SUPREME COURT OF CALIFORNIA
Electronically RECEIVED on 4/27/2018 at 9:17:10 AM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/27/2018 by April Boelk, Deputy Clerk

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 REPLY BRIEF

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INTRODUCTION

As shown in Ms. Dalton's Opening Brief (AOB) and Supplemental Appellant's Opening Brief (SAOB), her trial was rife with errors that violated state and federal law. Despite the absence of substantial evidence that the victim, Irene "Melanie" May (May) was dead, the absence of any forensic evidence that could be affirmatively linked to her death, and the unreliable and questionable testimony of the individuals who purported to have knowledge about the crime, respondent contends in its Respondent's Brief (RB) and Respondent's Supplemental Brief (SRB) that there were no errors, and if there were, these errors were not prejudicial because of the strength of the prosecutor's case.

Although the prosecutor convinced the jury to convict Ms. Dalton of first-degree murder with special circumstances and conspiracy to murder, as set

forth in Argument XX,[1] he managed to do so only by minimizing his burden of proof, misstating the law, misleading the jury about the deliberative process, and glossing over the insufficiency of the evidence to prove the elements of the charges. In its SRB, respondent similarly ignores the significant gaps in the prosecution case and, in a number of instances, misstates the evidence, in its attempt to show any errors were harmless.

Respondent's arguments do not demonstrate the validity of Ms. Dalton's convictions, the special circumstances, or her death sentence and for the reasons stated below and in the prior appellate briefing, they should be rejected.

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[1] Although respondent has numbered the arguments in its supplemental brief beginning with "I," to avoid confusion, and as she did in her SAOB, Ms. Dalton continues to number her arguments sequentially beginning with "XVIII" to follow those raised in her AOB.

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

May's body was never found, and thus evidence that she actually was dead was crucial to the prosecution's case. A major source of that evidence was Nina Tucker, the CPS worker who took May's children from May's care shortly before her disappearance. Over defense objection, the trial court permitted Tucker to relate statements May allegedly made to her before disappearing as the basis for Tucker's "lay opinion" that May wanted to stay with her children. (35RT 3365-3371.) The prosecutor, in turn, relied on Tucker's testimony as evidence May was dead. (See 39RT 3765 [arguing to the jury that 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."].)

In her supplemental opening brief, Ms. Dalton challenged the admissibility of Tucker's lay opinion and the propriety of allowing her to relate hearsay to the jury as the basis for her lay opinion. Regarding Tucker's lay opinion, Ms. Dalton argued that the basis of Tucker's lay opinion was hearsay for which there was no applicable exception, that lay opinion may not be based on hearsay, and that her opinion testimony was not admissible to show May's state of mind. For these reasons, the trial court abused its discretion in allowing Tucker's opinion testimony. Its introduction violated the Confrontation Clause and Ms. Dalton's right to due process, a fair trial, and a reliable adjudication of her guilt. (SAOB, pp. 17-32.) Respondent disagrees, but its disagreement flows from a misapplication of the law and facts. This Court should reject respondent's arguments and reverse Ms. Dalton's convictions.

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

1. A Lay Opinion May Not Be Based on Hearsay

Respondent fails to address appellant's argument that, as a matter of law, lay opinion may not be based on hearsay. (See SAOB, pp. 22-23; SRB, pp. 12-13.) Instead, respondent asserts that Tucker's opinion was not based on May's out-of-court statements, but on her personal observations of May, and thus May's statements were not being relayed to the jury for their truth, but for the non-hearsay purpose of "support[ing] [Tucker's] lay opinion about whether May would abandon her children." (SRB, p. 12.) Respondent not only is wrong about the law, but significantly mischaracterizes the record.

Although Tucker based her opinion that May loved her children on her observations (35RT 3370), her opinion that May would try to stay with her children was entirely based on hearsay. When stating that opinion, Tucker testified: "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.) Respondent entirely omits that portion of Tucker's testimony from its discussion. Further, the trial court's sole rationale for allowing Tucker to relate May's out-of-court statements was that they provided the basis for Tucker's opinion. (35RT 3366.)

Respondent also erroneously claims that Tucker opined, based on her observations, that May would not abandon her children. (SRB, p. 13 ["When asked if 'based on her *observations*' she believed that May would abandon her children, Tucker replied 'no.' (35RT 3370, emphasis added.)"].) The record, however, shows that Tucker was asked if May gave "any indication *whether or not* she would abandon her children," and it was that question to which she responded "no," (35RT 3370, italics added), i.e. she did not observe anything that would indicate May's intentions, one way or the other. (35RT 3365-3366.)

Thus, the record belies respondent's suggestion that Tucker's opinion that May wanted to stay with her children was based on observation, and not on May's statements to her. Because Tucker's opinion was based on May's out-of-court statements, and not on personal observation, her opinion was not properly admitted.

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

Respondent also argues that May's statement to Tucker (which it never quotes or summarizes) was not being offered for its truth but for the non-hearsay purpose of "support[ing] [Tucker's] lay opinion about whether May would abandon her children." (SRB, p. 12.) Respondent is wrong. This Court rejected a nearly identical argument concerning hearsay basis testimony in *People v. Sanchez* (2016) 63 Cal.4th 665. *Sanchez* reasoned that basis testimony is necessarily admitted for its truth because if admitted for another purpose it would be irrelevant. (*Sanchez*, *supra*, at p. 683.) Respondent claims *Sanchez* is distinguishable because it involved expert opinion, not lay opinion. (SRB, p. 13.) According to respondent, *Sanchez* should not apply to basis testimony for a lay opinion because, unlike expert opinion, a lay opinion must be based on the witness's personal observations. (SRB, p. 14.) While true, that distinction is irrelevant.

It is not clear why respondent believes that the requirement that a lay opinion be based on personal observation would allow a lay witness to relate hearsay to a jury while an expert, who can also base an opinion on personal observation (as well as hearsay), may not. The issue is whether May's out-of-court statements to Tucker were admitted during Ms. Dalton's trial for their truth. Personal observation does not transform a statement into non-hearsay. Respondent's attempt to distinguish *Sanchez* should be rejected.

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

Under *Sanchez*, a witness cannot relate the hearsay basis for his or her opinion to the jury unless the hearsay falls within an exception. (See *People v. Sanchez, supra*, 63 Cal.4th at p. 684.) Respondent claims that May's statements to Tucker fall within the state-of-mind exception. (See SRB, pp. 14-15.) However, that exception is inapplicable.

In the SAOB, appellant argued that Tucker's opinion testimony ran afoul of the rule that "[a] lay witness generally may not give an opinion about another person's state of mind, but may testify about objective behavior and describe behavior as being consistent with a state of mind." (SAOB, p. 25.) Respondent acknowledges the rule (SRB, p. 12), but does not meaningfully discuss its application to the present case. Respondent claims that Tucker's opinion was based on her observations of May and not on May's statements to her. That is not only incorrect, as discussed above, but it is also non-responsive to the issue of whether Tucker was improperly allowed to offer a lay opinion on May's state of mind. Tucker opined that May loved her children and wanted them back, not that May's behavior was consistent with someone who had that state of mind. Regardless of what Tucker based her opinion on, her opinion was improper. Respondent does not address this point.

With respect to the issue concerning the applicability of the state-of-mind exception to Tucker's basis testimony, respondent concedes that the prosecution did not assert that theory of admissibility below. (SRB, p. 14.) Respondent claims there was no obligation to do so: "it has long been the law that a correct decision made by a court for the wrong reason will not be disturbed on appeal. (*People v. Vera* (1997) 15 Cal.4th 269.)" (SRB, p. 14.) However, "[t]hat principle does not apply . . . when the new theory was not supported by the record made at the first hearing and would have necessitated

the taking of considerably more evidence, [or when] the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition." (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

In the present case, the defense did not have notice that May's statements were being admitted under the state-of-mind exception. (See 35RT 3365 [reflecting that the prosecutor offered May's statements to Tucker as "circumstantial evidence of May's intent" and the trial court admitted them as basis testimony for Tucker's lay opinion].) Without notice, the defense was denied the opportunity to show that the statements were untrustworthy. (See Evid. Code, § 1252 [establishing that a statement must be trustworthy to be admissible pursuant to a number of hearsay exceptions, including the state-of-mind exception].) Accordingly, this Court should not consider the state-of-mind exception as new theory of admissibility on appeal.

As the record stands, however, there is plenty of evidence that the statements are untrustworthy and thus not admissible under Evidence Code section 1250. (SAOB, p. 26.) Respondent acknowledges the rule but disputes the untrustworthiness of May's statements. (SRB, p. 15.) However, respondent's analysis on this point is conclusory: "May's statement that she loved and wanted to be with her children was not inherently untrustworthy." (SRB, p. 15.)

Respondent does not meaningfully address appellant's arguments; instead, respondent mischaracterizes them. Respondent states "Dalton argues May's statement was untrustworthy because she was a drug addict and lost her children because of her addiction . . . but she fails to explain how that fact would render May's statement to Tucker untrustworthy." (SRB, p. 15.) In fact, appellant provided a number of explanations: 1) May had a motive to lie to Tucker to avoid criminal charges for drug use and child neglect (the reasons Tucker removed May's children from her care two weeks before); 2) May had a motive to lie to get her children back so she would resume receiving monthly

$800 AFDC checks; and 3) May continued using methamphetamine up until the date she disappeared despite her regular drug tests, which, if positive, would prevent her from getting her children back . (SAOB, p. 26 [discussing these explanations in more detail].)

B. 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

Respondent claims May's statements to Tucker did not violate the Confrontation Clause because they were not admitted for their truth and were not testimonial. (SRB, p. 17.) Respondent is incorrect. As discussed above, the trial court admitted May's out-of-court statements to Tucker as the basis for Tucker's lay opinion that May would not abandon her children. Basis testimony is necessarily admitted for its truth. (See *People v. Sanchez, supra*, 63 Cal.4th at p. 683.)

Respondent and Ms. Dalton agree 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." However, respondent argues that May's statements to Tucker do not meet that test because "Tucker was not law enforcement personnel and was not soliciting statements for potential prosecution; rather, she wanted to ascertain the best lifestyle for May's children, advocate for a suitable family environment for the May children, and encourage May to stay on track on her path to a healthier life with her children." (SRB, p. 17.) Respondent ignores that Tucker was a CPS worker who had removed May's children from her custody, filed a petition in the juvenile court against May and her husband that resulted in drug testing and other orders, and that Tucker's duties included "see[ing] that the family complied with the orders of the court . . . ." (35 RT 3362, 3363, 3373, 3376.)

Respondent also ignores appellant's argument that statements made for the purpose of proving events potentially relevant to a later non-criminal judicial proceeding (i.e., dependency proceedings), but which are ultimately used in a criminal proceeding, should be governed by the Confrontation Clause. (See SAOB, p. 28; SRB, 17.)

Finally, respondent failed to address appellant's argument that the introduction of the hearsay statements violated her rights to due process, a fair trial, and a reliable adjudication of her guilt under the state and federal constitutions. (See SAOB, pp. 28-29; SRB, p. 17.) This Court may interpret respondent's failure to address appellant's arguments as concessions. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

C. 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

Respondent argues that Ms. Dalton was not prejudiced by the admission of Tucker's basis testimony and opinions under any standard of review. Respondent is mistaken. Respondent argues that there was no prejudice from the admission of May's hearsay statements because the statements were not the basis of Tucker's opinion. Ms. Dalton has refuted that point above. Ignoring that Tucker's opinions as to May's state of mind were not admissible regardless of whether they were based on statements or personal observation, respondent argues that the statements added little to Tucker's observations, and thus there was no reasonable probability the statements "altered the weight given to Tucker's lay opinion." (SRB, p. 18.)

Even if Tucker's observations were properly admitted, the prosecutor apparently felt May's out-of-court statements added weight and dramatic force to his argument: He told the jury that May "had expressed to [Tucker] 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.)

Respondent also points to other evidence it claims established that May was dead, but overlooks that much of that evidence was discredited or does not prove May's death. The testimony of Joanne Fedor that her trailer was in disarray when she returned on the day of the crime proves only that her trailer was in disarray. Further, she was unable to show law enforcement the alleged burned wiring, extension cords, a bloody screwdriver, a bloody folding pocketknife, a bloody pillow and a bloody bar of soap (30RT 2600-2601, 2604-2606) just a few hours after she supposedly saw them (31RT 2747, 2766-2767 2752, 2769). Sheryl Baker, the only eye witness to the alleged murder did not say any of those items were used on May (see, e.g., 33RT 3313; 3176, 3177, 7CT 1439), and the weapons Baker did say were used (see e.g., 7CT 1434, 1439; 33RT 3128) were not mentioned by Fedor, nor ever located.

None of the other witnesses actually described that Fedor's trailer was "covered" in blood. (See, e.g., 30RT 2671-2672, 30RT 2673, 31RT 2871, 2881.) Gary Dorsett, a lab technician who did tests for presumptive blood in the trailer in 1991, after two other searches by the Sheriff's Department and criminalists failed to reveal any blood, described minute pin pricks of presumptive blood that could not be linked to the crime in any way. (32RT 2938-2943.)

Donald McNeely's testimony as to Mark Tompkins' (also known as TK) alleged admissions was highly suspect and subject to significant impeachment. (See AOB, pp. 51-55.) Finally, regardless of what she told Sherri Fisher, or testified to, Sheryl Baker admittedly was high on methamphetamine, and by the time of trial she was not even sure she witnessed a murder. (33RT 3171.)

For all these reasons, as well as those presented in the supplemental opening brief, the admission of Tucker's opinion testimony and May's statements rendered the outcome of Ms. Dalton's trial both unfair and unreliable and was not harmless under either *Chapman v. California* (1967)

386 U.S. 18, or *People v. Watson* (1956) 46 Cal.2d 818. This Court should reverse Ms. Dalton's convictions and death sentence.

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

In her AOB and SAOB, Ms. Dalton demonstrated that the evidence was insufficient to establish the elements of the lying-in-wait special circumstance. (AOB, pp. 145-157; SAOB, pp. 33-40.) Respondent has not only misrepresented the record, but also asks this Court to draw wholly speculative and unreasonable inferences from the evidence. Respondent has not established that a reasonable trier of fact could have found the elements of the special circumstance beyond a reasonable doubt.

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

Respondent contends the evidence was sufficient to show there was a period of watching and waiting, as required to find the special circumstance true. Respondent claims Ms. Dalton committed a "classic lying-in-wait special-circumstance murder" such as was found to be the case in *People v. Johnson* (2016) 62 Cal.4th 600, 631, and *People v. Bonilla* (2007) 41 Cal.4th 313. Respondent's reliance on these cases is unpersuasive. First, in neither of these cases did this Court address the waiting and watching element of the special circumstance. Second, the facts of Ms. Dalton's case are completely different than those of *Johnson* and *Bonilla.*

In *Johnson*, as this Court expressly observed, "defendant does not contest the sufficiency . . . of the evidence of watching and waiting for an opportune time to act" (*People v. Johnson, supra*, 62 Cal.4th at p. 631), and this Court accordingly did not discuss the evidence on that element. In *Bonilla*, the only issue before this Court was whether the evidence had to show that the defendant, who was an aider and abettor, personally engaged in a period of

waiting and watching, after he had conceded that the actual killer committed the crime while lying in wait. (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 331-332.)

Moreover, this case does not mirror the facts in either *Bonilla* or *Johnson*, and there is no evidence to suggest it was a "classic" case of lying wait. In both *Bonilla* and *Johnson*, the defendants lured their victims to a secluded place under false pretenses, where the victims were taken by surprise and murdered. In *Bonilla*, the defendant drove the victim to a vacant office park on the pretext of meeting with a real estate agent (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 322); in *Johnson*, the defendant drove with the victim and led him to a secluded alley way on the pretext of buying drugs (*People v. Johnson*, *supra*, 62 Cal.4th at p. 631).

Respondent asserts that here Ms. Dalton "led the victim" to a secluded place and waited for an opportune time to strike. (SRB, p. 22.) Respondent ignores, however, that the trial court expressly found there was insufficient evidence May was lured to Joanne Fedor's trailer in order to kill her (48RT 4630), and indeed there was no evidence to support that point.

Respondent cites the evidence that May followed Tompkins' truck (in which Ms. Dalton was a passenger) to Fedor's trailer and that the trailer was in a remote place. (*Ibid.*) Respondent overlooks that Fedor's trailer was only a few feet from other trailers in the park (see Exhibits 3A-3E & 4), that a maintenance man and his wife lived next to Fedor, and that the owners of the trailer park lived next door to the maintenance man. (30 RT 2626.) There were numerous trailers on her street and on the side street, homes just up the road and, near the entrance of the trailer park, a restaurant, store, gas station and a

number of A-frame motel rooms. (30 RT 2628-2629.) Thus, Fedor's trailer cannot reasonably be described as "secluded."[2]

Respondent also cites the evidence that May and the others stayed up all night using drugs. (SRB, p. 22.) That fact does not have any relevance to the element of watchful waiting.

According to respondent, in the morning, "Dalton refused to let the paramedics into the trailer to help May," and "she told TK to tell the paramedics the call was for him and that he was okay now. (30RT 2590.)" (SRB, p. 22.) This "evidence" respondent argues, "supported the theory that Dalton didn't want anyone to know May was there or to remove her from the trailer." (*Ibid.*) The cited transcript, however, directly refutes respondent's assertion. Fedor testified that it was Mark Tompkins, not Ms. Dalton, who refused to let the paramedics in and that it was Tompkins' idea to do so. (30RT 2590.)

Respondent next claims that "Dalton specifically told TK to take Baker with him away from the trailer," citing Baker's testimony at 33RT 3120. (SRB, p. 22.) No one testified that Ms. Dalton instructed Tompkins to take Baker with him. Fedor testified that *she* was the one who wanted Baker to go with Tompkins because Baker had stolen something from her (30RT 2593), while Baker testified she went with the others because Baker had made Ms. Dalton mad and was getting on her nerves. (33RT 3120). Baker explained this in greater detail in one of her prior statements, which also was presented to the jury. There, Baker made clear that she didn't want to stay at the trailer, and that she had engineered her own departure. In fact, Baker stated that Ms. Dalton

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[2] Fedor testified she told May that if she was afraid, May could just "'go outside because there is mobile homes on both sides, scream,'" and "'if you go right over the pasture, right there, you can get on the freeway. That is where the freeway is at.'" (30RT 2586.)

told her she could "either stay or go" but that she "wasn't going to sit up in the boondocks with no dope." (7CT 1423.)

Respondent also relies on the fact that Tompkins told Fedor not to go back in the trailer to support an inference that "Dalton then waited for Fedor and the others to leave before attacking May." (SRB, p. 22.) The prosecutor did not argue, nor was the jury asked, however, to find that Tompkins was lying in wait (see 39RT 3793-3794). Tompkins left the trailer along with Fedor, and, although Baker observed that May was tied up when she returned to the trailer with Tompkins, there is no evidence other than speculation that Ms. Dalton launched a *surprise* attack on May in their absence.

Respondent argues this case is distinguishable from *People v. Nelson* (2016) 1 Cal.5th 513, 551. (SRB, p. 23) There, this Court found there was no evidence that the defendant waited and watched before the murder because it was unknown whether the defendant arrived at the scene and waited for the victims to show up, or whether they were already there and he immediately attacked them once he arrived. That Tompkins told Fedor not to go back into the trailer, and that when Baker returned she saw someone under a sheet tied to a chair, does not, as respondent insists, provide any evidence that Ms. Dalton waited "for hours" for an opportune time to attack. (*Ibid.)* Nor does the evidence that Ms. Dalton spent the night doing drugs with May, Tompkins, Baker, and George establish that she did so because she was waiting for "an opportune time to ambush [May]." (SRB, pp. 23-24.) In light of the absence of any evidence as to when the intent to kill was formed, when May was tied up, or that she ever was "ambushed," any inference that Ms. Dalton spent time watching and waiting for an opportune time to act should be rejected.

Respondent's attempt to distinguish this case from *People v. Becerrada* (2017) 2 Cal.5th 1009, is equally unavailing. (SRB, p. 24.) Respondent argues that even if, as in *Becerrada*, there was no evidence that Ms. Dalton lured the victim to the location where she allegedly was killed, Ms. Dalton engaged in

watchful waiting after they arrived. (*Ibid*.) Respondent points to evidence Ms. Dalton treated May badly over a period of hours, that "she planned to kill May after her friends left because she did not want the paramedics to know May was present at the trailer (30RT 2590), and TK warned Fedor not to return to the trailer after Dalton and May were left alone together." (SRB, p. 24.) As discussed above, and in the supplemental opening brief at pages 36-37, the cited evidence does not logically suggest the inferences respondent draws from it, and is insufficient to show that Ms. Dalton engaged in a period of watching and waiting in order to surprise May.

B. The Evidence Was Insufficient to Establish that Ms. Dalton Launched a Surprise Attack Against an Unsuspecting Victim

Respondent erroneously relies on *People v. Streeter* (2012) 54 Cal.4th 205, 249, to argue that the evidence showed May was killed while Ms. Dalton was lying in wait. (SRB, p. 25.) Specifically, respondent represents that, pursuant to *Streeter*, a surprise attack occurs once the defendant launches a continuous assault resulting in the victim's death, and that "[t]here is no 'cognizable interruption' between the period of watching and waiting as long as the attack commences a continuous assault" resulting in death, even where discrete events occur between the surprise attack and the fatal act. (*Ibid*.) Respondent misreads *Streeter*.

In *Streeter*, this Court addressed the requirement that the murder occur "while" lying in wait. There, as in this case, the jury was instructed: "If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved." (*People v. Streeter*, *supra*, 54 Cal.4th at p. 248; 39RT 3896.) On the facts of that case, this Court rejected the claim that the defendant's acts after he launched the assault constituted a cognizable interruption *between the period of watchful waiting* and the assault on the victim because there had been a

continuous series of lethal acts once the watching and waiting ended. It found the defendant waited and watched for the victim for approximately 40 minutes. The defendant then began with the preparatory step of taking the victim's young son away, which "was followed immediately" with a series of violent acts leading to the victim's death. (*People v. Streeter*, 54 Cal.4th at pp. 248–249.) This Court did not hold, as respondent states, that if there is a continuous assault once the surprise attack begins then there is no "cognizable interruption" between the attack and the required period of watching and waiting, and thus its reliance on *Streeter* is misplaced.

Although respondent also contends the attack on May began immediately after the period of watchful waiting, when that period began or ended is a matter of pure speculation. (SRB, p. 25.) As discussed above, respondent said the waiting and watching occurred when May was lured to the trailer, or in the alternative, that it occurred prior to the departure of Tompkins, Fedor and Baker for the honor camp. If Ms. Dalton was waiting and watching during either of those time periods, there was an interruption of least several hours before the assault on May began, which was after Baker and Tompkins returned. There is no evidence from which the jury could have inferred what respondent claims.

Ignoring the presence of George, respondent claims that May and Ms. Dalton were "left alone" for no more than a couple of hours, during which time Ms. "Dalton was able to attack May, remove wiring from the walls, use that wiring to tie up May with it, find four or five syringes, then fill those syringes with battery acid." (SRB, p. 25.) However, there was no evidence of the circumstances that led to May being tied up, that the wiring was removed from the walls, or that May was tied with the wire. (See, e.g, 30RT 2607 [Fedor saw that the cord from a hanging lamp had been cut and that wires on the cord were exposed, and she also found some extension cords that were in the shape of a figure eight]); 7CT 1434 [Baker stated that May was tied up with rope, not wire

or electrical cord].) No evidence was presented to show that there was battery acid in either the trailer or in the syringes that Fedor and the others used for injecting methamphetamine during the preceding night or that morning. And there was absolutely no evidence that established, even by reasonable inference, when the supposed period of watchful waiting ended. Only by speculation could a finder of fact determine that the attack commenced immediately after Ms. Dalton ceased to watch and wait.

The same is true of respondent's claim that the jury could infer that the attack, whenever it began, was a surprise. Pointing to the fact that May didn't leave the trailer with the others, and did not ask to go with them, respondent states "it is reasonable to infer" that she would not have stayed behind if she suspected there was a plan to murder her. (SRB, p. 26.) Respondent neglects to mention that, before Fedor left for the honor camp, May told her she was frightened, armed herself with a knife, and asked Fedor how she could get out. (30RT 2585.)

Respondent contends that, unlike the defendants in *People v. Hajek*, (2014) 58 Cal.4th 1144, Ms. Dalton launched a surprise attack immediately following a period of watch and waiting. (SRB, pp. 26-27.) In *Hajek*, this Court found:

> Defendants entered the Wang residence by ruse, displayed a gun, and shortly thereafter bound and blindfolded the frightened victim and isolated her in an upstairs bedroom for several hours before finally killing her. From the moment defendants took Su Hung and Alice hostage, Su Hung could not have perceived their actions as anything other than a serious threat to her safety, even if they untied her for a period of time while she was kept isolated in the bedroom.

(*People v. Hajek, supra*, 58 Cal.4th at p. 1185.) This Court concluded that even assuming there was a period of watchful waiting before the victim was tied up, it was followed by a series of nonlethal events over the course of several hours,

and only after that was the victim killed in an inevitable and unsurprising fashion. (*Ibid.*)

Respondent argues that the nonlethal events in *Hajek* were unrelated to the murder, whereas in this case, they were part of the continuous attack that led to May's death. (SRB, p. 27.) Even if this the Court finds that there was a continuous attack on May that started when Ms. Dalton and Baker injected her with what Baker believed was battery acid, any alleged watchful waiting happened before May was tied up and there was a course of "several hours" during which, as far as the evidence shows, anything could have happened. There is no evidence to support the inference that the attack began immediately after a period of waiting. Instead, the evidence showed that May believed she was in sufficient danger to arm herself with a knife, and at some unknown point thereafter she was tied with rope and a sheet was draped over her. Like the victim in *Hajek*, it is completely unreasonable to believe that, by the time Baker and Tompkins returned to the trailer, May could "have perceived [the defendant's] actions as anything other than a serious threat to her safety." (*People v. Hajek, supra*, 58 Cal.4th at p. 1185.)

Ms. Dalton has shown that the evidence was insufficient to support the lying-in-wait special circumstance. To the extent respondent argues that Ms. Dalton's death sentence should not be reversed because the jury also found the torture-murder special circumstance to be true (SRB, pp. 28-29), that issue was addressed fully in the AOB, at pages 157-187, and the ARB, at pages 48-56. Additionally, the evidence respondent recites in its supplemental brief does not support a finding of sadistic intent. Neither the purported reasons that May was killed, i.e. "because May was a rat and deserved to die" (SRB, p. 29), nor bragging about a killing and burning the dead body, nor wanting to take credit for the murder indicate that Ms. Dalton harbored the requisite sadistic intent at the time of the crime. The evidence was not sufficient to support either of the

special circumstances, they both should be reversed, and Ms. Dalton's death sentence 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

A. Introduction

Ms. Dalton was convicted of first-degree murder with special circumstances after the prosecutor told the jury that the presumption of innocence was already gone (39RT 3854) and that "*all*" he had to do was prove guilt beyond a reasonable doubt (39RT 3856-3857), which he placed *below* four other levels of proof on a thermometer (39RT 3856). He analogized each juror's determination of whether or not their doubt was reasonable to that of someone trying to decide whether to check if he really had turned off the lights before going to bed, as he remembered, or whether simply to dismiss any doubts planted by his spouse as "unreasonable." (39RT 3857-3858.) Admitting his case was built on circumstantial evidence, he told the jury that his interpretation of the evidence should be accepted so long as it was "reasonable." (39RT 3858, 3859.) Left with the erroneous belief that Ms. Dalton was no longer presumed innocent, that the burden of proof was lower than other reachable levels of proof, that it could accept any interpretation of the circumstantial evidence that was reasonable, and that the doubts raised by the defense or the evidence were to be taken no more seriously than those raised by a nagging spouse, the jury likely failed to give proper weight to the multitude of questions and uncertainties that remained when deliberations began. Indeed, by the time all the evidence had been admitted and all the testimony presented, only one thing could be said for certain about the

prosecution's case – there was no solid, consistent or reliable evidence of what had happened to May at Joanne Fedor's trailer.[3]

The difficulty the prosecutor faced in proving his case was apparent from his argument. He had to tell the jury it could disregard as "garbage" the only forensic evidence he had been able to muster (39RT 3858),[4] miniscule drops of unidentifiable mammal blood found at an unsecured and contaminated crime scene 3½ years after May disappeared and after three previous searches had turned up nothing.[5] He had to impeach his own star witness, Sheryl Baker, who admitted she was "flying high" on methamphetamine at the time of the crime (33RT 3186), with her prior inconsistent statements, because by the time of her testimony she no longer believed she had witnessed a murder. (See, e.g., 39RT 3796, 3864-3865.)

He admitted the jury would have a hard time believing his only other percipient witness, Joanne Fedor,[6] also a long time methamphetamine user (see, e.g. RT 2568), who described a blood-soaked crime scene and numerous

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[3] See AOB, Arguments IV and V, challenging the sufficiency of the evidence of guilt and the special circumstances, respectively.

[4] "A great deal of time was spent on the blood evidence . . .but it doesn't mean a lot. . . .There are problems with it. . . . It would have been nice if we had found it earlier . . . . It would have been nice if they could have said it was human rather than animal, but they can't in this case. Let's wipe out the blood. Let's get rid of the blood, assuming the blood is garbage, cross it out." (39RT 3858.)

[5] (See 32RT 2931 et seq., 2938-2940 [testimony of San Diego Police Department Crime Lab evidence technician Dorsett regarding August 12, 1991, search of trailer for blood]; 34RT 3300 et seq. [testimony of supervising criminalist for the San Diego Sheriff's Crime Laboratory Randy Robinson regarding September 15, 1988, search of trailer for blood]; 36RT 3519 et seq. [testimony of San Diego Sheriff's Department criminalist Walter Fung regarding November 16, 1988, search of trailer for blood].)

[6] (See, e.g., 39RT 3767 ["I'm not asking you to accept Joanne Fedor at face value."].)

bloody items (see 30RT 2645, 2752) that had inexplicably disappeared by the time an officer arrived at her trailer just hours later (see, e.g, 31RT 2747, 2766-2767, 2752, 2769). In order to persuade the jury that Fedor's testimony was more credible than that of law enforcement, the prosecutor even had to disparage the efforts of multiple different members of the San Diego Sheriff's Department on separate visits to Fedor's trailer.[7]

The other evidence the prosecutor relied on came through the mouths of unreliable jailhouse informants, Donald McNeely, Pat Collins, and Lori Carlyle. Collins and Carlyle, both methamphetamine users (33RT 3216; 32RT 3059), claimed Ms. Dalton made differing incriminating admissions or threatening statements to them. (See, e.g., 33RT 3210; 32RT 3054-3056.) McNeely provided statements allegedly made to him by Mark Tompkins. Collins received, and McNeely was offered, benefits for their assistance. (See 33RT 3213-3214, 3219, 3221; 35RT 3407.) The prosecutor also relied on the dubious testimony of a methamphetamine dealer and user, Judy Brakewood (see RT 3263-3266), who came forward in 1992 after she supposedly suddenly remembered that sometime in 1988, she had heard Ms. Dalton state that "they" had "fucked up" an unidentified girl at some unknown time. (33RT 3255.)

In short, the prosecutor based his case on a questionable story pieced together from the testimony of unreliable witnesses who could not agree about even the most fundamental facts, such as who was left alone with the victim prior to her disappearance, exactly when or how she died, what weapons were used against her, what happened to her body, and whether she was even dead at all. The significant gaps and conflicts in the evidence should have raised

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[7] (See, e.g., 39RT 3855 [the defense gave you "employees of the Sheriff's Department who did not do a good job, not in all cases, just in this case."]; 39RT 3863 [Deputy Wilson "didn't do a good job, and from that point on, the Sheriff's Department followed suit."].)

legitimate doubts in the mind of any reasonable juror as to what had really happened; yet viewed through the distorting lens of the prosecutor's rebuttal argument, it is likely that the jurors dismissed any doubts as casually as an annoyed spouse might dismiss his partner's nagging insistence that he forgot to turn the lights off before bed. With no presumption of innocence, nothing stood in the way of the jury deciding that the prosecutor had met his burden, which was, after all, "just" proof beyond a reasonable doubt. (39RT 3856.)

B. The Prosecutor's Rebuttal Misstated the Law, Diluted, and Trivialized the Burden of Proof and the Jury's Deliberative Process

1. This Court Should Reach the Merits of Ms. Dalton's Argument Despite Counsel's Failure to Object

Respondent initially contends Ms. Dalton forfeited this argument because her attorneys failed to object or request an admonition at trial. (SRB, p. 31.) Respondent erroneously states that Ms. Dalton provided no argument as to why this Court should overlook the objection and admonition requirement and reach the merits. Ms. Dalton presented reasons why this Court should reach the merits, and supporting authorities for that proposition. (SAOB, pp. 62-63.) Since respondent has not addressed those reasons, appellant will not restate them here.

2. The Prosecutor's Nagging Spouse Analogy Trivialized and Simplified the Deliberative Process and the Burden of Proof

Respondent argues that, unlike in *People v. Centeno* (2014) 60 Cal.4th 659, the prosecutor "did not imply that the jury's task was less rigorous than the law requires by relating it to a more common experience." (SRB, pp. 33-34.) It fails to explain that statement, however, in the context of the prosecutor's actual words. Although the rebuttal argument here differed in many ways from the argument made in *Centeno*, the likelihood the jury was misled by the

prosecutor's simplification and trivialization of the burden of proof and deliberative process was even greater here.

The prosecutor in this case did relate a juror's task in deciding to convict Ms. Dalton of capital murder to an extremely common experience, that of someone deciding whether to accept the doubts created by a nagging spouse and get out of bed to check if he or she really remembered to turn out the lights. (39RT 3857-3858.) Determining whether the elements of a criminal offense have been proved beyond a reasonable doubt in any case requires far more rigorous consideration than determining whether someone remembered to perform the mundane, inconsequential task of turning off the lights. In a case where the determination of guilt could result in something as serious as a first-degree murder conviction with special circumstances, the jury's task requires even greater care and effort. Telling the jury in such a case that it should disregard the legitimate doubts raised by the evidence as casually as the doubts raised by a nagging partner significantly minimizes the critical nature of the jury's task.

Rather than addressing the prosecutor's words, or the argument raised in the supplemental opening brief, respondent claims the prosecutor was simply asking the jury "to be confident in their ability to follow the law, to be confident in their decision once they evaluated the evidence, and be confident in their ability to decide whether they had any reasonable doubts." (SRB, pp. 33-34.) Respondent's interpretation of the prosecutor's analogy is curious, since not once in his rebuttal did the prosecutor use the word "confident" or "confidence." Indeed, the prosecutor led into his analogy by saying it was "an example" of "what is reasonable doubt and what isn't" (39RT 3857), not that it was a motivational speech designed to build confidence in an insecure jury.

Attempting to distinguish the hypothetical in this case from the prosecutor's rebuttal in *People v. Centeno, supra*, 60 Cal.4th at p. 665, respondent asserts that, unlike in *Centeno*, the prosecutor here wasn't

addressing how the jury should decide conflicting evidence in a complex case. (SRB, p. 34.) Respondent is mistaken. The prosecutor was telling the jury that any doubts raised by the evidence or by the attorneys should be disregarded if the jurors believed they knew what happened, just like someone shouldn't doubt he turned off the lights when his spouse points to his absent-mindedness.

Further, the evidence in this case was full of discrepancies and inconsistencies, and putting together a coherent version of the alleged crime was nearly impossible. Yet the prosecutor equated the jury's task with a simple yes or no question—did I remember to turn the lights off?—a question which could be easily answered and empirically proved, rather than the task the jurors in this case actually faced, which involved sifting through rambling, incomplete and contradictory testimony, speculating about the absence of crucial evidence (i.e., the victim's body, any of the alleged murder weapons, the vehicles involved in getting to the trailer and allegedly used to dispose of the body, and the fourth person present during the alleged crimes). Rather than a simple question as suggested by the prosecutor, the jury here had to determine whether the prosecution proved beyond a reasonable doubt not only whether the victim was missing or actually dead, but whether there was a conspiracy to murder her, how and when she was killed, who was involved, what weapons were used, whether the murder was committed while lying in wait, and even whether, as the prosecutor himself put it "[May]was alive when she died" (39RT 3796), in order to determine if the murder involved the infliction of torture.

3. The Prosecutor Misstated the Law and Minimized the Beyond-a-Reasonable-Doubt Burden of Proof

Respondent asserts that the prosecutor did not misstate the law or "risk confusing the jurors about the burden of proof" when he displayed a drawing of a thermometer and placed four levels of proof *above* beyond a reasonable

doubt. (SRB. p. 34.) Respondent is not only wrong on both points, but in making this assertion, has omitted the most erroneous and misleading parts of the prosecutor's rebuttal.

Respondent's summary of the challenged argument describes how the prosecutor moved up the thermometer in explaining the different burdens of proof below the beyond-a-reasonable-doubt standard—namely preponderance of the evidence and clear and convincing evidence. (SRB, p. 35.) After explaining that proof beyond a reasonable doubt was the standard the jury had to use, respondent represents that "the prosecutor then moved up the scale, telling the jury that the law does not require proof beyond all possible doubt to reach a conviction." (*Ibid*.) Perhaps if that was all the prosecutor said, his argument might have been a correct statement of the law, as respondent insists. But the prosecutor said much more than that. He began by showing his drawing of a thermometer-like graph and explained:

> Using this as kind of like a thermometer – and don't worry about the gaps between all these. That doesn't mean anything. The law doesn't tell you anything about the gap that is between them, but those are the standards of proof that can be or could be established or required; and when you hear instructions regarding reasonable doubt, you'll hear about possible doubt and imaginary doubt.

(39RT 3855.)

After telling the jury that neither a preponderance of the evidence nor clear and convincing evidence would be enough to find Ms. Dalton guilty, the prosecutor argued as follows:

> 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 attorney arguments.
>
> 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. You'll hear that. You saw that in this chart. 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. 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.
>
> The law—the founders of this country could have set the standard anywhere in there. They just chose beyond a reasonable doubt. That's—you know, that can be accomplished in every criminal case. That's the standard.
>
> Drunk driving, petty theft, car thefts, rapes, murders, it's the same standard in them all. That's all I have to establish. I've gone way beyond that in this case.

(39RT 3855-3856.)

This argument misstated the law in several crucial ways, which respondent wholly omits from its discussion. First, the prosecutor told the jury that the law could require even more than proof beyond a reasonable doubt. As this Court has affirmed however, proof beyond a reasonable doubt is "the highest standard of factual certainty." (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1022.) Second, he made it seem like there were several gradations of proof between beyond a reasonable doubt and eliminating all doubt, e.g., beyond a possible doubt, beyond an imaginary doubt, and beyond a shadow of a doubt, and that there actually were gaps between each of these standards. Third, it would be impossible to ever meet any of these supposed other burdens of proof because "everything relating to human affairs is open to some possible or imaginary doubt." (Pen. Code, § 1096.)

Contrary to respondent's argument, the prosecutor was doing much more than "simply educating the jury on burdens of proof to make sure it applied the correct one." (SRB, p. 35.) The prosecutor in fact made up higher burdens than actually exist in the law and then told the jury he "just" was required to meet a measurably lower standard. Telling the jury that there are multiple higher levels of factual proof the prosecution does not have to meet has the effect of minimizing the beyond-a-reasonable-doubt standard because a reasonable juror would inevitably misunderstand that he or she may have some

doubts based on the evidence in the case, but still find the defendant guilty. Instead of educating the jury, the prosecutor misled them into believing that there were multiple other higher burdens of proof that could have been required, but that he was only required to prove things beyond a reasonable doubt.

Respondent also attempts to distinguish the prosecutor's argument here from the disfavored diagram used during voir dire in *People v. Medina* (1995) 11 Cal.4th 694, 745, because in this case "the prosecutor explained each burden of proof in sequential fashion, and at no point did the prosecutor misstate the law or state that his burden was easy to meet." (SRB, p. 36.) However, in *Medina*, this Court did not disapprove of the diagram because it misstated the law nor because the prosecutor implied that his burden was relatively easy to meet. Instead, it found that courts have discouraged "experiments" in defining the beyond-a-reasonable-doubt standard and found that "[b]y 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." (*People v. Medina*, 11 Cal.4th at p. 745.) The prosecutor here did just that, and more.

Regardless of the similarity or differences to the challenged diagram and statements in *Medina*, however, the prosecutor here did misstate the law and, importantly, signaled to the jury that his burden was not that hard to meet. Not only did he erroneously characterize his burden of proof as being lower than four other possible burdens, but he told the jurors that "the founders . . . *just* chose beyond a reasonable doubt."[8] (39RT 3856, italics added.) The

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[8] In fact, the "founders" did not establish that criminal convictions must be proved beyond a reasonable doubt, and that standard is not expressed in the United States Constitution. Instead, the standard arose from the common law, and it was not until 1970 that the Supreme Court made absolutely clear that

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prosecutor continued to mislead the jury about the level of certainty required to convict Ms. Dalton by asserting that proving the crimes beyond a reasonable doubt is "*all* I have to establish." (39RT 3856-3857, italics added.)

A prosecutor commits error during argument if, in the context of the whole argument and the instructions, there is a reasonable likelihood that the jury understood or applied the challenged statements in an improper manner. (*People v. Centeno, supra,* 60 Cal.4th at p. 667.) Taken together, the thermometer drawing and the argument that went with it could leave only one impression on a juror: "Wow, that reasonable doubt standard isn't as hard to meet as I thought. There are higher burdens of proof, but the prosecutor only has to meet this one." Such an impression would be erroneous, and runs counter to a bedrock principal of criminal law. (See, e.g., *In re Winship, supra*, 397 U.S.at p. 364 [finding the beyond-a-reasonable-doubt standard requires a prosecutor to convince "a proper factfinder of [] guilt with utmost certainty"].)

4. The Prosecutor Told the Jury a Reasonable Interpretation of Circumstantial Evidence Was All They Needed

After telling the jury that circumstantial evidence was "dynamite stuff," the prosecutor told them such evidence should be accepted if it was "reasonable." (39RT 3858.) "Circumstantial evidence, though, what's the reasonable interpretation. That's all we're looking for. What is reasonable? What isn't?" (*Ibid*.) He told them to discard any evidence they didn't "buy into," and then examine what was left. '"Do I still have enough?' That's all

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proof beyond a reasonable doubt is required as an element of due process. (*In re Winship* (1970) 397 U.S. 358, 364 ["Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"].)

we're talking about, is what's reasonable. Is this the reasonable interpretation?" (39RT 3859.)

Respondent claims that the prosecutor was discussing the standard for "evaluating conflicting evidence in applying the reasonable doubt standard." (SRB, pp. 36, 37.) Again, respondent reads into the prosecutor's rebuttal words that he never spoke. The prosecutor made no mention of any "conflicting evidence," nor did he refer to any instructions in this portion of his rebuttal. Taken in context and assigning the natural meaning to his language, he was telling the jury that if it was reasonable to interpret the circumstantial evidence in a way that favored the prosecution, the jury should credit that interpretation, and if it was reasonable, the prosecutor had "enough" evidence to convict. That is not the law, however. Even if the prosecutor's interpretation of the evidence was reasonable, the evidence still had to prove each element of the charged offenses beyond a reasonable doubt. The prosecutor's remarks could have led the jury to believe that circumstantial evidence, because it was "dynamite stuff" (39RT 3858), was not subject to the beyond-a-reasonable-doubt standard, but could be accepted as true merely if it was reasonable.

Circumstantial evidence gives rise to inferences, and if an inference is unreasonable, the jury must reject it. But if there are two reasonable inferences, one that points to guilt and one that points to innocence, the jury must accept the latter and reject the former. (See CALJIC No. 2.01.) By telling the jury "*all*" they needed to consider was whether the prosecutor's circumstantial evidence was reasonable, the prosecutor further misled the jury as to their duty to interpret the circumstantial evidence in a way that points to innocence when there is more than one reasonable interpretation.

Respondent argues that this Court should find no error in the prosecutor's argument just as it did in *People v. Romero* (2008) 44 Cal.4th 386, 416. This case is not like *Romero*. In *Romero*, this Court considered a claim of instructional error based on a series of instructions regarding circumstantial

evidence,[9] which conveyed to the jury that if one interpretation of circumstantial evidence appeared reasonable and another interpretation unreasonable, the jury must accept the reasonable interpretation. (*Id.* at p. 415.) In rejecting the challenge, this Court found the instruction did not "simply tell the jury that it must accept a reasonable interpretation," but told the jury that "it must accept a reasonable interpretation when the only other interpretation available is unreasonable." (*Ibid*.) The *Romero* court went on to reject a related challenge in which the appellant asserted that in closing argument, the prosecutor misused the instruction to lessen the prosecution's burden of proof beyond a reasonable doubt. There, the prosecutor explained that the reasonable doubt standard asks jurors to "decide what is reasonable to believe versus unreasonable to believe" and to "accept the reasonable and reject the unreasonable." (*Ibid.*)

Unlike the prosecutor in *Romero,* the prosecutor here did not distinguish between reasonable and unreasonable interpretations. He merely said "a reasonable interpretation" was "enough." He did not explain what the jury should do if faced with two competing reasonable interpretations, nor did he tell them it *had* to reject unreasonable interpretations. Nor did he, as respondent claims, ever state that, "in applying the standard of proof beyond a reasonable doubt, the jurors must use their common sense and life experience to determine what was reasonable to conclude." (SRB, p. 38.)

Respondent also incorrectly likens this portion of the prosecutor's rebuttal to the rebuttal made in *People v. Cortez* (2016) 63 Cal.4th 101, 130.

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[9] The instructions challenged were CALJIC Nos. 2.01 [sufficiency of circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state], 8.83 [special circumstance—sufficiency of circumstantial evidence—generally], and 8.83.1 [special circumstance—sufficiency of circumstantial evidence to prove required mental state]. (*People v. Romero, supra*, 44 Cal.4th at p. 415.)

(SRB, pp. 38-39.) In *Cortez*, the prosecutor argued that the beyond-a reasonable-doubt standard would be met if a juror could say "I believe I know what happened and my belief is not imaginary. It is based on the evidence in front of me." (*People v. Cortez*, 63 Cal.4th at p. 130.) At issue there was whether the jury likely interpreted these statements to mean that a simple belief was enough to convict so long as it was supported by more than speculation or imagination and thus encouraged the jury to convict on a preponderance of the evidence or a strong suspicion. This Court found that the prosecutor's remarks were an incomplete definition of the burden of proof "that did not alone suffice as a definition of the beyond-a-reasonable-doubt standard." (*Id*. at p. 131.) Nonetheless, it rejected the issue, finding that there was no likelihood the jury would have interpreted the challenged remarks as supplanting the beyond-a-reasonable-doubt standard with a lesser burden of proof because the comments "constituted a tiny, isolated part of the prosecution's argument," the prosecution was responding to defense counsel comments, the prosecution expressly referred the jurors to the instruction on reasonable doubt, both the court and defense counsel properly defined reasonable doubt numerous times, and the jury had written instructions during deliberations. (*Id*. at pp. 131-134.)

In contrast to *Cortez*, the prosecutor's remarks here were not "tiny" in comparison to the length of his rebuttal, especially when considered together with his other assaults on the beyond-a-reasonable-doubt standard. (See *People v. Centeno*, *supra*, 60 Cal.4th at p. 674 [finding a reasonable likelihood that a hypothetical presented to the jury *and* other aspects of the prosecutor's argument together misled the jury about the burden of proof and the jury's task during deliberations].) Further, it does not appear the prosecution was responding to any defense comments about reasonably interpreting the evidence.

The prosecutor's reference to the reasonable doubt instruction during rebuttal actually increased the likelihood he misled the jurors because he used it

to bolster his argument that higher burdens of proof could have been required, but weren't, while graphically displaying all the different burdens on his thermometer drawing. He explained to the jury that "those are the standards of proof that can be or could be required; and when you hear the instruction regarding reasonable doubt, you'll hear about possible doubt and imaginary doubt." (39RT 3855.) He did not refer to the instructions on circumstantial evidence at all.

Although the court instructed on reasonable doubt orally and in its written instructions provided to the jury, and defense counsel did read the proper definition of reasonable doubt during its argument, unlike in *Cortez*, the court did not did not specifically emphasize that the jury should follow the instructions if they conflict with the attorneys' comments on the law. (*People v. Cortez, supra*, 63 Cal.4th at pp. 131-132 [noting that the court emphasized that jurors should follow the instructions in the event of conflict with counsel's statements during argument, not only in instructions, but also at two other separate times, when addressing objections].) Here, there were no objections during argument that caused the judge to immediately admonish the jurors to follow the instructions instead of counsel's comments on the law, and thus they were only instructed on this principal once. Without such admonitions, it is likely the jurors would have believed the prosecutor's interpretation of the law was correct.[10]

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[10] Respondent addresses the likelihood that the jury erroneously or improperly applied the prosecutor's statements that went to the burden of proof and if so, whether Ms. Dalton was prejudiced by these statements, separately from the likely effect of and prejudice caused by his misstatement of the law regarding the presumption of innocence. (SRB, pp. 39-40, 41.) In light of the need to consider the challenged statements in the context of the entire rebuttal, and as this Court did in *People v. Centeno, supra*, 60 Cal.4th at pp. 674, 675-677, Ms. Dalton will address whether the prosecutor's misstatements of law and attempts to illustrate the burden of proof misled the jury and whether she

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C. The Prosecutor Misstated the Law When He Told the Jury the Presumption of Innocence Was Gone Before Deliberations

During his closing rebuttal the prosecutor told the jury that "[n]ow that the evidence is here, now that you heard it all, [the presumption of innocence] is gone" and Ms. Dalton is "no longer protected" by it. (39RT 3854.) Respondent claims that was not a misstatement of the law. (SRB, p. 40-41.) Respondent is mistaken.

It has long been error to tell jurors that the presumption of innocence ends before deliberations. (See *People v. McNamara* (1892) 94 Cal. 509, 514.) In *McNamara*, the trial court instructed the jury: "The defendant, like all persons accused of crime, is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt, and this presumption of innocence goes with him all through the case, until it is submitted to you." (*Ibid.*) This Court found that to be a misstatement of the law and observed, "[t]he 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." (*Ibid.*) Ms. Dalton discussed *McNamara* in the supplemental opening brief, but respondent has not addressed it. (See SAOB, p. 51; SRB, pp. 40-41.)

Ms. Dalton also discussed *People v. Cowan* (2017) 8 Cal.App.5th 1152, 1154, where, during rebuttal, a prosecutor made remarks similar to those at issue here. There, the prosecutor told the jury, "Let me tell you that presumption [of innocence] is over. Because that presumption is in place only when the charges are read. But you have now heard all the evidence. That presumption is gone." (*Cowan*, *supra*, 8 Cal.App.5th at p. 1154.) On appeal,

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was prejudiced thereby, after replying to respondent's argument regarding the presumption of innocence.

the court reversed the defendant's conviction, reasoning: "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.)

Nevertheless, respondent claims, "*Cowan* is distinguishable because here, the prosecutor did not misstate the law." (SRB, p. 41.) Respondent does not explain the difference between the statements made in *Cowan* and those made here. *Cowan* found misconduct because the prosecutor told the jury that the presumption of innocence was gone prior to the jury's deliberations. (*People v. Cowan, supra*, 8 Cal.App.5th at p. 1159.) Here, the prosecutor told the jury that the presumption of innocence was gone prior to the jury's deliberations. (39RT 3854.) Specifically, he told the jury that it "is gone" and that it "no longer protected" Ms. Dalton. To the extent that there are dissimilarities between the remarks here and in *Cowan*, they are immaterial.

This Court has drawn a bright line between asking the jury to find that the evidence has overcome the presumption of innocence (not misconduct) and telling it that the presumption is already gone (misconduct). (See *People v. Arlington* (1900) 131 Cal. 231, 235-236.) In *Arlington*, the trial court told the jury that the presumption of innocence "is a presumption that abides with [defendant] throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt." (*Id.* at p. 235.) On appeal, the defendant argued that remark improperly implied that the presumption of innocence ended prior to deliberations. (*Ibid.*) This Court disagreed. It began its analysis by observing that the presumption of innocence "continues . . . during the deliberations of the jury and until they reach a verdict" and that reversal would be required "if it could fairly be said that the instruction deprived the defendant of the full operation of this rule." (*Ibid.*) However, the Court "d[id] not think the language, 'until the evidence convinces you to the

contrary beyond all reasonable doubt,' conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution or at any time before the jury had finally determined upon a verdict." (*Ibid.*)

Respondent claims the prosecutor's remarks in this case stayed within the proper boundaries, and analogizes them to remarks this Court upheld in *People v. Booker* (2011) 51 Cal.4th 141. (SRB, pp. 40-41.) Respondent is wrong. The remarks in this case are not analogous to the ones at issue in *Booker*. The prosecutor in this case told the jury that the presumption of innocence was "gone" and that it "no longer protected" Ms. Dalton. (39RT 3854.) The prosecutor in *Booker* told the jury that "I had the burden of proof when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden . . . The defendant was presumed innocent until the contrary was shown. That presumption *should have left* many days ago." (*People v. Booker, supra*, 51 Cal.4th at p. 185, italics added.) The prosecutor in *Booker* talked about how the presumption of innocence "should have left" while the prosecutor here said it was already gone. That distinction makes all the difference. If something "should have left," it is not actually gone yet and is still there. The jury in *Booker* most likely would have understood the prosecutor's words to mean: The presumption of innocence should have left many days ago, but for the requirement that it protects the defendant until you deliberate and find his guilt proved beyond a reasonable doubt.

Leaving the jury with the impression that the presumption of innocence was still present but should have left, as the prosecutor did in *Booker*, is not misconduct. (See *People v. Arlington, supra*, 131 Cal. at p. 235.) It implies that the jury still needs to find, during its deliberations, that the evidence overcomes the presumption of innocence. That is exactly how this Court interpreted the remarks. (*People v. Booker, supra*, 51 Cal.4th at p. 185 ["the prosecutor here simply argued the jury should return a verdict in his favor based on the state of the evidence presented"].) But leaving the jury with the

impression that the presumption of innocence is already gone, as the prosecutor did in this case, is misconduct. (See *Arlington, supra*, 131 Cal. at p. 235; *People v. McNamara, supra*, 94 Cal. at p. 514.)

In *People v. Booker, supra*, 51 Cal.4th at pp. 185-186, this Court also stated that it was assured that the jury was not misled by the prosecutor's remarks because the trial court instructed with CALJIC No. 2.90 and the prosecutor acknowledged his burden of proof. But it does not follow that the instruction and acknowledgment can provide that same assurance where, as here, the prosecutor expressly states that the presumption of innocence "is gone" and that the defendant is "no longer protected" by it.

CALJIC No. 2.90[11] does not inform the jury that the presumption of innocence lasts into deliberations. Nor does it inform the jury that they are prohibited from forming conclusions about the case until they begin deliberating. There are instructions that would communicate those concepts to the jury; however, they were not given in this case. (See, e.g., CALCRIM No. 124 ["Do not make up your minds or express any opinion about the case or any issue connected with the trial until after you have discussed the case with the other jurors *during deliberations*."], italics added.) While the court did admonish the jury in this case "not to form or express any opinion on the case until it is finally submitted to you" (see, e.g., 28RT 2446), the jury was never told when the case stood "submitted" or that the presumption of innocence continued to operate following its submission. *People v. McNamara, supra*, 94 Cal. at p. 514, makes clear that the jury must understand that "[t]he

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[11] As read to the jury in this case, CALJIC No. 2.90 provides: "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 placed upon the People the burden of proving her guilty beyond a reasonable doubt." (39RT 3879.)

presumption of innocence does not cease upon the submission of the cause . . . 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."

Neither the admonition read to the jury in this case nor CALJIC No. 2.90 conflicted with the prosecutor's remarks and thus the jury would have had no reason to disregard the prosecutor's misstatement of the law, and was likely misled. Ms. Dalton argued the jury could have harmonized the instructions with the prosecutor's misstatement because the instruction is silent concerning whether the presumption of innocence continues during deliberations. (See SAOB, pp. 53-55.) Respondent has not addressed that argument. (See SRB, pp. 40-41.) This same analysis applies to the prosecutor's acknowledgment of his burden of proof. A prosecutor acknowledging that he has the burden of proof does not clarify that the presumption of innocence continues during deliberations.

The concepts of proof beyond a reasonable doubt and the presumption of innocence serve distinct purposes. (See *Coffin v. United States* (1895) 156 U.S. 432, 459-461 [discussing how the presumption of innocence operates as actual "evidence in favor of the accused" while proof beyond a reasonable doubt is "the condition of mind produced by the proof resulting from the evidence in the cause"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 484-485 [questioning whether the presumption of innocence is actual evidence in favor of the accused, but noting "While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence."].) Accordingly, neither CALJIC No. 2.90, nor the prosecutor's acknowledgment corrected the misstatement that the presumption of innocence "is gone."

People v. Booker, *supra*, 51 Cal.4th at pp. 185-186, does not stand for the proposition that a jury instructed with CALJIC No. 2.90, who hears the prosecutor acknowledge his burden of proof, will not be misled if they are also told the presumption of innocence has ended prior to deliberations. As discussed above, *Booker* dealt with remarks that could not fairly be construed as suggesting that the presumption of innocence actually ended before deliberations. Unlike in *Booker*, the remarks in this case expressly informed the jury that the presumption of innocence was "gone" and that it "no longer protected" Ms. Dalton and thus crossed the line that *People v. McNamara*, *supra*, 94 Cal. 509, and *People v. Arlington*, *supra*, 131 Cal. 231, drew over a century ago between proper argument and misconduct. *Booker* did not purport to redraw that line.

Courts throughout the country have drawn a similar line and found that statements like the ones at issue here amount to misconduct. (See, e.g., *Mahorney v. Wallman* (10th Cir. 1990) 917 F.2d 469, 471-474 [finding misconduct where in closing rebuttal the prosecutor told the jury that the presumption of innocence "has been removed by [the] evidence"]; *People v. Estes* (Colo.Ct.App. 2012) 296 P.3d 189, 194-195 [finding error where prosecutor told jury: "That presumption of innocence, after the evidence has come in, that cloak, the presumption of innocence is now gone"]; *Miller v. State* (Okla. Crim. App. 1992) 843 P.2d 389, 389-390 [finding misconduct where the prosecutor argued, "the defendant stands guilty as charged and the cloak of innocence that he wore . . . [i]t's been ripped away from him by the testimony of three men-four men, actually."]; *People v. Brooks* (Ill. App. Ct. 2004) 803 N.E.2d 626, 630 [finding misconduct where the prosecution argued "[w]hen you go back into the jury room, the presumption of innocence . . . that cloak of innocence is gone."]; *State v. Lawrence* (Mont. 2016) 385 P.3d 968, 971-973 [finding misconduct where the prosecutor argued, "The presumption of innocence that you came into this trial with no longer exists at this point."].)

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (*Coffin v. United States*, *supra*, 156 U.S. at p. 453.) The remarks in this case struck at that foundation; they likely misled the jury into believing that presumption of innocence ceased to operate prior to deliberations.

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

Respondent contends there was no error or misconduct here because there is no reasonable likelihood the jurors applied the prosecutor's misstatements of the law and/or his attempts to weaken his burden of proof by analogizing the jury's task to an everyday experience, by creating levels of proof that are higher than beyond a reasonable doubt, and by telling the jury that circumstantial evidence only needed to be reasonable to be accepted as evidence of guilt. (SRB, p. 39.) Respondent asserts that any misunderstanding caused by the prosecutor's rebuttal was ameliorated because defense counsel and the trial court defined reasonable doubt correctly, the court told the jury to follow its instructions in the event they conflicted with any statements by counsel and also that statements by attorneys are not evidence. Respondent is mistaken. There is a reasonable likelihood the jury understood or applied the prosecutor's statements in an improper manner. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.)

Ms. Dalton addressed the points raised by respondent in her supplemental opening brief at pages 52-55, and respondent has offered no reasons why this Court should reject the analysis there. Specifically, because the prosecutor's statements did not directly contradict any instructions by the court, the jury likely did not perceive any conflict. As in *Centeno*, the complained of statements regarding the burden of proof illustrated and gave

meaning (albeit an erroneous and misleading meaning) to the language in the instructions, but did not contradict them. The prosecutor's statement that the presumption of innocence was gone before any deliberations had occurred does not conflict with the instruction that says the presumption lasts until the contrary is proved beyond a reasonable doubt (see 39RT 3879), because the instruction does not make clear that only a deliberating jury may find guilt proved beyond a reasonable doubt.

Although the court did admonish the jurors "not to form or express any opinion on the case until it is finally submitted to you," (see, e.g., 28RT 2446), that admonition does not mention either the presumption of innocence, nor more importantly, does it explain that an opinion may not be formed until *after* the jury has begun deliberating. (Compare, CALCRIM No. 124 ["Do not make up your mind or express any opinion about the case or any issue connected with the trial until after you have discussed the case with the other jurors during deliberations."].) As discussed above, the "presumption of innocence does not cease upon the submission of the cause to the jury," but continues until the jury has determined guilt beyond a reasonable doubt. (*People v. McNamara*, *supra*, 94 Cal. at p. 514.) Contrary to respondent's argument (SRB, p. 39), because the prosecutor's remarks were about the law, rather than the state of the evidence, the court's instruction that attorney statements are not evidence would have had no bearing on the impact of the rebuttal on the jury.

For all these reasons and those stated in the supplemental opening brief, there was a reasonable likelihood that the jury was misled by the prosecutor's rebuttal, and thus the prosecutor committed error or misconduct.

E. Reversal Is Required Because There Is a Reasonable Probability the Outcome Would Have Been Different Absent the Prosecutor's Erroneous and Misleading Rebuttal

As argued in the supplemental opening brief, the prosecutor's rebuttal was not only erroneous under state law, but also violated Ms. Dalton's right to

due process under the United States Constitution. (SAOB, pp. 55-56.) Nevertheless, Ms. Dalton's convictions should be reversed regardless of whether this Court applies the standard for federal constitutional violations under *Chapman v. California* (1967) 386 U.S. 18, or for state law violations under *People v. Watson* (1956) 46 Cal.2d 818, because even under the latter standard, there is a reasonable chance that the outcome would have been different absent the error.

In *Centeno*, this Court identified what it referred to as "saving factors." When one or more of these factors are absent, there may be a reasonable probability the prosecutor's errors contributed to the verdicts, and if so, reversal would be required. (*People v. Centeno, supra,* 60 Cal.4th at pp. 676-677.) Ms. Dalton discussed the absence of the savings factors in the supplemental opening brief at pages 58-62 and to the extent respondent has not addressed these factors, she will not repeat her discussion here. Respondent does however, address the strength of the prosecution's evidence of guilt in arguing that Ms. Dalton was not prejudiced by the rebuttal. Ms. Dalton has already demonstrated the weakness of the prosecution's case in Argument IV of her opening brief and reply brief, as well as in her supplemental opening brief and in the introduction to this section of the supplemental reply. However, respondent makes serious errors in representing the evidence against Ms. Dalton, and vastly overstates the strength of the case to establish her guilt of first-degree murder or of the special circumstances.

Respondent claims there was strong evidence of guilt. (SRB, p. 40, referring to pp. 18-19.) On the cited pages, respondent points to the testimony of Joanne Fedor that her trailer was in disarray when she returned from the honor camp on the day of the alleged crime. Respondent overlooks that Fedor's description of the trailer does not establish Ms. Dalton killed May, only that Fedor's trailer was disturbed. More importantly, the items she supposedly saw there in the late afternoon of June 26, 1988—burned wiring, extension

cords, a bloody screwdriver, a bloody folding pocketknife, a bloody pillow and a bloody bar of soap (30RT 2600-2601, 2604-2606)—were not there when law enforcement came just a few hours later that evening (31RT 2747, 2766-2767 2752, 2769), although several witnesses (most of them drug users), claimed they saw Fedor with some of these items at some unidentified later date.

Significantly, Sheryl Baker, the only eye witness present when the murder supposedly occurred never said *any* of the above items were used during the crime. (See, e.g., 33RT 3313 [indicating she saw a screwdriver in the trailer, but didn't know what it was used for]; 3176 [she didn't see any burnt wires or extension cords and none were used on May; she didn't see a bloody pillow or pillowcase]; 3177 [she didn't see a bloody bar of soap]; 7CT 1439 [there was no folding knife].) The items Baker claimed were actually used, i.e., rope [7CT 1434], syringes filled with battery acid [33RT 3128], a cast iron frying pan , and a buck knife and/or a kitchen knife [7CT 1439], were not mentioned by Fedor, nor were they ever located. Although the prosecutor insisted, after having to admit that the jury could not take either Baker or Fedor's testimony at "face value" (39RT 3767), that Baker's testimony corroborated Fedor's and vice-versa (*ibid*.), what actually was corroborated did not prove the elements of the charged offenses or special circumstances beyond a reasonable doubt. (See AOB, pp. 127-133, 175-187.)

Although respondent also states that "multiple other witnesses corroborated that Fedor's trailer was covered in blood," none of the other witnesses actually described it that way. Fedor's daughter, Alisha, said when she returned to the trailer on the Monday following June 26, she saw "splatter marks that are pretty small" on the floor of the bedroom. She thought this was blood because it was dark reddish brown and because her mother told her it was. (30RT 2671-2672.) She also saw splatters on a heater and a reddish brown spot in the pop-out room. (30RT 2673.) Fred Eckstein, a fifteen year-old to whom Fedor gave methamphetamine (31RT 2878), testified that on

some unknown date, he stayed overnight at Fedor's trailer and she pointed out some spots on the floor and living room walls that looked like blood to him. (31RT 2871.) He didn't remember how big these spots were. (31RT 2881.) Gary Dorsett, a lab technician who did tests for presumptive blood in the trailer in 1991, after multiple other searches by the Sheriff's Department and criminalists failed to reveal any blood in the trailer, described minute pin pricks of presumptive blood that were only visible after he put his face up close to them, in the living room, bedroom and pop-up room. (32RT 2938-2943.) None of these witnesses said the trailer was "covered" in blood, the blood evidence was never linked to the crime in anyway (See AOB, Argument III), and the prosecutor told the jury it "doesn't mean a whole lot" and the jury could disregard it as "garbage." (39RT 3858.) Moreover, Baker, the only person who claimed to actually see the crime, was certain that May was in the kitchen, and not any of the places where specks of blood were found, when she was assaulted. (33RT 3126, 3177-3178.)

Donald McNeely's testimony conveying alleged admissions by Tompkins was proffered only to prove corpus, not Ms. Dalton's guilt or the circumstances of the offense (3CT 510), a distinction that was ignored by the prosecutor in his argument (see e.g. 39RT 3770, 3772, 3780, 3796, 3798). Accordingly, it should not be considered for any other purpose by this Court. Moreover, both McNeely and Tompkins were highly suspect and subject to significant impeachment. (See AOB, pp. 51-55.) Finally, regardless of what she told Sherri Fisher, Baker testified that May was likely dead already when she and Tompkins arrived back at the trailer (33RT 3171, 3197-3198), there was very little or no blood (33RT 3134-3135, 3180), and she had no idea what had happened while she was gone. (33RT 3126-3127.)

Even in his rebuttal argument, the prosecutor pointed to the evidence of reasonable doubt. (See, e.g., 39RT 3861 ["Maybe (May is) still alive . . .Maybe she died of asthma or hepatitis or drug usage. Maybe"].) But in light of the

prosecutor's lowered interpretation of his burden of proof, the jury would have accepted his argument that the circumstances he said were "maybe" true would not stand in the way of convicting Ms. Dalton. And despite all those reasonable doubts, the prosecutor convinced the jury it could find Ms. Dalton guilty on another "maybe" instead: "Maybe she was killed by that woman sitting in the courtroom." (*Ibid*.)

Here, as in *Centeno*, "it was up to the jury to evaluate the various versions of events and to weigh witness credibility in making its decision." (*People v. Centeno, supra*, 60 Cal.4th at p. 677.) Given the weakness of the prosecution case and the lack of sufficient corrective action, there is a reasonable probability that without the prosecutor's erroneous and misleading argument, the jury would have found the prosecutor failed to prove the elements of first-degree murder and the special circumstances beyond a reasonable doubt.

F. Defense Counsels' Failure to Object to the Arguments and Seek Curative Admonitions Violated Ms. Dalton's Right to the Effective Assistance of Counsel and Was Prejudicial

Respondent contends that because, in its view, the prosecutor neither misstated the law nor misled the jury, Ms. Dalton's trial attorneys' failure to object did not deprive her of the effective assistance of counsel. As shown above, respondent is mistaken that the jury would not have applied the prosecutor's statements in his rebuttal in an improper manner, and thus, reasonably competent counsel would have objected. As set forth in the supplemental opening brief at pages 63-66, trial counsel's failure to object fell below professional norms and was not the result of any conceivable reasonable tactical strategy.

Ms. Dalton was prejudiced by counsel's failure to object and to request that the jury be properly admonished. Curative admonitions could have informed the jury that the prosecutor misstated the law because the beyond-a-

reasonable-doubt standard is the highest legal burden of proof that the law requires and the presumption of innocence continues until the jury has deliberated. The jury also could have been admonished that their task in assessing guilt is not the same as everyday decision making, particularly when the consequences are as serious as a conviction of murder with special circumstances. Finally, the jury could have been admonished that, when the prosecutor relies on circumstantial evidence, he still must prove all material facts beyond a reasonable doubt.

Had the jury been properly admonished, there is a reasonable probability that the outcome of Ms. Dalton's trial would have been different. This Court should have no confidence in the reliability of the convictions or special circumstance findings.

G. Conclusion

The prosecutor's misstatements of the law regarding the burden of proof and presumption of innocence, and his attempts to minimize the beyond-a-reasonable-doubt standard and the seriousness of the jury's task worked together to assure a conviction despite case the evidentiary weaknesses of his case. Cumulatively, the prosecutor's rebuttal denied Ms. Dalton due process and a fair trial. Trial counsels' failure to object to the prosecutor's errors fell below professional standards and violated Ms. Dalton's right to effective representation.

There is a reasonable probability that, without these errors and if the jury had been properly admonished, Ms. Dalton would not have been convicted of first-degree murder or conspiracy, and the special circumstances would not have been found true. This Court should reverse her convictions and the special circumstances.

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

In her SAOB, Ms. Dalton argued that her prosecution for conspiracy to commit murder was time-barred by the three-year limitations period. (SAOB, pp. 69-79.) Respondent does not contest that Ms. Dalton was prosecuted for a conspiracy that occurred four years earlier. (See SRB, pp. 43-44.) Nor does it argue that the prosecution would be timely if governed by a three-year limitations period. (*Ibid.*) Instead, respondent urges this Court to conclude that conspiracy to commit murder is no longer governed by a three-year limitations period. (*Id.* at p. 43.) Respondent's analysis is flawed; it ignores the weight of authority and the intent of the Legislature.

Conspiracy is governed by a three-year limitations period, regardless of the underlying offense. (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1402 ["[L]egal precedent . . . provides that criminal conspiracy has a three-year statute of limitations, irrespective of the underlying offense. [Citations.]"].) This was true before the 1984 amendments to the limitations provisions. (See *ibid.*, citing *Davis v. Superior Court* (1959) 175 Cal.App.2d 15, 20-22, *People v. Crosby* (1962) 58 Cal.2d 713, 722, and *People v. Zamora* (1976) 18 Cal.3d 538, 549-550.) And it remains true following them. (*Prevost*, *supra*, 60 Cal.App.4th at p. 1402; *People v. Milstein* (2012) 211 Cal.App.4th 1158, 1168.)

The 1984 amendments, which respondent claims unambiguously establish that conspiracy to commit murder is no longer governed by a three-year limitations period, do not contain the word "conspiracy" or otherwise include any language reflecting an intent to alter the three-year rule for conspiracy. In relevant part, the 1984 amendments changed the wording of

Penal Code section 799 to eliminate the limitations period for a number of offenses. The Law Revision Commission comments expressly state which offenses were intended to be affected by the amendment, and conspiracy to commit murder is not among them. (Recommendation Relating to Statues of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep. 301, 317-318.) Further, in the 2013-2014 legislative session, Senate Bill No. 951 was introduced to eliminate the three-year limitations period applicable to conspiracy. (See 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].) Why would the Legislature find a need to do that if, as respondent claims, the 1984 amendments already had eliminated the three-year limitations period?

Respondent does not discuss the Law Revision Commission comments, the other cited indicators of legislative intent, or *People v. Prevost*, *supra*, 60 Cal.App.4th at p. 1402, which held, following the 1984 amendments, that conspiracy remains governed by a three-year limitations period. (See SRB, pp. 43-44.) The only support for respondent's construction of the limitations provisions is a footnote in a case whose holding concerned entirely different matters. (SRB, pp. 43-44, citing *People v. Sconce* (1991) 228 Cal.App.3d 693, 701, fn. 3 ["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."].)

Respondent construes the limitations provisions as follows: the 1984 amendments changed section 799 to state that there is no limitations periods for offenses punishable by death or life in prison (with or without the possibility of parole); pursuant to section 182 the punishment for conspiracy to commit murder is the same as for first-degree murder; and section 190 provides the punishment for first-degree murder is death or life in prison (with or without the possibility of parole). (See SRB, pp. 43-44.)

That analysis has one major flaw: it assumes that a court should take into account the underlying target offense when determining the applicable limitations period for conspiracy. Except for *Sconce*, *supra*, 228 Cal.App.3d at p. 701, fn. 3, courts have never done that, either before or after the 1984 amendments. (See *Davis v. Superior Court* (1959) 175 Cal.App.2d 15, 20-22 [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 [three-year limitations period applied to count of conspiracy to commit bribery even though limitations period then in effect for bribery was six years]; *People v. Prevost*, *supra,* 60 Cal.App.4th at p. 1402 [three-year limitations period applied to conspiracy where underlying/target offense was a misdemeanor subject to a one-year limitations period]; *People v. Milstein* (2012) 211 Cal.App.4th 1158, 1168 [three-year limitations period applied to conspiracy to commit fraud even though there is a four-year limitations period for offenses that have fraud as an element].)

Respondent acknowledges that *Milstein*, *supra*, 211 Cal.App.4th 1158 (decided after the 1984 amendments) concluded that conspiracy is always governed by a three-year limitations period regardless of the underlying/target offense. (SRB, at p. 44.) However, respondent claims *Milstein* "failed to take into account Penal Code section 805," which was added by the 1984 amendments. (SRB, at p. 44.) Respondent quotes the following portion of section 805: "For the purpose of determining the applicable limitation of time pursuant to this chapter . . . An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed." (SRB, at p. 44.) Contrary to respondent's suggestion, the quoted portion does not unambiguously signal the legislature's intent to cast aside the three-year limitations period that has always applied to conspiracies.

As discussed in the supplemental opening brief, the limitations period applicable to an offense generally depends on its punishment. If an offense is punishable by less than a year in jail, a one-year limitations period applies. (Pen. Code, § 802.) If an offense is punishable by eight years or more in prison, a six-year limitations period applies. (§ 800.) Most other felonies are governed by a three-year limitations period. (§ 801.) Section 805 resolves an issue that may occur when the mitigated or middle term for an offense would result in the application of a shorter limitations period than would the aggravated term. However, section 805 says absolutely nothing concerning the longstanding rule that conspiracy is subject to the three-year limitations period regardless of the underlying offense.

Finally, to the extent there is a latent ambiguity concerning the applicable limitations period, that ambiguity should be resolved in Ms. Dalton's favor. Extrinsic sources, including the Law Revision Commission comments and the legislative history of Senate Bill No. 951 (2013-2014 Reg. Sess.), reflect that the intent of the Legislature is for a three-year limitations period to govern all criminal conspiracies. (See SAOB, pp. 75-79.) Further, any lingering ambiguities should be resolved in favor of the accused. (*People v. Zamora* (1976) 18 Cal.3d 538, 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* (1971) 404 U.S. 307. 322, fn. 14 [criminal statutes of limitations "are to be liberally interpreted in favor of repose"].) Respondent does not address these aspects of appellant's argument presumably because the Legislature's intent is clear. (See SRB, at pp. 43-44.)

This court should reject respondent's parsing of the limitations provisions and conclude that Ms. Dalton's conspiracy conviction is time-barred by the three-year limitations period. Statutes of limitation "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."

(*Marion, supra*, 404 U.S. at p. 322.) Respondent's construction of the 1984 amendments destroys that predictability and invites confusion where there has been clarity. Accordingly, Ms. Dalton's conviction for conspiracy 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

Ms. Dalton argued that this Court's previous decisions regarding the constitutionality of California's death penalty scheme, as challenged under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), should be reconsidered in light of *Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616] (*Hurst*). (SAOB, pp. 80-95.)

Respondent argues that this Court has found that *Hurst* does not affect its previous decisions. (SRB, pp. 44-47) In the cases cited by respondent, this Court stated that California's statute was materially different than the former Florida scheme because this state requires a jury verdict before death can be imposed, unlike the advisory opinion that was at issue in Florida. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; *People v. Henriquez* (2017) 4 Cal.5th 1, 45; *People v. Jones* (2017) 3 Cal.5th 583, 619.)

The issue before this Court is not the role of the jury in imposing death, but the factual determinations that must be made. As Ms. Dalton argued (SAOB, pp. 87-91), this Court has construed Florida's sentencing directive to be comparable to California—if the sentencer finds that aggravating circumstances outweigh mitigation, a death sentence is authorized, but not mandated. (*People v. Brown* (1985) 40 Cal.3d 512, 542 (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538).)

In the past, this Court distinguished between the findings that are made before death is imposed—the weighing of aggravation and mitigation—and the kind of factual determinations at issue in *Apprendi* and *Ring*. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Merriman* (2014) 60 Cal.4th 1, 106.) *Hurst* made clear that the weighing decision—"that there are

insufficient mitigating circumstances to outweigh aggravating circumstances"—was part of the "necessary factual finding that *Ring* requires." (*Hurst, supra*, 136 S.Ct. at p. 622, citing former Fla. Stat. § 921.141(3).) The significance of *Hurst* for California, then, is that it brings the weighing process clearly within the ambit of *Ring*.

The decisions of the Florida Supreme Court in *Hurst v. State* (Fla. 2016) 202 So.3d 40 and the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 support Ms. Dalton's understanding of the application of *Hurst*. In Florida, the state supreme court described the sentencing factors, including the weighing process itself, as "elements" that the sentencer must determine, akin to elements of a crime during the guilt phase. (*Hurst v. State*, *supra*, 202 So.3d at pp. 53-54.) The court emphasized that the "critical findings necessary for imposition of a sentence of death" were "on par with elements of a greater offense." (*Id*. at p. 57.) In Delaware, the state supreme court explained that the weighing determination "is a factual finding necessary to impose a death sentence." (*Rauf v. State, supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.).) These cases support the contention that even though the sentencer might have been different between the former Florida scheme and California's death penalty law, the necessary factual findings are similar. These cases are not, as respondent contends, "contrary to *Carr*." (SRB, p. 46, fn. 7.)

Although this Court has emphasized the normative aspect of a juror's penalty decision to find that California is not bound by *Apprendi* or *Ring*, the weighing determination and the ultimate sentence-selection decision are not a unitary finding. These are two distinct determinations. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances is the necessary factual finding that brings the jury to its final normative decision: Is death the appropriate punishment considering all the circumstances? (See SAOB, pp. 93-95.)

Respondent glosses over the distinction between the jury's two penalty-phase determinations in arguing that *Kansas v. Carr* (2016) __ U.S. __ [136 S. Ct. 633] (*Carr*) forecloses any argument that the State bears a burden of persuasion in the penalty phase. (SRB, p. 46.) It is true that *Carr* questioned whether the sentence-selection decision is a factual determination to which a standard of proof can meaningfully be applied. (Kansas v. *Carr*, *supra*, 136 S.Ct. at p. 642.) But Ms. Dalton has not argued otherwise. Her argument pertains to the first part of the jury's penalty determination, concerning the existence of aggravating circumstances and whether they outweigh the mitigating circumstances, not to the second part, i.e., the determination of whether death ultimately ought to be imposed. Contrary to respondent's argument, *Carr* supports Ms. Dalton's position because the Supreme Court specifically noted that the determination of whether an aggravating factor exists is "a purely factual determination," and that is a determination for which it is possible to apply a standard of proof. (*Ibid.*)[12]

As Justice Scalia wrote, concurring, in *Ring*, "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.).) How a circumstance is labeled—whether as aggravating, mitigating, or, as in California, as capable of being interpreted either way—does not change the factual nature of the finding that is made. (See *Apprendi*, *supra*, 530 U.S. at p. 494 [emphasizing that the "relevant

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[12] Accordingly, to the extent this Court has relied on *Carr* to reject Ms. Dalton's claim (see *People v. Winbush* (2017) 2 Cal.5th 402, 489; *People v. Williams* (2016) 1 Cal.5th 1166, 1204), Ms. Dalton requests that this Court reconsider the issue, taking into account the argument presented here and in Appellant's Supplemental Opening Brief, and the analysis in *Hurst v. State*, *supra*, 202 So.3d 40 and *Rauf v. State*, *supra*, 145 A.3d 430.

inquiry is one not of form, but of effect"].) That the process calls for jurors to then determine whether the aggravating circumstances substantially outweigh the mitigating circumstances does not change the factual nature of this inquiry, nor does it change the guidance that the jury must receive in order for its verdict to conform to the Constitution's requirements.

The determination that aggravating circumstances outweigh mitigation is a necessary predicate to the imposition of the death penalty and one that must be made beyond a reasonable doubt. Ms. Dalton was not sentenced under these standards. Her death sentence must be reversed.

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CONCLUSION

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

DATED: April 27, 2018

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/
JOLIE LIPSIG
Supervising Deputy State Public Defender

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 16,972 words in length.

DATED: April 27, 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 REPLY BRIEF

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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 **April 27, 2018**, at Sacramento, CA.

/s/

MARSHA GOMEZ

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/27/2018 by April Boelk, Deputy Clerk

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Supreme Court of California

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4/27/2018
Date

/s/Jolie Lipsig
Signature

Lipsig, Jolie (104644)
Last Name, First Name (PNum)

Office of the State Public Defender
Law Firm