IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. **KHRISTINE EROSHEVICH** et al., Defendants and Respondents.	S210545 2 CRIM. B231411 LASC BA353907

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE ROBERT J. PERRY, JUDGE PRESIDING

ANSWER TO THE PETITION FOR REVIEW OF THE DISTRICT ATTORNEY OF LOS ANGELES COUNTY

on behalf of

KHRISTINE EROSHEVICH

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ANSWER TO THE PETITION FOR REVIEW OF THE DISTRICT ATTORNEY OF LOS ANGELES COUNTY

on behalf of

KHRISTINE EROSHEVICH

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

Pursuant to rule 8.500 of the California Rules of Court, respondent Dr. Khristine Eroshevich respectfully answers the Petition for Review (PRV) filed by petitioner District Attorney for Los Angeles County from the published decision of the Court of Appeal, Second Appellate District, Division Five, filed on March 28, 2013. (Slip opinion attached.)

In its opinion, the Court of Appeal discussed the post-remittitur proceedings available in this case. (Slip opn., at pp. 30-36.) The

Court of Appeal relied upon the authority vested in it by Penal Code section 1260 and *People v. Braxton* (2004) 34 Cal.4th 798, 818-819, in holding that: "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." (Slip opn., at p. 34.)

The District Attorney by its Petition, and in briefing below, contends that reinstatement of the verdicts in counts 1 and 3 is the *only* remedy available to the trial court and to respondents. (See, in particular, Arguments I and II in the Petition for Review.) The District Attorney primarily supports its contention with the following authorities: footnote 9 in *Evans v. Michigan*, (2013) 568 U.S. ___; 133 S.Ct. 1069; 185 L.Ed2d 124; *United States v. Wilson* (1975) 420 U.S. 332; *People v. Salgado* (2001) 88 Cal.App.4th 5 (PRV, at pp. 17-22.) Significantly, the issue before the courts in those cases was limited and specific, to wit, In the context of Double Jeopardy jurisprudence, does the government have the right to appeal a postconviction action? The question of whether verdict reinstatement was the *only* remedy available in these procedural circumstances was never in issue. (See Argument III, infra.) Because that is the case, the authorities do not provide the support the District Attorney assigns them.

Moreover, the District Attorney's Petition fails to address its "only available remedy" contention in the context of the very authorities – Penal Code section 1260 and *People v. Braxton*, *supra* – upon which the Court of Appeal relied in identifying the remedies available in this case.

IF THIS COURT GRANTS REVIEW –

If this Court does grant review, Dr. Eroshevich respectfully asks that this Court also address the issue of whether the United States Supreme Court's decision in *Evans v. Michigan* (2013) 568 U.S. ___; 133 S.Ct. 1069; 185 L.Ed.2d 124 (*Evans*) compels a determination, as she argued below, that the judicial acquittal dismissing the case against her constitutes an acquittal on the merits within the meaning of the Double Jeopardy Clause of the U.S. Constitution.

The Court of Appeal contrarily determined that the Double Jeopardy Clause does not bar retrial of Dr. Eroshevich because the trial court failed to apply the substantial evidence test when dismissing the conspiracy counts. In so concluding, the Court of Appeal relied on *People v. Hatch* (2000) 22 Cal.4th 260 (*Hatch*), which held that Penal Code section 1385 dismissals are not judicial acquittals for purposes of the Double Jeopardy Clause unless the trial court applied the procedurally correct substantial evidence standard.

Evans, however, makes clear that *Hatch*'s reliance on a procedurally correct review standard, i.e., on an error of law unrelated to guilt as the measure of whether a ruling constitutes a judicial acquittal for Double Jeopardy purposes, is constitutionally infirm. *Evans* expressly stated that the constitutionally relevant distinction is whether the judicial determination goes to culpability. "Culpability (i.e., the ultimate question of guilt or innocence) is the touchstone." (*Evans*, *supra*, 133 S.Ct. at p. 1077; internal quotation marks omitted.) *Evans* pointed out that the High Court's relevant prior cases "all instruct that an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence

was correct or not, and regardless of whether the court's decision flowed from an incorrect antecedent ruling of law." (*Evans*, *supra*, 133 S.Ct. at pp. 1075-1076; internal quotation marks omitted.)

Evans noted that Double Jeopardy jurisprudence treats procedural dismissals (rulings based on errors of law unrelated to guilt) differently from acquittals based on substantive rulings (rulings related to the question of guilt). *Evans* explained that the distinction exists because retrial following a merits-related ruling such as an acquittal presents the risk that the government with its superior resources will wear down the defendant and would disturb the defendant's expectation of repose. Procedural dismissals, on the other hand, for matters unrelated to a determination of factual guilt, carry no expectation of finality. (*Evans*, *supra*, 133 S.Ct. at p. 1075; internal quotation marks omitted.)

Evans stated that *judicial* acquittals and *jury* acquittals must be treated in the same way, reasoning "there is no way for antecedent legal errors to be reviewable in the context of *judicial* acquittals unless those errors are also reviewable when they give rise to *jury* acquittals (contrary to the settled understanding that a jury verdict of acquittal is unreviewable), or unless we distinguish between juries that acquit pursuant to their instructions and judicial acquittals (notwithstanding that this is a purely formal distinction)." (*Evans*, *supra*, 133 S. Ct. at p. 1081 (italics added); see *State v. Little* 2013 Tenn. LEXIS 309, at p.29 fn.6 [No. E2009-01796-SC-R11-CD, decided March 22, 2013], in which the Supreme Court of Tennessee, in distinguishing the facts in *Evans* from the facts in the case before it, described *Evans* as "treating bench acquittals the same as jury acquittals for double jeopardy purposes.")

Here, the trial court dismissed the conspiracy counts against Dr. Eroshevich after finding the prosecution had failed to prove the existence of an agreement between Dr. Eroshevich and Mr. Stern to violate the law. The trial court's judgment of acquittal resolved the question of Dr. Eroshevich's guilt or innocence as a matter of the sufficiency of the evidence, not on unrelated procedural grounds. (*Evans*, *supra*, 133 S.Ct. at p. 1078.) The Court of Appeal's conclusion that the trial court's dismissal of the conspiracy charges does not bar retrial because the record fails to indicate the trial court applied the substantial evidence standard of review (as required by *Hatch*) is manifestly a ruling based on a procedural error. (See Arguments I, II, infra.)

Evans and the authorities upon which it relies establish that the Court of Appeal's decision and the authorities upon which it relies are not supported by the United States Constitution.

ISSUES PRESENTED FOR REVIEW IN THIS ANSWER

1. Does *Evans v. Michigan* (2013) 568 U.S. ___; 133 S.Ct. 1069; 185 L.Ed.2d 124, compel a determination that the judicial acquittal dismissing the case against Dr. Eroshevich constitutes an acquittal on the merits and that the Double Jeopardy Clause of the U.S. Constitution therefore bars retrial of Dr. Eroshevich?

2. Does *Evans v. Michigan* (2013) 568 U.S. ___; 133 S.Ct. 1069; 185 L.Ed.2d 124 and the logic and principles upon which it relies require reconsideration of *People v. Hatch* (2000) 22 Cal.4th 260 and cases similarly holding that Penal Code section 1385 dismissals are not judicial acquittals for purposes of the Double Jeopardy Clause unless the trial court applied the procedurally correct substantial evidence standard, a

distinction which *Evans* explicitly states is *not* the relevant distinction in distinguishing rulings constituting judicial acquittals from those that are not?

NECESSITY OF REVIEW OF THE ISSUES PRESENTED FOR REVIEW IN THIS ANSWER

Review should be granted to settle an important question of law, to wit, whether *Evans v. Michigan* and the logic and principles upon which it relies require reconsideration of *People v. Hatch* and cases holding similarly because these cases fail to recognize that the relevant distinction between court rulings that trigger protection under the Double Jeopardy Clause of the U.S. Constitution and those that do not is between judicial determinations that go to a criminal defendant's lack of criminal culpability and those that hold that a defendant, although criminally culpable, may not be punished because of a supposed procedural error. (*Evans*, *supra*, 133 S.Ct. at p. 1077.)

Review should also be granted to determine whether *Evans v. Michigan* and the logic and principles upon which it relies compel the conclusion that the judicial acquittal dismissing the case against Dr. Eroshevich is an acquittal on the merits for purposes of the Double Jeopardy Clause, as a result of which the Court of Appeal's contrary holding is erroneous and retrial of Dr. Eroshevich is barred.

PROCEDURAL HISTORY RELEVANT TO THE DECISION TO GRANT REVIEW OF ISSUES PRESENTED IN THIS ANSWER

Defendants and respondents Dr. Eroshevich and Howard Stern were convicted of two counts of conspiracy. Both defendants moved

for new trial (Pen. Code, § 1181, subd. (6)) and for dismissal (Pen. Code, § 1385.) The trial court granted Mr. Stern's motion for new trial and then dismissed the two conspiracy counts for both defendants. The District Attorney appealed. The Court of Appeal initially filed its opinion on October 18, 2012, but on November 19, 2012, granted rehearing on its own motion to await the decision of the United States Supreme Court in *Evans v. Michigan* (2013) 568 U.S. ____. The decision in *Evans* was filed on February 20, 2013.

In Supplemental Letter Briefs III and IV, Dr. Eroshevich contended that *Evans* made clear (1) that in Double Jeopardy jurisprudence *judicial* and *jury* acquittals are to be treated alike; (2) that any judicial ruling that the prosecution's proof is insufficient to convict is an acquittal for Double Jeopardy purposes; (3) that in this case in which judicial rulings set aside jury verdicts of conviction, Double Jeopardy jurisprudence allows the District Attorney a right of review; (4) that the reviewing court's task is to determine whether the trial court's ruling is directed at a substantive or a procedural purpose; and (5) that under these precepts the trial court's ruling dismissing the conspiracy counts against Dr. Eroshevich constituted a judicial acquittal on the merits.

The Court of Appeal filed its opinion on March 28, 2013. The Court of Appeal reversed the dismissal order for Dr. Eroshevich[1] and the new trial and dismissal orders for Mr. Stern. The Court of Appeal further noted that "nothing in *Evans* warrants a change in our prior analysis," and issued an opinion that but for "minor alterations" reached the

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1 The Court of Appeal concluded that the trial court never ruled on Dr. Eroshevich's new trial motion. (Slip opn., at p. 33.)

same conclusions the court had originally reached, including the conclusions that under *Hatch* the trial court's ruling dismissing counts 1 and 3 was not an acquittal and that the Double Jeopardy Clause did not bar retrial of Dr. Eroshevich on the conspiracy counts.

STATEMENT OF FACTS RELEVANT TO THE DECISION TO GRANT REVIEW OF ISSUES PRESENTED IN THIS ANSWER

In this Answer to the District Attorney's Petition for Review filed with this Court, Dr. Eroshevich has presented issues pertaining to the application of the Double Jeopardy Clause in the wake of *Evans v. Michigan, supra.*

The trial court dismissed the conspiracy counts (counts 1, 3) against Dr. Eroshevich. In doing so, the court stated:

> Now, having dismissed counts 1 and 3 against Howard Stern, I address the issue of Eroshevich. I don't think there was an agreement between the two of them to violate the law, and I think the conspiracy counts as to Eroshevich, even though she is [sic] a doctor should have known about the C.U.R.E.S. system, I don't think the conspiracy counts can stand, and so I dismiss those as well as to Eroshevich. (48RT 15329:22-15330:1.)

The court's ruling was quite clearly directed at an evaluation of the prosecution's evidence that Dr. Eroshevich was party to an agreement and the conclusion that the evidence was insufficient to prove that element. The trial court's statement thus revealed that the court had resolved the question of Dr. Eroshevich's culpability as a matter of the sufficiency of the evidence as to her participation in an agreement, and not on procedural grounds unrelated to guilt.

ARGUMENT

I.

RECONSIDERATION OF *PEOPLE V. HATCH* IS MADE NECESSARY BY *EVANS V. MICHIGAN*, WHICH HOLDS, CONSISTENT WITH THE HIGH COURT'S PRIOR HOLDINGS, THAT A JUDICIAL DETERMINATION THAT GOES TO A CRIMINAL DEFENDANT'S GUILT OR INNOCENCE CONSTITUTES A JUDICIAL ACQUITTAL AND TRIGGERS PROTECTION UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION

In *People v. Hatch* (2000) 22 Cal.4th 260, this Court held that dismissals pursuant to Penal Code section 1385 should not be construed as dismissals for legal insufficiency unless the record clearly showed 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. (*Id.*, at p. 273.) Thus, according to *Hatch*, section 1385 dismissals are not judicial acquittals for purposes of the Double Jeopardy Clause unless the court applied the procedurally correct substantial evidence standard. (*Ibid.*) *Hatch* reasoned that this requirement was appropriate because "section 1385 dismissals often are not based on the insufficiency of the evidence as a matter of law." (*Ibid.*) *Hatch* quite clearly held the relevant determinative in deciding whether a judicial ruling constituted a judicial acquittal turns on whether the trial court applied the procedurally correct standard of review.

In *Evans v. Michigan*, *supra*, the United States Supreme Court held that the Double Jeopardy Clause bars retrial following an erroneously granted judicial acquittal based on the prosecution's failure to

prove an element of the offense that the prosecution was *not* required to prove. (*Evans*, *supra*, 133 S.Ct. at p. 1073.)

In so holding, *Evans* confirmed that the relevant distinction between court rulings that constitute judicial acquittals that trigger protection under the Double Jeopardy Clause of the United States Constitution and those that do not is between judicial determinations that go to a criminal defendant's lack of criminal culpability and those that hold that a defendant, although criminally culpable, may not be punished because of a supposed procedural error. The former constitute judicial acquittals; the latter are not.

In its analysis, *Evans*' relied upon the logic and principles underlying Double Jeopardy jurisprudence. The Court noted that in *Fong Foo v. United States* (1962) 369 U.S. 141, 143, it recognized that the Double Jeopardy Clause bars retrial following a judicial acquittal even when the acquittal is based on an error. (*Evans*, *supra*, 133 S.Ct. at p. 1074.) *Evans* observed that the Court has since applied *Fong Foo*'s principle broadly and that it has "defined an acquittal to encompass *any* ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." (*Evans*, *supra*, 133 S.Ct. at pp. 1074-1075; *Fong Foo v. United States* (1962) 369 U.S. 141, 143; emphasis added.)

The Court pointed out that its decisions have treated what *Evans* termed procedural dismissals (rulings based on errors of law unrelated to guilt) differently from acquittals based on substantive rulings (rulings related to the question of guilt) and explained that this is so because retrial following a merits-related ruling such as an acquittal presents the risk that the government with its superior resources will wear

down the defendant and would disturb the defendant's expectation of repose. Procedural dismissals, on the other hand, for matters unrelated to a determination of factual guilt, carry no expectation of finality. (*Evans*, *supra*, 133 S.Ct. at pp. 1075-1076; internal quotation marks omitted.)

Evans explained that a specific logic drives the application of these principles to its consideration of judicial acquittals and that logic is tied to the law's treatment of *jury* acquittals. There is a settled understanding that a *jury* verdict of acquittal precludes retrial or appeal. *Evans* reasoned that unless antecedent legal errors are reviewable in the context of *jury* acquittals there is no way for them to be reviewable in the context of judicial acquittals. *Evans* rejected the argument that the Double Jeopardy Clause must leave open a way to correct legal errors. (*Evans*, *supra*, 133 S.Ct. at p. 1080-1081; internal quotation marks omitted; see *State v. Little* 2013 Tenn. LEXIS 309, at p.29 fn.6 [No. E2009-01796-SC-R11-CD, decided March 22, 2013], *Evans* "[treats] bench acquittals the same as jury acquittals for double jeopardy purposes.")

The Court defined an acquittal as "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense"; "a ruling by the court that the evidence is insufficient to convict"; "a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability;" and "any other "rulin[g] which relate[s] to the ultimate question of guilt or innocence." (*Evans*, *supra*, 133 S.Ct. at p. 1074-1075; internal quotation marks omitted.)

Evans explained that the "relevant distinction is between judicial determinations that go to the criminal defendant's lack of criminal culpability and those that hold that a defendant, although criminally

culpable, may not be punished because of a supposed procedural error." (*Evans*, *supra*, 133 S.Ct. at p. 1077; internal quotation marks omitted.) The Court emphasized that "[c]ulpability (i.e., the ultimate question of guilt or innocence) is the touchstone, not whether any particular elements were resolved or whether the determination of nonculpability was legally correct." (*Evans*, *supra*, 133 S.Ct. at p. 1077; internal quotation marks omitted.)

Evans reasoned that the analysis "turns not on the form of the trial court's action, but rather whether it serve[s] substantive purposes or procedural ones." (*Evans*, *supra*, 133 S.Ct. at p. 1078; internal quotation marks omitted.) In the case before the Court, the State of Michigan argued that the trial court did not use the word "acquit" in its remarks. Of this argument, the Court said: "Here we know the trial court acquitted Evans, not because it incanted the word 'acquit' (which it did not), but because it acted on its view that the prosecution had failed to prove its case." (*Evans*, *supra*, 133 S.Ct. at p. 1078; internal quotation marks omitted.)

Evans explained that the fact that the acquittal may result from "erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character"; in short, a "mistaken acquittal is an acquittal nonetheless." (*Evans*, *supra*, 133 S.Ct. at pp. 1073-1074; internal quotation marks, citations omitted.)

Evans establishes that for Double Jeopardy purposes *Hatch*'s reliance on a procedurally correct review standard, i.e., on an error of law unrelated to guilt, as the measure of whether a ruling constitutes a judicial acquittal is not constitutionally correct. The constitutionally relevant distinction is whether the judicial determination goes to culpability.

"Culpability (i.e., the ultimate question of guilt or innocence) is the touchstone." (*Evans*, *supra*, 133 S.Ct. at p. 1077; internal quotation marks omitted.) *Evans* took note that the Court's relevant prior cases "all instruct that an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence was correct or not, and regardless of whether the court's decision flowed from an incorrect antecedent ruling of law." (*Evans*, *supra*, 133 S.Ct. at pp. 1075-1076; internal quotation marks omitted; citations omitted.)

Moreover, the respective procedural postures of the cases in *Evans* and *Hatch* do not affect the application of *Evans* here. In *Evans*, the trial court entered a directed verdict of acquittal after the prosecution rested its case based on the court's view, albeit mistaken, that the prosecution had failed to prove an element of the offense. In *Hatch*, the trial court dismissed the case pursuant to Penal Code section 1385 after the jury declared itself deadlocked. (*People v. Hatch*, *supra*, 22 Cal.4th at p. 266.) The trial court in the present case also dismissed the action against Dr. Eroshevich and Mr. Stern pursuant to section 1385.

Nothing in *Evans* suggests that the logic and principles driving its reasoning – that, for Double Jeopardy purposes, the constitutionally required determinative is whether the court's ruling related to culpability or to a matter unrelated to guilt – are limited to judicial rulings made before the case is submitted to the jury. In fact, in resolving the specific question before it, *Evans* relied on *Arizona v. Rumsey* (1984) 467 U.S. 203, a capital case, in which the trial court in a bench trial misconstrued a statute during the penalty phase of the trial and found the prosecution had failed to prove its case. The state appealed and won a

death sentence on remand. In this post-verdict, post-appeal, post-retrial procedural scenario, the Court, in *Rumsey*, held that retrial of the penalty phase violated the Double Jeopardy Clause. (*Arizona v. Rumsey*, *supra*, 467 U.S. at p. 211 ("Reliance on an error of law, . . does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits.").) (*Evans*, *supra*, 133 S.Ct. at pp. 1073, 1076-1077.) Accordingly, to the extent that *Hatch* may be read to suggest that Double Jeopardy jurisprudence treats pre- and post-jury submission judicial rulings differently and that *Evans* does not apply to Penal Code section 1385 rulings, *Hatch* is constitutionally incorrect. *Evans* expressly rejected any contention that the Double Jeopardy Clause must itself leave open a way of correcting legal errors. (*Evans*, *supra*, 133 S.Ct. at p. 1081.)

Burks v. United States (1978) 437 U.S. 1 held that the Fifth Amendment precludes retrial if a court determines the evidence at trial was insufficient to support a conviction as a matter of law. The rule of *Burks* applies to trials conducted in California courts. (*People v. Pierce* (1979) 24 Cal.3d 199, 210; *People v. Hatch*, *supra*, 22 Cal.4th at p. 272.)

II.

THE TRIAL COURT'S RULING DISMISSING THE CONSPIRACY COUNTS AGAINST DR. EROSHEVICH WAS BASED ON THE PROSECUTION'S FAILURE TO PROVE CRIMINAL CULPABILITY AND WAS BY DEFINITION AN ACQUITTAL ON THE MERITS FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

The trial court dismissed the conspiracy counts (counts 1, 3) against Dr. Eroshevich. In doing so, the court stated:

> Now, having dismissed counts 1 and 3 against Howard Stern, I address the issue of Eroshevich. I don't think there was an agreement between the two of them to violate the law, and I think the conspiracy counts as to Eroshevich, even though she is [sic] a doctor should have known about the C.U.R.E.S. system, I don't think the conspiracy counts can stand, and so I dismiss those as well as to Eroshevich. (48RT 15329:22-15330:1.)

Under California law, a conspiracy is an agreement between two or more persons to do some unlawful act, accompanied by an overt act done in furtherance of the conspiracy. (*People v. Van Eyk* (1961), 56 Cal. 2d 471, 478.) It is the agreement, not the object of the agreement, that is punishable. (*Pinkerton v. United States* (1945) 328 U.S. 640, 644.)

Here, when the trial court said, "I don't think there was an agreement between [Dr. Eroshevich and Mr. Stern] to violate the law," and dismissed the conspiracy counts as to Dr. Eroshevich, the court's assessment that the prosecution had failed to prove that Dr. Eroshevich was

a party to an agreement with Mr. Stern went to the gravamen of the crime of conspiracy. The court's ruling was directed at an evaluation of the prosecution's evidence that Dr. Eroshevich was party to an agreement and the conclusion that the evidence was insufficient.

The trial court's statement thus revealed that the court had resolved the question of Dr. Eroshevich's culpability as a matter of the sufficiency of the evidence as to her participation in an agreement, and not on procedural grounds unrelated to guilt. The trial court evaluated the prosecution's evidence and acted on its view that the prosecution had failed to prove its case that Dr. Eroshevich was party to an agreement.

The court's ruling constituted a judicial acquittal on the merits for Double Jeopardy purposes.

III.

PETITIONER'S CONTENTION THAT REINSTATEMENT OF THE VERDICT IS THE ONLY REMEDY AVAILABLE IN THIS CASE IS NOT SUPPORTED BY ITS CITED AUTHORITIES

Petitioner argues that upon reversal of the trial court's ruling dismissing counts 1 and 3, the only available remedy is the reinstatement of the verdicts. (PRV, at pp. 17-26.) The District Attorney primarily supports its contention with the following authorities: footnote 9 in *Evans v. Michigan*, (2013) 568 U.S. ___; 133 S.Ct. 1069; 185 L.Ed2d 124; *United States v. Wilson* (1975) 420 U.S. 332; and *People v. Salgado* (2001) 88 Cal.App.4th 5. (PRV, at pp. 17-22.)

But, as will be shown, the legal issue before the courts in these cases is whether the prosecution had the right to appeal in the context of Double Jeopardy jurisprudence. The issue under consideration was not whether verdict reinstatement was the *only* remedy available to respondents in the present procedural context.

So, for example, *Evans* presented footnote 9 in the context of a prosecution claim that mid-trial judicial acquittals deny "the prosecution a full and fair opportunity to presents its evidence to the jury, while the defendant reaps a 'windfall' from the trial court's unreviewable error." (*Evans v. Michigan*, *supra*, 133 S.Ct. at p. 1081.) *Evans* noted that the states could disallow such a practice, explaining that: "Many jurisdictions, including the federal system, allow or encourage their courts to defer consideration of a motion to acquit until after the jury returns a verdict, which mitigates double jeopardy concerns." (*Ibid.*) In that context, footnote 9 was attached to the last quoted sentence and read: "If 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. (*United States v. Wilson*, 420 U. S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975)." (*Ibid.*)

So, footnote 9 was written to inform the discussion regarding the prosecution's right to appeal in that procedural context and does not support petitioner's contention that the Court of Appeal was wrong in its identification of other post-remittitur proceedings.

The focus in *Wilson* was also upon the government's right to appeal in the context of Double Jeopardy jurisprudence, as the following excerpt establishes.

> A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. These interests, however, do not apply in the case of a postverdict ruling of law by a trial judge. Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions. We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been

> entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause. (*United States v. Wilson*, *supra*, 420 U.S. at pp. 352-353.)

Nothing in *Wilson* supports Petitioner's contention that reinstatement of the verdict is the only available remedy.

The right of the government to appeal in a criminal case was also at issue in *Salgado*, which relied upon *Wilson* in holding that the government had the right to appeal a postverdict action by the trial court in the context of Double Jeopardy jurisprudence because the prosecution could be resolved by entering a judgment on the verdict. (*People v. Salgado*, *supra*, 88 Cal.App.4th at pp. 12-13.)

Nothing in *Salgado* supports Petitioner's contention that reinstatement of the verdict is the only available remedy.

CONCLUSION

For the reasons herein set forth, Dr. Eroshevich respectfully requests that the issues set forth above be addressed if this Court does grant review in this case.

DATED: May 15, 2013

Respectfully submitted,

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Attorney by Appointment
of the Court of Appeal
for Defendant and Respondent
Khristine Eroshevich

CERTIFICATE OF WORD COUNT

Rule 8.504(d), California Rules of Court, states that an answer to a petition for review produced on a computer must not exceed 8400 words including footnotes, but excluding the tables, the certificate of word count required by the rule, and any permitted attachment.

Pursuant to Rule 8.504(d), and in reliance upon Microsoft Office Word 2010 software which was used to prepare this document, I certify that the word count of this brief is 4744 words.

DATED: May 15, 2013

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of the Court of Appeal
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Khristine Eroshevich

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. My business address is 321 Richmond Street, Suite A, El Segundo, California 90245. On the date of execution hereof, I served the attached document, **Answer to the Petition for Review in People v. Eroshevich et al. (B231411),** by placing true copies thereof in sealed envelopes addressed as stated below, with delivery fee fully prepaid, at El Segundo, California, with the United Parcel Service.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 16, 2013, at El Segundo, California.

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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.