S214116

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The PEOPLE of the State of California,
Appellant/Plaintiff

Versus

BRIAN ARANDA,
Respondent/Defendant

S 214116

ANSWER TO PETITION FOR REVIEW

Fourth Appellate District, Division Two, No. E056708
Riverside County Superior Court, No. RIF154701
The Honorable Michelle D. Levine and Helios Hernandez, Judges

ANSWER TO PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Brian Aranda, defendant and respondent in the above captioned action, provides this Answer to the Petition for Review filed by the People of the State of California to grant review of the published opinion filed on September 12, 2013 by the Court of Appeal, Fourth Appellate District, Division Two,.

ISSUES PRESENTED:

I. WHETHER THIS COURT'S HOLDING IN *STONE VERSUS SUPERIOR COURT* WAS BASED ON THE ADDITIONAL DOUBLE JEOPARDY PROTECTIONS PROVIDED BY THE STATE OF CALIFORNIA TO DEFENDANTS PROSECUTED IN CALIFORNIA'S STATE COURTS?

II. WHETHER THE LESSER INCLUDED OFFENSES OF COUNT ONE MUST ALSO BE DISMISSED BECAUSE NO LEGAL NECESSITY EXISTED TO DECLARE A MISTRIAL; HENCE, DOUBLE JEOPARDY BARS RETRIAL OF 1ST DEGREE MURDER AS WELL AS ANY OF THE LESSER INCLUDED OFFENSES IN COUNT ONE?

STATEMENT OF THE CASE AND SUMMARY OF THE RELEVANT FACTS:

Defendant had been told by his girlfriend that her father was sexually assaulting and raping her. These assaults happened because her father forced her to sleep in a bed with him in a one bedroom apartment. On December 2, 2009, defendant received an urgent text message from his girlfriend in which she pled with him to come to her house because her father "had that look in his eyes." She told defendant that she was pregnant with their twins, that she could not handle being raped again, and that it would result in a miscarriage. She told him where to find the key to the house.

Defendant went to his girlfriend's house. He took no weapon with him because his purpose was to rescue his girlfriend from her father. Upon entering the home, he realized her father had a gun, so he found an ice pick in the kitchen of his girlfriend's home to use for protection. Defendant found his girlfriend in the bed with her father. She awakened, and as she got out of bed, her father awakened. The defendant and her father fought as he attempted to remove her from the apartment. During the fight, defendant stabbed the father several times with the ice pick. The father subsequently died from these wounds. Defendant was thereafter arrested.

The Information charged defendant with one count of 1st degree murder [PC 187], use of a deadly weapon [PC 12022(b)(1)], and use of a deadly weapon during the commission of a serious/violent felony [PC 1192.7(c)(23)]. Defendant was tried before a jury beginning November 9, 2011, the Honorable Helios Hernandez, Judge presiding. The defense presented evidence of "defense of others" and "self defense."

Jury Deliberations:

At the conclusion of the trial, the jury was provided with four (4) verdict forms for Count One; guilty of 1st degree murder, guilty of 2nd degree murder, guilty of voluntary manslaughter, and not guilty.[1] Thereafter, on November 29, 2011 at 14:45

[1] This is the second alternative for providing the jury with verdict forms when the prosecution has filed a count that has lesser included offenses. See *Stone v. Superior Court* (1982) 31 Cal.3d 503.

p.m., jury deliberations began and continued through December 5, 2011. (See Court Docket Sheets for Nov. 29 and 30, and Dec. 2 and 5, 2011.)

Jury Activity on December 2, 2011

(See Reporter's Transcript of Dec. 2, 2011):

On December 2, 2011, the third day of jury deliberations, jurors spoke to the courtroom bailiff and expressed concern regarding one of the jurors who was acting "hostile" towards others if they disagreed with him. The bailiff told the court of this conversation, and at 14:40 p.m., the court had the bailiff tell counsel what the bailiff previously told the court. The court decided to ask the jury foreman how deliberations were coming. When asked, the jury foreman said nothing about any acrimony in the jury deliberation room. However, the foreman volunteered the numerical status of the jury deliberations, that the jurors had initially discussed 1st degree murder, then shifted to 2nd degree murder. He said that "a couple" jurors were considering 2nd degree murder, whereas the other jurors were now discussing whether petitioner was guilty of manslaughter. The court instructed the jury to continue deliberating. The court made no further inquiry as to the potential problem with one of the jurors. (Reporter's Transcript of December 2, 2011.)

Jury Activity on December 5, 2011

(See Reporter's Transcript of Dec 5, 2011):

On the next court day, December 5, 2011, at 14:40 p.m., the jury foreman sent a note to the court and indicated a need to speak with the court. However, prior to meeting with the jury foreman and based on what the foreman had said on December 2, 2011, defense counsel requested the jury be provided a "not guilty of 1st degree murder" verdict form in order to determine if the jury had reached a partial verdict as to 1st degree murder. The prosecutor "strenuously" objected. The trial court did not respond to the defense request. The court brought the foreman into court, and the foreman told the court that the jury may have reached a deadlock, that their numerical status had shifted, so that now only one juror was "stuck on" 2nd degree murder, two jurors were for voluntary manslaughter, and the remaining nine jurors were for acquitting petitioner

of all crimes alleged in Count One. He asked for direction from the court. (RT of December 5, 2011.)

The foreman was excused briefly. In the ensuing discussions, defense counsel requested two more times that the jury be provided a "not guilty of 1st degree murder" verdict form in order to determine if the jury had reached a partial verdict as to 1st degree murder. Again, the prosecutor "strenuously" objected. The trial court refused the defense request to determine if the jury had reached a partial verdict as to 1st degree murder. (Docket entry for Dec. 5, 2011; RT of Dec. 5, 2011.)

The entire jury was brought into the courtroom. The court asked the jurors if there was anything the court could do to assist them in their deliberations. Four jurors responded. Two indicated they believed that with assistance from the court, the jury may be able to reach a verdict. Juror #12 (the potentially problematic juror) stated he did not believe the jury could reach a verdict. A fourth juror asked what they should do if one of the jurors refused to change his mind. The court instructed the jury to continue deliberating, but the trial judge said he intended to call them back into court in 40 minutes. The court intended to declare a mistrial at that time. (RT of December 5, 2011.)

The Court Declared a Mistrial on It's Own Motion:

Forty minutes later, the court recalled the jury to the courtroom, and asked the foreperson if they had made "any progress"? The response was "No, we're still at the same spot." The Court confirmed the numerical vote was 9 to 2 to 1 (for acquittal, voluntary manslaughter and 2nd degree murder, respectively), then said, "I think that's about it. You've been at it a couple of days. You gave it your best shot. It didn't work out." (RT of Dec. 5, 2011, p. 10.) The Court then declared a mistrial and discharged the jury. (RT of Dec. 5, 2011, pp. 10, 11.) Defense counsel never consented to the court's declaring a mistrial. A new jury trial date was set for Jan. 23, 2012. (Docket entry for Dec. 5, 2011; RT of Dec. 5, 2011.)

Defendant Moved to Have the Entire Case Dismissed on Double Jeopardy Grounds.

The case was returned to the calendar courtroom where a new trial date was to be set. While in the calendar court, defendant filed a motion to dismiss as to a) 1st degree murder, and b) each of the lesser included offenses of 1st degree murder that was alleged in Count One. The basis was that defendant had been placed once in jeopardy. On May 14, 2011, the Honorable Michele D. Levine *granted* defendant's motion to dismiss the 1st degree murder charge alleged in Count One, but *denied* defendant's motion to dismiss the lesser included offenses of 2nd degree murder and voluntary manslaughter. (Reporter's Transcript of Defendant's Motion to Dismiss heard on May 10 and 14, 2012.)

Defendant Filed a Petition for Writ of Prohibition/Mandamus with the Fourth District Court of Appeal, *and* the People Filed a Motion for Reconsideration of the Court's Dismissal of the 1st Degree Murder Charge.

On May 28, 2012, defendant filed a Petition for Writ of Prohibition/Mandamus with the Fourth District Court of Appeal, Division Two, requesting that court issue a mandate that the Superior Court reverse its ruling and grant the motion to dismiss the lesser included offenses based on "once in jeopardy" grounds, or in the alternative, issue an Order to Show Cause to the Real Party in Interest why it should not do so.

On June 1, 2012 the People filed a Motion for Reconsideration of Judge Levine's ruling that dismissed the 1st degree murder charge. This motion was based on the recently decided United States Supreme Court case of *Blueford v. Arkansas* (2013) 566 U.S. ___ [132 S.Ct.2044, 182 L.Ed. 2d 937].

On June 8, 2012, the Court of Appeal issued a summary denial of the defendant's petition for writ of prohibition/mandamus. (The Court of Appeal's summary denial order, dated June 8, 2012.)

On June 18, 2012, Judge Levine denied the People's Motion for Reconsideration of the trial court's ruling that dismissed the 1st degree murder charge. (Docket entry for June 18, 2012.)

The People Filed an Appeal from Judge Levine's Ruling in the Fourth District Court of Appeal, Division Two.

The People filed a timely appeal with the Fourth District Court of Appeal, Division Two. The defendant filed a response. On September 12, 2013, the Court of Appeal affirmed the ruling by Judge Levine dismissing the 1st degree murder charge, but denied the defendant's request to have the lesser included offenses dismissed.[2] The Court of Appeal held that "*Blueford* abrogates *Stone* only to the extent that *Stone* held that the partial acquittal rule arises under the federal Constitution, and that the partial acquittal rule continues to apply in prosecutions in California state courts." (Court of Appeal Opinion, p. 10.)

Reasons for Granting Review

The opinion of this Court in *Stone v. Superior Court* (1982) 31 Cal.3d 503 was based on its interpretation of the Double Jeopardy Clauses of the federal Constitution *and* the California State Constitution. It is important this Court clarify and affirm the Court of Appeal's holding that *Blueford v. Arkansas* may have abrogated the reasoning of the California Supreme Court in *Stone* as to the Fifth Amendment of the federal Constitution, but that California law provides added double jeopardy protections to defendants prosecuted in California state courts. Hence, the law as enunciated in *Stone* is correct so far as it is based on the added double jeopardy protections provided by the California Constitution.

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[2] The Court of Appeal addressed this issue in footnote 7 of its opinion. The court asserted that the defendant had not appealed that ruling by Judge Levine, then held that "retrial on the lesser included offenses is permissible pursuant to *Stone*." The defendant could not file an appeal as to that portion of Judge Levine's ruling since it was not a final judgment, but the defendant did pursue the appropriate remedy of filing a petition for writ of prohibition/mandamus, which the court of appeal had previously denied summarily. (See *Stone v. Superior Court* (1982) 31 Cal.3d 503, 508, at fn. 1.)

Additionally, the Court of Appeal erred when it concluded that jeopardy has not attached to the lesser included offenses. Defendant will suffer irreparable harm if this Court does not reverse the decision of the Court of Appeal based on the reasoning of Argument #4, *infra*.

1. *Stone v. Superior Court* was also based on this Court's interpretation of the California Constitution; the language found in the *Stone* decision was not intended as *dicta*.

If the California Supreme Court was basing its decision in *Stone* solely on its interpretation of the federal constitution, why would the Court even mention the independent state grounds basis provided by the California constitution?

> [W]e are mindful that the double jeopardy clause of the Fifth Amendment applies to the states through the general provisions of the Fourteenth Amendment. [citation omitted.] Thus the minimum standards of double jeopardy protection for criminal defendants, as enunciated by numerous United States Supreme Court decisions, are binding on this court. Of course, we remain free to delineate a higher level of protection under article I, section 15 (formerly § 13), of the California Constitution. [citations omitted.] (*Stone*, *supra*, at pp. 509-510. Underscoring added.)

If *Stone* was based exclusively on the protections provided by the federal constitution, why would this Court also refer to the "disarray in other states" on the issue of "implied partial verdicts of acquittal", rather than cite federal and state cases that discuss this legal concept as it pertains to the Fifth Amendment?

> While cases in other states are in disarray on the issue of giving effect to implied partial verdicts of acquittal on a charged offense when the jury is deadlocked as to an uncharged lesser included offense,[FN6] two California Court of Appeal decisions have applied the rule of *Griffin* to comparable factual situations (*Stone, supra,* at. p. 512.)

Other states, like California, are free to provide *added double jeopardy protections* to defendants in state court prosecutions. Indeed, in footnote 6 of the *Stone* decision, this Court referred to two states by name which provide statutory protections to defendants in

addition to those provided by the Fifth Amendment double jeopardy clause.[3] Why would this Court cite cases that provide "added double jeopardy protections" beyond that of the Fifth Amendment unless that was what this Court intended to do in *Stone*?

Certainly when deciding the *Stone* case, this Court was aware that the United States Supreme Court had not yet addressed this specific issue as to whether the Fifth Amendment provides for "implied partial verdicts of acquittal." With that in mind, it is apparent that this Court in *Stone* provided its own legal rationale for basing its holding on the Fifth Amendment, but also reasoned that even if that interpretation were to be subsequently rejected by the United States Supreme Court, the *Stone* rationale would still stand based on independent state grounds.

2. Subsequent decisions by this Court confirm the *Stone* case was based on independent state grounds.

Fourteen years after *Stone*, this Court in *People v. Fields* (1996) 13 Cal.4th 289 reiterated that the double jeopardy clause exists within the Fifth Amendment of the United States Constitution as well as Article I, section 15 of the California Constitution, and that "the California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution, as construed by the United States Supreme Court." (*Id.*, at p. 298.) Thereafter, this Court wrote that its inquiry in *Fields*, as it was in *Stone*, was guided by decisions interpreting the Fifth Amendment "as well as the decisions interpreting the California Constitution . . ." :

> Our inquiry here is thus guided by the decisions announcing the minimum standards of double jeopardy protection under the Fifth Amendment, as well as the decisions interpreting the California Constitution and the statutory provisions implementing those constitutional protections. *Stone v. Superior Court* (1982) 31 Cal.3d 503, 509-510. (*People v. Fields* (1996) 13 Cal.4th 289.)

[3] New Mexico and New York.

More recently, in *People v. Batts* (2003) 30 Cal.4th 660, the California Supreme Court reiterated the fact that the California Constitution provides a higher level of double jeopardy protection in state court proceedings, and cited *Stone*.

If this Court in *Stone* did not base its holding in part on the California Constitution, then the "independent state grounds" language found in *Stone* would be mere *dicta*. It would seem unusual, however, for this Court in subsequent cases such as *Fields* and *Batts* to cite *Stone* for language therein that is mere *dicta* and was not necessary for the holding in *Stone*.

In a case decided after *Blueford v. Arkansas*, the court of appeal in *People v. Sullivan* (2013) 217 Cal.App.4th 242, 247 cited the holding in *Stone* as a valid discussion of "double jeopardy" in California. Since *People v. Sullivan* post-dated *Blueford*, it can be assumed the Court of Appeal was aware of the holding in *Blueford*, and concluded that *Blueford* did not abrogate the holding of *Stone* because *Stone* was based on California's Constitution.

3. Because of California's statutory scheme and without the rationale of *Stone*, prosecutors would gain a unilateral, and potentially unfair, advantage merely because of the prosecutor's election on how to charge the defendant.

It was the "statutory scheme in California" that created the issue presented in *Stone*. This Court framed the issue in *Stone* by stating the *statutory* options that a California prosecutor has in the way he/she charges a crime with lesser included offenses:

> Keeping these general principles [of double jeopardy] in view, we turn to the precise issue here - whether the double jeopardy clause requires formulation of a procedure for the receipt of partial verdicts in these circumstances. Under the statutory scheme in California, a prosecutor has the discretion to charge a lesser included offense and the greater offense in separate counts. (§954.) Alternatively, he may charge only the greater offense. (See §1159.) The latter is the usual practice. Thus, a charge of murder includes by implication a charge of the lesser degree of murder as

well as voluntary and involuntary manslaughter. (§1159; [citations omitted.]).) (*Stone*, *supra*, at pp. 516-517. Underscoring added.)

Hence, it stands to reason that this Court would address the "anomaly" created by California's "statutory scheme" by applying state, as well as federal, law. The *Stone* decision was an effort by this Court to ensure that a defendant prosecuted in state court would not be deprived of a valuable Constitutional right, based on either the federal or the state Constitution, merely because of a prosecutor's unilateral decision on how to charge the defendant for a crime that includes lesser included offenses.

This Court explained that as long as the California legislature allows prosecutors this option in charging a defendant, a rule of procedure is needed to ensure the defendant is treated the same in situations when a jury acquits on the greater charged offense but "hangs" on a lesser included offense, regardless of how the prosecutor elects to charge the defendant.

> For the purpose of delineating the scope of the double jeopardy protection, we believe the situation before us to be logically indistinguishable from the case in which a greater offense and a lesser included offense are charged in separate counts. It would be anomalous to formulate a rule that prevents a trial court from receiving a partial verdict on a greater offense on which the jury clearly favors acquittal merely because the prosecutor elected to charge only that offense, and left it to the court to instruct on any lesser included offense supported by the evidence. In addition to seriously infringing on the defendant's double jeopardy interest in avoiding retrial for offenses on which he has been factually acquitted, such a rule would make his substantive rights turn on the formality of whether he was charged in separate counts with the greater offense and the lesser included offense, or was charged in a single count with only the greater offense. (*Stone*, *supra*, at pp. 517-518. Underscoring added.)

The holding in *Blueford v. Arkansas* (2012) 566 U.S. ___ [132 S.Ct. 2044, 182 L.Ed.2d 937] appears to allow this anomaly to happen in California based on California's

statutory scheme . . . unless a rule is formulated to prevent it from occurring. That rule is enunciated in *Stone*. It would not be right nor fair to hold otherwise.

4. This Court Should Grant Review in this Case to Correct the Erroneous Conclusion Reached by the Court of Appeal that Jeopardy Had Not Attached to the Lesser Included Offenses.

In arguing to the Court of Appeal that the jury did not acquit the defendant of 1st degree murder, the People asserted in their Appellate Brief that "the jury did not acquit Brian Aranda of 1st degree murder because the jury's deliberations had not yet concluded." (AOB, p. 28. Underscoring added.) In other words, the People argue that since the jury was still deliberating, "no legal necessity" existed for the court to declare a mistrial as to 1st degree murder!

This is the very same argument the defendant made in urging Judge Levine to dismiss the *entire case* on double jeopardy grounds![4]

If, as the People argue, "the jury's deliberations had not yet concluded" when Judge Hernandez declared the mistrial, that means there was "no legal necessity" to declare a mistrial as to the lesser included offenses as well! Hence, double jeopardy bars retrial of not only 1st degree murder, but the lesser included offenses as well.

The Supreme Court's language in *Stone v. Superior Court* (1982) 31 Cal.3d 503 is clear and unambiguous in this situation:

> Accordingly, we hold that in all cases in which the jury has not yet begun deliberations as of the date this decision becomes final, the trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense. Failure to do so will cause a subsequently declared mistrial to be without legal necessity. . (*Stone v. Superior Court* (1982)31 Cal.3d 503, 519. Underscoring added.)

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[4] It is the very same argument made by the defendant in the petition for writ of prohibition/mandamus that was filed with the court of appeal. That court summarily denied defendant's writ petition without considering its merits.

The Supreme Court subsequently wrote when a mistrial may properly be granted:

> When a jury indicates it is unable to reach a verdict, double jeopardy rules bar retrial unless [1] the defendant consents to the discharge of the jury, or [2] the trial court determines further deliberations are not reasonably likely to result in a verdict, in which case legal necessity exists for a declaration of mistrial. (*People v. Marshall* (1996) 13 Cal.4th 799, 824. Underscoring added; citations omitted.)

Since 1) the defendant did not consent to the discharge of the jury, and since 2) legal necessity did not exist because "the jury's deliberations had not yet concluded", the discharge of the jury was premature. Jeopardy has attached to the entire case.

> [T]he doctrine of manifest necessity justifies a retrial following jury deadlock. In a trial by jury, the defendant is deemed to have been placed in jeopardy when the jurors have been impaneled and sworn. [Citation omitted.] Once this occurs, if a jury is discharged without returning a verdict, the defendant cannot be retried unless the defendant consented to the discharge, or manifest necessity required it. [Citations omitted.] . . . Similar to the federal manifest necessity rule, California's doctrine of legal necessity is a well-established exception to the constitutional prohibition against double jeopardy. [Citations omitted.] Like its federal counterpart, the state rule permits retrial following discharge of a jury that has been unable to agree on a verdict. [Citations omitted.] The rule is codified in sections 1140 and 1141, which permit retrial following discharge of a jury after the court has determined "there is no reasonable probability that the jury can agree." (*People v. Fields* (1996) 13 Cal.4th 289. Underscoring added.)

Defendant asserts that in this case the trial court declared a mistrial and discharged the jury without the consent of the defendant and without the existence of "legal necessity."

The California Supreme Court addressed this very issue 30 years ago in *Stone v. Superior Court* (1982)31 Cal.3d 503, a case with facts that were remarkably similar to those in the instant case.

After addressing the issue of implied partial verdicts of acquittal, the Supreme Court announced that *in the future*, the failure of the trial court to follow the procedures set forth in *Stone* will result in cases being dismissed after a mistrial has been declared because "legal necessity" does not yet exist:

> Accordingly, we hold that in all cases in which the jury has not yet begun deliberations as of the date this decision becomes final, the trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense. Failure to do so will cause a subsequently declared mistrial to be without legal necessity. . (*Stone v. Superior Court* (1982)31 Cal.3d 503, 519. Underscoring added.)

That is, the entire case should be dismissed because there was no legal necessity to declare a mistrial. This may appear to be an overly harsh remedy. However, the Supreme Court in *Stone* gave adequate warning of this potential jeopardy issue 30 years ago. It resulted in a CALCRIM instruction that is arguably used in every criminal trial in which lesser included offenses are included in verdict forms. Hence, it should come as no surprise to the trial court or to the prosecution. Indeed, the prosecutor in this case should have urged the trial court to grant defense counsel's request to provide the jury with a "not guilty" verdict form. Had the court provided the jury with a partial verdict form of "not guilty of 1st degree murder", the issue of whether the jury had reached a partial verdict as to 1st degree murder would have been resolved. Thereafter, if the jury could reach no further verdict, legal necessity would have existed as a basis to declare the mistrial.

In this case, the prosecutor apparently did not like the direction the jury was headed as the jury deliberated defendant's case. Once the prosecutor realized the jury was leaning towards acquitting defendant, the prosecutor wanted to "start over" with *a different jury*, thinking that a different jury may reach a different result. That is why the prosecutor in this case suggested the trial court should declare a mistrial, and why the prosecutor on two occasions "strenuously objected" to the court giving the jury a "not

guilty of 1st degree murder" verdict form that defense counsel had requested on three separate occasions.

When the trial court subsequently agreed with the prosecutor and declared a mistrial on its own motion, the trial court deprived defendant of his right to have *that particular jury* determine his fate. This Court reaffirmed a defendant's right to have a particular jury hear his case in 2003:

> In considering the double jeopardy consequences of a mistrial granted due to prosecutorial misconduct, we have observed that "a criminal defendant who is *in the midst of trial* has an interest, stemming from the double jeopardy clause, in having his or her case resolved by the jury that was initially sworn to hear the case--and in potentially obtaining an acquittal from that jury. [Citation.]" (*People v. Batts* (2003) 30 Cal.4th 660, 679, fn. 12. Italics in original.)

This was a difficult, very serious murder trial. Much to the dismay of the prosecution, the foreman disclosed that the jury deliberations were moving in the direction of acquitting petitioner, rather than convicting him. It is clear the prosecutor wanted the court to declare a mistrial as soon as possible. He wanted an opportunity to re-try petitioner, but with a different jury. Evidence of this is that on two occasions the prosecutor "strenuously objected" to the defense request to determine if the jury had reached a partial verdict of acquittal as to 1st degree murder. He was doing everything he could to avoid having petitioner acquitted of 1st degree murder, so that he could re-try petitioner again, but with a different jury. He even "reminded" the court that the deliberations were now on the last day of the time period for which the jury had been time qualified during jury selection in his efforts to persuade the trial court to declare a mistrial. Yet, in arguing against the court's providing a "not guilty" verdict form to the jury, he argued that the jury still "could arrive at a variety of decisions." (RT of Dec. 5, 2011, pp. 4-5.) He argued that the foreman's statement that no one was voting guilty on 1st degree murder was a "pseudo determination"; that there was no evidence the jury had actually voted unanimously that defendant was not guilty of 1st degree murder. (RT of

Dec. 5, 2011, pp. 4-5.) These arguments by the prosecutor clearly indicate that, in the prosecutor's mind, the jury was still fully capable of meaningful deliberations, yet he was urging the court to declare a mistrial based on "legal necessity!"

It is also clear that from 9:15 a.m. to 14:40 p.m. on this, their fifth full day of deliberations, the jury was continuing to make significant progress in their deliberations. Whereas the jury began the day with "a couple" of the jurors "stuck on second degree" murder, there was now only one juror who "feels that it's second degree murder." Further, whereas the jury began the day with the entire jury considering voluntary manslaughter, there were now only two jurors who thought petitioner was guilty of voluntary manslaughter. The nine (9) other jurors had worked through voluntary manslaughter and they were now of the opinion that defendant was not guilty of any crime alleged in Count One! (RT of Dec. 5, 2011, pp. 1-2.)

At 14:40 p.m., the foreperson commented, "And I *guess* we're *kind of* at a stalemate. Can I ask the Court, . . . where do we go from here? Do we keep deliberating, trying to find a decision, because we're kind of – you know. We're *kind of* stuck. We've gone through all the evidence. We've gone over and over and over. We've even tried with the direct evidence and the indirect evidence to try to weigh that out." (RT of Dec. 5, 2011, pp. 1-2. Italics added.)

The foreman's language suggested he was *not* convinced the jury was deadlocked. He was undoubtedly tired, but he *never* said, "I am convinced we will never reach a verdict", or words to that effect. He couched his comments with "I guess" and "we're kind of stuck." That is consistent with the comments of Juror #4 who told the judge, "I think there's a lot of things that need to be clarified, where some of us are not quite understanding, basically the definition. As to some of us, it's very clear. So I think clarifying a lot of things would help a lot of us." (RT of Dec. 5, 2011, p. 5.) It was also supported by Juror #6 who indicated there was confusion or disagreement regarding how to interpret CALCRIM 224 (circumstantial evidence).

Yet, the court only allowed the jury to deliberate an additional 40 minutes, and even that additional time was watered down by his comment to the jury that if they did not make any progress in those 40 minutes, he would declare a mistrial.

Defendant had a Constitutional right to have that *particular jury decide his fate.* Discharge of that particular jury before it reached a verdict in petitioner's case was permissible *only* if defendant consented to that particular jury being discharged *or* if *legal necessity* justified that particular jury being discharged. (*People v. Fields* (1996) 13 Cal.4th 289.) Defendant never consented to a mistrial. With the jury so close numerically to acquitting defendant (9 votes for acquittal), the court should *at a minimum* have asked *each of the jurors* whether they thought further deliberation might lead to a verdict. Defendant respectfully asserts that the trial court's decision to declare a mistrial was error and an abuse of discretion, and defendant requests this Court grant this Petition for Review in order to resolve this issue prior to the defendant being placed again in jeopardy at a subsequent trial.

Respectfully submitted,
BLUMENTHAL LAW OFFICES

By: Virginia M. Blumenthal
Attorneys for Defendant Aranda

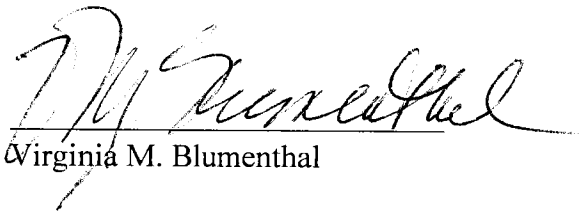
CERTIFICATION OF WORK COUNT

The text of the **ANSWER TO THE PETITION FOR REVIEW** consists of 5,382 words as counted by the Microsoft Word Program used to generate the said ANSWER.

Executed on November 6, 2013.

Respectfully submitted,

BLUMENTHAL LAW OFFICES



Virginia M. Blumenthal

PROOF OF SERVICE BY MAIL
Case No E056708

I, the undersigned, say: I am a resident of or employed in the County of Riverside, over the age of 18 years and not a party to the within action or proceedings; that my business address is 3993 Market Street, Riverside, California 92501.

That on November 6, 2013, I served a copy of the

ANSWER TO PETITION FOR REVIEW

by depositing a copy enclosed in a sealed envelope with postage thereon fully prepaid in a United States Postal Service mailbox, and addressed to the following recipients:

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