconstitutional by this Court and the United States Supreme Court. Reliance upon this invalid special circumstance rendered appellant's death

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[1]The state also alleged the multiple-murder special circumstance (Pen. Code, §190.2, subd. (a)(3)), which the jury found "true" based on appellant's conviction for the second degree murder of Raul Apodaca. (4 CT 1002.) As explained in Argument II, *infra*, that conviction was also invalid as the state was precluded by section 1387 from prosecuting appellant after having dismissed and refiled the Apodaca murder charges three times. As discussed further below, because both special circumstances are invalid, appellant was not eligible for the death penalty.

sentence arbitrary and unreliable and requires reversal of his death sentence. (U.S. Const., 5th, 8th and 14th Amends.; Cal. Const., art. I, §§ 15, 17.)

A. Relevant Facts

On February 7, 1969, less than a month after his sixteenth birthday, appellant fatally stabbed and robbed Allen Rothenberg, a delivery man for Nate's Liquor Store in Los Angeles. Appellant was arrested early the next day and allegedly confessed to the killing. On February 11, 1969, a petition was filed in juvenile court alleging that appellant, having turned sixteen on January 10, 1969, came within the provisions of Welfare and Institutions Code section 602, in that he (1) "did wilfully, unlawfully and with malice aforethought murder Allen Howard Rothenberg, a human being; thereby violating section 187 of the Penal Code" and (2) "did wilfully and unlawfully by means of force and fear take from the person, possession and immediate presence of Allen Howard Rothenberg . . . personal property, to wit: money; thereby violating section 211 of the Penal Code."[2] (1 CT Supp. IV 243.)

On February 13, 1969, appellant appeared before Juvenile Court Judge Leopoldo Sanchez. The public defender was appointed to represent

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[2]Pursuant to former Welfare and Institutions Code section 602, the juvenile court had jurisdiction over minors who had committed acts which would be crimes if committed by adults: that is, "[a]ny person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining a crime . . . ." In 1969, the juvenile court had exclusive jurisdiction over minors described in Welfare and Institutions Code section 602 who were under the age of sixteen. (Welf. & Inst. Code, § 707.) Thus, only minors over the age of sixteen could be transferred to superior court to be tried as adults.

All citations to the Welfare and Institutions Code are to the version in effect in 1969, at the time of appellant's offense and the juvenile court proceedings concerning it.

appellant, who denied the allegations of the petition. The district attorney was invited to assist the court in prosecuting the petition. Appellant was ordered detained at juvenile hall, and the case was set for an adjudicatory hearing on March 6, 1969. (1 CT Supp. IV 251 [Juvenile Court Minute Order In re Trujeque, Tom Adrian, no. 264068 0119282-IDC (Feb. 13, 1969)].) On February 28, 1969, the public defender was replaced by privately-retained counsel, David Marcus. (1 CT Supp. IV 256.)

In 1969, Welfare and Institutions Code section 701[3] provided for the juvenile court to conduct an adjudicatory hearing at which it would take evidence concerning whether the minor had committed the criminal acts alleged in a petition under Welfare and Institutions Code section 602. Welfare and Institutions Code section 702 required the court to make findings after hearing the evidence and, if the minor was found to be "a person described by" section 602, the court was to hear evidence concerning the proper disposition for the minor.[4] Pursuant to Welfare and

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[3]At the time of the hearing, Welfare and Institutions Code section 701 provided:

> At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602 . . . .

[4]Welfare and Institutions Code section 702 provided:

> After hearing such evidence [described in section 701], the

Institutions Code section 707, the court could at any time during a hearing on a petition brought under section 602 (either a section 701 adjudicatory hearing or a section 702 disposition hearing) make a finding that the minor was "unfit" for the juvenile court and order that he be tried as an adult.[5]

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court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. . . .

[5]Former Welfare and Institutions Code section 707 provided:

At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not fit and proper

Appellant's adjudicatory hearing began on March 6, 1969 before a referee of the juvenile court, Jules Barnett.[6] The deputy district attorney called eight witnesses to testify and introduced 29 exhibits. (1 CT Supp. IV

> subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.
>
> In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.
>
> A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.
>
> The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness.

[6]In 1969, Welfare and Institutions code section 554 provided that a presiding juvenile court judge could designate a referee to hear and determine issues in juvenile court. Orders removing a minor from his home required approval by a juvenile court judge. (Welf. & Inst. Code, § 555.) Other orders did not require judicial approval unless the judge of the juvenile court specified that the referees' orders be approved to take effect. (Welf. & Inst. Code, § 557.) A rehearing of a referee's decision could be requested by the minor or his parent or ordered on the judge's own motion. (Welf. & Inst. Code, §§ 558, 559.)

278-470.)

According to the evidence presented at the hearing, appellant, his co-defendant, Bert G., and several other teens, were drinking and listening to records at appellant's home at 3302 Paola Avenue in Los Angeles on the afternoon of February 7, 1969. (2 CT Supp. IV 362-65.) Debra J. was at the house from about 12 p.m. until sometime between 1:30 and 2:30 p.m.[7] There were empty liquor bottles at the house. Appellant had whiskey on his breath and Bert G. appeared to be drunk. Before she left, Debra J. heard someone suggest calling Nate's Liquor Store to order some beer. (2 CT Supp. IV 380-85.)

At about 2 p.m. that day, Nate's Liquor Store received an order for a case of Colt malt liquor from a person identifying himself as Mr. Martinez. (2 CT Supp. IV 310-12.) Allen Rothenberg, the owner's son, left at about 2:10 or 2:15 p.m. to deliver the order to 3302 Paola Avenue. (2 CT Supp. IV 312, 314.) As Debra J. left 3302 Paola, she passed a man carrying a case of beer toward the house. (2 CT Supp. IV 354, 385-86.) Shortly after that, she heard screams from inside the house. (2 CT Supp. IV 386-87.)

When Mr. Rothenberg had not returned by 2:30 or 2:45 p.m., Rudy Urbino, the manager of Nate's Liquors, went to 3302 Paola Avenue to look for him. (2 CT Supp. IV 318.) Mr. Urbino saw Mr. Rothenberg's car parked across the street, but there was no answer at 3302 Paola. (2 CT Supp. IV 319.) Mr. Urbino called Nate Rothenberg and Leonard Schaner,

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[7]Debra J. testified that she arrived at the party at noon and left about 1:30 p.m. (2 CT Supp. IV 367.) She also testified, however, that she saw the delivery man approaching the house as she left, and other witnesses testified that Mr. Rothenberg left the store to deliver an order to 3302 Paola about 2:10 or 2:15 p.m. (2 CT Supp. IV 310-12, 354, 385-86.)

Allen Rothenberg's father and uncle, who also came to 3302 Paola Avenue. (2 CT Supp. IV 319.) In the backyard of the house, they found a knife and what appeared to be blood on the rear stairs. (2 CT Supp. IV 320-21.) After looking further, they saw Allen Rothenberg's feet sticking out from underneath a bush that bordered a neighboring yard. (2 CT Supp. IV 320.) Someone called the police who arrived about 3 or 3:15 p.m. (2 CT Supp. IV 332, 339.) Allen Rothenberg was dead, having been stabbed multiple times. (2 CT Supp. IV 306.) His pockets were turned inside out. (2 CT Supp. IV 446.)

When the hearing resumed on the morning of March 7, 1969, appellant's lawyer made a motion proposing that appellant would admit to a violation of Penal Code section 192, former subdivision 2, now subdivision (b)[8] (involuntary manslaughter), if the court would amend the petition to include that allegation. (CT Supp. IVA 6.) The deputy district attorney opposed dismissing any portion of the petition, arguing that the evidence would show the murder and robbery allegations to be true. (CT Supp. IVA 6.) The referee requested a proffer, and the deputy district attorney said he would show that appellant had confessed to stabbing Rothenberg repeatedly with a knife and putting the body in a neighbor's yard, and that he had also admitted to planning the robbery in advance, calling Nate's Liquors, using the name Martinez, and having part of the money taken from Rothenberg. (CT Supp. IVA 7.) The referee ruled that, accepting all the facts proffered, "justice would dictate under present circumstances" deleting the allegation of malice aforethought and accepting appellant's admission. (CT Supp.

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[8]Section 192 was amended in 1984 to designate former subdivisions (1), (2), and (3) as subdivisions (a), (b), and (c). (Stats. 1984, ch. 742 § 1.)

IVA 8-9.)

Following this ruling, and in response to the referee's questions, appellant acknowledged that he had taken part in the stabbing that led to Allen Rothenberg's death. (CT Supp. IVA 9.) Referee Barnett accepted this admission and granted the motion to amend the petition and to dismiss the more serious allegations. (CT Supp. IVA 9.) He then read the probation officer's behavioral report and concluded that "justice is best served by retaining jurisdiction" and committing appellant to the Youth Authority. (CT Supp. IVA 10-11.)

The referee's written "Findings and Order," dated March 7, 1969, stated that the petition filed on February 11, 1969 was amended to add "'Paragraph III: that said minor on or about February 7, 1969, in the commission of an unlawful act killed Allen Howard Rothenberg, thereby violating Section 292.2 (*sic* - section 192, former subd. 2, now subd. (b)) of the Penal Code.' As amended, Paragraph III is sustained and Paragraphs I and II are dismissed in the interests of justice." (1 CT Supp. IV 264.) The referee filed a memorandum the same day, explaining his findings, including that appellant was just over the age of sixteen when he committed the crime alleged[9] and "after a lengthy hearing admitted the amended paragraph." (1 CT Supp. IV 265.) Also, the probation officer's report "indicates that the minor has a history of mental and brain problems plus a long record of delinquent behavior not highlighted by assaultive conduct" and the probation officer had recommended appellant be returned to the Youth Authority. (1 CT Supp. IV 265.) These factors, the referee found,

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[9]The referee mistakenly stated that appellant was two weeks over the age of sixteen; he was about two weeks older than that, having turned sixteen on January 10, 1969. (1 CT Supp. IV 265.)

supported "the Court's retention of jurisdiction of this minor, but dictate[] that he be recommitted to the California Youth Authority." (1 CT Supp. IV 265.) The referee's order was approved by Juvenile Court Judge Robert A. Wenke on March 21, 1969, and appellant was recommitted to the Youth Authority. (1 CT Supp. IV 264, 270.)

In the meantime, however, another Juvenile Court Judge, A.J. McCourtney, acting on his own motion, ordered a rehearing de novo of the referee's adjudication and set the rehearing for March 27, 1969.[10] (1 CT Supp. IV 268.) This minute order was dated March 18, 1969 but not entered until March 28, 1969. (1 CT Supp. IV 268.)

On April 7, 1969, after denying appellant's motion to dismiss the petition, Judge Wenke conducted the rehearing de novo ordered by Judge McCourtney. (1 CT Supp. IV 277.) Transcripts from the hearing before the referee were submitted to the court and the prosecution called additional witnesses. (1 CT Supp. IV 277.) On May 14, 1969, again over objection by appellant's counsel, Judge Wenke this time found the murder and robbery allegations in the petition "true." (2 CT Supp. IV 476-478.) He then found Appellant "unfit" for juvenile court and ordered him prosecuted as an adult. (2 CT Supp. IV 478.)

Entry of this order was stayed pending resolution of a writ of prohibition appellant's attorney had filed in this Court. (2 CT Supp. IV 476, 479-481.) The petition was denied and the stay expired on May 26,

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[10]Under former Welfare and Institutions Code section 559, "[a] judge of the juvenile court may, on his own motion, order a rehearing of any matter heard before a referee." Welfare and Institutions Code section 560 provided that "[a]ll rehearings of matters heard before a referee shall be before a judge of the juvenile court and shall be conducted de novo."

1969. (2 CT Supp. IV 484.) Appellant appealed the order of the juvenile court, but the appeal was dismissed on July 22, 1970. (2 CT Supp. IV 488, 520.) On February 1, 1971, appellant pled guilty, in adult court, to second degree murder for the death of Allen Rothenberg.[11] (2 CT 494.)

This second degree murder conviction was used to establish the prior-murder special circumstance in this case. (1 CT 109-110.) On August 2, 1999, appellant filed a motion to strike his prior conviction and the prior-murder special circumstances pursuant to *People v. Horton* (1996) 11 Cal.4th 1068, on the ground that the second degree murder conviction was unconstitutional because appellant's guilty plea was not knowing and intelligent. (2 CT 481-95.) During the evidentiary hearing on the motion, on August 10, 1999, the deputy district attorney who prosecuted appellant in adult court, John Breault, testified that appellant's lawyer had argued in 1971 that the proceeding in adult court was illegal, in violation of double jeopardy, because appellant had already been adjudicated and sentenced by the juvenile court. (4 RT 784.) Breault also remembered that he had argued that jeopardy did not attach in juvenile proceedings. (4 RT 785.) The trial court denied the motion to strike the prior. (4 RT 801.)

Following his conviction, appellant waived his right to jury trial as to his prior convictions and the prior-murder special circumstance. (7 RT 1861-62.) The trial judge took judicial notice of Appellant's juvenile court file, which is supplemental volume IV of the Clerk's Transcript in the appellate record, and reviewed the file. (4 RT 753, 7 RT 1867.) After

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[11]According to defense counsel, the only surviving evidence of the conviction is a superior court minute order dated February 1, 1971, a copy of which was attached to appellant's motion to strike his prior conviction. (2 CT 489, 494.)

doing so, he found the prior-murder special circumstance "true." (8 RT 1874.)

B. Appellant's Second Degree Murder Conviction Is Invalid under the Double Jeopardy Clauses of the Federal and State Constitutions

Just a few years after appellant's 1971 guilty plea, the United States Supreme Court held that the California juvenile court procedures by which appellant was transferred to adult court for prosecution violated the double jeopardy clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment to the United States Constitution. (*Breed v. Jones* (1975) 421 U.S. 519, 527, 541.) This Court has held that *Breed v. Jones* is retroactive. (*In re Bryan* (1976) 16 Cal.3d 782, 787.) Appellant's second degree murder conviction was therefore invalid on double jeopardy grounds.

In *Breed v. Jones*, as in appellant's case, a petition was filed under Welfare and Institutions Code section 602. The seventeen-year-old minor was alleged in a petition filed in 1971[12] to have committed acts "which, if committed by an adult, would constitute the crime of robbery in violation of California Penal Code section 211." (*Breed v. Jones*, *supra*, 421 U.S. at p. 521.) An adjudicatory hearing was held in juvenile court, pursuant to Welfare and Institutions Code section 701, at which the prosecution presented two witnesses. (*Id.* at pp. 521-22.) The juvenile court found the allegations "true" and sustained the petition. (*Id.* at p. 522.) The case was continued for a disposition hearing under Welfare and Institutions Code

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[12]The juvenile court procedures at issue in *Breed v. Jones, supra*, were the same as in 1969, the relevant provisions having been unchanged during that time.

section 702. At that hearing, the juvenile court found the minor "unfit for treatment as a juvenile" under Welfare and Institutions Code section 707, and ordered that he be prosecuted as an adult. (*Id.* at p. 524.) The minor challenged this decision on double jeopardy grounds, but the Court of Appeal denied his petition. (*Id.* at pp. 524-25.)

An information was filed against the minor in superior court, and he was found guilty of robbery. The minor then sought relief in federal court. The district court denied his petition for habeas corpus, but the court of appeals reversed, holding that jeopardy attached at the adjudicatory hearing in juvenile court, and the minor could not thereafter be tried as an adult. (*Breed v. Jones*, *supra*, 421 U.S. at pp. 525-526.)

The Supreme Court agreed, finding that "it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." (*Breed v. Jones*, *supra*, 421 U.S. at p. 529.) There was "little to distinguish an adjudicatory hearing" in California's juvenile justice system "from a traditional criminal prosecution."[13] (*Id.* at p. 530.) The Supreme Court therefore rejected the state's argument that, after such a hearing, trying the minor in superior court "on an information charging the same offense" did not violate double jeopardy. (*Id.* at p. 532.)

The Court declined to find an exception to the prohibition against double jeopardy based on the concept of "continuing jeopardy," finding

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[13]Indeed, the state conceded at oral argument "that the 'adjudicatory hearing is, in every sense, a court trial.'" (*Breed v. Jones*, *supra*, 421 U.S. at p. 529, fn.11.)

there was not sufficient justification for subjecting juveniles to essentially two trials as the California procedure did. (*Breed v. Jones, supra*, 421 U.S. at pp. 533-34.) The Court held that states could conduct hearings to decide whether a juvenile should be transferred to adult court, including an assessment of the strength of the evidence against the minor. (*Id.* at p. 538, fn. 18.) However, the determination whether to "treat a juvenile within the juvenile court system" must be made "*before* entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain and embarrassment of two such proceedings." (*Id.* at p. 538 [italics added].)

In response to *Breed v. Jones*, California revised its juvenile justice statutes to provide that the fitness (i.e. transfer) hearing must take place "prior to the attachment of jeopardy." (*Barker v. Estelle* (9th Cir. 1989) 913 F.2d 1433, 1439-40 [quoting Stats. 1975, ch. 1266, § 4, p. 3325 and finding no double jeopardy violation with respect to defendant transferred to adult court under the revised procedure].) Appellant, however, was subject to the very same procedures that were invalidated in *Breed v. Jones*.

Indeed, the only difference between appellant's case and *Breed v. Jones* is that appellant was, in addition, subject to the rehearing de novo procedure which was also found to violate double jeopardy.[14] (*Jesse W. v. Superior Court* (1979) 26 Cal.3d 41, 48 (*Jesse W.*).) In *Jesse W.*, as in appellant's case, a juvenile court judge ordered a rehearing de novo and set aside the findings of a referee who had ruled in the minor's favor. (*Id.* at p.

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[14]This Court distinguished California's rehearing de novo procedure from a system of review contained in Maryland's juvenile justice statutes and upheld by the Supreme Court in *Swisher v. Brady* (1978) 438 U.S. 204.

43.) This court held that, pursuant to *Breed v. Jones, supra*, jeopardy attached at the adjudicatory hearing – whether it was before a referee or a juvenile court judge – and a rehearing de novo at which the juvenile court judge abandoned the referee's findings and conducted a new hearing impermissibly subjected the minor to double jeopardy.[15] (*Jesse W., supra,* 26 Cal.3d at pp. 44, 48.)

Appellant was thus placed in jeopardy not twice but three times for the death of Allen Rothenberg. Under *Breed v. Jones* and *Jesse W., supra,* jeopardy attached at the adjudicatory hearing held before Referee Barnett. That hearing was a trial "in every sense" (*Breed v. Jones, supra,* 421 U.S. at p. 529, fn.11), and resulted in a finding that appellant had committed acts constituting only involuntary manslaughter, rather than murder and robbery as alleged in the petition. Appellant was placed in jeopardy again when a juvenile court judge ordered a rehearing de novo on his own motion, the referee's findings were abandoned, and a new hearing was held at which the prosecution presented additional evidence. In the second hearing, the previously dismissed allegations of murder and robbery were found "true," the petition was sustained, and appellant was ordered to be prosecuted as an adult. Finally, appellant was placed in jeopardy a third time when he was prosecuted in adult court for the same offense.

Even if the rehearing de novo procedure had not itself been constitutionally flawed, appellant's second degree murder conviction would

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[15]Because of the double jeopardy problems inherent in the rehearing de novo process, referees were thereafter precluded from conducting adjudicatory hearings on petitions filed under Welfare and Institutions Code section 602, absent a stipulation by the parties. (*In re Perrone C.* (1979) 26 Cal.3d 49, 56-57.)

still be invalid under *Breed v. Jones*, because appellant was subject to a full-blown adjudicatory hearing in juvenile court before being transferred to adult court to be tried for the same offense.[16] (See *Barker v. Estelle, supra,* 913 F.2d at pp. 1439-1440.)

Appellant's eventual guilty plea in adult court did not waive the double jeopardy violation. (*Menna v. New York* (1975) 423 U.S. 61, 62.) "Where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." (*Ibid.*)

The Constitution similarly precluded the state from haling appellant into adult court to be tried for the same offense for which he had already been adjudicated and sentenced as a juvenile. Appellant should have had only a juvenile court adjudication of involuntary manslaughter, which could not have been used to establish the prior-murder special circumstance under Penal Code section 190.2, subdivision (a)(2), because it was neither a "convict[ion]," nor for the offense of "murder in the first or second degree." (See *People v. Burton* (1989) 48 Cal.3d 843, 861 ["adjudications under Welfare and Institutions Code section 602 are not criminal convictions"].)

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[16]As *Breed* itself makes clear, double jeopardy bars a subsequent trial in adult court even if the adjudication hearing results in findings adverse to the minor. (*Breed v. Jones*, *supra*, 421 U.S. at p. 541.) "The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71-72, quoting *United States v. Ball* (1896) 163 U.S. 662, 669.)

C. The Invalidity of Appellant's Prior Conviction Is Cognizable on Appeal Although it Was Not Challenged Specifically on Double Jeopardy Grounds below

Appellant's trial counsel did not challenge the prior murder conviction on double jeopardy grounds. However, this Court has specifically urged that "attacks upon the constitutional basis of prior convictions be disposed of at the earliest possible opportunity," both in the interests of judicial economy[17] and "[b]ecause the Constitution places special emphasis upon the need for reliability in the capital context." (*People v. Horton, supra,* 11 Cal.4th 1068, 1131, 1134.) Because of the Eighth Amendment's requirement of heightened reliability in capital cases, it is "particularly important to assure that a prior conviction that is sought to be used as a basis or justification for the imposition of the death penalty is not tainted by a fundamental constitutional flaw." (*Id.* at p. 1134, citing *Johnson v. Mississippi* (1988) 486 U.S. 578.) A prior murder conviction that is, in fact, tainted by such a fundamental constitutional flaw "does not constitute reliable evidence that properly may support a death sentence." (*Id.* at p. 1135.)

A violation of double jeopardy is a fundamental constitutional flaw. As this Court has said, "the double jeopardy clause is no mere 'technicality'; it is an integral part of 'the framework of procedural protections which the Constitution establishes for the conduct of a criminal

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[17]A death sentence premised upon a constitutionally tainted prior murder conviction "inevitably will give rise to one or more exhaustive habeas corpus petitions in this court and possibly in federal tribunals, probably requiring, ultimately, that the death penalty judgment be set aside under the principles articulated in *Johnson v. Mississippi, supra*, 486 U.S. 578." (*People v. Horton, supra,* 11 Cal.4th at p. 1139.)

trial.'" (*Marks, supra,* 1 Cal.4th at pp. 78-79, quoting *United States v. Jorn* (1971) 400 U.S. 470, 479 (plur. opn.); see also *id.* at p. 71 ["The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence," quoting *Benton v. Maryland* (1969) 395 U.S. 784, 795.])

This Court has discretion to review legal claims raised for the first time on appeal, particularly when those claims " assert[ ] the deprivation of certain fundamental, constitutional rights," including the right not to be placed twice in jeopardy. (See *People v. Vera* (1997) 15 Cal.4th 269, 276, abrogated in part on other grounds in *People v. French* (2008) 43 Cal.4th 36, 47 & fn. 3; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [an appellate court is "generally not prohibited from reaching a question that has not been preserved for review by a party"]; *People v. Saunders* (1993) 5 Cal.4th 580, 592 [defendant's failure to object did not preclude his arguing on appeal that his conviction violated double jeopardy]; accord *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 618, fn. 29.)

In *People v. Horton, supra*, this Court held that "procedural bars," which might otherwise prevent a court from addressing the merits of a constitutional challenge to a prior conviction used to establish the prior-murder special circumstance should not be applied in the context of a capital case – at least where a serious constitutional deficiency was apparent from the record. (*People v. Horton, supra,* 11 Cal.4th at pp. 1138-1139.)

In this case, all the facts establishing the double jeopardy violation are contained in appellant's juvenile court record which is part of the record

on appeal and of which the trial court took judicial notice. Those facts are as follows: (1) on March 6 and 7, 1969, Referee Barnett conducted a full adjudicatory hearing, found appellant had committed conduct amounting to involuntary manslaughter, dismissed the original two allegations of the petition, ruled that appellant should remain in the jurisdiction of the juvenile court, and ordered him committed to the Youth Authority (1 CT Supp. IV 264-265, 270, 2 CT Supp. IV 278-470, CT Supp. IVA 9-11); (2) on April 7, 1969, a juvenile court judge conducted a rehearing de novo, found the more serious, previously dismissed allegations true, found appellant unfit for juvenile court, and ordered that he be tried as an adult (1 CT Supp. IV 268, 277, 2 CT Supp. IV 478); and (3) appellant was charged in adult court for the same offense, resulting in a conviction for second degree murder on February 1, 1971 (2 CT 494). The law is also unambiguous: these very procedures were found constitutionally defective by the United States Supreme Court and by this Court. (*Breed v. Jones, supra,* 421 U.S. at p. 541; *Jesse W., supra,* 26 Cal.3d at pp. 44, 48.) Appellant's conviction for second degree murder is therefore constitutionally invalid and "does not constitute reliable evidence that properly may support a sentence of death." *(People v. Horton, supra*, 11 Cal.4th at p. 1135.)

Consistent with this Court's reasoning in *People v. Horton*, *Marks*, and *People v. Saunders, supra*, it would be in the interests of judicial economy to address the validity of appellant's prior murder conviction now, in his direct appeal, rather than in the context of a post-conviction ineffective assistance of counsel claim.

D. Conclusion

A death sentence "predicated in part" upon a constitutionally invalid prior conviction "cannot be sustained." (*People v. Horton, supra,* 11 Cal.4th

at p. 1135, citing *Johnson v. Mississippi, supra,* 486 U.S. at pp. 585-586.) The prior-murder special circumstance must be set aside. Because, as discussed in Argument II, *infra*, the conviction supporting the multiple-murder special circumstance is also invalid, appellant was not eligible for the death penalty, and his death sentence must therefore be vacated. Moreover, as discussed in Argument XII, *infra*, the invalid conviction was also used to impeach appellant when he testified and thereby tainted the entire guilt-innocence phase, requiring the reversal of appellant's convictions as well.

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DECLARATION OF SERVICE

Re: People v. Tommy Adrian Trujeque No. S083594

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

ARGUMENT I PAGES 38-56,
OF APPELLANT'S OPENING BRIEF
(FILED UNDER SEAL)

on each of the following, by placing same in an envelope addressed respectively as follows:

STACY S. SCHWARTZ
Deputy Attorney General
Attorney General's Office
300 South Spring St.
Los Angeles, CA 90013

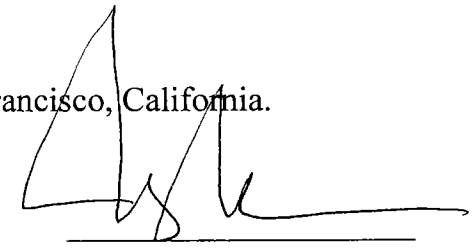
SUSAN GARVEY
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

Los Angeles Superior Court
Attn: ADDIE LOVELACE
Death Penalty Coordinator
210 West Temple St., Room M-3
Los Angeles, CA 90012

TOMMY A. TRUJEQUE
P.O. Box D-94497
San Quentin State Prison
San Quentin, CA 94974
(to be hand delivered on 03/26/12)

Each said envelope was then, on March 23, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 23, 2012, at San Francisco, California.



DECLARANT