IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KERRY LYN DALTON, Defendant and Appellant.	Case No. S046848 San Diego County Superior Court No. 135002 Death Penalty Case

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

Honorable Thomas J. Whelan, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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INTRODUCTION

Appellant's Opening Brief [AOB] was filed on December 12, 2006; her reply brief was filed on June 9, 2009. Nearly a decade has passed since the briefing in this case was completed. Ms. Dalton now submits this Supplemental Opening Brief to provide this Court with additional authorities supporting arguments raised in the AOB and to raise new arguments that were not presented in the prior briefing, including arguments that could not previously have been included because they are based on cases and other matters not available when the initial briefing was completed.

Appellant's submission of this brief is not intended to constitute abandonment of any arguments made in her opening and reply briefs.

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XVIII.
THE TRIAL COURT ERRED WHEN IT ALLOWED NINA TUCKER TO OFFER A LAY OPINION OF MAY'S STATE OF MIND BASED ON UNRELIABLE HEARSAY AND TO RELATE THAT HEARSAY IN HER TESTIMONY

A. Introduction

The victim, Irene "Melanie" May, disappeared after a night of partying in June, 1988 and never returned. Because law enforcement did not find May's body and there was no forensic evidence she had been killed, the prosecution had to prove that May actually was dead, rather than merely missing. As the trial court found *after* the prosecutor had presented his case-in-chief: "there is a legitimate issue before the jury as to whether or not . . . a corpus of a homicide has been established." (35RT 3507.) Thus, all evidence suggesting May was dead was crucial to the prosecution case. One source of such evidence was a Child Protective Services worker, Nina Tucker.

Over defense objection, the trial court permitted Tucker to testify to statements made to her by May shortly before May disappeared. The court ruled these statements were the basis for Tucker's lay opinion that May would not abandon her children. The prosecutor used Tucker's testimony to argue that when May failed to call Tucker at a previously-scheduled time on the day after she disappeared, it was because May was dead.

The trial court erred in admitting Tucker's lay opinion as to May's intent prior to her disappearance, and to testify to May's out-of-court statements. Under state law, a lay witness may not opine as to another person's state of mind. Further, Tucker's opinion that May would not abandon her children was based solely on May's out-of-court statements. Unlike an expert, a lay witness cannot base an opinion on hearsay. Here, the basis for Tucker's opinion was not only hearsay, but also was unreliable. The court additionally

erred in ruling that May's statements were not hearsay because they were not being admitted for their truth, and thus erroneously allowed Tucker to relate May's statements directly to the jury. Because Tucker was employed by Child Protective Services and had initiated judicial proceedings to have May's children removed less than a month before May's disappearance, May's statements were testimonial and thus their introduction also violated appellant's rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. Admission of Tucker's testimony also denied Ms. Dalton her rights to due process, a fair trial, and a reliable determinations of guilt and penalty under the state and federal constitutions. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

Without the hearsay testimony, there was no factual basis for Tucker's opinion, and it should have been excluded. Because the government cannot establish that introduction of the testimony or Tucker's opinion was harmless beyond a reasonable doubt, and there was a reasonable probability that her testimony influenced the verdicts, Ms. Dalton's convictions must be reversed.

B. Procedural and Factual Background[1]

During his case-in-chief, the prosecutor presented the testimony of Nina Tucker, who had been a Child Protective Services worker at the time of the crime. (35RT 3362.) Her duties were to supervise families to make sure that they complied with court orders and acted in the best interest of their children. In 1987, she took over the case of May and her husband. (*Ibid*.) Prior to Tucker's assignment, the May case was handled by social workers with Emergency Services who were trying to keep the family together. Tucker was

1. Appellant incorporates by reference the Statement of Guilt Phase Facts, set forth in her opening brief at pages 5-41.

assigned when the case was turned over to Child Protective Services. (35RT 3363.)

When Tucker received the case, there was a Family Reunification Plan in place requiring May and her husband to submit to regular urine screening for drugs. (35RT 3363.)[2] Tucker had appeared in court with May approximately three times; May had not missed any appearances. (35RT 3364.) Tucker also met with May outside of court about once a month, and occasionally at other times. These meetings were initiated by a letter or notice to May, or by phone. (35RT 3365.)

Tucker initially testified that May phoned her "very frequently" (35RT 3365), but subsequently clarified May only had called her "approximately--maybe three" times. (35RT 3367.)[3] As soon as Tucker began to describe the telephone calls, defense counsel raised a hearsay objection, which the court sustained. (35RT 3365.) However, after the prosecutor asserted that he was not offering the testimony for its truth, but to show May's intent with regard to her children, the court allowed Tucker to continue. (*Ibid.*) Tucker responded: "[May] called me very frequently. Most of the time it was perhaps just to talk, and some of the time she wanted to just make me aware of what she was doing." The defense raised another hearsay objection and requested a sidebar. (*Ibid.*)

At the sidebar, defense counsel argued that if the purpose of the testimony was to establish that May was in contact with Tucker, there had already been evidence on that point, which had been established without

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2. The trial court sustained the defense relevance objection to Tucker's comments about the contents of the reunification plan, but refused to strike her answer. (35RT 3363-3384.) While the question and answer were irrelevant to the matters Tucker testified about, they are relevant to the present discussion.

3. Tucker found it difficult to estimate how many times May called her because she did not keep records of the calls. (35RT 3367.)

hearsay. But if the testimony was being offered to show what the conversations were about, then it *was* being offered for the truth, and if not, May's statements had no relevance. (35RT 3365-3366.)

The court responded that it assumed that the prosecutor was trying to provide a foundation for Tucker's lay opinion that May cared about her children and "would not have abandoned them," and that the prosecutor could properly use May's previous statements to do so. (35RT 3366.) When the defense argued that there were no records or tapes of these conversations, the court said the defense could bring that out in cross-examination, but the prosecutor was "entitled" to establish some "basis for [Tucker's] opinion" and the jury could decide its weight. (*Ibid.*) The court overrruled the objection. (*Ibid.*)

Tucker resumed testifying. The last phone call she received from May was on June 24, 1988, two days before she disappeared. May told Tucker she was living with a friend in Lakeside. May said she was tired of being on the street and that she wanted to get her children back and wanted to make changes in her lifestyle. (35RT 3367.) At the time of the call, May's children had been removed from May's home by Tucker. (*Ibid.*) Tucker had filed a petition for removal of the children on June 14, 1988. (35RT 3368.) Tucker "wanted to pin [May] down" and give her "something to look forward to," so she asked May to call her the following Monday (June 27) at 9:00 a.m. May seemed pleased and anxious to meet her, but she did not call Tucker on Monday. (*Ibid.*) Tucker did not see or hear from May after June 24. Later, Tucker received a phone call from Joanne Fedor; she made some inquiries and filed a missing person report about a week after Fedor's call. (35RT 3369-3370.)

Tucker opined that May loved her children very much. She observed May being attentive to her children, and that the children did not act afraid of her. May "even verbalized" that she loved her children. (35RT 3370.) Tucker observed no indication whether or not May would abandon her children.

(35RT 3370-3371.) In response to the question whether, based on her observation, May gave any indication that she would try to stay with her children, Tucker responded "Oh, yes. The last contact that I had with her, her words to me were, 'I'm tired of living on the street. I want to get my life together. I want to get my children back.'" (35RT 3370-3371.)

On cross-examination, Tucker testified that the May children had been removed from their parents' care due to neglect on more than one occasion and that, in order to keep their children, both May and her husband were required to submit to drug tests and to remain drug free. (35RT 3372.) On June 10, 1988, Tucker went to remove May's children from their home, accompanied by a member of the Sheriff's Department and a social worker. (35RT 3373.) She removed the children because they were not properly supervised. Tucker had learned that May had not returned home for three days, and that she had failed to submit to any drug testing since February, 1988. (35RT 3374.) After visiting the home, Tucker filed a supplemental petition in the juvenile court, requesting additional orders to ensure the children were protected. (35RT 3376.) May had admitted in court that she was abusing drugs and neglecting her children. (*Ibid*.) Tucker stated that "on occasion" people indicate a desire to keep their children and love them, yet still do things that require CPS to remove the children from their parents. (35RT 3377.)

C. Tucker's Lay Opinion That May Intended to Stay with Her Children Was Not Properly Admitted and Was Based on Inadmissible Hearsay

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) A "statement" is an "oral or written verbal expression" or the "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.)

After defense counsel objected to Tucker's testimony on hearsay grounds, the trial court found that Tucker was providing a lay opinion, and thus the statements made by May two days before she disappeared were not being offered for their truth, but merely as the foundation or basis for Tucker's opinion. (35RT 3365-3366.) The trial court erred in admitting May's statements through Tucker, and because there was no other basis for her opinion, it should have been excluded in its entirety.

1. A Lay Opinion May Not Be Based on Hearsay

Lay opinion testimony must be based on personal "observation" of the witness. (Evid. Code, § 800). "'A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony.'" (*People v. Jones* (2017) 3 Cal.5th 583, 602, quoting *People v. Leon* (2015) 61 Cal.4th 569, 601.) When a lay witness offers an opinion that goes beyond facts the witness personally observed, the opinion is inadmissible. (*Jones*, at p. 602; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1308.)

The trial court's ruling that a lay witness can base an opinion on hearsay statements, rather than personal observation was incorrect. Tucker's opinion was not based on her observations. When asked whether she *observed* May give any indication "whether or not" she would abandon her children, Tucker responded "No." (35RT 3370.) When asked whether she observed any indication May wanted to stay with her children, Tucker based her affirmative answer entirely on May's purported words during their last conversation: "I'm tired of living on the street. I want to get my life together. I want to get my children back." (35RT 3370-3371.)

Unlike an expert witness, a lay witness cannot rely on hearsay as a basis for her opinion. The Legislature has enacted a specific provision that permits experts to give opinion testimony based on out-of-court statements they heard

from another person. (See Evid. Code, § 804.) However, there is no similar provision allowing hearsay to form the basis of lay opinion testimony. By expressly permitting experts to form an opinion based on hearsay, but making no provision also allowing lay opinion based on hearsay, the Legislature necessarily intended to exclude the latter. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 ["*Espressio unius est exclusio alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed."].)

Decisions of this Court support that interpretation. This Court has said that expert opinion is unique in that it can be based on inadmissible hearsay so long as it is "material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665.) In *Sanchez*, this Court noted three historical justifications for allowing hearsay to form the basis of expert opinions: "'the routine use of the same kinds of hearsay by experts in their conduct outside the court; the experts' experience, which included experience in evaluating the trustworthiness of such hearsay sources; and the desire to avoid needlessly complicating the process of proof.' [Citations]." (*Sanchez*, *supra*, 63 Cal.4th at p. 678.) Those justifications simply cannot be applied to lay opinion.

2. A Witness May Not Relate Out-of-Court Statements to the Jury as a Basis for a Lay Opinion

In addition to erroneously allowing Tucker to offer a lay opinion based on more than her personal observations, the trial court abused its discretion in permitting Tucker to repeat May's words to the jury as the basis for her lay opinion. To the extent that it credited the prosecutor's argument that May's statements were not hearsay because they were not being presented for their truth, it appeared to be confusing the law regarding expert opinion testimony with the much narrower acceptable basis for lay opinion. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 675 [explaining that expert witnesses are given

"greater latitude" regarding the matters about which they may testify].) Unlike a lay witness, whose opinion must be based on personal observation alone, an expert may base an opinion on any matter "perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible," so long as it is of a type reasonably relied on by experts in the same field in forming the same type of opinion upon the subject to which his testimony relates. (Evid. Code, § 801.) And unlike a lay witness, an expert is entitled to explain to the jury "the matter" relied on for reaching an opinion, even if "that matter would ordinarily be inadmissible." (*Sanchez*, at p. 679.)

At the time of Ms. Dalton's trial, trial courts were required to balance the expert's need to consider extrajudicial matters, and the jury's need for sufficient information to evaluate the expert's opinion, against the defendant's interest "in avoiding substantive use of unreliable hearsay." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 679, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 919.) To avoid hearsay problems, some courts concluded that extrajudicial statements related by experts were not hearsay because they went only to the basis of the expert's opinion and were not to be considered for their truth. (*Sanchez*, at p. 680, citing *People v. Montiel*, *supra*, at p. 919.) In many, but not all cases, the hearsay problems could be cured by an instruction to that effect. (*Sanchez,* at p. 679.) Under the then-existing paradigm, the court had no need to distinguish whether an expert's opinion was based on generally admissible background information or on case-specific facts, which often included hearsay or other inadmissible matters. (*Ibid.*) However, in *Sanchez*, this Court expressly declared that an expert's testimony regarding the basis for an opinion "*must* be considered for its truth by the jury." (*Ibid.*, italics in original.)

Accordingly, the *Sanchez* court concluded that, where an expert testifies to case-specific out-of-court statements to explain the bases for an opinion, "those statements are necessarily considered by the jury for their truth, thus

rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 679.) As this Court made absolutely clear: "What an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.) It follows that, if an expert witness cannot relate hearsay to establish a basis for his or her opinion, a lay witness cannot do so either.

Here, Tucker's opinion was based on May's alleged out-of-court statements to her. If May's statements were not true, then they were irrelevant to any issue in the case. Because the statements were admitted for their truth, i.e. to prove May wanted her children back, they were hearsay, and to be admissible had to be covered by an exception to the hearsay rule. There is no hearsay exception that would have allowed Tucker to testify to May's statements.

3. A Lay Witness May Not Offer an Opinion of Another Person's State of Mind and Untrustworthy Statements Do Not Fall Within the State of Mind Exception to the Hearsay Rule

Although in some situations hearsay may be admitted to establish the declarant's state of mind (see Evid. Code, § 1250), lay witnesses generally may not offer an opinion as to someone else's state of mind (*People v. Weaver* (2012) 53 Cal.4th 1056, 1086, quoting *People v. Chatman* (2006) 38 Cal.4th 344, 397 ['"a lay witness may not give an opinion about another's state of mind[,] . . . a witness may testify about objective behavior and describe behavior as being consistent with a state of mind'"]). Because Tucker testified that May wanted her children back, and not that May's behavior was consistent with someone who had that state of mind, her testimony was not properly admitted as the opinion of a lay witness.

In addition, an out-of-court statement is not admissible to show state of mind under Evidence Code section 1250 when the statement is made under circumstances that indicate it is not trustworthy. (Evid. Code, § 1252.) A declarant's statements are admissible only when they are '"made at a time when there was no motive to deceive.'" (*People v. Riccardi* (2012) 54 Cal.4th 758, 821-822 [citations omitted].)

The circumstances under which May made the statements to Tucker indicate a lack of trustworthiness. May had a motive to deceive Tucker into believing she would not continue to use drugs, that she wanted to change her lifestyle and wanted her children back to prove she was complying with the court's orders. A mother's statements of her desire to get her life together and to get her children back, made to a CPS worker who, less than two weeks earlier, had removed the children from the mother's care due to her neglect and drug abuse, and who was in a position to seek criminal charges against the mother, cannot be considered trustworthy. This is especially true in this case, when, on June 24, the date the statements allegedly were made, May was still using drugs, and perhaps even actively under the influence of methamphetamine at the time she spoke to Tucker. (See 33RT 3096 [On June 24, 1988, May was getting high on marijuana and "crystal" methamphetamine with Sheryl Baker and others.].) The following day, June 25, May was still using methamphetamine. (33RT 3156.) She also procured drugs later on that day (33RT 3160), and was injecting methamphetamine on the night before she disappeared. (33RT 3163.) Further, once her children were removed from the home, May was no longer entitled to her monthly welfare check of approximately 800 dollars from Aid for Families with Dependent Children (31RT 2903), giving May a financial motive to misrepresent her intentions to Tucker.

For all these reasons, the trial court erred in allowing Tucker to rely on and relate May's statements as the basis for her opinion testimony that May

wanted her children back. It was also improper for Tucker to offer her lay opinion of May's state of mind. Because her testimony was not based on admissible evidence, and the subject of her opinion was beyond the scope of what is permissible testimony for a lay witness, the trial court abused its discretion in permitting Tucker's opinion testimony.

D. The Introduction of May's Statements and Tucker's Opinion Violated Ms. Dalton's Rights to Confrontation, Due Process, a Fair Trial, and a Reliable Determination of Guilt and Penalty under the United States Constitution

In addition to violating California rules of evidence, the introduction of Tucker's lay opinion and May's statements violated Ms. Dalton's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.[4]

A criminal defendant has a constitutional right to confront witnesses under the Sixth Amendment. (U.S. Const., 6th Amend.) This protection has been incorporated into the Fourteenth Amendment and thus is applicable in state court prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 406-407.) The United States Supreme Court has held that the confrontation clause prohibits the admission of testimonial statements of a witness who did not appear at trial unless he or she was unavailable to testify, and the defendant had a prior

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4. Although trial counsel objected to Tucker's testimony only on hearsay grounds, that objection preserved Ms. Dalton's claims that the admission of the testimony also violated her rights to due process, a fair trial, and reliable verdicts pursuant to *People v. Partida* (2005) 37 Cal.4th 428, 433-439. Ms. Dalton's Sixth Amendment claim based on *Crawford v. Washington* (2004) 541 U.S. 36, 53-54, also should be excused from the contemporaneous objection requirement. As this Court has found, because *Crawford* "was a dramatic departure from prior confrontation clause case law," a defendant's failure to raise a *Crawford* claim in a pre-*Crawford* trial "is excusable because defense counsel could not reasonably have been expected to anticipate this change in the law." (*People v. Harris* (2013) 57 Cal.4th 804, 840.)

opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54.)

In *Davis v. Washington* (2006) 547 U.S. 813, 822, the Court explained that statements are testimonial when the "circumstances objectively indicate" that they are being made for the "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." For the same reasons that a statement made with the primary purpose of establishing facts potentially relevant to a criminal prosecution is testimonial, statements made for the purpose of proving events potentially relevant to a later judicial proceeding that is *not* criminal in nature, but which are ultimately used in a criminal proceeding, also are "testimonial" and thus should be governed by the Confrontation Clause.

May's statements in this case were made to a Child Protective Services worker whose duties included "see[ing] that the family complied with the orders of the court . . . ." (35RT 3362.) One of those orders was a Family Reunification Plan that required May to comply with drug testing. (35RT 3363.) Further, two weeks before May allegedly made the statements, Tucker had removed May's children from their home (35RT 3373) and filed a supplemental petition in the juvenile court, seeking additional orders. (35RT 3376.) May's statements to Tucker were thus not only self-serving and untrustworthy, but their primary purpose appears to have been to prove that she was complying with the court's orders and should be reunified with her children, events potentially relevant to a judicial proceeding. As such, their introduction in a capital case in May's absence violated Ms. Dalton's right to confront May, as guaranteed by the Sixth Amendment.

Ms. Dalton's state and federal constitutional rights to due process (U.S. Const., 5th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7 and 15), to a fair trial and to a reliable adjudication of her guilt and the appropriate penalty were also violated by the introduction of Tucker's opinion and May's statements.

(U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

The United States Supreme Court has recognized that due process may be violated where the admission of evidence is "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Here, Tucker's opinion and May's untrustworthy statements that she was trying to get her life together, and that she loved her children and wanted to get them back not only misleadingly strengthened the prosecution's corpus argument, but also would have engendered great sympathy for the victim and her family. In the context of the guilt phase of a capital case, the introduction of irrelevant and unreliable hearsay that collaterally operated as victim impact evidence was inflammatory and prevented Ms. Dalton from receiving a fair trial. It also distorted the fact-finding process to such an extent that the resulting verdict could not have possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 335.)

E. The Admission of Tucker's Opinion and May's Statements That She Wanted to Get Her Life Together and Wanted Her Children Back Was Not Harmless under Either Federal or State Standards

The admission of Tucker's opinion and the included hearsay testimony was not harmless either as federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24, or as state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836 and *People v. Brown* (1988) 46 Cal.3d 432, 448 (reversal of death sentence required where there is reasonable possibility that error affected the penalty verdict).

The prosecutor introduced Tucker's opinion to prove the element of corpus delicti, that May in fact was dead. The absence of May's body, the complete dearth of forensic evidence to corroborate Baker's story that May was

stabbed in Fedor's trailer, and testimony from May's husband that he had seen her after the date she was purportedly killed, made Tucker's testimony crucial to the prosecution's case. The prosecutor relied on her testimony, inter alia, to argue that a murder had occurred. (39RT 3765 [Tucker "told you about how important that [sic] those children were to Melanie May. They were a part of her life. She wanted them back. She wouldn't walk away from them, not just walk away."].) Although he also pointed to the fact that after May's last welfare check, which was signed by her on June 17, 1988, she did not reapply for AFDC assistance (39RT 3764), that she did not appear for a hearing in Juvenile Court on June 30 (39RT 3765), and that May was not found in local or national computer databases for driver's licenses, criminal records or missing persons reports (39RT 3763), or by her husband (39RT 3766), the prosecutor told the jury that "every one of those things work together, tell you she is dead."[5] Without Tucker's testimony, there is a reasonable probability, that at least one juror would have found that May's death had not been proven beyond a reasonable doubt.

Further, the prosecutor not only used Tucker's opinion to prove corpus, but he even paraphrased May's inadmissible and unreliable hearsay in his argument, embellishing it with dramatic emphasis. (39RT 3765.) He reminded the jury that Tucker had testified about a phone call "two days before [May's] torture, two days before her murder," when May "had expressed to her how tired of – 'I'm tired of my lifestyle. I want to get it over with. I want help. I want to change my life.' Snuffed out, two days later." (39RT 3765-3766.)

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5. To the extent the prosecutor also pointed to Sheryl Baker's guilty plea to second degree murder as evidence that May was dead (see 39RT 3772), as argued in Appellant's Opening Brief, Baker's plea was inadmissible for that purpose. (AOB at pp. 94-103.)

It was particularly prejudicial in this case to use inadmissible evidence to paint the victim, whom the prosecutor referred to as "this little lady," (39RT 3763)[6] as a sympathetic mother determined to change her lifestyle to get her children back, who had been "snuffed out" by this "sadist" for "sadistic purposes." (39RT 3766.)

Under *Chapman*, respondent must prove beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.) "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 87.) Put another way, the Court must look to "'the basis on which the jury *actually rested its verdict*.' [Citation.] The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics in original.) Because respondent cannot prove that "there is no reasonable possibility" that the erroneously admitted evidence contributed to the guilt and penalty verdicts, Ms. Dalton is entitled to reversal under *Chapman*.

Ms. Dalton is also entitled to reversal under the state constitution. "Prejudice, under our state Constitution, means a miscarriage of justice that rendered the proceeding or its outcome unfair or unreliable." (*People v. Lara* (2010) 48 Cal.4th 216, 238, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.) The admission of Tucker's opinion testimony and May's statements rendered the outcome of Ms. Dalton's trial both unfair and unreliable and it is reasonably probable that she would not have been convicted or sentenced to

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6. According to Sheryl Baker, at the time of the crime, Ms. Dalton and May were about the same size. (33RT 3177.)

death had that testimony been excluded. The evidence of corpus was entirely circumstantial, and without Tucker's testimony, could just as easily have demonstrated that May left the area as it could establish she had been murdered. The prosecutor's use of the testimony also allowed the prosecutor to place her in a positive light compared to Ms. Dalton, thus injecting irrelevant and emotional considerations into the jury's determination of guilt.

For all the reasons stated above, appellant's convictions and death sentence should be reversed.

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XIX.
THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Ms. Dalton argued in her opening brief that the prosecutor presented insufficient evidence to support the lying-in-wait special circumstance. (AOB, pp. 145-157.) Ms. Dalton argued that there was insufficient evidence upon which a rational juror could find, beyond a reasonable doubt, that Ms. Dalton concealed her purpose, that the victim was killed during a substantial period of watchful waiting or that there was a surprise attack on an unsuspecting victim. Since 2009, when Appellant's Reply Brief [ARB] reply brief was filed, this Court has decided a series of cases elaborating on the evidence required to establish these elements of the lying-in-wait special circumstance. Ms. Dalton discusses the application of these newly available authorities to the arguments presented in her AOB and ARB.

To determine whether the evidence supports a special-circumstance finding, this Court reviews "'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find'" the special circumstance allegation true "'beyond a reasonable doubt.'" (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) At the time of the crime in this case, June 1988, the lying-in-wait special circumstance required a jury to find beyond a reasonable doubt that the murder was committed "while" the defendant was lying in wait, i.e, "'that the killing take place during the period of concealment and watchful waiting' [Citation]." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149.) In *People v. Lewis* (2008) 43 Cal.4th 415, this Court affirmed the temporal requirement of Penal Code section 190.2, former subd. (a)(15), and explained that "'[d]uring' means 'at some point in the course of.'" (*Id*. at p.

514.) Since *Lewis*, this Court has further delineated the evidentiary contours of the former lying-in-wait special circumstance in a trio of cases. (See *People v. Hajek* (2014) 58 Cal.4th 1144, 1183-1185; *People v. Nelson* (2016) 1 Cal.5th 513, 551; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1029.)

A. The Evidence Was Insufficient to Establish a Period of Watching and Waiting

In *Nelson* and *Becerrada*, there was no evidence that established, either directly or by reasonable inference, what happened prior to the attack and the evidence thus was insufficient to establish the requisite period of watching and waiting in order to surprise the victims. In *Nelson*, for example, the defendant rode his bicycle to an area where he had reason to believe the victims would be waiting to go to work. He hid his bicycle and "came up behind his victims on foot to take them by surprise." (*People v. Nelson, supra*, 1 Cal.5th at p. 551.) There was, however, no witness testimony or crime scene evidence to demonstrate that the defendant arrived before the victims or waited in ambush for their arrival. (*Ibid.*) This Court found no factual basis for an inference that, before approaching the victims, the defendant had waited for a time when they would be vulnerable to surprise attack. "The jury was presented with no evidence from which it could have chosen, beyond a reasonable doubt, that scenario over one in which defendant arrived after the victims, dismounted from his bicycle, and attacked them from behind without any distinct period of watchful waiting." (*Ibid.*) Absent this evidence, there was no basis to conclude the defendant had engaged in a substantial period of watching and waiting, and the special circumstance could not be upheld.

In *People v. Becerrada, supra*, 2 Cal.5th at p. 1029, this Court also vacated the lying-in-wait special circumstance. There, the defendant had pressured the victim to dismiss rape charges. After a phone call from the defendant, the victim went to his house, where she was apprehended and eventually murdered. (*Ibid.*) The prosecution's theory was that when the

defendant learned that the victim had not dropped the charges, he lured her to his home intending to kill her; then, after watching and waiting for the opportune time to act, he attacked her from a position of advantage and intentionally killed her. (*Id.* at pp. 1028-1029.) As this Court found, the evidence showed that the defendant expected the victim to drop the charges and supported a finding that he intended to kill her if she did not do so. (*Id.* at p. 1029.) It also showed that after the defendant called her, the victim bought a pack of the defendant's favorite cigarettes and drove to his neighborhood. (*Ibid.*) At some point after she arrived, defendant attacked and ultimately strangled her. (*Ibid.*)

While finding that the evidence supported an inference that Becerrada intended to kill the victim if and when he learned that she had not dropped the charges, and that he did kill her because she had not done so, this Court also found that there was no evidence that he had learned before the victim's fatal trip to his home that she had not dropped the charges. (*People v. Becerrada*, *supra*, 2 Cal.5th at p. 1029.) Although the victim might have hoped she could appease the defendant by bringing him a pack of his favorite cigarettes, no evidence was presented to establish whether she did so because she had already told him she was not dropping the charges, or because she intended to tell him when she met him. (*Ibid.*) There was no evidence as to the content of the telephone conversation that led the victim to the defendant's house or any other evidence supporting a finding that defendant knew she had not dropped the charges before she arrived at his home. Nothing proved, beyond a reasonable doubt, that he lured her to his home and engaged in a substantial period of watching and waiting, and the lying-in-wait special circumstances could not be sustained. (*Ibid.*)

Here, as in *Nelson* and *Becerrada*, there was no evidence as to what occurred during the time period when any waiting and watching may have occurred. As the trial court expressly found when addressing the sufficiency of

the evidence to prove the special circumstance, there was no evidence that Ms. Dalton purposefully lured Irene Melanie May to Joanne Fedor's trailer in order to kill her. (48RT 4630.)[7]

There was evidence that Ms. Dalton became angry at May after they were at the trailer, started ordering her around (33RT 3115-3116), and according to Fedor, May was so fearful of Ms. Dalton that she pulled out a knife to protect herself. (30RT 2581-2585, 2635.) When the paramedics later came, it was Mark Tompkins, not Ms. Dalton, who sent them away (30RT 2588; 31RT 2712-2713, 2719-2721; 33RT 3118-3119). Although it was possible that Ms. Dalton and Tompkins planned to isolate May and keep the paramedics away so that they could launch a surprise attack on May, it was equally possible that Tompkins acted alone and/or with an intent only to prevent the paramedics from intruding on the scene of their all-night party. As

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7. The trial court ruled as follows on the sufficiency of the evidence to prove the lying-in-wait special circumstance:

> In that regard I am relying specifically on *People versus Morales*, 48 Cal.3d 527. That case stands for the proposition that physical concealment is not a requirement. All you need is concealment of purpose for the special circumstance of lying-in-wait.
>
> There was a substantial -- the evidence has to show there was a substantial period of waiting for an opportune time to act. I agree with Mr. Landon from the standpoint that there is insufficient evidence to show that they specifically took Miss May to the Fedor trailer, however, once they got there, I think that the evidence is overwhelming that there was a substantial waiting for a period of time to act. It was clearly a surprise attack on the victim and clearly by those in a position of advantage. Paramedics were called. There was evidence of a female paramedic going there twice and not being allowed to see the victim. As one example of that.

(48RT 4630.)

in *Nelson*, there was no evidence from which the jury could have chosen beyond a reasonable doubt one scenario over the other, and absent this evidence, there was no basis to conclude the defendant had engaged in a substantial period of watching and waiting. (*People v. Nelson, supra,* 1 Cal.5th at pp. 551-552.) The trial court's conclusion that evidence that Tompkins sent away the paramedics to keep them from seeing May was "overwhelming" evidence that Ms. Dalton was waiting and watching for an opportune time to act was erroneous.

Similarly, there was no evidence of what happened after the paramedics left, when Tompkins, Baker and Fedor left Ms. Dalton and George alone with May for at least several hours. There was no evidence to suggest that Ms. Dalton knew she would be left in the trailer with May, nor that she was waiting for the others to leave. When Baker and Tompkins returned, May already was tied up in a chair with a sheet over her. (33RT 3125-3126.) Again, it was possible that Ms. Dalton restrained and covered May intending to disadvantage her in order to take her by surprise, but there was no evidence on which the jury could find, beyond a reasonable doubt, that scenario was true, as opposed to any number of other speculative possibilities, including that May died of an overdose or other accidental causes while Baker and Tompkins were gone, and was placed in the chair under a sheet to cover her from view;[8] that she attacked Ms. Dalton with the knife and died during the fight, that George killed her, or even that someone other than May was under the sheet.

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8. Baker testified that the person under the sheet could have been dead already. (33RT 3171-3172.)

B. The Evidence Was Insufficient to Establish a Surprise Attack on an Unsuspecting Victim

Even assuming that, when Tompkins and Baker returned, May was alive and Ms. Dalton was *still* waiting for an opportune moment to attack her, the evidence wholly defeats the notion that May was the unsuspecting victim of a surprise attack. The *Hajek* case is remarkably similar in that regard. (*People v. Hajek, supra*, 58 Cal.4th 1144.) In *Hajek*, this Court found the evidence insufficient to establish that the defendants launched a surprise attack on an unsuspecting victim. (*Id.* at pp. 1183-1185.) In that case, the defendants entered the victim's house by ruse, displayed a gun, bound and blindfolded her and isolated her in a bedroom for several hours before killing her. At certain periods after the defendants had secured her in the bedroom, the victim may have been untied, but this Court nonetheless concluded that the victim "could not have perceived [the defendants'] actions as anything other than a serious threat to her safety." (*Id.* at p. 1185.) This Court reasoned that, even assuming the defendants had at some point engaged in a period of watchful waiting, there was an intervening series of nonlethal events, after which the victim was killed in '" a cold, calculated, inevitable, and unsurprising'" attack. (*Ibid.*, quoting *People v. Lewis, supra*, 43 Cal.4th at p. 515.)

Here, May was bound in a chair for an unknown period of time, but that was after she had expressed fear and armed herself with a knife. (30RT 2584-2586, 33RT 3124-2127.) And even assuming there was a period of watching and waiting after Tompkins, Fedor and Baker left the trailer, there was no evidence of a surprise attack on May during that time or at any time thereafter. Viewed in the light most favorable to the prosecution, the evidence showed that once Tompkins and Baker returned to the trailer, Ms. Dalton told May she was going to give her a sedative, and within earshot of May, told Baker to inject her. (33RT 3128-3129.) As the prosecutor reminded the jury more than once, Sheryl Baker related in her first statement to law enforcement (8CT 1558) that

May then said "please don't kill me I'm sorry." (39RT 3797, 3865.)[9] Ms. Dalton told Baker that May was suffering and to hit May with a frying pan. (33RT 3130.) When nothing happened to May from the blow with the pan, Ms. Dalton said they would have to get Tompkins because "[t]his isn't working." After that, Tompkins stabbed May twice. (33RT 3133.) May would have heard all these comments, and from them, known that she was in danger. Just like the victim in *Hajek*, May was restrained and unable to see, but "could not have perceived [Ms. Dalton's] actions as anything other than a serious threat to her safety." (*People v. Hajek*, *supra*, 58 Cal.4th at p. 1185.) Also, as in *Hajek*, even assuming Ms. Dalton had engaged in a period of watchful waiting at some point, there was an intervening series of nonlethal events, and only after that was the victim killed in an altogether *unsurprising* attack. (*Ibid.*, citing *People v. Lewis*, *supra*, 43 Cal.4th at p. 515.)

C. Conclusion

There is simply no evidentiary basis upon which to find Ms. Dalton engaged, beyond a reasonable doubt, in a substantial period of watching and waiting for an opportune time to take May by surprise. Indeed, even in his argument to the jury, the prosecutor was unable to point to evidence to support all of the elements of lying in wait. The prosecutor told the jury: "She disguised her purposes as best she could. She certainly didn't let anybody know." (39RT 3793.) Essentially conceding the absence of the element of surprise, he continued: "The victim may have suspected something was up . . . ." (39RT 3793.) The prosecutor also pointed to the rural location, where

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9. In her second statement to law enforcement, made shortly before the trial and some eight years after the date of the crime, Baker said she was not sure she heard May say anything after Baker and Tompkins arrived back at the trailer. (20CT 4148-4149.) During trial, Baker testified that the person under the sheet may have been dead already. (33RT 3171-3172.)

help was far away, and the victim's defenselessness, and then merely concluded that Ms. Dalton "was lying in wait for this victim until she saw the time to hit, to strike, brought in her help." (39RT 3794.) Nowhere did he summon any evidence to show Ms. Dalton watched and waited in order to launch a surprise attack upon May.

For all these reasons, along with the reasons set forth in the opening brief and reply, the evidence was insufficient to support the lying-in-wait special circumstance finding, and it should be vacated.

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XX.
THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY INFORMING THE JURY THAT THE PRESUMPTION OF INNOCENCE WAS GONE AND DILUTING AND TRIVIALIZING THE BURDEN OF PROOF AND THE JURY'S DELIBERATIVE PROCESS

During the guilt phase closing argument, defense counsel focused on weaknesses in the prosecution's case, including the lack of physical evidence and the unreliability of the prosecution's witnesses. Law enforcement found no body and no murder weapons, and were unable to match tiny drops of blood found at the alleged crime scene three years later to a human, let alone the alleged victim. Witnesses gave conflicting statements. Accomplice testimony lacked the requisite corroboration. Many witnesses were methamphetamine addicts with prior felony convictions and some were in-custody informants who either obtained or expected leniency in exchange for testifying against Ms. Dalton. On those bases and others, the defense urged the jury to find the prosecution had not proven its case beyond a reasonable doubt.

The prosecutor began his rebuttal with an assault on the presumption of innocence, the burden of proof, and the deliberative process. First, he informed the jury that the presumption of innocence "is gone." Second, he diluted the burden of proof by showing the jurors a graphic that placed the reasonable doubt standard below what he argued were four higher standards. Third, he trivialized the burden of proof and deliberative process in this capital case by comparing them to someone lying in bed second-guessing whether he or she remembered to turn off all the lights. Finally, he encouraged the jury to convict Ms. Dalton based on a "reasonable" account of the evidence rather than proof beyond a reasonable doubt.

In *People v. Centeno* (2014) 60 Cal.4th 659, this Court reversed a conviction based on a similar rebuttal, but with fewer, erroneous components.

The prosecutor's rebuttal in this case misstated the law and misled the jury concerning the presumption of innocence, the burden of proof, and the nature of the deliberative process. Those misstatements made it easier for the prosecutor to obtain a conviction, in violation of Ms. Dalton's rights to due process of law, a fair trial, and the fundamental requirement of reliability in a capital case. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15-17; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *In re Winship* (1970) 397 U.S. 358, 364.) Reversal is required.

A. Factual and Procedural Background

The prosecutor began his rebuttal by telling the jury that Ms. Dalton was "no longer protected" by the presumption of innocence. (39RT 3854.) He argued: "[Defense] [c]ounsel made comments regarding the presumption of innocence and, truly, the defendant had it – had it – when we started this case. Now that the evidence is here, now that you heard it all, it is gone." (39RT 3854.) He continued: "The evidence shattered that presumption of innocence. It only lasts until the evidence of guilt has been shown. It has been shown. She's no longer protected by that presumption." (39RT 3854.)

Next, the prosecutor showed the jury a handwritten graph, which he likened to a thermometer showing various standards of proof interposed between the top and bottom. (39RT 3855.)[10] He told the jury that they started the case with no evidence, and at that point, the defendant was presumed innocent. (39RT 3856.) After that "we work our way up the thermometer" beginning with a preponderance of the evidence, and then moving to clear and

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10. The thermometer graphic did not become a part of the appellate record. However, the prosecutor's description of it is sufficiently detailed to permit review.

convincing evidence, neither of which were enough to convict. (39RT 3856.) He continued: "But we – when we get to proof beyond a reasonable doubt, that is enough. Reasonable doubt. Subject to reason; not guesses, not hopes, not hunches, not attorneys' arguments." (39RT 3856.)

He then explained there were still higher burdens of proof: "And we can still go above that. The law could require more than that, but it doesn't. I do not have to prove the case beyond a possible doubt. I don't." (39RT 3856.) Suggesting the defense case was based on "imaginary doubt," he argued, "I do not have to prove this case beyond an imaginary doubt. Anybody can come up with some imaginary doubt; we heard an hour of it." (39RT 3856.) He told the jury there were even higher burdens of proof: "I do not have to prove the case beyond a shadow of a doubt. That is not the same thing as reasonable doubt, make no mistake about that; and I do not have to eliminate all doubt." (39RT 3856.)

The prosecutor continued to explain the constitutional standards: "the founders of this country could have set the standard anywhere in there. They just chose beyond a reasonable doubt. . . ." (39RT 3856.) He then told the jury that the reasonable doubt standard "can be accomplished in every criminal case. . . . Drunk driving, petty theft, car thefts, robberies, rapes, murders, it's the same standard in them all. That's all I have to establish." (39RT 3856-3857.)

The prosecutor next told the jury not to let the attorneys convince it what was or wasn't reasonable doubt. (39RT 3857.) He asked the jurors to imagine they were married or living with someone and it was their job to turn off the lights before going to bed. "You go over and you lock the door, turn the TV off. You switch the lights out. You do it that way every night, because that's your job and you do it." (39RT 3857.) Then: "You climb in bed and your wife says, 'Did you turn that light off? . . . And now you're a big dummy. You never turn it off, you big goof ball. You forgot your socks the other day. You probably didn't turn it out." (39RT 3857.) He analogized this to an

unreasonable doubt: "And all of a sudden, she starts creating a reasonable doubt in your mind, or that doubt – or it's not reasonable, because when you went to bed you knew you turned it out. Don't let me create that doubt; don't let him create that doubt." (39RT 3857-3858.) He concluded by analogizing this to the jury's process: "The guy goes downstairs and, sure enough, the lights were off and the doors were locked. You knew what you had done. You did it right. You did it conscientiously, just like you'll do it in this case." (39RT 3858.)

The prosecutor transitioned to how he had built the case on circumstantial evidence, which he characterized as "dynamite stuff." (39RT 3858.) He further explained: "Circumstantial evidence, though, what's the reasonable interpretation? That's all we're looking for. What is reasonable? What isn't?" (39RT 3858.) After telling the jury to discard evidence if they didn't "buy into it," and to look at what else they had to see if it was enough, he repeated that all "we are talking about, is what's reasonable. . . . Is this the reasonable interpretation?" (39RT 3859.)

B. The Prosecutor's Remarks Concerning the Presumption of Innocence, the Reasonable Doubt Standard, and the Deliberative Process Amount to Misconduct and Violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The prosecution must prove every element of an offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) It is prosecutorial misconduct to misstate the law regarding the reasonable doubt standard, or "'to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].'" (*People v. Centeno, supra*, 60 Cal.4th at p. 666.) "To establish such error, bad faith on the prosecutor's part is not required." (*Ibid.*) The relevant test is whether, "in the context of the whole argument and the instructions, there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or

erroneous manner." (*Id.* at p. 667, internal citations and quotations omitted.) The prosecutor's rebuttal argument in this case meets that test. Taken as a whole, it eviscerated the government's burden of proof and neither defense counsel nor the trial court did anything to disabuse the jury of the prosecutor's misstatements.

1. The Prosecutor Diluted the Burden of Proof and Trivialized the Reasonable Doubt Standard

This Court has cautioned against using reasonable doubt analogies or diagrams and found "[t]he case law is replete with innovative but ill-fated attempts to explain the reasonable doubt standard." (*Centeno, supra*, 60 Cal.4th at p. 667, internal citations and quotations omitted.) Recognizing "the difficulty and peril inherent in such a task," this Court has "discouraged such experiments by courts and prosecutors." (*Ibid.*)

Appellate courts have found error where prosecutors or trial courts used analogies or diagrams that diluted the reasonable doubt standard. (See, e.g., *Centeno, supra*, 60 Cal.4th at p. 669 [reversing where prosecutor turned deliberative process "into a game" and encouraged the jury to convict based on what "reasonably" may have happened]; *People v. Medina* (1995) 11 Cal.4th 694, 744-745 [finding error when prosecutor showed jury a diagram during voir dire with two lines on it: "100 percent certainty" and below that "beyond a reasonable doubt"]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-987 [reversing where trial court compared deliberative process to everyday decision-making]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-37 [finding error where prosecutor compared deliberative process to everyday decision-making].)

In *Centeno*, for example, this Court considered whether the hypothetical a prosecutor used during closing argument amounted to misconduct. (*Centeno, supra*, 60 Cal.4th at p. 665.) During her closing, the prosecutor attempted to illustrate the reasonable doubt standard by projecting a geographical outline of

California and asking the jury to decide what state it was. (*Ibid*.) The prosecutor told the jury to assume witnesses testified that an adjacent state had good gambling, that there was a city in the state called "Fran-something" with a beautiful bridge and cable cars, and that Los Angeles and Hollywood were two other cities in the state. (*Ibid.*) The prosecutor argued that even with incomplete, wrong, or missing information there could be no reasonable doubt that the state was California. (*Ibid.*) In an accompanying argument, the prosecutor urged the jurors to convict the defendant if they found the prosecutor's theory was "reasonable" in light of the facts supporting it. (*Id.* at p. 666.)

This Court held that the prosecutor's hypothetical and accompanying argument were misconduct. (*Centeno*, *supra*, 60 Cal.4th at p. 674.) This Court found it "reasonably likely that the prosecutor's hypothetical and accompanying argument misled the jury about the applicable standard of proof and how the jury should approach its task." (*Ibid*.) This Court reasoned that the hypothetical "oversimplif[ied] and trivializ[ed] the deliberative process" and the accompanying argument "confounded the concept of rejecting unreasonable inferences, with the standard of proof beyond a reasonable doubt." (*Id.* at pp. 670, 673.).

As in *Centeno*, the prosecutor's rebuttal in this case contained both a mundane hypothetical and an accompanying argument "tinkering with the explanation of reasonable doubt." (*Centeno*, *supra*, 60 Cal.4th at p. 671 [noting that "judges and advocates have been repeatedly admonished that tinkering with the explanation of reasonable doubt is a voyage to be embarked upon with great care"].) The prosecutor's analogy of the deliberative process to an absent-minded spouse lying in bed second-guessing him or herself about whether he or she turned off all the lights was a different means to accomplish the same ends as the "what state is this" hypothetical employed by the prosecutor in *Centeno*: oversimplifying and trivializing the deliberative process.

(39RT 3857-3858.) The absent-minded spouse analogy suggested the deliberative process in a criminal case was as easy and familiar as deciding whether to get out of bed to make sure the lights were turned off, which was the precise problem this Court had with the hypothetical in *Centeno*. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 670.)

This Court described the "what state is this" hypothetical as "misleading" because it involved easy facts and a definitive answer whereas the jury's actual task was "far from definitive" and "involved starkly conflicting evidence and required assessments of witness credibility." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 670.) The absent-minded spouse analogy was misleading for the same reasons. It did not accurately reflect the evidence in Ms. Dalton's case, which was far from definitive because it depended on the credibility of witnesses who were drug addicts, accomplices, and informants. Sheryl Baker, the chief prosecution witness, made two prior statements that conflicted with each other and with her trial testimony (compare e.g. 33RT 3128-3129, with 8CT 1528-1529, and 20CT 4148-4149), and her version of the events leading up to May's disappearance differed in significant ways from the version related by Joanne Fedor (see e.g., 30RT 2604-2606; 33RT 3120-3122), as well as with the versions presented through jailhouse informants Donald McNeely (see e.g. 32RT 3073-3076), Laurie Carlyle (see e.g. 32RT 3053-3056) and Pat Collins (see e.g. 33RT 3209-3210, 3218-3219.) As in *Centeno*, the jury had to make "crucial evaluation" of the demeanor of multiple witnesses, the "inconsistencies" among their "various" accounts and the absence of corroborating physical evidence. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 670.)

Centeno found misconduct because the prosecutor's hypothetical implied that the jury's task was "less rigorous than the law requires" by "relating it to a more common experience. . . ." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 671.) The absent-minded spouse analogy, while different in form,

accomplished the same thing. It presented a hypothetical whose answer involved a single trivial question, i.e. whether the lights were off, and thus the oversimplification of the deliberative process risked misleading the jury just like the prosecutor's argument in *Centeno*. (*Ibid*.)

The analogy employed by the prosecutor in this case is arguably more specious than the hypothetical at issue in *Centeno* for two reasons. First, it encouraged the jurors to disregard their doubts about the evidence in the same way they might casually dismiss doubts created by a nagging spouse, and implied they should reach a decision in Ms. Dalton's case based on gut instinct, like they might decide that they really had turned off the lights, even before they checked to make sure. (39RT 3857-3858 ["And all of a sudden, she starts creating a reasonable doubt in your mind, or that doubt – or it's not reasonable, because when you went to bed you knew you turned it out. Don't let me create that doubt; don't let him create that doubt."]; 39RT 3858 ["You knew what you had done. You did it right. You did it conscientiously, just like you'll do it in this case."].)

Second, the analogy equated proof beyond a reasonable doubt to everyday decision-making in a juror's own life. This Court has condemned equating proof beyond a reasonable doubt to everyday decision-making. (See *People v. Brannon* (1873) 47 Cal. 96, 97.) In *Brannon*, the trial court instructed the jury that they should convict if "satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life." (*Ibid.*) This Court reversed, noting, "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence." (*Ibid.*)

Since *Brannon*, courts have continued to find misconduct where the prosecutor equated the deliberative process to the ordinary affairs of life. In *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-37, the prosecutor compared the deliberative process to the decision to marry or change lanes while driving.

In *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172, the deliberative process was compared to the decision to marry or seek a college education. Both *Nguyen* and *Johnson* found error, citing *Brannon*. (*Nguyen*, *supra*, 40 Cal.App.4th at p. 36; *Johnson*, *supra*, 115 Cal.App.4th at p. 1172.) The prosecutor's analogy in this case trivializes the deliberative process to the same or greater extent than the analogies at issue in *Brannon*, *Johnson*, and *Nguyen*. The decision to marry or to invest in a college education necessarily requires much greater deliberation and the consideration of weightier and more numerous concerns than the decision to get out of bed and check the lights. If equating the deliberative process to the decision to marry or seek a college education is misconduct, equating it to checking the lights is too.

The prosecutor's rebuttal in this case also encouraged the jury to find Ms. Dalton guilty based on a reasonable interpretation of the evidence. (39RT 3858-3859.) In *Centeno*, this Court found the prosecutor's closing was problematic because "[i]t strongly implied that the People's burden was met if its theory was 'reasonable' in light of the facts supporting it." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 671.) This Court observed, "It is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory" but it is error to leave the jury "with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Id.* at p. 672.) The prosecutor's remarks in *Centeno* crossed that line. "She repeatedly suggested that the jury could *find defendant guilty* based on a 'reasonable' account of the evidence" which "clearly diluted the People's burden." (*Id.* at p. 673, italics in original.) The prosecutor in this case committed the same error. He suggested to the jury that it could find Ms. Dalton guilty based on a reasonable account of the evidence. He informed the jury he had built his case against Ms. Dalton on circumstantial evidence and then told the jury that the relevant way to assess

such evidence was to ask, "what's the reasonable interpretation? That's all we're looking for. What is reasonable? What isn't?" (39RT 3858.)

In addition to trivializing the burden of proof and deliberative process, the prosecutor here also used a thermometer graphic to further dilute the reasonable doubt standard. (39RT 3855-3857.) The graphic and accompanying argument made it appear that proof beyond a reasonable doubt was a relatively easy standard to meet by illustrating that there were only two easier standards of proof than beyond a reasonable doubt, but four that were more difficult. He told the jury he "just" had to meet the reasonable doubt level, even though the law could require at least four higher levels of proof, but does not. (39RT 3855-3857.)

This Court encountered a similar graphic in *People v. Medina* (1995) 11 Cal.4th 694. There, during jury voir dire, the prosecutor used a diagram to "illustrate the quantum of proof he needed to prove defendant's guilt beyond a reasonable doubt." (*Medina*, at p. 744.) There were two lines on the diagram: "100 percent certainty" and beneath it "beyond a reasonable doubt." (*Ibid*.) The prosecutor asked the jurors "not to 'hold' him to the 100 percent standard, but only to the 'lower' standard." (*Ibid.*) This Court cautioned against the prosecutor's "attempt to reduce the concept of guilt beyond a reasonable doubt to a mere line on a graph or chart." (*Id*. at p. 745.) However, it found no prejudicial misconduct because the prosecutor's remarks were made during voir dire, before the evidence was received and formal, proper, instructions were given. (*Ibid.*)

The graphic and accompanying argument in this case were worse than the graphic and argument in *Medina*. The graphic in *Medina* only showed one standard above proof beyond a reasonable doubt whereas the graphic and argument in this case referenced four higher standards. (39RT 3855-3857.) Furthermore, the prosecutor also suggested that proof beyond a reasonable doubt was a relatively easy standard to meet by stressing how it is the same

standard that applies in less serious cases, such as driving under the influence and petty theft. (39RT 3856-3857 ["[Proof beyond a reasonable doubt] can be accomplished in every criminal case. . . . Drunk driving, petty theft, car thefts, robberies, rapes, murders, it's the same standard in them all. That's all I have to establish."].) While the prosecutor's statement is accurate—proof beyond a reasonable doubt does applies to less serious crimes too—by stressing that point in a capital case the prosecutor diluted his burden of proof in the jurors' minds.

Unlike in *Medina*, the error did not occur during voir dire. (*People v. Medina*, *supra*, 11 Cal.4th at p. 745.) It occurred during the prosecutor's closing rebuttal. Like the absent-minded spouse analogy and insistence that Ms. Dalton could be convicted based on a reasonable interpretation of the evidence, the thermometer graphic and argument likely misled the jury into holding the prosecutor to a diluted burden of proof, which made it easier for him to secure a conviction.

2. The Prosecutor Misstated the Law by Telling the Jury Ms. Dalton Was No Longer Protected by the Presumption of Innocence

The prosecutor also committed misconduct by misleading the jury to believe that Ms. Dalton was not entitled to the presumption of innocence after the presentation of "evidence of guilt," that she was "no longer protected" by it, that it only attached at the start of the trial, and now (prior to deliberations) it "is gone." (39RT 3854.)

The prosecutor's statement concerning the presumption of innocence was erroneous. This Court has noted: "The presumption of innocence does not cease upon the submission of the cause to the jury, but operates in favor of the defendant, not only during the taking of the testimony, but during the deliberations of the jury, until they have arrived at a verdict." (*People v. McNamara* (1892) 94 Cal. 509.)

In *People v. Cowan* (2017) 8 Cal.App.5th 1152, the prosecutor told the jury, in rebuttal, that the presumption of innocence was gone once it had heard all the evidence and the charges were read. (*Cowan, supra*, 8 Cal.App.5th at p. 1154.) The Court of Appeal affirmed the conviction. (*Ibid.*) However, this Court granted review and transferred the case back to the Court of Appeal for reconsideration in light of its decision in *Centeno*. (*Ibid.*) On transfer, the Court of Appeal reversed. (*Id.* at p. 1155.) The court held: "It is misconduct to misinform the jury that the presumption of innocence is 'gone' prior to the jury's deliberations. It strikes at the very heart of our system of criminal justice. Even a novice prosecutor should know not to make such a fallacious statement to the jury." (*Id.* at p. 1159.)

The prosecutor made an identical error in this case. He began by telling the jury that he had overcome the presumption of innocence. (39RT 3854.) However, he crossed the line and committed misconduct when he told the jury that the presumption ended once it heard all the evidence: "Now that the evidence is here, now that you heard it all, it is gone." (39RT 3854.)

3. Taking the Argument as a Whole, There Was a Reasonable Likelihood the Jury Understood or Applied the Prosecutor's Rebuttal in an Improper Manner

Prosecutorial misstatements of the law during closing argument amount to misconduct when there is a "reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Centeno, supra*, 60 Cal.4th at p. 667.) As set forth above, the prosecutor's absent-minded spouse analogy, use of a thermometer graphic showing four levels of proof higher than beyond a reasonable doubt, and his statement that a verdict of guilt was appropriate based on a "reasonable" account of the evidence were misstatements of the law, as was his argument that Ms. Dalton was not entitled to the presumption of innocence in

deliberations. For the reasons set forth below, there is a reasonable likelihood that the jury applied those misstatements in an improper manner.

The jury likely harmonized the prosecutor's misstatements with the trial court's instructions concerning the presumption of innocence, the burden of proof, and the deliberative process, or took them as illustrations of how the instructions operate. Defense counsel did not object to the prosecutor's misconduct and the trial court did not admonish the jury. (See 39RT 3854-3859.) Thus, neither defense counsel nor the court called the propriety of the prosecutor's misstatements into question. Furthermore, it is unlikely that the jury was able to discern a conflict between the prosecutor's arguments and the court's instructions. The trial court instructed the jury after closing arguments. Some decisions note that giving the prosecutor the last word is a factor to consider. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 745 [finding misconduct harmless when it occurred during voir dire as opposed to closing rebuttal].) However, nothing in the trial court's instructions corrected or expressly conflicted with the prosecutor's misstatements. (See 39RT 3879.) The absent-minded spouse analogy and thermometer example likely stood out in the jurors' minds more than the trial court's quick recitation of the standard instructions.

With respect to the presumption of innocence, the trial court instructed the jury, "A defendant in a criminal trial is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether her guilt is satisfactorily shown, she's entitled to a verdict of not guilty. This presumption places upon the people the burden of proving her guilty beyond a reasonable doubt." (39RT 3879.) The trial court's instruction did nothing to clarify the prosecutor's misstatement that the presumption of innocence ended at the close of the evidence. While the trial court also instructed the jury to follow its instructions in the event of a conflict between them and counsels' argument, a conflict with the instruction was not apparent in this case. The jury easily could

have harmonized the instruction with the prosecutor's misstatement because the instruction is silent concerning whether the presumption of innocence continues during deliberations.

With respect to the burden of proof, the trial court instructed the jury that reasonable doubt: "is not a mere possible doubt; because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt." (39RT 3879.) Reasonable doubt is "that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge." (*Ibid*.) There was no reason for the jury to reject the prosecutor's absent-minded spouse hypothetical and or his graphic and description of the different levels of doubt higher than a reasonable doubt. Neither "directly contradict[ed] the trial court's instruction on proof beyond a reasonable doubt, but instead purported to illustrate that standard." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 676.)

Further, the trial court's reasonable doubt instruction used "moral certainty" language that could imply that the standard was as low as the prosecutor represented it to be. One or more jurors may be convinced to a moral certainty before they are convinced beyond a reasonable doubt because a juror could equate being convinced to a moral certainty with being convinced by a preponderance of the evidence. (See *People v. Brannon*, *supra*, 47 Cal. at p. 97 ["The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence."].) The United States Supreme Court has cautioned courts against using the "moral certainty" language. (See *Victor v. Nebraska* (1994) 511 U.S.

1, 16.) As a result, the language no longer appears in the standard instruction on reasonable doubt, CALCRIM No. 103.[11]

Courts have also recognized that a prosecutor's closing argument is an especially critical period of trial and carries great weight. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694; accord, *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["closing argument matters; statements from the prosecutor matter a great deal"].) A "prosecutor's opinion carries with it the imprimatur of the Government. . . ." (*United States v. Young* (1985) 470 U.S. 1, 18.) When a prosecutor misstates the law in such a way as not to directly contradict a trial court's instructions, a jury is likely to defer to the prosecutor's explanation.

4. The Prosecutor's Rebuttal Violated Ms. Dalton's Right to Due Process under the Fourteenth Amendment to the United States Constitution

The due process clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt each element or fact necessary to prove a crime or special circumstance. (*Ring v. Arizona* (2002) 536 U.S. 584, 602.) Stated differently, "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Courts have held that prosecutorial misstatements of the law concerning those principles violate due process. (See, e.g., *People v. Woods* (2006) 146 Cal.App.4th 106, 113-114 [prosecutor's misstatement that

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11. The trial court instructed the jury in *Centeno* with CALCRIM No. 103. (*People v. Centeno* (2013) 214 Cal.App.4th 843, revd. (2014) 60 Cal.4th 659.)

defendant carried burden of proof or production "cannot be reconciled with due process" and thus, constituted federal constitutional error].)

When considered cumulatively, the prosecutor's misstatements in this case violated Ms. Dalton's right to due process. The misstatements skewed the jury's understanding of the presumption of innocence, the burden of proof, and the deliberative process in a manner that made it easier for the prosecutor to obtain a conviction. The misstatements, which came at perhaps the most critical stage of appellant's trial, "so infected [it] with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, internal citations and quotations omitted.)[12]

C. The Prosecutor's Misconduct Requires Reversal Because There Is at Least a Reasonable Chance the Outcome Would Have Been Different Absent the Error

As a threshold matter, this Court should evaluate the prejudice flowing from each instance of misconduct cumulatively rather than in isolation. Errors that are harmless when evaluated in isolation from one another may be prejudicial when evaluated cumulatively. (*People v. Hill* (1998) 17 Cal.4th 800, 847 [finding that multiple instances of prosecutorial misconduct "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors"].) The prosecutor's misstatements in this case were mutually reinforcing and lessened his burden of proof. The presumption of innocence and burden of proof

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12. To the extent this Court holds that prosecutorial errors rendered appellant's trial so fundamentally unfair as to violate due process, it need not separately review for prejudice, because proof of the violation incorporates an assessment that the errors likely affected the verdict. (See, e.g., *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1229, fn. 9 [substantive prejudice component inherent in fundamental-fairness review essentially duplicates the function of harmless-error review].) Nonetheless, appellant explains below in detail why the errors in this case were prejudicial under any standard.

operate symbiotically. If the prosecutor cannot meet his or her burden of proof, the defendant is entitled to an acquittal by virtue of the presumption of innocence. (*In re Winship*, *supra*, 397 U.S. at p. 363.) By stating that the presumption of innocence was gone and by repeatedly trivializing and diluting the burden of proof beyond a reasonable doubt via analogy, example, and other argument, the prosecutor attacked the nature of the deliberative process from both ends.

Whether treated as a violation of state law or a violation of due process, the prosecutorial misconduct was prejudicial and thus Ms. Dalton's convictions should be reversed. Where, as here, the prosecutor's argument violates the federal constitution the prejudice test set forth in *Chapman v. California* (1967) 386 U.S. 18, applies. Under *Chapman*, the Court must reverse the defendant's conviction unless the government can prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman*, *supra*, at p. 24.) Respondent will be unable to carry that burden in this case. As set forth in more detail below, the evidence of guilt was not overwhelming. The physical evidence was nearly nonexistent and there were serious credibility issues with the testimonial evidence. On this record, respondent will be unable to prove beyond a reasonable doubt that diluting the burden of proof and trivializing the deliberative process did not affect the outcome.

Even if considered a violation of state law only, and subject to the prejudice test set forth in *People v. Watson* (1956) 46 Cal.2d 818, reversal is still required because there is at least a reasonable chance of a more favorable outcome. (*Watson, supra*, 46 Cal.2d at pp. 836-837 [reversal required when it is "reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error."]; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [A "reasonable probability" does not mean "more likely than not." It just means "a reasonable chance, more than an abstract possibility."].)

Prosecutorial misstatements of the law during closing argument carry with them a heightened risk of prejudice. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117 ["In assessing the effect of . . . misconduct, we must factor in the 'special regard the jury has for the prosecutor.'"], citing *People v. Bolton* (1979) 23 Cal.3d 208, 213.) In evaluating the prejudice flowing from prosecutorial misstatements, this Court's analysis in *People v. Centeno, supra*, 60 Cal.4th at pp. 674-677, is instructive. While *Centeno* dealt with prosecutorial misconduct through the lens of ineffective assistance of trial counsel (for failing to object to misconduct), a claim that is prejudicial under that standard i.e., reasonable probability that the result of the proceeding would have been different (*id.* at p. 676), will be prejudicial under any potentially applicable standard.

Centeno's prejudice calculus focused on a number of factors, including whether the prosecutor's misconduct conflicted with correct instructions, whether defense counsel objected to the argument, whether the trial court admonished the jury, and whether the evidence of guilt was strong. (*Centeno, supra*, 60 Cal.4th at p. 676.) The Court referred to these as "saving factors" presumably because if any of them were present, the judgment could be saved rather than reversed. The savings factors were absent in *Centeno* and they are absent in this case.

The majority of those factors were discussed in section B, *ante*. The prosecutor's remarks during closing rebuttal conflicted with the law, defense counsel did not object to them, and the trial court did not admonish the jury. Further, the jury likely harmonized the prosecutor's misstatements concerning his burden of proof, the nature of the deliberative process, and the presumption of innocence with the trial court's instructions or took them as illustrations of how the standards operate.

The last saving factor identified by the *Centeno* court is the strength of the evidence. The evidence of guilt in Ms. Dalton's case was weak. There was

no physical evidence of murder. Law enforcement never found Melanie May's body and May's husband, Robert, testified that he saw her twice, alive, after Ms. Dalton allegedly murdered her. (31RT 2808.) Further, the criminalists were unable to find May's blood in Joanne Fedor's trailer (the location of the alleged murder). (See 31RT 2766, 32RT 2988, 35RT 3442, 3493-3500, 36RT 3526.) The first officer to respond to Fedor's trailer, Deputy David Wilson, did not find any blood (31RT 2766-2767) and subsequent teams of criminalists and detectives were unable to find a trace of blood there either (35RT 3442, 3445-3447, 3449, 3493-3500, 36RT 3526). Years later, after Fedor moved out and two different tenants had occupied the trailer, an evidence technician found traces of blood. (32RT 2932-2934, 2938-2943, 2954-2955.) However, forensic testing could not establish whether the blood was human, let alone that it came from May. (32RT 2961.)

The testimonial evidence also was problematic. The most damning testimony came from Sheryl Baker, but she was an accomplice and her testimony lacked the requisite corroboration. (35RT 3414 [noting court's observation that Baker's testimony was the "key note testimony" of the trial]; see AOB Argument IV, A [discussing how Baker's testimony was not sufficiently corroborated].) Baker also received a favorable deal in exchange for testifying against Ms. Dalton and thus had an obvious motive to inculpate her. (33RT 3093-3094, 3148-3149.) Further, Baker had a serious methamphetamine problem, had smoked or injected more than anyone else at Fedor's trailer, and described herself as "flying high." (33RT 3114, 3186.) Dr. Smith testified that methamphetamine users are suggestive and commonly suffer psychotic delusions and hallucinations. (36RT 3554-3555.) Baker's testimony also conflicted with earlier statements she had given to law enforcement. (Compare 33RT 3128-3129, with 8CT 1528-1529, and 20CT 4148-4149.) In one version, May was still alive when Baker and Tompkins returned to the trailer from Lakeside. (8CT 1528-1529.) In another, May was

already dead. (20CT 4148-4149.) Baker was impeached with her prior inconsistent statements.

Like Baker, Joanne Fedor's testimony was seriously undermined by the long-term effects of her methamphetamine addiction and the fact she was highly intoxicated on the night of the alleged crime. Fedor was not present when the alleged murder occurred in her trailer. (30RT 2592-2599.) When she returned, she claimed to have found a blood-covered pillowcase, a blood-covered knife, a blood-covered bar of soap, a blood-covered heater, a screwdriver with scalp on it, a cut electrical cord with burnt ends, and another cord that had been tied into knots. (30RT 2600, 2601, 2604.) She called the police. The responding officer, Wilson, described Fedor as paranoid, under the influence of methamphetamine, and "5149 ½ – almost 5150." (31RT 2772.) Wilson searched the trailer but did not see any blood. (31RT 2752, 2768-2769.) Fedor ultimately gave the heater and knife to a social worker who turned them over to law enforcement. (30RT 2645-2646, 2653.) Law enforcement did not find blood on either. (32RT 2989, 37RT 3639-3644.)

Other witnesses who claimed to have seen blood in the trailer and objects the prosecution argued were used in the murder were of questionable reliability. For example, Fedor's 12-year-old daughter, Alisha, admitted her mother's story may have influenced her beliefs about what she had seen. (30RT 2669-2676.) Other witnesses were unsure about what they had seen, when they had seen it, and/or were using methamphetamine. (31RT 2759-2764 [Kathy Eckstein], 2863-2884 [Fred Eckstein], 32RT 3042-3043 [Allan Woods].)

The inference that May must be dead because she did not continue collecting her AFDC checks, could not be located by investigators, and missed court appearances to get her children back (31RT 2824, 2893-2901, 2911-2914, 32RT 2927), was disputed by her husband, who claimed to have seen May twice, alive, after her alleged murder (31RT 2808). A CPS caseworker opined

that May would not abandon her children. (35RT 3367-3374.) However, May's husband, who arguably knew her best, said that May was not making much of an effort to get her kids back and only cared about getting high. (31RT 2792 ["she was working on getting high, a little more higher every day"].)

Many of the prosecution's remaining witnesses were in-custody informants who either obtained or likely expected leniency in exchange for information inculpating Ms. Dalton. For example, Donald McNeely testified that Ms. Dalton's codefendant, Mark Tompkins, confessed to him while they were cellmates. (32RT 3071-3076.) McNeely denied seeking or receiving consideration in exchange for relaying that information to authorities. (32RT 3077-3078.) However, District Attorney Investigator Richard Cooksey admitted he told McNeely that he would write a letter to McNeely's sentencing judge in exchange for information. (35RT 3394, 3407.) Lori Carlyle was also an in-custody informant who claimed Ms. Dalton confessed to her when they were in prison in 1992. (32RT 3054-3056.) However, in 1993, Carlyle told Baker that she had heard of Ms. Dalton, but never met her. (32RT 3059.) Carlyle had informed before and said she knew informants sometimes got benefits. (32RT 3062-3063.) Pat Collins was another in-custody informant. Like Carlyle, she claimed Ms. Dalton confessed to her. (33RT 3209-3210.) Collins received consideration in exchange for providing authorities information about Ms. Dalton. (33RT 3213-3214, 3219-3221.) Pam Aitchison testified that Collins had a reputation for being a thief and a liar. (37RT 3615-3616, 3621.)

Judy Brakewood was not an in-custody informant but her testimony was equally unreliable. In 1992, she reported to law enforcement that four years earlier, while using methamphetamine with Steven Notolli inside a van, Notolli told her that "they" had shot up a girl with battery acid and burned her. Then, according to Brakewood, Ms. Dalton got into the van and said "Yep. We really

fucked that girl up." (33RT 3255-3259.) Brakewood did not explain how Ms. Dalton was able to hear her conversation with Notolli despite being outside the van or why she failed to report the conversation to law enforcement for so long. Furthermore, at trial, Notolli denied that such an encounter ever occurred. (37RT 3627-3631.)

In sum, the prosecution's case was weak. The prosecution did not attempt to prove Ms. Dalton murdered May with physical evidence or credible witnesses. Instead, its case hinged on in-custody informants, alleged accomplices, and methamphetamine addicts.

Provided those evidentiary weaknesses, the prosecutor's misstatements trivializing the deliberative process and diluting his burden of proof are prejudicial under any standard. Under *Chapman v. California, supra*, 386 U.S. 18, 24, respondent will be unable to prove beyond a reasonable doubt that they did not affect the outcome. Under the standards set forth in *People v. Watson, supra*, 46 Cal.2d at pp. 836-837, and *People v. Centeno*, *supra*, 60 Cal.4th at pp. 674-677, there is at least a reasonable chance of a different outcome had the prosecutor not misstated the deliberative process and his burden of proof in a way that made it easier for him to obtain a conviction. Accordingly, regardless of which prejudice test applies, this Court should reverse Ms. Dalton's convictions.

D. This Court Should Reach the Issue Despite the Lack of Contemporaneous Objections

To preserve for appeal a claim of prosecutorial misconduct, the defense must ordinarily make a timely objection at trial and request an admonition. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) Defense counsel did not do so. However, this Court has the discretion to consider the merits of a claim where there had been no objection, and it has done so on multiple occasions. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6, citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1072-1076 [reviewing merits of claim of

prosecutorial misconduct despite absence of an objection], and *People v. Ashmus* (1991) 54 Cal.3d 932, 975-976 [same].) This Court may also reach the issue when "nothing less fundamental is at stake than the denial of [the defendant's] due process protection 'against conviction except upon proof beyond a reasonable doubt.'" (*People v. Johnson* (2004) 119 Cal.App.4th 976, 985, citing *In re Winship*, *supra*, 397 U.S. at pp. 362-364.) Alternatively, it may reach the merits when "the case being closely balanced and presenting grave doubt of the defendant's guilt, the misconduct contributed materially to the verdict . . . ." (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182, citation omitted.) In this case, the Court should review the merits of Ms. Dalton's claim because the case was close and the prosecutorial errors bear directly on her right not to be convicted except upon proof beyond a reasonable doubt.

E. Alternatively, Defense Counsels' Failure to Object to the Arguments and Seek Curative Admonitions Was Ineffective Assistance of Counsel in Violation of the Sixth Amendment to the United States Constitution

As in *Centeno*, to the extent this Court concludes that defense counsels' failure to object forfeited the issue on appeal, the Court should still find error and reverse the judgment on the ground that counsel failed to afford the effective assistance guaranteed Ms. Dalton by the state and federal constitutions. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) The Sixth Amendment to the United States Constitution provides criminal defendants a right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) If a defendant receives ineffective assistance, her conviction should be reversed. (*Ibid.*) A defendant can demonstrate that she received ineffective assistance by showing that (1) her lawyer's performance was deficient, and (2) the deficient performance prejudiced her defense. (*Id.* at pp. 688, 694.) Here, Ms. Dalton can satisfy both prongs.

1. Reasonable Trial Counsel Would Have Objected to the Arguments and Sought Curative Admonitions, and No Conceivable Tactical Reasons Exist for Failing to Do So

"When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was no conceivable tactical purpose for counsel's act or omission." (*Centeno, supra*, 60 Cal.4th at p. 675, internal citations and quotations omitted.) Ms. Dalton acknowledges that as a general matter, "The decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one, and a mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*Ibid.*, internal citations, quotations, and brackets omitted.) Nevertheless, as this Court stressed in *Centeno*, "deference to counsel's performance is not the same as abdication. [Citation.] '[I]t must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions.'" (*Ibid.*, quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

A reasonably competent attorney will preserve arguably meritorious issues for appellate review. (See *People v. Jackson* (1986) 187 Cal.App.3d 499, 506; *In re Christina P.* (1985) 175 Cal.App.3d 115, 129-130.) Moreover, "an attorney . . . may be held responsible for failing to make . . . an objection when precedent supported a 'reasonable probability' that a higher court would rule in defendant's favor." (*Bloomer v. United States* (2d Cir. 1998) 162 F.3d 187, 193.) Thus, where defense counsel fails to object and preserve a meritorious claim of prosecutorial error in explicating the burden of proof, this Court has applied heightened scrutiny to counsel's deficiency.

For example, in *Centeno*, *supra*, 60 Cal.4th at p. 676, this Court held that it could "conceive of no reasonable tactical purpose for defense counsel's [failure to object]." The Court first reasoned that any problems with the

prosecutor's argument and display of the diagram "were not difficult to discern," and a prior case involving a prosecutor's use of a diagram "provided firm grounds for an objection at the time of defendant's trial." (*Id.* at p. 675.) Next, the suggested tactical reasons for counsel's omission were unpersuasive. (*Ibid.*) Finally, because the prosecutor's hypothetical came in rebuttal, defense counsel's only chance to correct the misimpression was through a timely objection and admonition from the trial court. (*Id.* at p. 676.)

Under this framework, defense counsels' failure to object in this case was not a rational tactical decision. The problems with the use of the absent-minded spouse analogy, the thermometer graphic showing four levels of proof higher than beyond a reasonable doubt, the statement that a verdict of guilt was appropriate based on a "reasonable" account of the evidence, and the statement that Ms. Dalton was not entitled to the presumption of innocence during deliberations were not difficult to discern. Well before appellant's trial, the case law was "replete with innovative but ill-fated attempts to explain the reasonable doubt standard." (*Centeno*, *supra*, 60 Cal.4th at p. 667, citing *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986, and *People v. Garcia* (1975) 54 Cal.App.3d 61, 63.) For example, decades before Ms. Dalton's trial, the Court of Appeal noted, "Well intentioned efforts to 'clarify' and 'explain' [the presumption of innocence and proof beyond a reasonable doubt] have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state." (*Garcia*, *supra*, 54 Cal.App.3d at p. 63.) Indeed, "Courts . . . repeatedly cautioned prosecutors against using diagrams or visual aids to elucidate the concept of proof beyond a reasonable doubt . . . ." (*Centeno, supra*, 60 Cal.4th at p. 662; see also *Medina*, *supra*, 11 Cal.4th at p. 745 ["The courts, recognizing the difficulty and peril inherent in such a task, have discouraged 'experiments' by trial courts in defining the 'beyond a reasonable doubt' standard. [Citation.] By a parity of reasoning, similar perils undoubtedly would attend a prosecutor's attempt to

reduce the concept of guilt beyond a reasonable doubt to a mere line on a graph or chart"].)

In addition to *People v. Garcia* (1975) 54 Cal.App.3d 61, there were other cases predating Ms. Dalton's trial establishing the impropriety of the prosecutor's remarks. (See, e.g., *People v. Brannon* (1873) 47 Cal.96, 97 [holding that it is improper to compare the deliberative process to everyday decision-making]; *People v. McNamara* (1892) 94 Cal. 509 [holding that that it is improper to state the presumption of innocence has ended before the jury began deliberating].)

Because counsel pursued a reasonable doubt defense and relied upon that principle (see 39RT 3800-3853), any reasonably competent attorney would have been especially cautious about attempts to diminish the burden of proof. (See *Washington v. Hofbauer* (6th Cir. 2000) 288 F.3d 689, 704 ["Indeed, the risk of prejudice inherent in [counsel's] articulated strategy would have made a reasonably competent attorney doubly cautious about the potential misuse of that evidence"]; cf. *Centeno, supra*, 60 Cal.4th at p. 675 [prosecution's burden of proof is the most fundamental issue in a criminal case].) Yet counsel here did nothing. Counsels' silence and lack of action in the face of improper arguments was neither reasonable nor tactical. (See *Washington, supra*, 228 F.3d at p. 703 [where the prosecution's argument plainly merited an objection and curative instruction counsel sat silent: "At the most pivotal moments . . . his silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy"]; *Moore v. Johnson* (5th Cir. 1999) 194 F.3d 586, 604 ["The Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all"].) Counsels' performance fell below an objective standard of reasonableness.

2. It Is Reasonably Probable That the Prosecutor's Argument Caused One or More Jurors to Convict Ms. Dalton Based on a Lesser Standard of Proof than the Law Requires, and Had Counsel Objected, the Result of the Proceedings Would Have Been Different

Defense counsels' deficient performance was prejudicial. An attorney's deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) In the specific context of failure to object to misstatements in prosecutorial argument, this Court has looked to whether "there is a reasonable probability that the prosecutor's argument caused one or more jurors to convict defendant based on a lesser standard than proof beyond a reasonable doubt." (*Centeno*, *supra*, 60 Cal.4th at p. 677.)

For the reasons set forth above and throughout the opening brief, there is a reasonable probability that the outcome of Ms. Dalton's trial would have been different had her counsel properly objected to the prosecutor's misconduct during closing argument. The prosecutor's misstatements of the law – which came at a critical stage and from an individual whom the jury held in special regard – were not meaningfully challenged and systematically lowered the government's burden of proof. Because there can be no confidence in the reliability of Ms. Dalton's convictions, there can be no confidence in the reliability of her death sentence. All convictions, true findings on special circumstance allegations, and the death sentence must be reversed.

F. Conclusion

The prosecution's case had major evidentiary weaknesses, which were only overcome by diluting the burden of proof and trivializing the deliberative process via a multi-pronged assault during its rebuttal. This Court has reversed

convictions where prosecutors or trial courts misstated the presumption of innocence, diluted the burden of proof, or trivialized the nature of the deliberative process. This case involves a combination of all those misstatements, the cumulative effect of which was to deny Ms. Dalton due process and a fair trial. Trial counsels' failure to object to the prosecutor's misconduct fell below professional standards and deprived Ms. Dalton of her right to the effective assistance of counsel. For these reasons, and others set forth in more detail above, she urges this Court to reverse her convictions.

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XXI.
THIS COURT SHOULD REVERSE MS. DALTON'S CONSPIRACY CONVICTION BECAUSE IT WAS TIME-BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS

The District Attorney filed an information charging Ms. Dalton with a conspiracy that had occurred four years earlier. The statute of limitations for criminal conspiracy, however, is three years. The jury thus convicted Ms. Dalton of a time-barred offense. Because the statute of limitations is jurisdictional and can be asserted at any time, this Court must reverse the conspiracy conviction.

A. Factual and Procedural Background

On November 13, 1992, the District Attorney filed an information charging Ms. Dalton with murder and conspiracy to commit murder. (1CT 48-52.) The information specifically alleged that Ms. Dalton murdered Irene Melanie May on or about June 26, 1988, and that Ms. Dalton conspired to murder May and committed eight overt acts in furtherance thereof on or about that same day.[13] Over four years and four months elapsed between the date Ms. Dalton allegedly conspired to murder and murdered May and the date the prosecutor filed an information charging her with those offenses. (See 1CT 48-52, 5CT 999-1004.) Ms. Dalton was ultimately convicted of the conspiracy charge. (8CT 1706.)

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13. The original information filed on November 13, 1992, contained a typographical error. Although it alleged that May's murder occurred on or about June 26, 1988, it alleged that the conspiracy to kill her occurred on or about June 26, 1990. (See 1CT 48-52.) However, all the overt acts listed for the conspiracy charge were alleged to have occurred on either June 25, 1988 or June 26, 1988. The prosecutor filed an amended information on December 22, 1994, correcting the date of the alleged conspiracy to June 26, 1988. (5CT 999-1004.)

B. The Three-year Statute of Limitations for Criminal Conspiracy Expired Before the District Attorney Charged Ms. Dalton with That Offense

The conspiracy charge in this case was time barred because the applicable three-year limitations period had long expired by the time the prosecutor charged Ms. Dalton with the offense.[14] Although Ms. Dalton's attorneys did not assert a statute-of-limitations defense to the conspiracy charge in the trial court, a defendant may assert she was convicted of a time-barred offense for the first time on appeal because it is not subject to inadvertent forfeiture. (*People v. Williams* (1999) 21 Cal.4th 335, 338-339.) A conviction for a time-barred offense must be reversed unless the defendant expressly waived the statute of limitations. (*Id.* at pp. 338-341.) Ms. Dalton did not waive her right to a timely trial and thus has not forfeited this issue.

The applicable statute of limitations is considered "the primary guarantee against bringing overly stale criminal charges." (*United States v. Marion* (1971) 404 U.S. 307, 322, quoting *United States v. Ewell* (1966) 383 U.S. 116, 122.) Limitations periods "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence." (*Marion, supra*, at p. 322, quoting *St. Louis Public Schools v. Walker* (1870) 76 U.S. (9 Wall) 282, 288.) Statutes of limitation also "provide predictability by

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14. The three-year limitations period begins to run when the target offense is completed, or if it is never completed, when the last overt act is committed in furtherance of the conspiracy. (*People v. Zamora* (1976) 18 Cal.3d 538, 560 [holding that acts taken to conceal a conspiracy after the target offense has been completed do not restart the three-year limitations period].) Here, the charging document reflects that Ms. Dalton was prosecuted for a conspiracy four years after completion of the target offense. (1CT 48-52, 5CT 999-1004.)

specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*Marion, supra*, at p. 322.) Here, Ms. Dalton was prosecuted for conspiracy over a year after that irrebuttable presumption arose.

1. The Statute of Limitations for Conspiracy is Separate and Distinct from the Statute of Limitations for the Target Offense

"[L]egal precedent . . . provides that criminal conspiracy has a three-year statute of limitations, irrespective of the underlying offense." (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1402, citing *Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 20-22, *People v. Crosby* (1962) 58 Cal.2d 713, 722, and *People v. Zamora* (1976) 18 Cal.3d 538, 549-550.) The limitations period applicable to an offense generally depends on its maximum punishment. For example, if the maximum punishment does not include a term of imprisonment, the limitations period is one-year. (Pen. Code, § 802.) If the maximum punishment is death or life in prison (with or without the possibility of parole) there is no limitations period. (Pen. Code, § 799.) If the maximum punishment is eight years or more, there is a six-year limitations period. (Pen. Code, § 800.) For all other felonies, a three-year limitations period applies, with few exceptions. (Pen. Code, § 801.)

Exceptions exist for fraud (Pen. Code, § 801.5 [four-year limitations period]), crimes against elder or dependent adults (Pen. Code, § 801.6 [five-year limitations period]), and sex crimes against children (Pen. Code, § 801.1 [victim's 40th birthday]). However, there is no exception for conspiracy and conspiracy is not expressly mentioned in any of the other limitations provisions. While the punishment for conspiracy is generally the same as for the underlying crime (see Pen. Code, § 182, subd. (a)), courts have repeatedly held that conspiracy is subject to a three-year limitations period "irrespective of the underlying offense." (*People v. Prevost, supra*, 60 Cal.App.4th at p. 1402; *People v. Milstein* (2012) 211 Cal.App.4th 1158, 1168.) This is because

"criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy." (*Milstein*, *supra*, 211 Cal.App.4th at p. 1166 & fn. 8 [noting how case law has established that "the agreement is the conspiracy; the specific crimes that constitute the object of the conspiracy are not elements of the conspiracy"].)

Whether the defendant conspires to commit a misdemeanor or conspires to commit murder, the applicable limitations period is three years. (See *Davis v. Superior Court*, *supra*, 175 Cal.App.2d at pp. 20-22 [holding that three-year limitations period applied to conspiracy to commit a misdemeanor even though a one-year limitations period applied to the underlying misdemeanor itself]; *People v. Diedrich* (1982) 31 Cal.3d 263, 284 [applying three-year statute of limitations to count of conspiracy to commit bribery even though limitations period then in effect for underlying bribery was six years]; *People v. Zamora*, *supra*, 18 Cal.3d at p. 560, fn. 20 ["In the case of murder and other offenses which are excluded from the statute of limitations, the statute for conspiracy purposes, of course, runs from the completion of the substantive offense itself."].)

Challenges to the three-year limitations period for conspiracy have been litigated and appellate courts have declined invitations to depart from it. For example, defendants have argued that a shorter limitations period should apply to some conspiracies and the prosecution has argued that a longer limitations period should apply to others. Courts rejected both arguments and upheld the three-year limitations period. (See *People v. Prevost*, *supra*, 60 Cal.App.4th 1382, 1401; *People v. Milstein* (2012) 211 Cal.App.4th 1158, 1168.)

In *People v. Prevost*, *supra*, 60 Cal.App.4th at pp. 1400-1401, the defendants argued that the one-year misdemeanor limitations period should apply to a conspiracy to violate Penal Code section 593d (a misdemeanor). Their precise argument was that Penal Code section 182, subdivision (a) provides that conspiracy is punished the same as the underlying offense (which

was a misdemeanor in their case), and Penal Code section 801 provides the limitations period applicable to misdemeanors is one year. (*Id.* at pp. 1400-1402.) The Court of Appeal rejected the argument and held a three-year limitations period applied. (*Id.* at p. 1402.) The court reasoned that section 182 states that conspiracies are punished the same as the underlying offense but it is silent on the issue of which statute of limitations should apply. According to the court, "[l]egislative silence in view of the case law such as *Davis*, *Crosby* and *Zamora*, is instructive. It informs us that there is no reason to depart from the legal precedent which provides that criminal conspiracy has a three-year statute of limitations, irrespective of the underlying offense." (*Ibid.*)

While the three-year limitations period for conspiracy was longer than the limitations period for the underlying offense at issue in *Prevost*, the appellate court noted that this is not always the case. (*People v. Prevost*, *supra*, 60 Cal.App.4th at p. 1401.) The court used conspiracy to commit murder as an example of how the three-year limitations period for conspiracy could be much shorter than the limitations period (or lack thereof) for the underlying crime (murder). (*Ibid.* ["For example, if charged with conspiracy to commit certain offenses like murder, where the underlying offense is not governed by a statute of limitations, the three-year statute of limitations for conspiracy would govern."].)

In *People v. Milstein*, *supra*, the prosecution argued that the trial court had properly applied a four-year limitations period to conspiracy to commit fraud. (211 Cal.App.4th at p. 1163.) The argument was based on Penal Code section 801.5, which sets a four-year limitations period for offenses that have fraud as an element. (*Ibid.*) The Court of Appeal reversed. (*Id.* at pp. 1163-1164.) It reasoned that the Legislature is aware that courts have held a three-year limitations period applies to all criminal conspiracies, regardless of the underlying offense, and yet has "made no attempt to include conspiracy to commit any crime among the offenses subject to a four-year limitations

period." (*Id.* at pp. 1167-1168.) The Court of Appeal discussed *Prevost* at length including its hypothetical of how conspiracy to commit murder, like all conspiracies, is subject to a three-year limitations period. (*Id.* at p. 1167.)

Counsel for Ms. Dalton is aware of only one published decision where a court has said that a three-year limitations period is inapplicable to conspiracy. The court's analysis consisted of a single conclusory sentence in a footnote: "Because there is no statute of limitations applicable to the crime of conspiracy to commit murder in California (§§ 799, 805, subd. (a), 182, subd. (a)), Sconce cannot assert the statute of limitations in this instance." (*People v. Sconce* (1991) 228 Cal.App.3d 693, 701, fn. 3.) The issue before the court did not concern the statute of limitations; it was whether the trial court erred by setting aside the information charging Sconce with conspiracy because he had withdrawn from it.

In *Sconce*, the court did not provide any analysis to support its conclusion that there is no limitations period applicable to conspiracy to commit murder. However, it appears from the court's citation to Penal Code sections 799, 805, subdivision (a), and 182, subdivision (a), that the court reasoned that there is no statute of limitations for murder, the punishment for conspiracy is the same as for the underlying offense, and thus, there is no statute of limitations for conspiracy to commit murder. This argument is nearly identical to the ones made, and rejected, in *Prevost* and *Milstein.*

Prevost and *Milstein* explain why the argument is flawed. Courts have historically applied a three-year limitations period to all conspiracies regardless of the underlying offense or the punishment for that offense. (See *People v. Prevost*, *supra*, 60 Cal.App.4th at pp. 1401-1402 [discussing the history of the rule]; *People v. Milstein*, *supra*, 211 Cal.App.4th at p. 1165-1167 [same].) Despite these cases, the Legislature has remained silent on the issue and has not amended the provisions governing limitations periods to make conspiracy expressly subject to a longer limitations period. The limitations provisions

simply do not mention conspiracy. This was true of the misdemeanor limitations provision at issue in *Prevost*, it was true of the fraud limitations provision at issue in *Milstein*, and it is also true of Penal Code section 799.

2. Any Latent Ambiguity Arising from the Statutory Scheme Should Be Resolved by Consideration of the Legislature's Intent to Retain the Three Year Limitations Period for All Criminal Conspiracies

Assuming, arguendo, that *Sconce*'s interpretation (*People v. Sconce, supra*, 228 Cal.App.3d at p. 701, fn. 3), is plausible, and that the split of authority reflects a latent ambiguity concerning the applicable limitations period, extrinsic sources reflect that the intent of the Legislature is for a three-year limitations period to govern all criminal conspiracies.

A "latent ambiguity is said to exist where the [statutory] language employed is clear and intelligible and suggests but a single meaning, but some extrinsic evidence creates a necessity for interpretation or a choice among two or more possible meanings." (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495, fn. 18.) When there is a latent ambiguity in a statute, the court may resort to extrinsic sources to ascertain the intent of the Legislature. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495-1496.)

Law Revision Commission comments are considered a reliable extrinsic source. (*People v. Williams* (1976) 16 Cal.3d 663, 667-668 ["The official comments of the California Law Revision Commission . . . are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it."]; *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 623 ["Explanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law."].) The comments to Penal Code section 799 in the Law Revision Commission's 1984 recommendation relating to statutes of

limitations for felonies provide a strong indication that the scope of section 799 was never intended to cover conspiracy to commit murder.[15]

In 1981, the Legislature directed the Law Revision Commission to study the statute of limitations applicable to felonies and submit findings and recommendations. (Stats. 1981, ch. 909, § 3.) At that time, section 799 stated that prosecutions could be commenced at any time for murder, embezzlement of public money, kidnapping for ransom, or the falsification of public records. The listed offenses clearly exclude conspiracy to commit murder. In 1984, the Law Revision Commission recommended that section 799 be amended to state that prosecutions could be commenced at any time for offenses punishable by death or life in prison (with or without the possibility for parole). (Recommendation Relating to Statues of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep. 301, 317-318.) The Legislature adopted that recommendation, with minor revision.[16] (Stats. 1984, ch. 1270, § 2.)

As discussed above, *Sconce* appears to have interpreted the post-amendment language as eliminating the three-year limitations period for conspiracy to commit murder because section 182 makes conspiracy to commit murder punishable by death or life in prison. (*People v. Sconce, supra,* 228 Cal.App.3d at p. 701, fn. 3.) It was wrong to do so. *Sconce*'s interpretation is inconsistent with the Law Revision Commission's comment to section 799. The comment listed all the offenses whose limitations periods would be altered

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15. Ms. Dalton is filing, together with this brief, a motion for judicial notice of the Law Revision Commission Recommendation discussed above, and all other legislative materials discussed in the text in this section of the brief.

16. The Legislature's only alteration to the Law Revision Commission's recommendation was to keep embezzlement of public money in section 799 even though it is not punishable by death or life in prison. (See Stats. 1984, ch. 1270, § 2.)

by the amendment: treason, procuring execution by perjury, train wrecking, assault with a deadly weapon by a life term prisoner, bombing resulting in death or bodily injury, and making defective war materials that cause death. (Recommendation, *supra*, 17 Cal. Law Revision Com. Rep. at pp. 318-319.) Conspiracy to commit murder is not among them. (See *ibid.*)

The Law Revision Commission also proposed amendments to sections 800 through 806, which are not relevant to this case. (Recommendation, *supra*, 17 Cal. Law Revision Com. Rep. at pp. 319-324.) To summarize the effect of all its proposals, the Law Revision Commission included an appendix titled "Changes Made by Recommendation" listing every affected offense, which expressly stated: "the existing limitations periods would be *unchanged* for all felonies and misdemeanors except as indicated below." (*Id.* at p. 325, original italics.) Conspiracy to commit murder is not listed in the appendix; nor is conspiracy to commit any other offense. (See *ibid.*)

The Law Revision Commission's comments are buttressed by the legislative history of Senate Bill No. 951 (2013-2014 Reg. Sess.). That history reflects that 1) the Legislature understood *People v. Milstein, supra*, 211 Cal.App.4th at p. 1163, to reflect existing law, *i.e.*, that all criminal conspiracies are subject to a three-year limitations period regardless of the underlying offense, and 2) that for financial reasons, the Legislature did not want to *extend* the statute of limitations for conspiracy.

In the 2013-2014 legislative session, Senate Bill No. 951 was introduced to add section 801.7 to the Penal Code, to provide: "Prosecution for conspiracy to commit a crime pursuant to Section 182 shall be commenced within the time required for the commencement of prosecution for the underlying crime." (Sen. Bill No. 951 (2013-2014 Reg. Sess.) § 1, as introduced Feb. 6, 2014 < http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_ 0951-1000/sb_951_bill_ 20140206_introduced.pdf > [as of Feb. 14, 2018].) As amended, the bill stated: "It is the intent of the Legislature in enacting this

act to abrogate *People v. Milstein* (2012) 211 Cal.App.4th 1158 to the extent that it holds that prosecution for the crime of conspiracy to commit a felony must commence within three years . . . ." (Sen. Bill No. 951 (2013-2014 Reg. Sess.) § 1 < http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0951-1000/sb_951_bill_ 20140328_amended_sen_v97.pdf > [as of Feb. 14, 2018].)

In its analysis of the bill, the Senate Committee on Public Safety noted that "existing law" sets the statute of limitations for conspiracy at three years. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 951 (2013-2014 Reg. Sess.) as amended Mar. 28, 2014, pp. 9-10 < http://www.leginfo.ca.gov/pub /13-14/bill/sen/sb_0951-1000/sb_951_cfa_20140421_113259_sen_comm.html > [as of Feb. 14, 2018].) The committee noted that *Milstein* reflects existing law and that the proposed bill would "change the law on which that case was based." (*Id.* at p. 10.)

Senate Bill No. 951 did not become law because the Senate Appropriations Committee was concerned about the costs, potentially in the millions of dollars that might result from altering existing law to extend the statute of limitations for conspiracy. (Sen. Appropriations Com., Fiscal Analysis of Sen. Bill No. 951 (2013-2014 Reg. Sess.) as amended Mar. 28, 2014, p. 1 < http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0951-1000/sb_951_cfa_20140505_120825_sen_comm.html > [as of Feb. 14, 2018].) The committee analysis specifically used conspiracy to commit murder as an example: "prosecutions for conspiracy to commit murder, for which the three-year window may have passed years ago, could now be reopened for prosecution, as there is no statute of limitations for crimes punishable by death or life without the possibility of parole." (*Id.* at p. 2.) The committee chair recommended referring the bill to the suspense file and the committee ultimately voted to do so. No further action was taken on the bill.

The legislative history of a failed bill normally offers only limited insight into the Legislature's original intent in enacting a related statute.

(*Martin v. Szeto* (2004) 32 Cal.4th 445, 451.) However, in this case, the bill analyses concerning the proposed enactment of section 801.7 makes it very clear that the Legislature, in enacting section 799, did not intend that conspiracy to commit murder would be subject to its provisions.

C. Conclusion

Courts have repeatedly held that all criminal conspiracies are subject to a three-year limitations period regardless of the underlying offense and the Legislature, aware of those holdings, has declined to amend the relevant statutes. While one court, *Sconce*, has taken the position that conspiracy to commit murder falls under Penal Code section 799 and therefore may be prosecuted at any time, the history of Senate Bill No. 951 and the Law Revision Commission comment to section 799 refute that construction. Moreover, to the extent there is any lingering ambiguity, this Court should construe a statute of limitations in favor of the accused. (*People v. Zamora*, *supra*, 18 Cal.3d at p. 574 ["Our action has been mandated by adherence to the rule that statutes of limitation are to be strictly construed in favor of the accused."]; *United States v. Marion*, *supra*, 404 U.S. at p. 322, fn. 14 [criminal statutes of limitations "are to be liberally interpreted in favor of repose"].)

Accordingly, this Court should reaffirm that the limitations period for a conspiracy is separate from the limitations period for the underlying offense, and make clear that conspiracy to commit murder is subject to a three-year limitations period. Since Ms. Dalton was not prosecuted for that offense for over four years (1CT 48-52, 5CT 999-1004), her conviction was time-barred and should be reversed.

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XXII.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MS. DALTON'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In Argument XV of her opening brief, Ms. Dalton identified numerous aspects of the application of California's capital sentencing scheme that facially and as-applied violate the requirements of the United States Constitution. (AOB at pp. 350-369.) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 624] [hereafter "*Hurst*"].) *Hurst* provides new support to Ms. Dalton's claims in Arguments XV.D and XV.E of her opening brief. (AOB at pp. 354-364.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

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A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, Must Be Found by a Jury Beyond a Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the

sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst, supra,* 136 S.Ct. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst, supra,* 136 S.Ct. at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (Ibid.)[17]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "*Ring*'s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring, supra,* 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring, supra,* 536 U.S. at p. 588; *Hurst, supra,* 136 S.Ct. at p. 624.)

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17. The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele,* [(Fla. 2005)] 921 So.2d [538,] 546.

(*Hurst, supra,* 136 S.Ct. at p. 622.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst, supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst, supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[18] The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

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18. See *id*. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id*. at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id*. at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

B. California's Death Penalty Statute Violates Hurst by Not Requiring That the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating

circumstances to outweigh aggravating circumstances" (*Hurst, supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[19]

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst, supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi, supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination

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19. As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst, supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the Ring inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree

murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[20]

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id*. at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id*. at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some

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20. Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

confusion as to the jury's role" (*id*. at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, 40 Cal.3d at p. 541, [hereafter "*Brown*"], footnotes omitted.)[21]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion

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21. In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown's* gloss on the sentencing instruction.

in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id*., subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown's* interpretation of section 190.3.[22] The requirement that the jury must find that the aggravating

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22. CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of

Footnote continued on next page

circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

> an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

D. This Court Should Reconsider its Prior Rulings That the Weighing Determination Is Not a Factfinding under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Ms. Dalton asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable

doubt under the due process clause].)[23] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable- doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 [hereafter "*Rauf*"] supports Ms. Dalton's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf, supra*, 145 A.3d at pp. 433-434 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at p. 456 (conc. opn. of Strine, C.J.).) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[24] (*Id.* at pp. 433-434 (*per curiam*

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23. The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

24. In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf, supra*, at pp. 433-434 (*per curiam* opn.) [addressing Questions 1-2]; *id.* at p. 484 (conc. opn. of Holland, J.) [same]; and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id*. at p. 434 (*per curiam* opn.) [addressing Question 3]; *id.* at pp. 485-487 (conc. opn. of Holland, J.) [same]).

opn.).) One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Ibid.*; see id. at pp. 485-487 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Rauf*, *supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.), quotation and fns. omitted.)

The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the

mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt. As Ms. Dalton's jury was not required to make this finding, Ms. Dalton's death sentence must be reversed.

CONCLUSION

For all the reasons argued above, and those stated in appellant's opening and reply briefs, the judgment against appellant must be reversed.

DATED: March 15, 2018

Respectfully submitted,

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State Public Defender

/s/
JOLIE LIPSIG
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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I am the Supervising Deputy State Public Defender assigned to represent appellant, KERRY LYN DALTON in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 22,932 words in length.

DATED: March 15, 2018

/s/
JOLIE LIPSIG

DECLARATION OF SERVICE

Case Name: ***People v. Kerry Lyn Dalton***

Case Number: **Supreme Court Case No. S046848**

San Diego County Superior Court No. 135002

I, **Marsha Gomez**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **March 15, 2018**, as follows:

Kerry Lyn Dalton, W-42583 504-C1-138L Central California Women's Facility Post Office Box 1508 Chowchilla, CA 93610	San Diego County Superior Court The Honorable Michael D. Wellington, Judge Attn: Criminal Appeals Division 220 W. Broadway San Diego, CA 92101

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **March 15, 2018**, at Sacramento, CA.

/s/

MARSHA GOMEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. DALTON (KERRY LYN)**
Case Number: **S046848**
Lower Court Case Number:

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Date

/s/Jolie Lipsig

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Lipsig, Jolie (104644)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm