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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. KHRISTINE ELAINE EROSHEVICH et al., Defendants and Respondents. Real Party in Interest.	**No. S**_____ (Court of Appeal Case No. B231411, LASC No. BA353907)

SUPREME COURT
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PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES Respondent. HOWARD STERN, and KHRISTINE EROSHEVICH, Real Parties In Interest.	**No. S**_____ (Court of Appeal Case No. B231411, LASC No. BA353907) **PETITION FOR REVIEW**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, the People of the State of California, by and through their attorney, Jackie Lacey, District Attorney for Los Angeles County, hereby petition this Court for review of the order of the Court of Appeal, Second Appellate District, Division Five, issuing an order authorizing the trial court to dismiss and thereby acquit respondents pursuant to a Penal Code[1] section 1181 motion on grounds of double jeopardy. A copy of the published opinion, filed on March 28, 2013, is attached as Appendix A. A Petition for Rehearing was filed and denied on November 6, 2012, but subsequently rehearing was granted on the Court's

1. Unless otherwise indicated, all other statutory references are to

own motion on November 1, 2012, pending decision by the United States Supreme Court in *Evans v. Michigan* (2012) 568 U.S. __, 133 S.Ct. 1069, 185 L.Ed.2d 124.

ISSUES PRESENTED FOR REVIEW

1) If a Court of Appeal reverses a trial court's ruling that the prosecution's evidence was insufficient as a matter of law pursuant to sections 1181 and 1385, upon reinstatement of the verdict, is the defendant barred from thereafter waiving jeopardy in order to have his motion for new trial heard by the trial court pursuant to section 1181? Or, as Justice Mosk suggests in his dissent, is it only the People, not the defendant, who are barred from requesting retrial?

2) May the Court of Appeal depart from the three statutorily authorized remedies available to a trial court pursuant to section 1181, namely granting a new trial, denying the motion, or modifying the verdict, in order to allow a trial court to dismiss and acquit a defendant pursuant to that motion?

APPROPRIATENESS OF REVIEW

It is submitted that review of the Court of Appeal's decision in the instant case should be ordered, consistent with rule 8.500(b), California Rules of Court because it is "necessary to secure uniformity of decision or to settle an important question of law."

There is no question that the People are barred from retrying a defendant in two definitive scenarios: after acquittal by jury and following a trial court's grant of a defendant's *mid-trial* motion for acquittal.[2]

(..continued)
the Penal Code.

2. In *Evans v. Michigan* (2012) 568 U.S. at p. __ [133 S.Ct. 1069],

It is equally well settled that *after conviction*, the trial court may review the validity of the jury's decision pursuant to both section 1181, utilizing the "13th Juror" standard of review[3], and section 1385, utilizing the "substantial evidence" standard of review.[4] The granting of a new trial pursuant to section 1181 does not violate Federal and State Constitutional principles against being held twice in jeopardy for distinct reasons, discussed below. Alternatively, if a court grants an *acquittal after verdict* pursuant to section 1385, reversal of that order does not offend notions of jeopardy because the verdict is reinstated and there is no second trial.

Here, the Court of Appeal's order must be reversed because it has merged these principles and held that following reversal of a 1385 order and reinstatement of the verdict, a defendant may move for a new trial, but may not be retried. In fact, a successful motion would require dismissal and acquittal. As Justice Mosk soundly noted in his dissent on this issue, "by opting to move for a new trial, [the defendant] would, in effect, waive his

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(..continued)
the United States Supreme Court held that a midtrial acquittal on the merits is an acquittal for double jeopardy purposes. In California, mid trial motions for acquittal are heard pursuant to Cal. Pen. C. § 1118.1 which states, "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal..." Furthermore, pursuant to Cal. Pen. C. § 687, "[n]o person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

3. *People v. Veitch* (1979) 89 Cal.App.3d 722, 827-828 (hereafter, *Veitch*); *People v. Robarge* (1953) 41 Cal.2d 628.

4. *People v. Hatch* (2000) 22 Cal.4th 260, 272-273 (hereafter,

Double Jeopardy rights...the People are barred from a retrial, not the defendant." (Slip Opn. at p. 37.)

For purposes of a "new trial" motion pursuant to section 1181, retrial after conviction does not violate the defendant's right against successive prosecutions for the same offense because application for a second trial must, and can only be, made by the defendant himself.[5] Said application is thus construed as a waiver of jeopardy. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 136 (hereafter, *Porter*) ["In filing a motion for new trial, petitioner impliedly waived any double jeopardy protections he might have had under state law, just as if he had consented to a mistrial."]; *United States v. Alvarez-Moreno* (9th Cir. 2011) 657 F.3d 896, 900 (hereafter, *Alvarez-Moreno*) ["But a defendant who appeals and is found entitled to a new trial has waived his right to claim double jeopardy at the second trial. [Citation.] In other words, by appealing or collaterally attacking his conviction on the basis of legal error, the defendant is taken to have consented to being retried should he succeed."]; *United States v. Smith* (1947) 331 U.S. 469, 474 [67 S.Ct. 1330, 91 L.Ed. 1610] ["For it is such request which obviates any later objection the defendant might make on the ground of double jeopardy. [Citations.]"].)

(..continued)
Hatch).

5. "When a verdict has been rendered or a finding made against the defendant, the court may, *upon his application*, grant a new trial, in the following cases only..." (Cal. Pen. C. § 1181.) The same cannot be said of motions pursuant to section 1118.1 ["the court on motion of the defendant or on its own motion"] or section 1385 ["[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney"]. (Cal. Pen. C. §§ 1118.1, 1385.)

In fact, without the defendants' waiver, the *trial court* would violate the Defendants' right against Double Jeopardy if it were to order a new trial on its own motion. (*Alvarez-Moreno*, *supra*, 657 F.3d at p. 901; *See also*, *Gonzalez v. Municipal Court* (1973) 32 Cal.App.3d 706, 712-713; *Mourmouris v. Superior Court* (1981) 115 Cal.App.3d 956, 962.)

Alternatively, for purposes of a "legal acquittal"[6] pursuant to section 1385, notions of jeopardy are not violated because *after a verdict*, reversal of the trial court's ruling would not result in a second trial, but rather reinstatement of the jury's verdict. (*People v. Salgado* (2001) 88 Cal.App.4th 5, 13 (hereafter, *Salgado*), review denied July 25, 2001, 2001 Cal. LEXIS 5166 ["But with the jury's guilty verdict in this case, a successful appeal will not require retrial."]; *United States v. Wilson* (1975) 420 U.S. 332, 344-345 (hereafter, *Wilson*) [95 S.Ct. 1013, 43 L.Ed.2d 232] ["So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition."].)

Indeed, this is the very reason that section 1385 dismissals, *post verdict*[7], are subject to appeal by the Government in the first instance.

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6. Hereafter, "legal acquittal" will be used in reference to an acquittal entered by a trial court or court of appeal upon consideration of whether a jury's verdict was insufficient as a matter of law utilizing the substantial evidence standard wherein "the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt." (*Hatch, supra*, 22 Cal. 4th at p. 273.) Furthermore, section 1385 states, "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (Cal. Pen. C. § 1385.)

7. Compare *United States v. Martin Linen Supply Co.* (1977) 430

(*Wilson, supra*, 420 U.S. at pp. 344-345 ["Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution."]; *People v. Statum* (2002) 28 Cal.4th 682, 693.)

This court has itself made great strides in clarifying the methods, reasons, standard of review and remedies which must be employed and adhered to by trial courts in order for them to unambiguously grant either motion. (*Porter, supra*, 47 Cal.4th 125; *Hatch, supra,* Cal.4th 260; *People v. Watkins* (2012) 55 Cal.4th 999; *People v. Lagunas* (1994) 8 Cal.4th 1030; *People v. Trevino* (1985) 39 Cal.3d 667.) However, in the case at hand, despite the fact that *after guilty verdicts* both defendants applied for a new trial pursuant to section 1181 and urged the trial court to acquit pursuant to section 1385, the trial court acquitted both defendants pursuant to section 1385 in abrupt rulings that blended both motions and only clearly entered a legal acquittal based upon the "substantial evidence standard"[8] as to Defendant Stern. In addition, the trial court granted

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U.S.564 [97 S. Ct. 1349, 51 L. Ed. 2d 642] (hereafter, *Martin-Linen*); *Sanabria v. United States* (1978) 437 U.S. 54 [98 S. Ct. 2170, 57 L. Ed. 2d 43]; *Smalis v. Pennsylvania* (1986) 476 U.S. 140 [106 S. Ct. 1745, 90 L. Ed. 2d 116]; *Smith v. Massachusetts* (2005) 543 U.S. 462 [125 S. Ct. 1129, 160 L. Ed. 2d 914]; *Fong Foo v. United States* (1962) 369 U.S. 141 [82 S. Ct. 671, 7 L. Ed. 2d 629]; *People v. Valenti* (1957) 49 Cal.2d 199, which pertain to *mid-trial* acquittals, *i.e.* before a jury's verdict, and are thus not subject to appeal by the Government.

8. This refers to the standard of review which must be employed by trial courts in considering whether a jury's verdict is insufficient as a matter of law wherein "the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt." (*Hatch, supra*, 22 Cal. 4th at p. 273.)

Defendant Stern's motion for new trial by applying the substantial evidence standard of review in lieu of sitting as a "13th Juror," and failed to address all grounds raised in the motion. With regard to Defendant Eroshevich, the trial court entered an acquittal without having applied the "substantial evidence standard," and failed to address her motion for new trial at all.

The People have no quarrel with the Court of Appeal's unanimous opinion that substantial evidence supported the verdicts, that the trial court's decision must be reversed, and that the verdict as to Defendant Stern must be reinstated. (Slip Opinion (hereafter Slip Opn.), at p. 22.)

At issue is only the Court of Appeal's majority opinion,[9] wherein the court goes beyond reinstatement of the verdict to insist that the trial court reconsider the issues raised in Defendant Stern's new trial motion. Thus, they create an exception which swallows the rule.

In section IV, subdivision C, Part 3 of the Court of Appeal's opinion entitled, "Post-remittitur proceedings," the majority outlined what the trial court may consider *after* reinstatement of the verdict.

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9. Justice Mosk succinctly dissented from the majority's view on this issue. "I have difficulty with the majority's conclusion in Section IV. C. 3. The District Attorney cogently questions why, upon reinstatement of the verdict, Mr. Stern may not reinitiate his Penal Code section 1181 motion if he so chooses, and receive a new trial if the trial court grants the motion acting as a so-called "13th juror," or on other grounds applicable under that provision. By opting to move for a new trial, Mr. Stern would, in effect, waive his Double Jeopardy rights. [Citations omitted] As the District Attorney suggests, the People are barred from retrial, not the defendant." (Slip Op. at p. 37.)

> the trial court could grant the new trial motion after reweighing the evidence (acting as the so-called "13th juror") subject to the following double jeopardy analysis...[¶]...***But if the trial court grants Mr. Stern's new trial motion, the case against him must be dismissed on double jeopardy grounds.*** Mr. Stern may not be retried.

(Slip Opn. at pp. 30, 33, *italics added.*)

Because the Court of Appeal has reversed the trial court's finding of legal insufficiency pursuant to section 1385 as to Defendant Stern and the trial court's section 1385 dismissal in favor of Defendant Eroshevich, the only available remedy is reinstatement of the verdicts as to both defendants.

Instead, a majority of the Court of Appeal thereafter invites the trial court to engage in a pointless legal endeavor -- motion for new trial -- where the only remedy available in this case *is* the prohibited new trial.[10] To worsen matters, the reviewing court has held that if the trial court grants the new trial motion by applying a "13th Juror" analysis- the case must be dismissed. (Slip Opn. at pp. 30, 33.) This result unfairly subverts the People's proverbial "one bite at the apple," by eviscerating guilty verdicts supported by substantial evidence while allowing the Defendant to gain immunity from further prosecution for having successfully obtained an *earlier and erroneous* acquittal by the trial court.

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10. Pursuant to section 1181, the trial court may grant a new trial, modify the verdict, or deny the motion. It may not acquit the defendant. (Cal. Pen. Code, §1181; *Porter, supra,* 47 Cal.4th at p. 133; *People v. Serrato (1973)* 9 Cal.3d 753, 762 (hereafter, *Serrato*); *Veitch, supra,* 89 Cal.App.3d at pp. 726-727.) Here, based upon the charges, modification of the verdict is not available because there is no lesser degree, or lesser included. Thus, the court may only deny the motion or grant a new trial, and it has already outlined it's pre-disposition to grant a new trial.

By simply truncating 'retrial' from section 1181's list of available remedies, the majority's opinion unnecessarily fashions an outcome which allows Defendant Stern to be acquitted of all charges pursuant to a new trial motion, when he could not have been acquitted pursuant to a section 1385 order. "[D]efendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." (*Salgado, supra*, 88 Cal.App.4th at p. 16, citing *Wilson, supra*, 420 U.S. at p. 345.)

This remedy misconstrues both the essence of a new trial motion and the logic behind precluding government retrials. The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence that it failed to muster in the first proceeding. (*Tibbs v. Florida* (1982) 457 U.S. 31, 41-42 [102 S.Ct. 2211, 72 L.Ed.2d 652].) For this reason, when a reversal rests upon the ground that the prosecution has failed to produce sufficient evidence to prove its case, the Double Jeopardy Clause ***bars the prosecutor*** *from making a second attempt at conviction.* (*Id.* at pp. 41-42.) However, nothing in the Double Jeopardy Clause precludes ***the defendant*** from requesting the court to review the evidence as a "13th Juror" after the verdict has been reinstated. As this court noted in *Hatch, supra*, 22 Cal.4th at p. 276, "the double jeopardy focus ... is not on the appeal but on the relief that is requested." (*Hatch, supra*, 22 Cal. 4th at p. 276, citing *Wilson, supra*, 420 U.S. at p. 346 [95 S. Ct. at p. 1023].)

The Court of Appeal's hybrid remedy is in contravention of current state and federal authority for the following three reasons: First, it contradicts established precedent that upon a *defendant's application*, request for a new trial is an implied waiver of jeopardy. (*Porter, supra*, 47

Cal.4th at p. 136.) Second, it permits acquittal as a permissible remedy pursuant to section 1181. (*Id. at p. 136*; *Serrato, supra,* 9 Cal.3d at p. 762; *Veitch, supra,* 89 Cal.App.3d at pp. 726-727, review den.) Third, said result incongruously allows Defendant Stern to be acquitted pursuant to a "13th Juror" standard of review, pursuant to section 1181, when the Court of Appeal itself has held that the trial court was in error and could NOT be acquitted pursuant to the more stringent "substantial evidence" standard of review required for a section 1385 acquittal. (*Hatch, supra,* 22 Cal.4th at p. 271; *People v. Watkins, supra,* 55 Cal.4th at p. 1019, fn. 11.)

Moreover, as a matter of policy, the remedy creates a new and untenable procedural outcome for a perfectly predictable scenario -- that which occurs when a trial court combines motions pursuant to sections 1181 and 1385 by utilizing the substantial evidence standard for both. Thus, it allows trial courts to guarantee an acquittal and evade meaningful review, while rendering motions for new trial pursuant to section 1181 meaningless.

The Court of Appeal has gone beyond the permissible scope of legal remedies available upon a post-verdict reversal of a legal acquittal and even farther toward muddying the waters in an already turbid area of law which this Court has made great strides in clarifying since the United States Supreme Court's opinion in *United States v. Burks* (1978) 437 U.S. 1 [98 S.Ct. 2146, 57 L.Ed.2d 1]. Quite simply, if the Court of Appeal insists that the new trial motion be heard, either defendant Stern, like defendant Eroshevich, impliedly waives jeopardy upon *his application* for retrial, or he doesn't. If he asks for retrial, there is no double jeopardy bar upon hearing his motion. If he doesn't, then the trial court has no basis for hearing it.

The verdicts should be reinstated. Thereafter, nothing precludes Defendant Stern from filing a motion to reduce the charge pursuant to section 17, subdivision (b), filing an appeal, or filing a Petition for Writ of Habeas Corpus. Alternatively, as Justice Mosk points out in his dissenting opinion on this issue, upon reinstatement of the verdict, Defendant Stern may reinitiate his section 1181 motion as it is the People who are barred from a retrial, not the defendant.

The People herein file this Petition for Review, requesting review of the opinion of the Court of Appeal.

STATEMENT OF THE FACTS

A

Facts Underlying the Jury's Guilty Verdict

The Court of Appeal thoroughly set forth the procedural history and facts of the case in its Slip Opinion. (Slip Opn. at pp. 3-21.) The People incorporate the procedural history and facts as stated by the Court of Appeal in the aforementioned pages, herein. The facts giving rise to the offenses charged against Defendants Stern and Eroshevich are not relevant to the issue raised in this petition as the People are not requesting review of the Court of Appeal's decision to reverse the trial court's finding of insufficiency of evidence as a matter of law.

B

Facts Underlying Petition for Review

After a jury trial, Defendants Stern and Eroshevich, were each convicted by jury of two felony counts: Count 1, conspiracy to obtain controlled substances by fraud, deceit or misrepresentation or concealment

of a material fact between September 11, 2006 and February 8, 2007;[11] and Count 3, Conspiracy to unlawfully give false names or addresses for prescriptions for controlled substances between June 5, 2004 and September 10, 2006.[12] (Slip. Opn. at pp. 3-4.) In addition, Defendant Eroshevich was convicted of two other felonies: Count 7, obtaining controlled substances by fraud or misrepresentation in violation of Health and Safety Code section 11173, subdivision (a); And count 9, giving a false name or address for a controlled substance prescription in violation of Health and Safety Code section 11174. (Slip Opn. at p. 4.)

On November 29, 201 Defendant Stern, himself an attorney, filed a motion requesting the trial court to dismiss counts 1 and 3 pursuant to section 1385, alleging that there was no substantial evidence supporting the jury's finding that he lacked good faith to believe that his method of acquiring controlled substances for Vicki Lynn Marshall, also known as celebrity figure, Anna Nicole Smith, was legal. The motion also claimed that he was "selectively targeted" for prosecution in violation of his due process rights. On the same date, Defendant Stern also filed a new trial motion contending, in addition to the grounds argued in his invitation to dismiss, that a Deputy District Attorney committed prejudicial misconduct

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11. Count 1 is a violation of Health and Safety Code section 11173, subdivision (a), which states, "No person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact."

12. Count 3 is a violation of Health and Safety Code section 11174, which states, "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a controlled substance, give a false name or false address."

in argument to the jury, and that the trial court should reduce the two felony conspiracy verdicts to misdemeanors. (Slip Opn. at p. 5.)

On December 1, 2010, Defendant Eroshevich filed a single "omnibus request" for dismissal, new trial, or to reduce the felonies to misdemeanors. The basis for her request was based upon several arguments. (Slip Opn. at pp. 5-6.) In addition, she argued that Count 9 was a lesser included offense of count 7. (*Ibid.*)

After making factual findings which were contrary to both the jury's verdict and the trial court's earlier denial of Defendant's mid-trial motion for acquittal pursuant to section 1118.1,[13] the trial court found as to Defendant Stern, "[T]here is [no] evidence in the record at all that Howard Stern lacked a good faith belief that the practice of obtaining prescription medicines for [Ms. Marshall] in names other than [her true name] could be against the law." (Slip Opn. at p. 7.) The trial court found Stern acted to protect Ms. Marshall's privacy, as had most of the doctors and hospitals that had dealt with her. The trial court concluded: "When I consider all the evidence, and even viewing it in a light most favorable to upholding the verdict, I find it is clearly insufficient. Under these circumstances, I find no reasonable trier of fact could find that Howard Stern had a specific intent to violate either of these target crimes ... and I do grant a motion for new trial to Mr. Stern on these [conspiracy] counts ...." (*Ibid.*) Immediately after granting Mr. Stern's new trial motion, the trial court stated: "[B]ut I'm going further. [¶] I find the evidence at trial was so lacking and insufficient

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13. On September 29, 2010, the trial court denied the section 1118.1 motion as to Counts 1 and 3 after the defendant's case in chief, but before submitting the cause to the jury. (Reporter's Transcript 42, at pp. 12198-12199.)

to show a specific intent to join a conspiracy on the part of Howard Stern to commit these target crimes, that I do believe the interest of justice supports the dismissal of these counts as to Mr. Stern, and I so order. And this, of course, is under Penal Code section 1385..." (*Ibid.*)

The minute order prepared for Defendant Stern set forth the trial court's reasons for dismissing counts 1 and 3 as required by section 1385: "On the court's motion, counts 1 and 3 are dismissed due to insufficiency of the evidence. [¶] The court further clarifies that it is dismissing counts 1 and 3 in their entirety, which includes all hung target offense, due to insufficiency of the evidence as a matter of law pursuant to Penal Code section 1385." (Slip Opn. at p. 7)

With respect to Defendant Eroshevich, the trial court turned to her motions and concluded: "I don't think there was an agreement between the two of them to violate the law, and ... I don't think the conspiracy counts can stand [as to Dr. Eroshevich], and so I dismiss those as well...." (Slip Opn. at p. 8.) The minutes concerning this finding stated, "The cause is argued and the court grants defense motion to dismiss counts 1 and 3 pursuant to ... section 1385 due to insufficiency of the evidence." (*Ibid.*) The court never considered Defendant Eroshevich's new trial motion. (*Id.* at p. 33.)

In its published opinion, the Court of Appeal concluded that the trial court erroneously granted Defendant Stern's motion for acquittal, finding that substantial evidence supported the jury's guilty verdicts. The Court of Appeal went on to outline the facts which supported this finding. (Slip Opn. at pp. 25-27.)

Similarly, the Court of Appeal reversed the dismissal order as to Defendant Eroshevich finding that the trial court was legally incorrect

and thus, did not possess the discretion to dismiss counts 1 and 3. (Slip Opn. at p. 34.)

After reversing the dismissal order as to Defendant Stern, the Court of Appeal went on to state that in accord with the prosecution's argument, Mr. Stern's verdicts must be reinstated. (Slip Opn. at p. 30.)

Conversely, with regard to Defendant Eroshevich, no mention is made of reinstatement of the verdict. Instead, the Court of Appeal held that the trial court "may decide to grant Dr. Eroshevich's new trial motion as to counts 1 and 3. Or the trial court may decide to dismiss counts 1 and 3 on other grounds. We express no opinion on how the trial court should exercise its discretion." (Slip Opn. at p. 34.)

With regard to Defendant Stern, the Court of Appeal went beyond simply reinstating the verdict to dictating what may occur upon issuance of a remittitur. (Slip Opn. at pp. 30-33.) The Court of Appeal stated that after the verdict is reinstated, "there are a series of hurdles that must be overcome." (*Id.* at p. 30.) Despite the fact that the trial court "granted" Defendant Stern's new trial motion for insufficiency of the evidence, the Court of Appeal highlighted the fact that there were issues raised in the new trial motion that were never ruled upon. (*Ibid.*) The Court of Appeal pointed out that the trial court ruled that the evidence was insufficient as a matter of law, but that "[n]o effort was made to rule on these other matters nor was there any reason to do so given the dismissal order and the new trial motion evidentiary insufficiency finding." (*Ibid.*)

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Because the trial court did not rule on these other grounds, the Court of Appeal outlined four post-remittiur options:

> [T]he trial court could deny the new trial motion and sentence Mr. Stern to prison, place him on probation or reduce the two conspiracy counts to misdemeanors. Or the trial court could deny the new trial motion but dismiss the case pursuant to section 1385 on some ground other than evidentiary insufficiency as a matter of law. ***Or the trial court could grant the new trial motion after reweighing the evidence (acting as the so-called "13th juror") subject to the following double jeopardy analysis.*** Or the trial court could dismiss counts 1 and 3 on other than legal insufficiency grounds.

(Slip Opn. at p. 30, *italics added.*)

Despite the Court of Appeal's invitation to reweigh the evidence as a "13th juror," the court engaged in a lengthy analysis of *Hudson v. Louisiana* (1981) 450 U.S. 40, 44 [101 S.Ct. 970, 67 L.Ed.2d 30 (hereafter *Hudson*), and *Burks vs. United States*, *supra,* 437 U.S. at pp. 2-11, in order to hold that due to the "double jeopardy effect" of the trial court's finding of legal insufficiency as a matter of law, that there can be no retrial. (Slip Opn. at p. 33.) Thus, "if the trial court grants Mr. Stern's new trial motion, the ***case against him must be dismissed*** on double jeopardy grounds. Mr. Stern may not be retried." (*Ibid.*)

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ARGUMENT

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EVANS[14] HIGHLIGHTS REINSTATEMENT OF THE VERDICT AS THE ONLY REMEDY AVAILABLE FOLLOWING REVERSAL OF AN ERRONEOUS POST VERDICT ACQUITTAL

Evans v. Michigan (2013) 568 U.S. ___ (hereafter *Evans*) [133 S.Ct. 1069], includes a small, but powerful footnote that sustains the heart of the People's position by meaningfully distinguishing the difference between two separate and distinct analytical frameworks: that which exists when an acquittal has been entered by a trial court *prior to a jury's verdict*, versus that which has been entered *after a jury's verdict*. Furthermore, and most importantly, the footnote serves to clarify the respective remedies available pursuant to each analysis, and whether the Double Jeopardy Clause of the State and Federal Constitutions bar retrial following certain acquittals.

In *Evans*, the high court considered whether a clearly erroneous legal ruling based upon insufficient evidence *entered midtrial* served to bar further proceedings based upon the Double Jeopardy clause. (*Evans, supra,* 568 U.S. at p. __ [133 S. Ct. at p. 1073].) The Court found that, "[t]here is no question that the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under State law." (*Id.* at p. 1075.) The high court went on to state that "*Martin Linen, Sanabria, Rumsey, Smalis and Smith* all instruct that an acquittal due to insufficient evidence precludes retrial, whether the court's

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14. *Evans v. Michigan, supra*, 568 U.S. __ [133 S.Ct. 1069].

evaluation of the evidence was correct or not." (*Id.* at pp. 1075-1076.)[15] Thus the court held that "*a midtrial acquittal* in these circumstances is an acquittal for double jeopardy purposes as well." (*Id.* at p. 1073.) It is noteworthy that *Martin Linen, Sanabria, Smalis, and Smith* all pertained to *midtrial acquittals*, as opposed to acquittals after a jury's verdict.

However, in footnote 9, the high court excluded from its sweep those cases where acquittals occurred *after the jury had convicted.* In those cases, the court noted that deferring consideration of a motion to acquit until after the jury had returned a verdict mitigated double jeopardy concerns. (*Evans, supra,* 568 U.S. at p. __ [133 S.Ct. at p. 1081].) The reason for this appears quite clear: when an acquittal is entered *prior to jury verdict*, reversal would require retrial because there would be no verdict to reinstate. Thus, *after a jury's verdict*, Double Jeopardy concerns are mitigated because the court is not required to retry the accused, it may simply reinstate the jury's verdict. The high court's intent on this issue could not have been more clear: "[I]f a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial." (*Ibid.*, at fn. 9, citing *Wilson, supra,* 420 U.S. 332 [95 S. Ct. 1013, 43 L. Ed. 2d 232].)

It is undisputed that in the case at hand, the trial court entered what was tantamount to a legal acquittal based upon legal insufficiency when it granted Respondent Howard Stern's motion for new trial and

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15. *Martin Linen, supra,* 430 U.S. 564 [97 S. Ct. 1349, 51 L. Ed. 2d 642]; *Sanabria v. United States, supra,* 437 U.S. 54 [98 S. Ct. 2170, 57 L. Ed. 2d 43]; *Smalis v. Pennsylvania, supra,* 476 U.S. 140 [106 S. Ct. 1745, 90 L. Ed. 2d 116]; *Smith v. Massachusetts, supra,* 543 U.S. 462 [125 S. Ct.

acquittal pursuant to both sections 1181 and 1385.[16] Neither do the People have any quarrel with the Court of Appeal's opinion that there was substantial evidence to support the verdicts, and that both the trial court's orders, pursuant to sections 1181 and 1385, should be set aside. Similarly, the trial court's section 1385 order in favor of Dr. Eroshevich was set aside, but for a different reason.[17]

Thus, having reversed the legal acquittal, the only remedy available is reinstatement of the verdict. The rationale underlying footnote 9 of *Evans*, as stated in *Wilson* was relied upon in a case nearly indistinguishable from the one at bar in *Salgado, supra,* 88 Cal.App.4th 5, *review denied* July 25, 2001, 2001 Cal. LEXIS 5166. In *Salgado*, following jury verdicts of guilty, the trial court granted its own motion for new trial, and further dismissed the case after finding the evidence legally insufficient as a matter of law. (*Id.* at pp. 5-7.) The trial court's decision met all the requirements of section 1385. (*Id.* at p. 6.) Thus, because the trial court's ruling implicated Double Jeopardy considerations, the court weighed the

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(..continued)
1129, 160 L. Ed. 2d 914].

16. In its ruling, the trial court stated, "When I consider all the evidence, and even viewing it in a light most favorable to upholding the verdict, I find it is clearly insufficient. Under these circumstances, I find no reasonable trier of fact could find that Howard Stern had a specific intent to violate either of these target crimes.. and I do grant the motion for new trial to Mr. Stern on these [conspiracy] counts... ." (Slip Op. at pp. 6-7.)

17. The Court of Appeal held that despite the trial court's statement in the minutes that there was insufficient evidence, the fact that the court did not employ the substantial evidence standard of review, it had not entered legal acquittal. Thus, the trial court did not possess the discretion to dismiss counts 1 and 3. Dr. Eroshevich's dismissal order was reversed. (Slip Op. at pp. 33-34.)

threshold consideration left unanswered by *Hatch*, *supra,* 22 Cal.4th 260, and asked whether a dismissal for insufficiency was even subject to appeal. (*Salgado, supra*, at p. 10.) After analyzing the legislative history of section 1238, subdivision (a)(8), "an order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty..." the court determined that a legal acquittal *after the verdict* is subject to review. (*Id.* at p. 12.)

Significantly, the court in *Salgado, supra,* 88 Cal.App.4th at p. 12, then relied upon both *Wilson, supra,* 420 U.S. 332, and *Martin Linen, supra*, 430 U.S. 564, ["with the jury's guilty verdict in this case, a successful appeal will not *require retrial*,"], for its holding that the remedy for a trial court's erroneous declaration of legal acquittal is reinstatement of the jury's verdict for that is the only remedy that does not offend principles of Double Jeopardy. The court stated:

> The purpose of the double jeopardy clause, however, is not undermined when the jury reaches a guilty verdict before the trial court acts. Even if it is the functional equivalent of an acquittal, appellate review of a dismissal for legal insufficiency will not result in another trial. Where the jury convicts and the court then "acquits," an error in the court's ruling can be corrected by restoring the jury verdict and entering judgment accordingly.

(*Salgado, supra,* at pp. 15-16.)

The court's determination, in *Salgado* stemmed from authority provided by the United States Supreme Court in both *Wilson, supra, 420 U.S. 332,* and *Martin Linen, supra,* 430 U.S. at p. 571. In *Martin Linen*, the Supreme Court found that the appropriate remedy for an erroneous post-conviction dismissal was "restoration of the verdict, and not a new trial," (*Id.* at p. 570), citing its prior decision in *Wilson*, *supra,* 420

U.S. at pp. 344-345 ["Reversal on appeal would merely reinstate the jury's verdict ...."], overruled on other grounds in *United States v. Scott* (1978) 437 U.S. 82, 94-101 [98 S. Ct. 2187, 57 L.Ed.2d 65]. (*Martin Linen, supra*, 430 U.S. at p. 570.)

Although persuasive and not binding, further support for the court's decision in *Salgado* was found in *United States v. Sharif* (9th Cir. 1987) 817 F.2d 1375, 1376 ["A different situation is presented where the jury returns a guilty verdict and the district court enters a judgment of acquittal. In that situation, a successful appeal by the government would result merely in a reinstatement of the original verdict, not a new trial. (See *Wilson, supra*, 420 U.S. at pp. 344-345.)"] (*Salgado, supra*, 88 Cal.App.4th at p. 14.)

In *Salgado*, Division Six of the Second Appellate District additionally quoted the United States Supreme Court's public policy consideration in restoring the verdict, stating:

> "[T]he government's interest in preserving a conviction fairly attained obviously is far greater than its interest in investing additional time and resources in reprosecuting a defendant following a jury's failure to reach a verdict and a trial court's judgment of acquittal." (*Martin Linen, supra*, 430 U.S. at p. 570, fn. 7.)

(*Salgado, supra*, 88 Cal.App.4th at p. 14.)

The court's remedy in *Salgado* has been followed by other divisions within the Second Appellate District. In *People v. Craney* (2002) 96 Cal.App.4th 431, 439-442 (hereafter, *Craney*), Division Five of the Second Appellate District found that "appellate review of a dismissal for legal insufficiency will not result in another trial." (*Id.* at p. 442.) More recently, in *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1306-1307,

Division Four of the Second Appellate District followed the Court's opinion in *Salgado*, and held:

> If the [trial court] order [dismissing a case under section 1385] is made post verdict ... a successful prosecution appeal will not result in a new trial. In that situation, the case can be resolved by entering judgment on the verdict.

(*Id.* at p. 1306, citing *Salgado*, *supra*, 88 Cal.App.4th at pp. 12-13, and citing *Craney*, *supra*, 96 Cal.App.4th at pp. 439-442.)

Here, the trial court erroneously granted the motion for a new trial. Accordingly, based upon the foregoing authority, most recently highlighted in *Evans* and including the court's decision in *Salgado*, the only appropriate remedy is that the jury's verdicts be reinstated.

II

HUDSON V. LOUISIANA DOES NOT CONTEMPLATE WHAT REMEDY IS AVAILABLE WHEN A LEGAL ACQUITTAL IS REVERSED, THUS ONLY *WILSON* IS APPLICABLE

In its opinion, the Court of Appeal has steadfastly adhered to the notion that because the trial court's new trial order was in effect a legal acquittal, then pursuant to *Hudson v. Louisiana* (1981) 450 U.S. 40 (hereafter, *Hudson*)[101 S. Ct. 970, 67 L. Ed. 2d 30], retrial is barred. Indeed, *the People are not requesting a retrial.* The Court of Appeal has maintained that *Hudson* is controlling in this case because in making a finding of legal insufficiency during a new trial motion, the trial court in this case spoke with "materially greater clarity" than did the trial court in *Hudson.* (Slip Opn. at p. 33.) *However, the People do not disagree that the trial court's determination was tantamount to a legal acquittal.* Moreover,

Hudson does not dictate the Court of Appeal's conclusion as to what happens to the case after reversal and is readily distinguishable on that basis.

a.

Hudson Governs The Content Of A Trial Court's Ruling

The holding in *Hudson, supra, 450 U.S. 40* reaffirms the premise that when a trial court employs what has come to be known as the substantial evidence standard and determined that the People's evidence is insufficient then the defendant must be acquitted. *Hudson* in no way speaks to what *remedy* is afforded the People when the trial court *erroneously* enters a post-verdict acquittal. Specifically, what was left unanswered by the United States Supreme Court in *Hudson* is what remedy would be employed *had the high court disagreed with the trial court's determination*? In *Hudson*, the trial court's finding of legal insufficiency was bolstered, as opposed to set aside, by the United States Supreme Court. It is not known what the United States Supreme Court would have held had it agreed with the Louisiana Supreme Court's questionable interpretation of the trial court's ruling, and upheld their faulty analysis of *Burks v. United States* (1978) 437 U.S. 1 [98 S. Ct. 2141, 57 L. Ed. 2d 1]. Thus, *Hudson* does not offer a remedy on point with the facts of this case.

Furthermore, the fact that the trial court acquitted the defendant pursuant to a new trial motion is of no consequence. The defendant in *Hudson* did not have any other remedy in order to seek an acquittal other than in a post-verdict new trial motion. "Petitioner then moved for a new trial, which under Louisiana law was petitioner's only

means of challenging the sufficiency of the evidence against him." (*Hudson v. Louisiana, supra*, 450 U.S. at p. 41.) Thus, the fact that *Hudson* brought his motion to acquit for legal insufficiency pursuant to a new trial motion, as opposed to a motion to acquit, exalts the nature of the motion above its substance. The fact that *Hudson* brought his motion to acquit pursuant to a new trial motion in a state that does not offer more does not immediately transform every new trial motion in every state of the union as having mythical significance and double jeopardy implications. The People agree with the Court of Appeal that "'what constitutes an "acquittal" is not be controlled by the form of the judge's action.'" (Slip Opn. at p. 31.)

However, the People disagree that Hudson is of assistance in terms of providing guidance as to what remedy must be employed. *Hudson* is the beginning, not the end, of the inquiry. While *Hudson* unquestionably outlines what constitutes a legal acquittal and that the government is barred from retrying a defendant, it does not address what courts must do when the trial court's acquittal was *wrong*.

b.

Only *Wilson* Proscribes A Remedy

United States v. Wilson, supra, 420 U.S. 332, offers an appropriate remedy and dictates that despite the nature of a post-verdict acquittal, Double Jeopardy will not be disturbed by reversal and reinstatement of the verdict. "Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecutions." (*Wilson, supra*, at pp. 344-345.) "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an

error of law when that error could be corrected without subjecting him to a second trial..." (*Id.* at 345.) Furthermore, *Wilson* cited Judge Learned Hand's position in *United States v. Zisblatt* (1949) 172 F. 2d 740, 743, "So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition." (*Ibid.* at fn. 14.)

c.

Pursuant To *Hudson*, The Double Jeopardy Clause Does Not Bar Retrial When The Trial Court Sits as a "13th Juror"

In *Hudson*, despite that trial court's clear statement after the first trial that there was "no evidence, certainly not evidence beyond a reasonable doubt," the defendant in *Hudson* was tried and convicted a second time. Upon review by the United States Supreme Court, the high court explained that "the trial judge granted the new trial because ***the State had failed to prove its case as a matter of law***, not merely because he, as a '13th juror,' would have decided it differently from the other 12 jurors." (*Hudson, supra*, 450 U.S. at pp. 44-45.) Because the Defendant in *Hudson* had already been convicted a second time, the Supreme Court's only remedy was to bar retrial and acquit that Defendant.

Here, despite the similarity in the words used by the trial court, this case presents an ***opposing factual scenario***. Unlike *Hudson*, substantial evidence supports the verdicts in this case. Furthermore, nowhere does the opinion in *Hudson* hold that following *an erroneous acquittal*, the *defendant* is barred from *seeking a new trial*, or from being retried at his request. In fact, in *Hudson* the high court makes clear that the

Double Jeopardy clause does not bar retrial following a new trial motion where a judge sits as a "13th Juror."

> We do not decide whether the Double Jeopardy Clause would have barred Louisiana from retrying petitioner if the trial judge had granted a new trial in that capacity, for that is not the case before us. We note, however, that *Burks* precludes retrial where the state has failed as a matter of law to prove its case despite a fair opportunity to do so. [Citation Omitted.] By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

(*Hudson, supra*, 450 U.S. at 45, fn. 5.)

In sum, majority of the Court of Appeal's reliance on *Hudson* under the facts here is erroneous and contrary to Double Jeopardy jurisprudence. Footnote 9 of *Evans* excises *Wilson* from the sweep of its opinion and is the only relevant precedent here as it breaks down the *remedy* available when a legal acquittal is reversed *prior to a jury's verdict* (retrial is barred, even if the acquittal is based upon an egregiously erroneous foundation[18]) from the remedy available when legal acquittal is reversed *after a jury's verdict.* (The verdict is reinstated.[19]) Furthermore, nothing in *Hudson* indicates that retrial is barred for purposes of a new trial motion.

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18. *See Evans*, citing *Sanabria v. United States, supra*, [98 S.Ct. 2170, 57 L.Ed.2d 43] 437 U.S. 54, *People v. Valenti, supra,* 49 Cal.2d 199 *Fong Foo v. United States, supra,* 369 U.S. 141[82 S.Ct 671, 7 L.Ed 2d 629].

19. See *United States v. Wilson, supra,* [95 S.Ct. 1013, 43 L.Ed.2d 232] 420 U.S. 332 (1975).

III

A TRIAL COURT MAY NOT ACQUIT A DEFENDANT PURSUANT TO A SECTION 1181 MOTION FOR NEW TRIAL

In an apparent attempt to simplify the review of whether a trial court *meant* to invoke the substantial evidence standard versus the traditional "13th juror" analysis, this court held in *Porter, supra,* 47 Cal.4th 125 that pursuant to section 1181, "Significantly, a court has no authority to grant an acquittal in connection with an 1181 motion." (*Porter, supra*, at p. 133, citations omitted.) Further, "a trial court considering a section 1181 motion to modify a verdict on the ground that it is contrary to the evidence *is limited to three options specified in the statute*: (1) it can set aside the verdict of conviction and grant the defendant a new trial, (2) it can deny the motion and enter judgment on the verdict reached by the jury; or (3) it can modify the verdict either to a lesser degree of the crime reflected in the jury verdict or to a lesser included offense of that crime..." (*Ibid.*)

Furthermore, in discussing whether or not a Petitioner waives jeopardy by filing a motion for a new trial, this court stated, "[y]et the law is well settled that a court reviewing the jury's verdict under section 1181 lacks the power to acquit the defendant based on the court's view of the evidence." (*Porter, supra,* 47 Cal.4th at p. 136, citations omitted.) A plain reading of the statute supports this court's conclusion. The rationale for this rule was stated as "permit[ting] trial court oversight of the verdict, but ensur[ing] that the People, like the defendant, have the charges resolved by a jury. (*Id.* at p. 133.)

Alternatively and more recently in *Watkins, supra,* 55 Cal.4th 999, this court clearly assigned distinct remedies to both section 1181 and

1385 decisions in discussing the substantial evidence standard that is applied in mid-trial motions for acquittal. This Court thus stated:

> The same standard of review applies when a defendant asks the trial court to review the legal sufficiency of the evidence after the jury has returned its verdicts. (*People v. Hatch* (2000) 22 Cal.4th 260, 268-269.) We have since clarified that a defendant seeking to challenge the legal sufficiency of the evidence in the trial court after the case has been submitted to the jury ***should not move for a new trial under section 1181, subdivision 6, but should instead invite the court's dismissal under section 1385***. (*Hatch, supra*, at pp. 268-271; *Porter v. Superior Court* (2009) 47 Cal.4th 125.)

(*Watkins, supra*, 55 Cal.4th at 1019, fn. 11.)

The People submit that the trial court's grant of Defendant Stern's new trial motion for legal insufficiency of the evidence was a final decision and may not be reconsidered. (*People v. DeLouize* (2004) 32 Cal.4th 1223, 1228-1230.) Both Defendants' motions pursuant to section 1181, the only vehicle by which a court may order a new trial, were largely ignored.

In dealing with a perfectly predictable scenario -- where a trial court has blended the standards for 1181 and 1385 motions by utilizing the substantial evidence standard for both -- the Court of Appeal has created a new procedural scenario in which trial courts can guarantee an acquittal and evade meaningful judicial review. The opinion is legally flawed.

The notion that the accused may "waive Jeopardy" is not a new one. In *Evans,* the high court recognized that when a defendant persuades the court to declare a mistrial, jeopardy continues and retrial is generally allowed, but in that scenario, the defendant consents to a disposition that contemplates reprosecution, whereas when a defendant

moves for acquittal, he does not. (*Evans, supra,* 568 U.S. at p. __ [133 S.Ct. 1069, 1079], citing *United States v. Dinitz* (1976) 424 U.S. 600, and *Sanabria v. United States, supra,* 437 U.S. at p.75 [98 S.Ct. 2170, 57 L.Ed. 2d 43].)

Furthermore, this Court has held that "[i]n filing a motion for a new trial, petitioner impliedly waived any double jeopardy protections he might have had under state law, just as if he had consented to a mistrial." (*Porter, supra*, 47 Cal. 4th at p. 136.) "It is a familiar principle that a defendant who has succeeded in having his conviction set aside impliedly waives any objection to being retried on the charge of which he was convicted." (*Ibid.*, citing *Serrato*, *supra*, 9 Cal.3d at p. 759.) "A new trial can only be granted on the defendant's motion." (*Ibid.,* citing 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 90, p. 121.) *See also*, *Gonzalez, supra,* 32 Cal.App.3d 706 (where judgment on prior conviction was vacated on courts own motion and not on petitioner's request, jeopardy attached to preclude petitioner from being tried again.)

Therefore, if the Court of Appeal insists that Defendant Stern's new trial motions be heard again, there is no reason he may not thereafter waive jeopardy *if he chooses*. His implied waiver of jeopardy would not require the hybrid remedy created by the Court of Appeal. Alternatively, if the verdict was simply reinstated, Defendant Stern would not be facing a new trial.

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CONCLUSION

For the foregoing reasons, the People respectfully request that review be granted.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Petition for Review contains approximately 8,343 words including footnotes, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

SERENA R. MURILLO
Deputy District Attorney

Filed 3/28/13 Opinion following rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Appellant, v. KHRISTINE ELAINE EROSHEVICH et al., Defendants and Respondents.	B231411 (Los Angeles County Super. Ct. No. BA353907)

Appeal from orders of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Reversed with directions.

Steve Cooley and Jackie Lacey, District Attorneys, Irene Wakabayashi, Head Deputy District Attorney, Brentford J. Ferreira, Shirley Sui-Nin Sun and Natasha Cooper, Deputy District Attorneys, for Plaintiff and Appellant.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Respondent Khristine Elaine Eroshevich.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Respondent Howard Kevin Stern.

I. INTRODUCTION

The People of the State of California appeal after a series of rulings which resulted in the dismissal of charges against two defendants, Dr. Khristine Elaine Eroshevich and Howard Kevin Stern. Mr. Stern's new trial motion was granted. Two conspiracy counts were then dismissed pursuant to Penal Code[1] section 1385, subdivision (a) (section 1385). We will reverse the new trial and dismissal orders.

Defendants were convicted after a jury trial. After the verdicts were returned, the trial court granted Mr. Stern's new trial motion. The ground for granting Mr. Stern's new trial motion was that the evidence was insufficient as matter of law. The trial court did not address a number of other grounds specified in Mr. Stern's new trial motion. The trial court then proceeded to dismiss the charges against Mr. Stern pursuant to section 1385. The trial court, without ruling on Dr. Eroshevich's new trial motion, dismissed the charges as to her. We agree with the prosecution that Mr. Stern's new trial motion could not be granted nor the charges dismissed on the ground the evidence was insufficient as a matter of law. But, as we will explain, what can occur to Mr. Stern once the remittitur issues is limited by the double jeopardy provisions of our Constitutions.

The federal and state constitutional double jeopardy protections apply to both trials and sentences. (*Illinois v. Vitale* (1980) 447 U.S. 410, 415; *Ludwig v. Massachusetts* (1976) 427 U.S. 618, 631.) In the trial context, the core protection of the double jeopardy clause is the prohibition of a retrial after an acquittal. (*Dowling v. United States* (1990) 493 U.S. 342, 355; *Wang v. Withworth* (6th Cir. 1987) 811 F.2d 952, 957-958; *People v. Salgado* (2001) 88 Cal.App.4th 5, 13.) An acquittal most often results when a jury returns a not guilty verdict. Although less common, an acquittal for double jeopardy purposes also can occur when a trial court grants a defendant's new trial motion for evidentiary insufficiency. (See *Hudson v. Louisiana* (1981) 450 U.S. 40, 44; *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.) Also comparatively unusual, an

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1 Unless otherwise noted, all future statutory references are to the Penal Code.

acquittal for double jeopardy purposes can occur when a trial court dismisses a case pursuant to section 1385 for evidentiary insufficiency. (*People v. Hatch* (2000) 22 Cal.4th 260, 273; *People v. Belton* (1979) 23 Cal.3d 516, 520-521.) In double jeopardy jurisprudence, evidentiary insufficiency means the evidence is insufficient *as a matter of law*; that is, the verdict is not supported by substantial evidence.

Here, we conclude the trial court incorrectly granted Mr. Stern's new trial motion; the evidence was not insufficient as a matter of law. As will become clear, the former jeopardy effect of the erroneous order granting Mr. Stern's new trial motion is the same as an acquittal. Similarly, we conclude the trial court dismissed the charges against both defendants based on an erroneous finding the evidence was insufficient as a matter of law. Thus, we reverse the orders granting Mr. Stern's new trial motion and dismissing the case pursuant to section 1385 as to both defendants. Once the remittitur issues, the trial court may take up the remaining new trial motion issues, dismiss on other grounds pursuant to section 1385, or even impose sentence. But, there is one thing the trial court may not do and that is to order Mr. Stern to be retried.

On October 18, 2012, we issued an opinion in this case which reached the precise same result we do today. On November 19, 2012, we granted rehearing on our own motion. We did so because the United States Supreme Court was reconsidering aspects of its double jeopardy jurisprudence in *Evans v. Michigan* (2013) 568 U.S. ___, ___-___ [2013 U.S. LEXIS 1614, **6-32]. On February 20, 2013, the United States Supreme Court issued its opinion in *Evans*. Nothing in *Evans* warrants a change in our prior analysis. Thus, with minor alterations, we reach the same conclusions we did originally.

II. PROCEDURAL HISTORY

A. Charges And Verdicts

Vicki Lynn Marshall died on February 8, 2007. Toxicology tests revealed an above therapeutic level of metabolites of a controlled substance—chloral hydrate—in her

blood. Our discussion of the evidence in part III of this opinion focuses on the testimony relevant to the two conspiracy counts of which the jury convicted Mr. Stern and Dr. Eroshevich. However, by way of procedural background, the prosecutor filed an 11-count information against Mr. Stern and Dr. Eroshevich. Also charged was Dr. Sandeep Kapoor.

Dr. Kapoor was acquitted of all charges. As to count 3, the jury found defendants conspired between June 5, 2004, and September 10, 2006. As to count 1, the jurors found defendants conspired between September 11, 2006, and February 8, 2007. The jury found defendants conspired to commit two crimes. The first target offense was to obtain controlled substances by fraud, deceit or misrepresentation or concealment of a material fact. (Health & Saf. Code, § 11173, subd. (a)[2].) The second target offense was to unlawfully give false names or addresses in prescriptions for controlled substances in violation of Health and Safety Code section 11174.[3]

Dr. Eroshevich was also convicted of two other charges. She was convicted in count 7 of obtaining controlled substances by fraud or misrepresentation in violation of Health and Safety Code section 11173, subdivision (a). Further, she was convicted as charged in count 9 of giving a false name or address in a controlled substance prescription in violation of Health and Safety Code section 11174.

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2 Health and Safety Code section 11173, subdivision (a) states, "No person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact."

3 Health and Safety Code section 11174 states, "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a controlled substance, give a false name or false address."

B. New Trial And Dismissal Motions

1. Mr. Stern

On November 29, 2010, Mr. Stern filed a motion inviting the trial court to exercise its discretion to dismiss the action under section 1385. Mr. Stern raised two points in support of his motion. First, using false names on prescription medications to protect the privacy of celebrities was a common practice in Los Angeles. Dr. Eroshevich knew Ms. Marshall was the intended recipient of the prescribed medications. And according to Mr. Stern, Ms. Marshall knew those same prescriptions were for her use. Further, doctors and hospitals had routinely prescribed medications for Ms. Marshall's use in other names. And Mr. Stern readily admitted to investigators that controlled substance prescriptions intended for Ms. Marshall were written in his name to protect her privacy. Hence, Mr. Stern asserted, there was no substantial evidence he lacked a good faith belief his actions were legal. Second, Mr. Stern argued he was "selectively targeted" for prosecution in violation of his due process rights. Moreover, as to the non-opiate controlled substance prescriptions, the district attorney delayed filing what would have been misdemeanor charges until after the statute of limitations had run. As a result, the district attorney was forced to charge felony conspiracies.

Also on November 29, 2010, Mr. Stern filed a new trial motion. In addition to the grounds argued in his invitation to dismiss, Mr. Stern raised two further issues. First, Mr. Stern argued a deputy district attorney committed prejudicial misconduct in argument to the jury. Second, Mr. Stern urged the trial court to reduce the two felony conspiracy verdicts to misdemeanors.

2. Dr. Eroshevich

On December 1, 2010, Dr. Eroshevich filed a single "omnibus request" for dismissal, for a new trial, or to reduce the felonies to misdemeanors. Dr. Eroshevich

raised several arguments. First, with respect to the two conspiracy counts, Dr. Eroshevich asserted there was in fact only one agreement, not two separate conspiracies; therefore count 1 should be dismissed. Dr. Eroshevich further argued: there was no evidence Mr. Stern and she shared a common purpose to violate the law; they simply openly engaged in a practice that was common to numerous doctors and hospitals; and Mr. Stern readily admitted that prescriptions in his name were in fact for Ms. Marshall.

In addition, Dr. Eroshevich argued count 9 was a lesser included offense of count 7. She further asserted she was the subject of selective prosecution because her conduct was consistent with that of "numerous other" medical professionals. Moreover, Dr. Eroshevich contended, the jury was likely influenced by evidence she had violated various standards of practice. This evidence, Dr. Eroshevich argued, obscured the real issue—whether the prescriptions were medically legitimate. On these grounds, Dr. Eroshevich argued, a new trial should be granted or the case dismissed.

Also, Dr. Eroshevich argued that the remaining counts should be reduced to misdemeanors. She reasoned that the crimes actually committed were misdemeanors; further, a conspiracy to commit a misdemeanor is a "wobbler" that may be punished as a misdemeanor. Finally, Dr. Eroshevich requested that the trial court, on its own motion, dismiss the charges pursuant to section 1385. She argued that even if there is sufficient evidence of guilt, a trial court may dismiss an action where a retrial would not further the interests of justice.

3. The Trial Court's Rulings

a. Mr. Stern

Preliminarily, the trial court found Ms. Marshall suffered from chronic pain syndrome; further, her "drug-seeking behavior" was primarily due to inadequate control of pain rather than addiction. The trial court was further persuaded the overriding

purpose in procuring controlled substances in names other than Ms. Marshall's true name was to protect her privacy. With respect to prescribing medications in a false name, the trial court concluded the law was vague as to what constitutes a false name. The trial court found no basis for charging a conspiracy ending on September 10 and a new one beginning the very next day on September 11, 2006. More significantly, the trial court found, "[T]here is [no] evidence in the record at all that Howard Stern lacked a good faith belief that the practice of obtaining prescription medicines for [Ms. Marshall] in names other than [her true name] could be against the law." The trial court found Mr. Stern acted to protect Ms. Marshall's privacy, as had most of the doctors and hospitals that had dealt with her. The trial court concluded: "When I consider all the evidence, and even viewing it in a light most favorable to upholding the verdict, I find it is clearly insufficient. Under these circumstances, I find no reasonable trier of fact could find that Howard Stern had a specific intent to violate either of these target crimes . . . and I do grant a motion for new trial to Mr. Stern on these [conspiracy] counts . . . ." Immediately after granting Mr. Stern's new trial motion, the trial court stated: "[B]ut I'm going further. [¶] I find the evidence at trial was so lacking and insufficient to show a specific intent to join a conspiracy on the part of Howard Stern to commit these target crimes, that I do believe the interest of justice supports the dismissal of these counts as to Mr. Stern, and I so order. And this, of course, is under Penal Code section 1385 . . . ."

The minute order prepared for Mr. Stern sets forth the trial court's reasons for dismissing counts 1 and 3 as required by section 1385: "On the court's motion, counts 1 and 3 are dismissed due to insufficiency of the evidence. [¶] The court further clarifies that it is dismissing counts 1 and 3 in their entirety, which includes all hung target offenses, due to insufficiency of the evidence as a matter of law pursuant to Penal Code section 1385."

b. Dr. Eroshevich

Having dismissed the conspiracy counts as to Mr. Stern, the trial court turned to Dr. Eroshevich's motion. The trial court concluded: "I don't think there was an agreement between the two of them to violate the law, and . . . I don't think the conspiracy counts can stand [as to Dr. Eroshevich], and so I dismiss those as well . . . ." The clerk's minutes for Dr. Eroshevich contain no statement of reasons for the dismissal. The minutes state concerning Dr. Eroshevich: "The cause is argued and the court grants defense motion to dismiss counts 1 and 3 pursuant to . . . section 1385 due to insufficiency of the evidence." No other language pertinent to the dismissal of counts 1 and 3 as to Dr. Eroshevich is contained in the clerk's minutes. We will later discuss the effect of the absence of any language in the trial court's oral order or the clerk's minutes concerning: the substantial evidence standard of review; having viewed the evidence in a light most favorable to the verdicts; and that no reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Hatch*, *supra*, 22 Cal.4th at p. 273; *People v. Salgado*, *supra*, 88 Cal.App.4th at p. 10.)

However, the trial court denied Dr. Eroshevich's motion for a new trial or to dismiss as to counts 7 and 9: "I choose not to disturb the jury's verdict regarding [Dr.] Eroshevich on counts 7 and 9. There is no doubt in the court's mind that based on the evidence [Dr.] Eroshevich acted out of a heart-felt desire to help her friend. Obtaining a prescription in the name of another person, Charlene Underwood, without [Ms.] Underwood's knowledge or consent was clearly wrong and constituted a violation of the law. As a doctor[,] [Dr.] Eroshevich well knew she should not have done this and it is clear to the court that she acted with the required intent to defraud." However, the trial court "vacated" the count 9 conviction on grounds it was not appropriate to punish Dr. Eroshevich twice for the same act. The trial court then reduced count 7 to a misdemeanor. The prosecution has not appealed the trial court's orders with respect to counts 7 or 9.

III. THE EVIDENCE

A. Overview Of The Participants

We begin by generally describing the key participants in the counts that resulted in Ms. Marshall's death on February 8, 2007. Mr. Stern became Ms. Marshall's lawyer in 1996. Over the course of a 12-year relationship, Mr. Stern became a regular part of Ms. Marshall's entourage. From at least June 5, 2004, until Ms. Marshall's death, the dates of the conspiracies as found by the jury, Mr. Stern was her attorney, manager, "right-hand man" and close companion. He managed her day-to-day affairs and escorted her to events. By some accounts, a romantic relationship developed between Mr. Stern and Ms. Marshall in the year before she died.

Mr. Stern was closely involved in Ms. Marshall's medical care. He accompanied her to medical appointments, discussed her health and drug use with her treating physicians, assisted her in acquiring prescription medication and monitored her medication use. He kept track of her medication schedule and personally ensured she took her prescribed drugs on time. At times, Mr. Stern injected Ms. Marshall with liquefied vitamins and medications. Ms. Marshall was hospitalized from April 24 to May 2, 2006. During her hospitalization, Mr. Stern consulted with Ms. Marshall's staff physicians. On April 26, 2006, Ms. Marshall was examined by Dr. Nathalie Maullin. During the examination, at which Mr. Stern was present, Ms. Marshall was asked about her medical history. Ms. Marshall told Dr. Maullin to ask Mr. Stern. Also, Ms. Marshall was asked what medication she was taking. Ms. Marshall told Dr. Maullin, "Ask Howard," referring to Mr. Stern. At a later point during the examination, Ms. Marshall was asked again what medications she had taken. Once again, Ms. Marshall told Dr. Maullin, "Ask Howard."

Dr. Eroshevich was a California-licensed psychiatrist and, beginning in October 2002, Ms. Marshall's neighbor and friend. Between June 5, 2004 and February 8, 2007, the dates of the conspiracies as found by the jury, Dr. Eroshevich repeatedly prescribed

controlled substances for Ms. Marshall's use. Dr. Eroshevich kept no medical records with respect to Ms. Marshall. Ten prescription drugs including three controlled substances were found in the hotel room where Ms. Marshall died. The three controlled substances were prescribed to Howard K. *Stearn*. Dr. Eroshevich wrote all 10 of the prescriptions.

Prior to the dates of the conspiracies, from March 2001 until about January 2004, Dr. Victor Kovner had treated Ms. Marshall for, among other things, chronic pain. Dr. Kovner kept Ms. Marshall's medical file under the name Michelle Chase. The file also contained references to Anna Nicole Smith and Vickie Marshall. At all times, Dr. Kovner and his staff knew Michelle Chase and Anna Nicole Smith were pseudonyms for Ms. Marshall. Dr. Kovner did not know Ms. Marshall was obtaining pain medications and benzodiazepines from other physicians.

Mr. Stern accompanied Ms. Marshall to her appointments with Dr. Kovner. Mr. Stern conferred with Dr. Kovner about Ms. Marshall's treatment. From time to time, the two men discussed Ms. Marshall's medication use. Mr. Stern was concerned that Ms. Marshall not overuse her medications. When prescription refills were needed, Ms. Marshall's assistant, Kim Walther, or Mr. Stern would call Dr. Kovner's office. Occasionally, Mr. Stern requested early refills because Ms. Marshall was traveling. Dr. Kovner wrote prescriptions for Ms. Marshall's use in her true name, Vicki Lynn Marshall. But he prescribed methadone to her under a pseudonym, Michelle Chase. Dr. Kovner could not remember why he wrote the prescriptions in two names, but he assumed the name Michelle Chase was used for privacy reasons. Dr. Kovner denied any attempt or intent to defraud.

Dr. Ira Freeman was a pharmacist and the owner of Key Pharmacy. Dr. Freeman filled Dr. Kovner's prescriptions for Ms. Marshall. Drs. Kovner and Freeman discussed the use of a false name for Ms. Marshall's methadone prescription. Dr. Freeman described their initial conversation on the subject of methadone prescriptions: "Dr. Kovner called me to tell me he was referring over a patient, part of his pain

management practice. The patient's name was Anna Nicole Smith, but on one of the prescriptions, he was going to have a different name, and that name was Michelle Chase." Dr. Freeman at all times knew prescriptions in the name Michelle Chase were in fact for Ms. Marshall. In 2001 and 2002, Ms. Walther retrieved Ms. Marshall's prescriptions from Key Pharmacy. However, beginning at some point in 2003 or 2004, it was Mr. Stern who usually picked them up.

In early 2004, Dr. Kapoor took over Dr. Kovner's practice. Dr. Kapoor continued Dr. Kovner's practice of prescribing methadone for Ms. Marshall in the name Michelle Chase. With two exceptions—on June 10 and 17, 2004—all of Drs. Kovner's and Kapoor's prescriptions for Ms. Marshall were filled at Key Pharmacy. Mr. Stern spoke with Dr. Kapoor about Ms. Marshall's health issues. Mr. Stern called Dr. Kapoor's office to obtain refills of Ms. Marshall's prescriptions.

B. The Narcotics And The Method For Detecting Prescription Abuse

The jury was instructed that, for purposes of this case, the following were "controlled substances": alprazolam (Xanax or Niravam); chloral hydrate (Somnote); clonazepam (Klonopin); diazepam (Valium); flurazepam (Dalmane); hydrocodone with acetaminophen (Vicodin); hydromorphone (Dilaudid); lorazepam/lorazepam intensol (Ativan); meperidine/pethidine (Demerol); methadone (Methadose); modafinil (Provigil); and zolpidem (Ambien). A subset of those controlled substances—alprazolam (Xanax), clonazepam (Klonopin), flurazepam (Dalmane), diazepam (Valium) and lorazepam (Ativan)—are sedative hypnotic drugs called benzodiazepines. Benzodiazepines are commonly used to treat anxiety and insomnia. The controlled substances also include opiates (pain relievers): hydrocodone with acetaminophen (Vicodin); hydromorphone (Dilaudid); meperidine/pethidine (Demerol); and methadone (Methadose). Chloral hydrate (Somnote) for insomnia, modafinil (Provigil) for narcolepsy and zolpidem (Ambien) for insomnia round out the list.

The California Department of Justice Bureau of Narcotics Enforcement maintains a "Controlled Substance Utilization Review and Evaluation System." This is a record of all controlled substances prescribed. Prescriptions are tracked through a patient's name, address, date of birth and gender, as well as information about the prescribing doctor and pharmacist. Doctors can consult the review system to determine whether a patient is taking medication prescribed by other physicians.

C. Count 3: June 5, 2004-September 10, 2006

Dr. Eroshevich's first prescription for Ms. Marshall was written on June 5, 2004. As noted above, Dr. Eroshevich kept no medical records with respect to Ms. Marshall. Initially, Dr. Eroshevich wrote prescriptions for Ms. Marshall, including for controlled substances, in the names Vickie or Vicki Marshall and Anna N. Smith. Prescriptions Dr. Eroshevich wrote in the name Vickie Marshall were, with two early exceptions, filled at a Rite Aid pharmacy. Prescriptions Dr. Eroshevich wrote in the name Anna N. Smith were dispensed from a grocery store pharmacy. Dr. Eroshevich never sent any of Ms. Marshall's prescriptions to Key Pharmacy. As noted above, Drs. Kovner's and Kapoor's prescriptions were filed at Key Pharmacy. And the pharmacist at Key Pharmacy, Dr. Freeman, knew both Dr. Eroshevich and Mr. Stern. Dr. Freeman also knew that Dr. Eroshevich and Ms. Marshall were neighbors. Between June 5, 2004 and April 24, 2006, when Ms. Marshall was admitted to a hospital, Dr. Eroshevich wrote or approved refills for various medications. On more than 20 dates the medications included controlled substances prescribed in the names Vickie Marshall or Anna N. Smith. On at least 10 of those occasions, Mr. Stern retrieved the medications from the dispensing pharmacy.

Ms. Marshall, who was pregnant, was hospitalized from April 24 to May 2, 2006. She was identified by the hospital and in medical records as Jane Brown, but her treating physicians knew her true name. Dr. Kapoor and Mr. Stern both consulted with staff

doctors. A detoxification plan was developed in consultation with Ms. Marshall, Mr. Stern and Dr. Kapoor. The plan was to stabilize Ms. Marshall and then wean her off benzodiazepines and methadone. Dr. Maullin recommended an inpatient drug treatment program. Ms. Marshall then stopped speaking to Dr. Maullin. Ms. Marshall told Mr. Stern she wanted to self-discharge from the hospital. Upon discharge, Dr. Maullin prescribed methadone and an anti-depressant, Cymbalta, for Ms. Marshall. Dr. Maullin wrote the prescriptions in the name Anna Nicole Smith to be filled under the name Jane Brown. Dr. Maullin did so to link the prescriptions to Ms. Marshall's hospital medical chart. As noted, Ms. Marshall's hospital medical records listed her as Jane Brown.

Following Ms. Marshall's discharge from the hospital, she traveled to South Carolina and then to the Florida Keys. In July 2006, Ms. Marshall, who was pregnant, traveled to the Bahamas. Mr. Stern joined her there. Dr. Kapoor continued to prescribe methadone for Ms. Marshall under the false name Michelle Chase through September 2006. However, consistent with the detoxification plan developed during Ms. Marshall's hospitalization, Dr. Kapoor lowered her methadone dosage and stopped prescribing benzodiazepines. Dr. Kapoor spoke to Dr. Freeman, the pharmacist, about Ms. Marshall's methadone. Dr. Kapoor said he wanted to taper Ms. Marshall's methadone down prior to delivery of the baby. Dr. Kapoor's last methadone prescription for Ms. Marshall was dated August 25, 2006. The methadone was in liquid form for injection. At Mr. Stern's direction, Dr. Freeman shipped the methadone by air to Ms. Marshall in the Bahamas.

At the same time, and in direct contravention of Dr. Kapoor's detoxification efforts, Dr. Eroshevich began prescribing benzodiazepines—diazepam (Valium), lorazepam (Ativan), and alprazolam (Xanax)—to "Howard K. Stearn." The medications prescribed for "Howard K. Stearn" were to be used by Ms. Marshall. They were not for Mr. Stern's use. Dr. Eroshevich had no patient file for Mr. Stern. In June, July and August 2006, Mr. Stern retrieved prescriptions written in the misspelled version of his name, Stearn, but intended for Ms. Marshall's use. Mr. Stern then flew from the United

States to the Bahamas. Dr. Eroshevich also prescribed other medications for Ms. Marshall's use.

Ms. Marshall gave birth to a daughter on September 7, 2006 in the Bahamas. Three days later, on September 10, her adult son died. Ms. Marshall was discharged from the hospital that same day.

D. Count 1: September 11, 2006-February 8, 2007

Mr. Stern notified Dr. Eroshevich that Ms. Marshall's adult son had died. On September 11, 2006, Dr. Eroshevich filled two controlled substance prescriptions for Anna Smith—chloral hydrate (Somnote) and lorazepam intensol (Ativan)—at a Burbank pharmacy. Lorazepam intensol is a concentrated form of lorazepam. Lorazepam intensol is administered in hospitals but is not commonly used as an outpatient drug. Dr. Eroshevich filled out the Lorazepam prescription forms for Ms. Marshall in the pharmacist's presence. Dr. Eroshevich brought the medication to the Bahamas for Ms. Marshall's use. From that point forward, Dr. Eroshevich ceased writing prescriptions in the names Vickie Marshall or Anna Smith. Instead, Dr. Eroshevich began writing prescriptions in the name of Howard K. Stearn and that of her ex-husband, Wesley Irwin. The prescribed medications were intended not for Mr. Stern or Mr. Irwin but for Ms. Marshall.

On September 15, 2006, Dr. Eroshevich sent a facsimile transmission to Dr. Kapoor's office in California. Dr. Eroshevich requested that six medications be dispensed under the name Michelle Chase and sent or brought to the Bahamas. The list included four controlled substances—two opiates, hydromorphone (Dilaudid) and methadone, and two benzodiazepines, lorazepam intensol (Ativan) and flurazepam (Dalmane). The list also included a muscle relaxant, carisoprodol (Soma).

Dr. Kapoor's office forwarded Dr. Eroshevich's list to Key Pharmacy. Dr. Freeman refused to fill the prescriptions. Dr. Freeman determined the quantity of

medication and dosing instructions were excessive. Dr. Freeman spoke to Mr. Stern by telephone and expressed his concerns about the excessive quantity and dosage. Additionally, Dr. Freeman contacted Dr. Gregory Allan Thompson, the founder and former director of the Los Angeles Regional Drug and Poison Information Center. Dr. Eroshevich subsequently telephoned Dr. Thompson. Dr. Thompson urged Dr. Eroshevich to check Ms. Marshall into a hospital or clinic.

Because she was unable to acquire the desired medications through Dr. Kapoor, Dr. Eroshevich resorted to other means. Dr. Eroshevich wrote a series of prescriptions in several different names and filled them at varying pharmacies. Members of Ms. Marshall's entourage then ferried the medications to her in the Bahamas. On September 18, 2006, Mr. Irwin traveled from the Bahamas to Los Angeles. On September 22, 2006, per Dr. Eroshevich's instructions, Mr. Irwin picked up several prescriptions she had called into a grocery store pharmacy. Two prescriptions were in Mr. Irwin's name. Those prescriptions were for carisoprodol (Soma), a muscle relaxant, and clonazaepam (Klonopin), a benzodiazepine. Three prescriptions were in the name "Howard K. Stearn": clonazepam; carisoprodol; and chloral hydrate (Somnote) for insomnia. Mr. Irwin testified the medications were for Ms. Marshall or for Mr. Stern. The following week, Ms. Marshall's bodyguard, Maurice Brighthaupt, flew from the Bahamas to Fort Lauderdale, Florida. Mr. Brighthaupt returned to the Bahamas three days later.

On October 17, 2006, Dr. Eroshevich called in two controlled substance prescriptions, chloral hydrate and clonazepam, to a California pharmacy, Unipharma. The pharmacy was not open to the public. Dr. Eroshevich falsely said the patient was Charlene Underwood. Dr. Eroshevich lied and claimed to be Ms. Underwood's aunt. Dr. Eroshevich used Mr. Irwin's birth date and the address of one of her offices as the patient's information. Later that day, Dr. Eroshevich retrieved the prescription medications and paid cash for them. Dr. Eroshevich flew to the Bahamas on October 18,

2006. Ms. Marshall's son was buried in the Bahamas on October 19, 2006. Dr. Eroshevich returned to California on November 5, 2006.

On November 24, 2006, Dr. Eroshevich filled three controlled substance prescriptions at Unipharma—two benzodiazepines, alprazolam (Xanax) and diazepam (Valium), and a pain killer, hydrocodone (Vicodin). Dr. Eroshevich again falsely identified the patient as Ms. Underwood. As before, Dr. Eroshevich picked up the prescriptions and paid cash for them. Two days later, she returned to the Bahamas.

There was in fact a person named Charlene Underwood. The real Ms. Underwood was a worker's compensation lawyer who had once corresponded with Dr. Eroshevich. However, the real Ms. Underwood had never met Dr. Eroshevich. The real Ms. Underwood was neither Dr. Eroshevich's niece nor patient. The real Ms. Underwood did not give anybody permission to use her name. The real Ms. Underwood never received any medications prescribed by Dr. Eroshevich. Other than being the victim of the deceitful misuse of her name, Ms. Underwood had nothing to do with the fraudulent conspiracy to violate this state's narcotics laws.

Dr. Eroshevich returned to California on December 3, 2006. On December 4, 2006, the grocery store pharmacy refilled two controlled substance prescriptions written by Dr. Eroshevich for "Howard Stearn"—chloral hydrate and clonazepam. On December 12, 2006, Mr. Irwin picked the medications up and paid cash for them. Dr. Eroshevich returned to the Bahamas the following day.

On December 27, 2006, Dr. Eroshevich returned to California. On January 2, 2007, Dr. Eroshevich called in prescriptions for "Howard K. Stearn" and collected them from the grocery store pharmacy the following day. The prescriptions included two controlled substances, chloral hydrate (Somnote) and clonazepam (Klonopin), and the muscle relaxant carisoprodol (Soma). On January 5, 2007, Dr. Eroshevich called two additional controlled substance prescriptions into the grocery store pharmacy, one for "Howard K. Stearn" (diazepam (Valium)) and the other for "Ben Stern" (lorazepam (Ativan)). Dr. Eroshevich picked up the medications that day, paid cash for them, and

sent them by Federal Express to Mr. Brighthaupt in Florida. On January 29, 2007, Mr. Brighthaupt flew from Fort Lauderdale to the Bahamas.

On January 26, 2007, Dr. Eroshevich went to the grocery store pharmacy. Dr. Eroshevich requested early refills of prescriptions for "Howard K. Stearn" including the controlled substances clonazepam (Klonopin), diazepam (Valium) and chloral hydrate (Somnote) together with the muscle relaxant carisoprodol (Soma). Dr. Eroshevich did not explain that the medicines were intended for use by Ms. Marshall or anyone else. The pharmacist, Emma Avakyan, told Dr. Eroshevich it was too early to refill the prescriptions. Dr. Eroshevich said she was going to take the medication to "Mr. Stearn" in the Bahamas. On that basis, Ms. Avakyan filled the prescriptions early. Mr. Irwin picked up at least some of the prescriptions and paid for them on January 27, 2007. On January 29, 2007, Dr. Eroshevich returned to the Bahamas. The medications refilled at the grocery store pharmacy were in Ms. Marshall's hotel room on the day she died.

In the Bahamas, Mr. Stern administered the medication to Ms. Marshall. Sometimes she could take the medicine on her own; other times she needed help. Mr. Stern gave Ms. Marshall injections of liquefied medications and Vitamin B-12. Mr. Stern and Dr. Eroshevich both said the medication needed to be administered by injection because Ms. Marshall was having trouble swallowing. Ms. Marshall's Bahamian obstetrician, Dr. Hubert Minnis, visited her at home. On one of those occasions, prior to Dr. Minnis's arrival, Mr. Stern was observed moving Ms. Marshall's medications from a table in her bedroom to the bathroom.

On February 5, 2007, Ms. Marshall, Dr. Eroshevich and Mr. Stern flew from the Bahamas to Miami, Florida. Mr. Brighthaupt picked up a package containing chloral hydrate which had been shipped and brought it to Ms. Marshall's hotel. A Walgreen's pharmacy in Fort Lauderdale, Florida filled Dr. Eroshevich's Tamiflu prescription for "Irma Katz." On February 6, 2007, the same pharmacy filled the doctor's Cipro prescription for "Alex Katz."

Ms. Marshall died in her hotel room on February 8, 2007. Toxicology reports showed an above therapeutic level of metabolites of chloral hydrate together with therapeutic levels of other drugs. Ms. Marshall had been consuming chloral hydrate (Somnote) in liquid form to induce sleep. Although the prescription was for two teaspoons at bedtime, she had been drinking it straight from the bottle. As noted above, 10 prescription drugs were recovered from Ms. Marshall's hotel room. All of the medication was prescribed by Dr. Eroshevich. Six prescriptions, including all three controlled substances, were written for Howard K. Stearn. Mr. Stern told investigators the prescriptions written in his name were for Ms. Marshall. Mr. Stern said his name was used to protect Ms. Marshall's privacy.

There were several days of testimony on the standard of practice or care issues. The trial court repeatedly advised the jury that acting outside the standard of practice was not a violation of law. The jury was instructed: "If you find that a defendant physician acted outside the standard of practice for his or her profession, you may consider that along with the other evidence in the case. A physician's acts outside the standard of practice do not alone constitute a violation of any crime in this case. It is up to the jury to assign whatever weight you deem appropriate to this evidence."

The trial court determined the parties and witnesses should refer to a "standard of practice" rather than a "standard of care." Dr. James Gagne said "standard of practice" and "standard of care" were interchangeable terms. He defined "standard of practice" as follows: "The standard of practice is the sort of care every physician treating a certain kind of patient should employ. It's not a minimum, but it's—it's the baseline of what you should do. There are best practices which are if you're doing everything correctly would go beyond the standard of practice. The standard of practice to some exten[t] is the minimum required to have a reasonable likelihood of a good outcome." (Dr. Gagne testified primarily with respect to Dr. Kapoor's conduct.)

The uncontradicted testimony indicated six related deviations from the standard of practice by Dr. Eroshevich. First, Dr. Eroshevich's practice of treating Ms. Marshall and

prescribing opiates and benzodiazepines on a regular basis without keeping any medical records was outside the standard of practice. Dr. Victor Kovner testified it was below the standard of medical practice to prescribe opiates and benzodiazepines on a regular basis without keeping a medical chart. Dr. Kovner explained, "[A] medical record is essential for the benefit of the patient so that there can be continuity of care so one doesn't have to just rely upon recall." Dr. Kovner further testified, "[I]t's illegal to prescribe without a good faith examination, and the only patients it's legal to prescribe for are patients of another physician with whom you have a coverage relationship; in other words, you're covering their practice and you have reason to believe that they are taking their medication." Dr. Gagne likewise testified medical records must be kept for a patient who has been prescribed opiates: "[T]he standard of practice is that everything that is pertinent to [a patient] visit [be put in writing] and that would inform yourself or someone else looking at the record about what happened during that visit [would] be present in the record." Dr. Perry Gordon Fine testified that within the standard of practice a doctor prescribing opiates must maintain "accurate" records. Further, it would be outside the standard of practice for a physician to prescribe opiates over a period of three years without any medical records for that patient.

Second, Dr. Eroshevich operated outside the standard of practice to the extent opiates were prescribed for Ms. Marshall. Dr. Gagne testified that although commonly done, it was "absolutely" outside the standard of practice to prescribe opiates for psychological pain. (There was conflicting evidence, of course, whether Dr. Eroshevich was treating Ms. Marshall for psychological or physical pain.) Dr. Gagne further testified that in the case of a patient in Ms. Marshall's situation, it was an extreme deviation from the standard of practice to treat her pain with opiates.

Third, Dr. Eroshevich operated outside the standard of practice to the extent she treated Ms. Marshall for chronic pain without: taking a comprehensive history; performing a physical examination; and conducting indicated tests including laboratory analysis, imaging and x-rays. Dr. Gagne testified that within the standard of practice,

when a patient complains of chronic pain, "[The physician] needs to do a comprehensive history, a physical exam, and any needed labs or imaging, x-rays and M.R.I.'s and so forth." If a patient has a history of taking opiates for at least a couple of years and is still complaining of chronic pain, the standard of practice is to "assess addiction in more detail."

Dr. Gagne discussed the situation where a patient is a neighbor or friend of a physician. If the physician saw the friend or neighbor, took a history, conducted a physical examination and wrote down the encounter in a medical record, that would be within the standard of practice. With respect to "hallway prescribing," Dr. Gagne testified: "Hallway prescribing is always risky because you really are not in a medical setting where you can establish a good history and physical and get enough of a basis to form an understanding of what the patient needs. So if a patient has a trivial illness and you're pretty certain that's all that's going on, it's acceptable and within the standard of practice. . . . Anything else, anything that's not trivial, it's a departure from the standard of practice . . . ." Dr. Gagne testified: "[Prescribing opiates to someone with whom you have a friendship] would have to happen in a medical setting. And so long as I have a chart and I write down the history and physical and obtain a [medical] history and physical and I'm satisfied that I have the basis for care, that doesn't have to happen in a physician's office, but it has to have the elements of . . . genuine doctor/patient visit where you take the time to establish what's going on with that patient, write it down, and have a medical record." Prescribing an opiate without creating any medical record is an extreme departure from the standard of practice according to Dr. Gagne, "Any controlled drug prescribing needs to happen in the context of a genuine physician/patient relationship with . . . a history, a physical exam, a medical record, and it has to be a good solid, good faith doctor/patient relationship."

Dr. Timothy Botello offered a different view of the standard of practice for psychiatrists. Dr. Botello testified a person can be a friend or a patient but not both. A psychiatrist acting as a general practitioner should consult with other treating physicians.

A psychiatrist prescribing opiates and benzodiazepines should communicate with the patient's medical doctor to ensure there is no overprescribing of the same medication to a chronic pain patient. Dr. Botello further testified it was outside the standard of practice in psychiatry to cross boundaries—for example, Dr. Eroshevich's being naked in a tub with Ms. Marshall. And it was outside the standard of practice to treat Ms. Marshall in the Bahamas and to bring medicine to her there. This is because Dr. Eroshevich was not licensed to practice medicine in the Bahamas.

Fourth, Dr. Eroshevich's treatment was outside the standard of practice when she requested, by facsimile, large quantities of opiates and sedatives. Dr. Gagne testified that if the medications listed on People's exhibit 57 were intended for Ms. Marshall, that would be a departure from the standard of practice. Dr. Gagne explained: "That's a very large amount of medication. Now, possibly somebody could be so used to taking enormous amounts of opiates and sedatives so that would not cause a problem. But there's a grave risk that somebody would take so much of this that they would stop breathing. So that's a very concerning request."

Fifth, it was an extreme departure from the standard of practice when Dr. Eroshevich prescribed benzodiazepines to Ms. Marshall after she was released from the hospital. Dr. Gagne testified any prescribing of benzodiazepines after Ms. Marshall was released from the hospital and while she was pregnant was not merely outside the standard of practice. Rather, Dr. Eroshevich engaged in an extreme departure from the standard of practice. Dr. Gagne was referring specifically to Dr. Kapoor's prescriptions. But Dr. Eroshevich also prescribed benzodiazepines to Mr. Marshall during her pregnancy subsequent to her hospitalization.

Sixth, Dr. Eroshevich engaged in a departure from the standard of practice by prescribing multiple benzodiazepines to Ms. Marshall. Dr. Gagne testified, "[I]n the vast majority of cases, using multiple benzodiazepines is a departure from the standard of practice. Now, in a non-addict I would consider it a simple departure. In an addict, it's an extreme departure."

IV. DISCUSSION

A. Overview

As to Mr. Stern, the trial court ruled no reasonable jury could have found he engaged in the conspiracies charged in counts 1 and 3. We begin by analyzing the elements of conspiracy to violate Health and Safety Code sections 11173, subdivision (a) and 11174. Then, we will discuss whether there was substantial evidence Mr. Stern could be convicted under counts 1 and 3. Finally, we will conclude as to Mr. Stern: the new trial and dismissal orders must be set aside; the verdicts as to counts 1 and 3 must be reinstated; and, upon remittitur issuance, the trial court must proceed to rule on other new trial issues, dismissal grounds and, if appropriate, sentence him; but under no circumstances may he be retried.

As to Dr. Eroshevich, we conclude the section 1385 dismissal order must be reversed. But as to her, the trial court must decide the other issues raised by Dr. Eroshevich's dismissal and new trial requests set forth in her "omnibus request": for dismissal; for a new trial; or to reduce the felonies to misdemeanors. Depending on the post-remittitur rulings as to Mr. Stern and Dr. Eroshevich, only she is subject to retrial.

B. The Legal Elements Of The Charges In Counts 1 And 3

The prosecution had the burden of proving Mr. Stern specifically intended to commit unlawful acts. Section 182, subdivision (a) defines a conspiracy. It states: "If two or more persons conspire: [¶] (1) To commit any crime. [¶] . . . [¶] They are punishable . . . ." (§ 182, subd. (a); *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 600.) Conspiracy is a specific intent crime. (*People v. Morante, supra,* 20 Cal.4th at p. 416; *People v. Cortez* (1998) 18 Cal.4th 1223, 1232; *People v. Swain, supra,* 12 Cal.4th at p. 600; *People v. Horn* (1974) 12 Cal.3d 290,

296, disapproved on another point in *People v. Cortez, supra,* 18 Cal.4th at p. 1238; *People v. Marsh* (1962) 58 Cal.2d 732, 743.) Our Supreme Court has explained: "'The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree, *but also that they intended to commit the elements of that offense.*' (*People v. Horn*[, *supra,*] 12 Cal.3d [at p.] 296, citations omitted, italics added.)" (*People v. Swain, supra,* 12 Cal.4th at p. 600; accord, *People v. Morante, supra,* 20 Cal.4th at p. 416; *People v. Croy* (1985) 41 Cal.3d 1, 23.) As our Supreme Court explained in *Marsh*: "The essence of the crime of conspiracy is the 'evil' or 'corrupt' agreement to do an unlawful act. It is the evil intent that makes a combination criminally indictable. 'The association of persons with an honest intent is not conspiracy, and one of the tests on a conspiracy trial is, did the accused act in ignorance without criminal intent? In other words, did they honestly entertain a belief that they were not committing an unlawful act? [Citation.] . . . [¶] For these reasons, it is often said that conspiracy is a 'specific intent' crime [citation]. This specific intent of the conspirators must be proved in each case by the prosecution and will not be presumed from the mere commission of an unlawful act [citation]. Therefore, even though a conspiracy has as its object the commission of an offense which can be committed without any specific intent, there is no criminal conspiracy absent a specific intent to violate the law. That is, to uphold a conviction for conspiracy to commit a 'public welfare offense' there must be a showing that the accused knew of the law and intended to violate it. [Citations.]" (*People v. Marsh, supra,* 58 Cal.2d at p. 743; accord, *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774-779 [conspiracy to sell marijuana]; *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 585-586 [conspiracy to practice medicine without a license]; *People v. Bowman* (1958) 156 Cal.App.2d 784, 797-799 [conspiracy to, inter alia, unlawfully prescribe, administer or furnish narcotics]; 19 Cal.Jur.3d Criminal Law: Miscellaneous Offenses § 72, pp. 108-110; 1 Witkin, Cal.

Criminal Law (4th ed. 2012) Elements, § 81, pp. 377-379.) Based on the foregoing, the jury was instructed in part, "If a defendant had a good faith belief that his or her actions were legal, he or she is not guilty of conspiracy." In convicting defendants of conspiracy, the jury necessarily rejected this good faith defense.

Interstate and international drug distribution conspiracies based on fraudulent use of names and, in one case, identity theft (the use of Ms. Underwood's name) are ordinarily not "public welfare" violations. (*People v. Coria* (1999) 21 Cal.4th 868, 876-878; *People v. Urziceanu, supra*, 132 Cal.App.4th at pp. 774-779.) Here, the prosecution does not contend the trial court committed any error in instructing on defendant's good faith defense. We express no opinion on whether the good faith defense applies here.

Conspiracy, including the requisite specific intent, may be proved by circumstantial evidence. (*People v. Zamora, supra,* 18 Cal.3d at p. 559; *People v. Marsh, supra,* 58 Cal.2d at p. 746; *People v. Osslo* (1958) 50 Cal.2d 75, 94-95; *People v. Steccone* (1950) 36 Cal.2d 234, 238; *People v. Lawrence* (1904) 143 Cal. 148, 153-154; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1024-1025; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464, disapproved on another point in *People v. Mesa* (2012) 54 Cal.4th 191, 199.) As our Supreme Court held: "A conspiracy is almost always of necessity provable only by circumstantial evidence, that is to say, by inference reasonably deduced from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing a conspiracy by direct evidence. Consequently the conspiracy complained of may oftentimes be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy. [Citation.]" (*Siemon v. Finkle* (1923) 190 Cal. 611, 615-616, abrogated on another point in *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1208-1212; see *People v. Bogan* (2007) 152 Cal.App.4th 1070, 1074.) As explained in *People v. Bentley* (1888) 75 Cal. 407, 409: "A conspiracy, like most other facts, may be proved by circumstantial evidence. Indeed, it is not often

that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main central object, and tending to convince the mind reasonably and logically, of the existence of the conspiracy. [¶] . . . 'If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.' [Citation.]" (See *People v. Bawden* (1962) 208 Cal.App.2d 589, 596-597.) Here, the jury was instructed on the sufficiency of circumstantial evidence generally and to prove a specific intent.

C. Mr. Stern

1. There Was Sufficient Evidence For A Rational Jury To Convict Mr. Stern Of The Conspiracies Charged In Counts 1 And 3

As noted, the trial court's new trial order was premised on the conclusion no rational jury could find Mr. Stern was guilty of the conspiracy charges in counts 1 and 3. Before discussing the effects of the trial court's findings, we address the pure legal issue of whether there was substantial evidence to support the counts 1 and 3 verdicts.

There was sufficient evidence for a rational jury to convict Mr. Stern of the charged conspiracies. Viewing the evidence in the light most favorable to the verdicts, the jury reasonably could have found as follows. Mr. Stern was intimately involved in procuring and dispensing medication to Ms. Marshall over an extended period of time. Mr. Stern accompanied Ms. Marshall to medical appointments, consulted with her physicians, obtained her medications and administered them to her. Ms. Marshall befriended Dr. Eroshevich.

Thereafter, it was agreed, expressly or tacitly, that Dr. Eroshevich would provide Ms. Marshall with controlled substances. The quantity of drugs exceeded those prescribed by Ms. Marshall's treating physicians. Mr. Stern participated with Dr. Eroshevich in procuring controlled substances for Ms. Marshall. He did so with knowledge Dr. Eroshevich was not Ms. Marshall's treating physician and no medical records were being kept.

There is evidence Mr. Stern knowingly participated in conduct designed to avoid detection and scrutiny. Mr. Stern knew Dr. Eroshevich's prescriptions were written in names other than Ms. Marshall's, including his own, and were filled at varying pharmacies. Mr. Stern knew that Dr. Eroshevich filled prescriptions in the name Vickie Marshall at one pharmacy and in the name Anna N. Smith at another. Neither pharmacy was used by Ms. Marshall's treating physicians. Mr. Stern knew Dr. Eroshevich prescribed controlled substances for Ms. Marshall's use utilizing the names: Anna N. Smith; Vickie Marshall; Wesley Irwin; Mr. Stern; Howard K. Stearn; Ben Stern; and Charlene Underwood. Mr. Stern knew multiple doctors were prescribing controlled substances and other medications to Ms. Marshall. Mr. Stern also knew that her treating physicians were unaware of that fact. On one day in June 2006, for example, Dr. Kapoor prescribed Zoloft, an anti-depressant, and lorazepam (Ativan), a controlled substance, to Michelle Chase. The prescriptions were filled at Key Pharmacy. At the same time, Dr. Eroshevich prescribed Zoloft and lorazepam in higher quantities to Howard K. Stearn. Those prescriptions were filled at the grocery store pharmacy. Mr. Stern admitted to investigators prescriptions written in his name were intended for Ms. Marshall.

When Ms. Marshall became pregnant and detoxification was indicated, Mr. Stern and Dr. Eroshevich knowingly side-stepped Dr. Kapoor's detoxification efforts. They provided Ms. Marshall with controlled substances that were inconsistent with the detoxification plan. During their stay in the Bahamas, Mr. Stern, Dr. Eroshevich, and

other members of Ms. Marshall's entourage, went to great lengths to secure medication, including controlled substances. These narcotics were given to Ms. Marshall.

Dr. Eroshevich was unable to secure prescriptions in the name Michelle Chase through Drs. Kapoor and Freeman. Dr. Eroshevich then resorted, with Mr. Stern's knowledge, to the use of other names: Howard K. Stearn; Wesley Irwin; Charlene Underwood; and Ben Stern. Mr. Stern, who was caring for Ms. Marshall in the United States and Bahamas, including administering medications to her, was impliedly aware of these facts. Mr. Stern was physically present in the United States and the Bahamas when Ms. Marshall was ingesting the drugs with prescriptions in other person's names. His knowledge and involvement was such the jury could reasonably conclude Mr. Stern knowingly participated in the ongoing practice of securing illegal prescriptions.

Mr. Stern argues that, as a matter of law, he could in good faith believe the widespread procurement of controlled substances utilizing false names was legal. This argument has no merit. His knowledge and involvement was such the jury could reasonably conclude Mr. Stern, a lawyer, knowingly participated in the ongoing illegal practice of securing illegal prescriptions. The prescriptions were secured unsupervised by treating physicians or pharmacists and without medical documentation. The controlled substances were procured for Ms. Marshall with the fraudulent use of multiple names other than her own. The jury could reasonably have concluded that a lawyer would know such ongoing and unrelenting fraudulent activity was unlawful.

Mr. Stern argues that since in limited circumstances over a several years period medical professionals used aliases for Ms. Marshall, he reasonably believed he could participate in the scheme. No doubt, in light of how the jury was instructed, Mr. Stern could posit such an argument to the jury in support of his defense he acted in good faith. But such a problematic state of mind by anybody, much less a lawyer, does not constitute a defense *as a matter of law* given the facts of this case.

2. The Legal Effect Of The Presence Of Substantial Evidence On The Order Granting Mr. Stern A New Trial

As noted, the sole ground upon which the trial court granted Mr. Stern's new trial motion was: "When I consider all the evidence, and even viewing it in a light most favorable to upholding the verdict, I find it is clearly insufficient. Under these circumstances I find no reasonable trier of fact could find that Howard Stern had a specific intent to violate either of these target crimes . . . and I do grant a motion for new trial to Mr. Stern on these [conspiracy] counts . . . ." The trial court ruled that the evidence was insufficient as a matter of law when it granted the new trial motion. The trial court was empowered to grant new trial motion on the legal ground the evidence was insufficient as a matter of law. (*Hudson v. Louisiana*, *supra*, 450 U.S. at p. 44; see *People v. Lagunas*, *supra*, 8 Cal.4th at p. 1038, fn. 6.) Typically, a new trial motion is reviewed for an abuse of discretion. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729; *People v. Thompson* (2010) 49 Cal.4th 79, 140.) But because the trial court ruled the evidence was insufficient as a matter of law, we do not apply the abuse of discretion standard of review. Rather, we engage in the precise same task undertaken by the trial court; we examine the record to determine whether substantial evidence supports the verdicts. (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1310 [if the trial judge reduces the verdict to an included offense because no reasonable jury could convict of the greater crime, appellate court review is de novo]; *People v Salgado*, *supra*, 88 Cal.App.4th at p. 15 [dismissal of carjacking conviction on evidentiary insufficiency grounds reviewed to determine whether a rational jury could convict].) The result would be different if the trial court, acting as the so-called "13th juror," reweighed the evidence and concluded Mr. Stern was entitled to a new trial. (See *Porter v. Superior Court* (2009) 47 Cal.4th 125, 133; *People v. Lagunas*, *supra*, 8 Cal.4th at p. 1038.) Under those circumstances, we would apply the traditional abuse of discretion standard of review. (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252; *People v. Johnston*, *supra*, 113

Cal.App.4th at pp. 1307-1308; see *People v. Ault* (2004) 33 Cal.4th 1250, 1261.) As we have explained, there was substantial evidence to support the jury's counts 1 and 3 verdicts. Thus, the new trial order must be set aside as to Mr. Stern and the guilty verdicts reinstated. (*People v. Johnston, supra*, 113 Cal.App.4th at p. 1314; *People v. Salgado, supra*, 88 Cal.App.4th at p. 16.)

In terms of the section 1385 dismissal, the analysis is the same. Typically, section 1385 dismissal orders involve competing interests and must be issued only in furtherance of justice. (See *People v. Wallace* (2004) 33 Cal.4th 738, 747; *People v. Orin* (1975) 13 Cal.3d 937, 945.) As a result, section 1385 dismissal orders in most circumstances are reviewed by appellate courts for an abuse of discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 374; *People v. Memro* (1995) 11 Cal.4th 786, 835-836.) But we are reviewing a pure legal issue—the legal sufficiency of the evidence. We respectfully disagree with the trial court's ruling that there is insufficient evidence, as a matter of law, Mr. Stern is legally culpable for the two charged conspiracies. On the other hand, an abuse of discretion can occur when its exercise involves decisionmaking outside the confines of established legal criteria. (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737; *People v. Jackson* (1992) 10 Cal.App.4th 13, 22.) Or an abuse of discretion can be established if it is entirely premised on a legal error. (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1483; *People v. Millard* (2009) 175 Cal.App.4th 7, 26.) The trial court's sole basis for the dismissal decision was that the evidence was insufficient as a matter of law. Since, as we have explained, that decision was incorrect, the section 1385 dismissal order can be viewed as one beyond the allowable scope of judicial decision. Regardless of the standard of review, we respectfully disagree with the trial court's ruling there is legally insufficient evidence Mr. Stern is guilty of the two charged conspiracies.

3. Post-remittitur proceedings

We now address the issue of what may occur once the remittitur issues. The prosecution argues the verdict must be reinstated and Mr. Stern sentenced. We are in accord with the prosecution that Mr. Stern's verdicts must be reinstated. (*United States v. Sharif* (9th Cir. 1987) 817 F.2d 1375, 1379; *People v. Johnston, supra,* 113 Cal. App. 4th at pp, 1313-1314.) But before Mr. Stern may be sentenced, there are series of hurdles that must be overcome.

The trial court never ruled on other issues raised by Mr. Stern's new trial motion. As noted, he raised other issues including: *the weight of the evidence* indicated he acted in good faith; prosecutorial misconduct; selective prosecution; and both conspiracy counts should be reduced to misdemeanors as permitted by section 17, subdivision (b)(3). Before any sentencing can occur, the trial court must rule on these issues. The trial court's ruling was precise—the evidence was insufficient as matter of law. No effort was made to rule on these other matters nor was there any reason to do so given the dismissal order and the new trial motion evidentiary insufficiency finding. Once the remittitur issues, the trial court may rule on Mr. Stern's new trial motion, subject to our former jeopardy analysis. (§ 1260; *People v Braxton* (2004) 34 Cal.4th 798, 818-819.) The trial court has a variety of options. Conceivably, the trial court could deny the new trial motion and sentence Mr. Stern to prison, place him on probation or reduce the two conspiracy counts to misdemeanors. Or the trial court could deny the new trial motion but dismiss the case pursuant to section 1385 on some ground other than evidentiary insufficiency as a matter of law. Or the trial court could grant the new trial motion after reweighing the evidence (acting as the so-called "13th juror") subject to the following double jeopardy analysis. Or the trial court could dismiss counts 1 and 3 on other than legal insufficiency grounds. We express no opinion as to how the trial court should exercise its discretion.

But under no circumstances may a retrial occur. As discussed in this opinion's introduction, for double jeopardy purposes, a new trial order based on evidentiary insufficiency grounds can have the effect of an acquittal. Our Supreme Court has summarized the applicable law in the section 1385 dismissal context: "[T]he United States Supreme Court has long held that 'what constitutes an "acquittal" is not to be controlled by the form of the judge's action.' ([*U.S. v. Martin Linen Supply Co.* (1977)] 430 U.S. [564,] 571.) Rather, appellate courts 'must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' (*Ibid.*) If a trial court rules the evidence is insufficient as a matter of law, then the ruling bars retrial even if it is patently erroneous or the court has no statutory authority to make it. (See *Sanabria v. United States* (1978) 437 U.S. 54, 64 [a trial court finding of legal insufficiency based on an erroneous foundation is still an acquittal for double jeopardy purposes]; *People v. Valenti* (1957) 49 Cal.2d 199, 203, 209 [a trial court dismissal for legal insufficiency made *without* statutory authorization bars retrial under the California Constitution], disapproved on other grounds in *People v. Sidener* (1962) 58 Cal.2d 645, 647; see also *Fong Foo v. United States* (1962) 369 U.S. 141, 143 [a ruling by a trial court acquitting a defendant bars retrial even if the ruling is 'egregiously erroneous' and the court lacks the power to make the ruling].)" (*People v. Hatch*, *supra*, 22 Cal.4th at pp. 270-271; see *Evans v. Michigan, supra,* 568 U.S. at p. ___ [2013 U.S. LEXIS **13]; *Mannes v. Gillespie* (9th Cir. 1992) 967 F.2d 1310, 1313-1316.)

The same is true in the new trial order context—an order granting a new trial motion on the ground of evidentiary insufficiency bars a retrial. (*Hudson v. Louisiana*, *supra*, 450 U.S. at p. 44; *People v. Lagunas*, *supra*, 8 Cal.4th at p. 1038, fn. 6.) In *Hudson*, the trial court granted the defendant's new trial motion and stated: "'I heard the same evidence the jury did[;] I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of the homicide committed by this defendant of this particular victim.'" (*Hudson v. Louisiana*, *supra*, 450 U.S. at pp.

41-42; see *Freer v. Dugger* (11th Cir. 1991) 935 F.2d 213, 217-218.) In *Hudson*, the United States Supreme Court relied upon its prior decision in *Burks v. United States* (1978) 437 U.S. 1, 2-11. *Burks* held that if a judgment is reversed on appeal on evidentiary insufficiency grounds, there can be no retrial. (*Id.* at pp. 16-17; see *People v. Anderson* (2009) 47 Cal.4th 92, 104.)

Citing *Burks*, in *Hudson*, the high court held: "We considered in *Burks* the question 'whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict.' [Citation.] We held that a reversal 'due to a failure of proof at trial,' where the State received a 'fair opportunity to offer whatever proof it could assemble,' bars retrial on the same charge. [Citation.] We also held that it makes 'no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient,' [citation] or that 'a defendant has sought a new trial as one of his remedies, or even as the sole remedy.' [Citation.] [¶] Our decision in *Burks* controls this case, for it is clear that petitioner moved for a new trial on the ground that the evidence was legally insufficient to support the verdict and that the trial judge granted petitioner's motion on that ground." (*Hudson v. Louisiana, supra*, 450 U.S. at pp. 42-43; *Freer v. Dugger, supra,* 935 F.2d at p. 218; see *People v. Trevino* (1985) 39 Cal.3d 667, 699, disapproved on another ground in *People v. Johnson* (1989) 47 Cal.4th 1194, 1221.)

The prosecutor in *Hudson* argued that the trial court's comments were not entitled to double jeopardy effect because it was acting as the "13th juror" in granting the accused's new trial motion. (*Hudson v. Louisiana, supra*, 450 U.S. at p. 44.) The high court rejected this argument explaining: "As the State reads the record, the trial judge granted a new trial only because he entertained personal doubts about the verdict. According to the State, the trial judge decided that he, as a '13th juror,' would not have found petitioner guilty and he therefore granted a new trial even though the evidence was not insufficient as a matter of law to support the verdict. The State therefore reasons that *Burks* does not preclude a new trial in such a case, for the new trial was not granted 'due

to a failure of proof at trial.' [Citation.] [¶] This is not such a case, as the opinion of the Louisiana Supreme Court and the statements of the trial judge make clear. The trial judge granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a '13th juror,' would have decided it differently from the other 12 jurors. Accordingly, there are no significant facts which distinguish this case from *Burks*, and the Double Jeopardy Clause barred the State from prosecuting petitioner a second time." (*Hudson v. Louisiana*, *supra*, 450 U.S. at pp. 44-45, fns. omitted; accord *Freer v. Dugger, supra,* 935 F.2d at p. 219.) The same is true here except the trial court ruled with materially greater clarity than in *Hudson*. In *Hudson*, the trial court spoke of "no evidence, certainly not evidence beyond a reasonable doubt" to sustain the homicide verdict. By contrast, here the trial court spoke with precision: there was no evidence Mr. Stern acted in bad faith; Mr. Stern's motive was to protect Ms. Marshall's privacy; it had considered all of the evidence; the evidence was clearly insufficient; and no reasonable trier of fact could find Mr. Stern had the specific intent to commit the target offense. *Hudson* is controlling. There can be no retrial in our case. Given the double jeopardy effect of the new trial order, we need not address whether the section 1385 dismissal order for evidentiary insufficiency also bars retrial.

Once the remittitur issues, the trial court may exercise its new trial and section 1385 discretion as it deems fit. We have already listed some of the trial court's options. But if the trial court grants Mr. Stern's new trial motion, the case against him must be dismissed on double jeopardy grounds. Mr. Stern may not be retried.

D. Dr. Eroshevich

The issue is more straightforward as to Dr. Eroshevich. The trial court never ruled on her new trial motion. The trial court had just dismissed counts 1 and 3 as to Mr. Stern. The trial court merely dismissed counts 1 and 3 because Dr. Eroshevich could not act alone as a member of a conspiracy. As noted, the information alleged the co-conspirators

were Dr. Kapoor, Dr. Eroshevich and Mr. Stern. The jury acquitted Dr. Kapoor and the trial court dismissed the counts 1 and 3 charges against Mr. Stern. Thus, the sole remaining charged and convicted co-conspirator was Dr. Eroshevich. A conspiracy requires the agreement of at least two persons. (*People v. Palmer* (2001) 24 Cal.4th 856, 864; *People v. Herrera, supra,* 70 Cal.App.4th at p. 1464.)

Thus, the sole factual predicate of the dismissal order as to Dr. Eroshevich—Mr. Stern could not have been a member of the conspiracy—is no longer extant. We have reversed the ruling that Mr. Stern, as a matter of law, was not a member of the charged conspiracies. Because the legal basis of Dr. Eroshevich's dismissal order was incorrect, the trial court did not possess the discretion to dismiss counts 1 and 3 pursuant to section 1385. Thus, Dr. Eroshevich's dismissal order is reversed.

No doubt, there can be inconsistent verdicts. The fact that all of Dr. Eroshevich's co-conspirators may be so acquitted does not mean she must, as a matter of law, also be found not guilty. Our Supreme Court has expressly so held. (*People v. Palmer*, *supra*, 24 Cal.4th at p. 864; Witkin & Epstein, Cal. Criminal Law, *supra*, Elements § 86, pp. 386-387.) We need not discuss that issue as no party has addressed that question.

Upon remittitur issuance, the trial court may decide to grant Dr. Eroshevich's new trial motion as to counts 1 and 3. Or the trial court may decide to dismiss counts 1 and 3 on other grounds. (§ 1260; *People v Braxton*, *supra*, 34 Cal.4th at pp. 818-819.) As in the case of Mr. Stern, these are matters that rest in the good hands of the trial court. We express no opinion on how the trial court should exercise its discretion.

We reject any suggestion that Dr. Eroshevich's dismissal bars retrial on double jeopardy grounds. Our Supreme Court has set forth explicit requirements as to when double jeopardy effects attach to a section 1385 dismissal order. In *Hatch*, our Supreme Court held the record must clearly state the trial court applied the substantial evidence standard of review in a section 1385 dismissal order. In *People v. Hatch*, *supra*, 22 Cal.4th at page 273, our Supreme Court held: "Because section 1385 dismissals often are not based on the insufficiency of the evidence as a matter of law, we believe these

dismissals should not be construed as an acquittal for legal insufficiency unless the record clearly indicates that the trial court applied the substantial evidence standard. Specifically, the record must show that the court viewed the evidence in the light most favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt. (See *Lagunas*, *supra*, 8 Cal.4th at p. 1038, fn. 6 [declining to construe the trial court's grant of a new trial as an acquittal for legal insufficiency because the record indicates that the court did not use the "'substantial evidence" standard'].) Absent such a showing, we will assume the court did *not* intend to dismiss for legal insufficiency and foreclose reprosecution." Here, the trial court made no such express statement concerning the use of the substantial evidence test when orally dismissing counts 1 and 3. As noted, the trial court merely orally stated: "I don't think there was an agreement between the two of them to violate the law, and . . . I don't think the conspiracy counts can stand [as to Dr. Eroshevich], and so I dismiss those as well . . . . The clerk's minutes for Dr. Eroshevich contain no statement of reasons for the dismissal. The minutes only state concerning Dr. Eroshevich, "The cause is argued and the court grants defense motion to dismiss counts 1 and 3 pursuant to . . . section 1385 due to insufficiency of the evidence." No language referring to the substantial evidence rule is contained in the clerk's minutes. (Actually, the trial court did not grant the "defense motion" to dismiss. The trial court raised the issue on its own motion. The defense has no right to move to dismiss. (§ 1385; *People v. Konow* (2004) 32 Cal.4th 995, 1022 [defendant may ask the trial court to consider dismissal on its own motion]).) Depending on the circumstances, Dr. Eroshevich can be retried on counts 1 and 3 if a new trial motion is granted.

V. DISPOSITION

As to defendant, Howard Kevin Stern, the new trial and dismissal orders are reversed. The verdicts as to counts 1 and 3 are ordered reinstated. Upon remittitur

issuance, the trial court shall proceed as discussed in part IV(C)(3) of this opinion. The dismissal order as to defendant, Dr. Khristine Elaine Eroshevich, is reversed. Upon remittitur issuance, the trial court shall proceed as discussed in parts IV(C) and (D) of this opinion.

CERTIFIED FOR PUBLICATION

TURNER, P.J.

I concur:

ARMSTRONG, J.

People v. Khristine Elaine Eroshevich et al.
Case No. B231411

MOSK, J., Concurring and Dissenting

I have difficulty with the majority's conclusion in Section IV. C. 3. The District Attorney cogently questions why, upon reinstatement of the verdict, Mr. Stern may not reinitiate his Penal Code section 1181 motion if he so chooses, and receive a new trial if the trial court grants the motion acting as a so-called "13th juror," or on other grounds applicable under that provision. By opting to move for a new trial, Mr. Stern would, in effect, waive his Double Jeopardy rights. (See *United States v. Alvarez-Moreno* (9th Cir. 2011) 657 F.3d 896, 901 ["the defendant's consent is the reason double jeopardy is not implicated when the court granted his motion for new trial . . ."]; see also *United States v. Smith* (1947) 331 U.S. 469, 474 ["it is such request [for new trial] which obviates any later objection the defendant might make on the ground of double jeopardy"].) As the District Attorney suggests, the People are barred from a retrial, not the defendant.

I concur in the reversals, but as discussed above, not with respect to the entire remainder of the Disposition.

MOSK, J.

DECLARATION OF SERVICE BY MAIL

IN RE: KHRISTINE ELAINE EROSHEVICH, et al.; No.B231411;
Los Angeles Superior Court No. BA353907

The undersigned declares under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document of: **PETITION FOR REVIEW,** by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

THE HONORABLE ROBERT J. PERRY Los Angeles County Superior Court Department 103 210 West Temple Street Los Angeles, CA 90012 **LANCE WINTERS** Senior Assistant Attorney General Attorney General's Office 300 South Spring Street Los Angeles, CA 90013 **JANYCE BLAIR, ESQ.** 321 Richmond St. El Segundo, Ca. 90245 Attorney for *Eroshevich*	**PETER GOLD, ESQ.** 5758 Geary Blvd., Suite 160 San Francisco, Ca. 94121 Attorney for *Stern* **CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE** 300 South Spring Street Los Angeles, CA 90013

Executed on, May 7, 2013 at Los Angeles, California.

PATRICIA L. HOUSEL