IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. AMY SAM HO, Defendant and Appellant.	Court of Appeal Case No. B279939 Superior Court Case No: BA395107

An appeal from a judgment of the Superior Court
of the State of California for the County of Los Angeles,
The Honorable George G. Lomeli, Judge Presiding

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF APPEALABILITY

The present appeal is from a final judgment entered following a jury trial and is thereby authorized under Penal Code section 1237.

II. STATEMENT OF THE CASE

Subsequent to a preliminary hearing, a two-count felony information was filed on September 25, 2013, charging Amy Ho ("Ho") with (1) murder of Cora Sam ("Sam") (§ 187, subd. (a)) and (2) elder or dependent adult abuse, resulting in death (§ 368, subd. (b)(1)). (1CT 244-245.) It was also alleged as to count two that Ho proximately caused the death of Sam, age 60 years (§ 368, subd. (a)(3)). (1CT 245.) Ho entered a not guilty plea to both counts. (1CT 248.)

Ho filed a motion to exclude and suppress her statements for violations of her rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution, including violation of her *Miranda* rights.

(1CT 261.) The trial court denied the motion. (2CT 511.) A petition for a writ of mandate regarding the trial court's ruling was filed with the Court of Appeal. The Court of Appeal denied the petition on September 11, 2015, in Court of Appeal case number B266470. (2CT 513.)

A jury convicted Ho of both charges on July 8, 2016 and found true the allegation in count two that Ho proximately caused the death of Sam, who was under the age of 70 years. (4CT 929-930.)

Ho filed a motion for a new trial. (5CT 1049.) The trial court denied the motion and refused to permit Dr. Richard Romanoff and attorney Errol Stambler to testify about issues raised in the motion. (5CT 1324; 14RT 4205-4206, 4221.)

Ho was sentenced on December 16, 2016. On count one, Ho was ordered to serve 15 years to life in State prison. (5CT 1324.) On count two, Ho was ordered to serve the midterm of three years plus five years for the enhancement. (5CT 1325.) The sentence in count two was stayed pursuant to section 654. (5CT 1325-1326.) She was ordered to pay fines and fees.

III. STATEMENT OF FACTS

A. Beverly Hospital

On the morning of October 10, 2011, Amy Ho ("Ho") approached the front desk at Beverly Hospital and informed staff that she needed assistance carrying her sister into the hospital from her car. Ho stated that her sister could not eat. (6RT 627; 7RT 994-995.) Nurse Christopher Cardenas ("Cardenas")[1] went outside and observed a dirty Volvo car right

[1] Cardenas acknowledged that, at the time of testifying, his license was suspended as a result of an accusation that he gave Vicodin, Ativan, and Xanax to a patient without a doctor's order. (6RT 649-650, 653, 655.) Two days after administering the drugs, the patient died. (6RT 655-656.) This incident occurred before Cardenas worked at Beverly hospital. (6RT 654.) Cardenas admitted to the nursing board that he had lied about a doctor's order for the drugs. (6RT 656-657.)

outside the door of the hospital. (6RT 628.) The interior of the car was dirty as well and had a bad smell. (6RT 629.)

In the back of the car was a female patient, later identified as Cora Sam ("Sam"), laying down in fetal position. (6RT 629.) Her limbs were stiff such that Cardenas was unable to move them. (6RT 631.) Cardenas explained that stiffness can result from contractures or the beginning of rigor mortis, which is the hardening the body undergoes after death. (6RT 631-632.) Rigor mortis starts to set in approximately 25 to 45 minutes after death. (6RT 659.) It fully develops six to eight hours after the person's death. (8RT 1238.)

Cardenas brought Sam into the hospital and called for help. (6RT 633.) Approximately four to five people began treating Sam. (*Ibid*.) They checked for a pulse and found no pulse. (*Ibid*.) They also checked for heart activity and found none. (6RT 634.) After multiple resuscitations attempts failed, Sam was pronounced dead at approximately 9:12 a.m. (6RT 635-636; 10RT 1844.)

Cardenas also observed bandages on Sam's body. (6RT 637.) When Cardenas brought up the bandages to Ho, Ho said, "Don't remove [the] bandages." (*Ibid*.) She explained that it takes her a while to finish the bandaging. (6RT 662.) The tape on the bandages appeared fresh to Cardenas and emergency room physician Dr. Raul Lopez. (6RT 662; 10RT 1872.) Nonetheless, Cardenas removed the bandages and observed "unstageable gangrene…unstageable wounds on the hips, hands, all over the body. Blisters. Second degree." (6RT 638.) Cardenas explained that by "unstageable," he meant "bone to bone…all the muscle is gone and it just went through … to [the] bones." (*Ibid*.) Cardenas classified the wounds as bedsores. (6RT 639.)

Cardenas proceeded to identify a number of photographs of the wounds. One photograph showed bedsores in the area of the right armpit. (6RT 641; People's Exh. 1-C.) Other photographs showed bedsores on the lower party of the body. (6RT 642-643.) Another photograph showed the "unstageable" wound in the pelvis area. (6RT 643.) Another photograph showed bedsores on the buttocks and extending along the back. (6RT 644.) Another photograph showed Stage II or State III sores in the vulva area. (6RT 644.) Cardenas denied that any of the wounds were caused by the removal of the tape by the medical staff. (6RT 663.)

Dr. Raul Lopez ("Dr. Lopez"), the emergency room physician who tried to resuscitate Sam, opined that her death was most likely caused by sepsis, which is an infection of the blood. (10RT 1859, 1862.) Dr. Lopez believed that Sam had been dead for "at least a few hours" prior to her being brought to the hospital. (10RT 1862.) He observed extensive gangrene "[i]n the area of her right hip, extending to her right gluteal area, also extending down towards part of her perineum." (10RT 1864.) Gangrene is essentially "rotten skin." (10RT 1866.) The wounds did not result from any major organs shutting down. (10RT 1868.)

Dr. Lopez explained that pressures sores develop from "laying in a prolonged position for a period of time." (10RT 1869.) For instance, as he explained, "[n]ot being turned from side to side, then you develop a sore, that becomes an infection, it becomes deeper, it spreads to the blood, and ultimately it spreads to the surrounding tissue, as appears to have been in this situation, and ultimately spreads to the blood, leading to sepsis and death." (*Ibid*.) Stage V of decubitis occurs when the wound "is broken down beyond the dermis, down into the subcutaneous layer, and down to the … muscle layer." (10RT 1866.) Dr. Lopez had never "seen anything so severe in terms of wounds and how chronic they were and how unkempt she appeared." (10RT 1873.)

Dr. Lopez also believed that Sam was malnourished due to the fact that "[h]er skin looked atrophied. It was dry. The skin turgor was diminished. She had temporal wasting in her forehead….[T]here was atrophy to her muscles." (10RT 1872.)

Dr. Lopez was suspicious of neglect due to the fact that "the wounds were so extensive and they appeared to have developed over a rather prolonged period of time. (10RT 1851.) Ho told Dr. Lopez that Sam "had been vomiting for several days, and that she had become ill as a result of her vomiting." (10RT 1853.) Ho had previously expressed to the medical staff that Sam just needed to be fed. (10RT 1857.) Dr. Lopez also recalled that Ho had become upset when the medical staff removed Sam's dressings as Ho stated that "it had taken her a long time to place those dressings." (10RT 1854.)

Based on the bedsores and malnutrition, Cardenas was mandated by the State of California to report the situation. (6RT 645.) The skin and bone were visible and there was "no meat" on Sam. (6RT 645-646.) Additionally, there were indications that Sam had not been cleaned as there was poop in the diaper area. (6RT 646.)

When Cardenas informed Ho that her sister had passed away, Ho responded, "No, she's going to eat….I brought her here, you know, just to feed her." (6RT 647.) Cardenas got the impression that Ho believed that her sister was still alive when she brought her. (*Ibid*.) Ho then said something to Cardenas to indicate that she wanted to leave. (6RT 648.) Cardenas instructed the secretary not to let her leave and called the police. (*Ibid*.)

B. Coroner

Yulai Wang ("Dr. Yulai Wang") is a deputy medical examiner at the Los Angeles County coroner's department. (8RT 1229.) He performed an autopsy of Sam on October 13, 2011. (8RT 1230.) At that time, he

determined Sam's weight to be 66 pounds and her height to be 4 feet, 3 inches. (*Ibid*.) Dr. Yulai Wang opined that a healthy weight for her height "should be up around 100 pounds." (8RT 1255.) He identified the cause of death as "sepsis that was caused by decubitus ulcers and then pneumonia, that was due to cerebral malformation, and malnutrition." (8RT 1230.) The death was classified as a homicide. (*Ibid*.) "Sepsis is the bacterial infection of the bloodstream involving the entire body." (8RT 1231.) One of the sources of the infection was decubitus ulcers, also called pressure ulcers, pressure sores, or bedsores. (*Ibid*.) A bacterial infection of those ulcers will then infect the bloodstream with bacteria and lead to sepsis. (*Ibid*.) Sepsis then impairs the organs and cause them to fail. (8RT 1232.) Sepsis can make a person lethargic or lose consciousness, thereby impacting a person's ability to eat or swallow. (*Ibid*.) Pneumonia, an infection of the lungs, causes difficulty breathing. (8RT 1232-33.)

Dr. Yulai Wang then wavered and stated that he could not say whether the pneumonia or the ulcers caused the sepsis. He explained that "it could be either one. That's why I put down both pneumonia and the decubitus ulcers as the underlying source for the sepsis." (5T 1249.) But then he changed his stance again and stated that "both contributed to develop sepsis." (8RT 1251.) He did not believe a culture of the lungs or the sores would have provided additional useful information. (*Ibid*.)

Malnutrition also contributed to the death as poor nutrition prevents the ulcers or sores from healing quickly. (8RT 1233.) Dr. Yulai Wang could not exactly state how Sam's cerebral malformation impacted the development of the pressure sores, but speculated that by impacting the mobility of a person, that limited mobility could produce pressure sores.

Dr. Yulai Wang explained that "[p]ressure ulcers tend to be classified into four stages, I to IV. Stage I, basically intact superficial skin; Stage II, intact skin and underlying soft tissue; Stage III will go even

deeper, to the muscles and deeper soft tissue; and Stage IV all the way to the bone." (8RT 1240.) He characterized Sam's ulcers as "Stage I up to IV." (*Ibid*.) He identified in photographs the various ulcers on Sam's body. (8RT 1241-43.) He estimated that the development of those ulcers occurred over the span of "[a]t least several months." (8RT 1246.)

Dr. Yulai Wang acknowledged that pneumonia is a common cause of death for people who are bedridden. (8RT 1280.)

C. Search

Deputy Robert Kenney ("Deputy Kenney") of the Los Angeles County Sheriff's Department conducted a search of the home where Ho, her husband, and Sam resided, on October 10, 2011, at around 7:00 p.m. (9RT 1554.) He identified various photographs that were taken of the residence. He pointed out a chair in the kitchen that had a minor smell of decomposition. (10RT 1953-1954.) The smell was more pronounced as he "got into the master bedroom, towards the shower." (10RT 1954.) Of the three beds he saw in the residence, only one appeared to be functional and that one was on the first level of the home. (*Ibid*.) The bedroom was used by Tim Ho. (*Ibid*.)

Two weeks later, another search was conducted of the residence with the use of a canine. Karina Peck ("Peck") is a canine handler with the Los Angeles County coroner's office. (9RT 1609.) The dog she works with is trained to detect only human remains. (9RT 1613.) The dog can detect dead skin tissue from a decubitus ulcer because it has already begun the decomposition process. (*Ibid*.) The dog gives certain alert signals, such as barking and scratching at a particular area or sitting down and pointing with her nose. (9RT 1616.)

On October 26, 2011, Peck conducted a search of Ho and Sam's residence with her canine. (9RT 1617.) The dog gave no alert signals at a

mat laid out in the driveway that Deputy Kenney believed to be where Sam had slept (11RT 2130), the garage, or anywhere on the first floor of the residence. The dog then gave a positive alert signal in the bathroom on the second floor at the foot of the shower as well as towards a bucket and gloves. (9RT 1620-23.) The dog subsequently gave some positive alerts in a room on the second floor. (9RT 1525.) There were a large number of items in the room. The dog did not give a strong alert as to any particular item although Peck did note some interest in a suitcase and silver pot. (9RT 1630.) The dog provided negative results to several chairs and a recliner. (9RT 1634.) Peck stated that the negative results indicated that "that person was not in that location." (9RT 1636.) Peck opined that the interest in the suitcase and pot was simply cross-contact contamination. (9RT 1637.) After conducting the search, Peck concluded that Sam "was left in the shower." (9RT 1640.)

D. Interviews

Montebello Police Department Officer Teri Connors ("Officer Connors") was dispatched to Beverly Hospital on October 10, 2011 at around 9:30 a.m. (9RT 1518-19.) At the hospital, Officer Connors spoke with Ho. Ho stated that she had been the primary caretaker for Sam for two years and that her sister was now in the hospital because she had not eaten for one day. (9RT 1522.) When asked why Sam had bruising and sores on her body, Ho responded that they were a result of not eating. (*Ibid*.) Ho stated that she had been giver her sister colloidal silver, which Ho characterized as "a natural antibiotic." (*Ibid*.) Ho provided the colloidal silver to Officer Connors. (9RT 1526.) Ho also stated that Sam had been walking two days before. (9RT 1523.) Ho believed that Sam was still alive when she was brought to the hospital and that she was still alive at the time

they were having the conversation. (*Ibid*.) Ho believed the doctors would just feed her and then she could take her sister home. (9RT 1527.)

Los Angeles Sheriff's Department Deputy Sheriff Joe Espino ("Deputy Espino") later interviewed Ho at the Montebello police station. (11RT 2141.) Deputy Espino testified about what he thought to be Ho's inconsistencies during her interview. He testified that Ho's statement that Sam had stopped walking just two days prior to her death seemed inconsistent with his view of Sam's body on the day of her death. (11RT 2154.) He believed Ho's statement that Sam had only stopped eating the day before was also inconsistent with the state of Sam's malnourishment. (11RT 2155.) He believed Ho's statements about how Sam was still alive and blinking before being brought to the hospital were inconsistent with the medical staff's conclusions. (11RT 2156.)

Deputy Espino additionally believed Ho contradicted herself when Ho first stated that Sam was losing weight at the Villa Oaks convalescent home, but then later stated that Sam's weight when she moved in with Ho after Villa Oaks was in the 70s and that Ho had been told an ideal weight for Sam was between 70 and 80 pounds. (11RT 2159.) Deputy Espino also believed Ho contradicted herself when she first did not characterize the wounds as pressure sores but instead as "blemishes, a tearing of the skin," and then later said that Sam did have pressure sores, but they were from when she left Villa Oaks, only to then mostly retract that statement as well. (11RT 2160.) Deputy Espino also believed Ho contradicted herself by first stating that she brought Sam to the hospital to be fed but later stating that she brought Sam to the hospital so Sam would be admitted to a convalescent home." (11RT 2161.) The fact that Ho did not want Sam's bandages removed also contributed to Deputy Espino's concern. (11RT 2162.) Additional sources of concern were Ho's characterization of the sores as "not serious" and Ho's lack of interest in taking Sam to the doctor.

(11RT 2162-63.) Although Deputy Espino asked, Ho never provided him with names of relatives or family members. (12RT 2790.)

Ho denied to Deputy Espino that Sam slept on the floor of the shower. (13RT 3008-3009.)

E. Doctor Visits

1. Dr. David Voron

Dr. David Voron ("Dr. Voron"), a dermatologist, began treating Sam in March of 2003. (8RT 1204.) Ho brought Sam in for the visits. (*Ibid*.) Dr. Voron first treated Sam for a fungal infection on her feet. (8RT 1205.) Dr. Voron treated her again later that year for some dryness of the skin and patchy inflamed areas. (8RT 1206.) In 2004, he treated her twice for benign growths on her right ring finger. (8RT 1207.) In December of 2007, he treated her for "a very common skin eruption associated with dry skin." (8RT 1208.) He saw her once again in July of 2008 to treat her for a fungus condition of the toenails and seborrheic dermatitis, which is "dandruff, redness and scaling of the scalp." (8RT 1221.) He never treated Sam for pressure sores or any of the types of wounds that were photographed on October 10, 2011. (8RT 1209-10.) Dr. Voron did, during one visit, suggest to Ho "that she not apply the colloidal silver" because he did not believe "it was providing any benefit." (8RT 1210.) Colloidal silver "is an over-the-counter product that has silver particles in a suspension." (8RT 1210-11.) Dr. Voron characterized it as "a popular remedy, but there's no … evidence that it has any efficacy." (8RT 1211.) At the time, Ho had been applying the colloidal silver to Sam's skin. (8RT 1211.) Dr. Voron added that colloidal silver would not be an appropriate remedy for pressure sores. (8RT 1212.) He also stated that "[v]ery large quantities over a long period of time can produce a condition called argyria, in which the silver is absorbed into the skin and … produces organ problems." (8RT 1223-24.)

Based on his "impression of how much colloidal silver was being used," however, he opined that the development of argyria was "extremely unlikely." (8RT 1224.)

2. Dr. Robert Wang

Dermatologist Robert Wang ("Dr. Robert Wang") first treated Sam in April of 2006. (10RT 1805.) Sam was accompanied by Ho to Dr. Robert Wang's office, although Sam was walking by herself. (10RT 1805, 1811.) During that first visit, he treated her for minor skin problems such as an allergy, a rash, fungus, and folliculitis, which is a follicle infection that is similar to a pimple. (10RT 1806.) Dr. Robert Wang prescribed corticosteroid antibiotic ointment or cream for these issues. (*Ibid*.) The last time Dr. Robert Wang treated Sam was in December of 2009. (10RT 1807.) He never treated her for bedsores or pressure sores. (*Ibid*.) He did treat her for a "little bit breaking of the skin" in Sam's right buttocks area. (10RT 1808.) He agreed that this problem amounted to "a wound on her butt" but would not characterize it as a pressure sore. (10RT 1809-10.) He reasoned that since he had seen her walking at his office, she would not have been developing pressure sores; however, he agreed it was possible that the wound was a pressure sore if she was not walking when she was at home. (10RT 1812.) He first prescribed Centany cream for this issue and, when that proved ineffective, prescribed Silvadene cream. (10RT 1808-09, 1831-32.) He also recommend to "put gauze and paper tape" on the wound in order to maintain the moisture and facilitate cell migration. (10RT 1809, 1816.) He never prescribed colloidal silver. (10RT 1813.)

Dr. Robert Wang reviewed the photograph in People's 8 and stated that it was not a bedsore but a maceration of the skin. (10RT 1824.) Dr. Robert Wang explained that maceration of the skin is "usually caused by several reasons. One is bad hygiene; second is underlying disease, like

diabetes, third, may trauma; and, …fourth, maybe allergy cause[d] the trauma." (10RT 1825.) He further explained that if the heart rate goes down, due to pneumonia, then the blood pressure goes down and the blood supply will decrease, which allows an infection to become aggravated. (10RT 1826.)

3. Dr. David Gu

In April of 2007, Dr. David Gu ("Dr. Gu") was a physician assigned to treat patients at Sunbridge facility, which later changed its name to Baldwin Gardens. (9RT 1564.) At that time, he treated Sam and noted that she had mental challenges, was underweight, and had decubitus ulcers on her upper thigh and lower buttock. (9RT 1567, 1571.) The decubitus ulcer was in Stage III. (*Ibid*.) From the period of April 4, 2007 to May 30, 2007, Dr. Gu noted that Sam's weight increased from 86 pounds to 92 pounds. (*Ibid*.) Dr. Gu provided treatment for the decubitus ulcer wounds. (9RT 1568.)

Dr. Gu acknowledged that a decubitus ulcer can be recurring in a particular spot. (9RT 1574.)

4. Dr. Gene Tu

Dr. Gene Tu ("Dr. Tu") is a physician who began seeing Sam in May of 2009. (9RT 1532.) Ho brought Sam to his office. (*Ibid*.) At the time he first met with her, Sam weighed 87 pounds. (9RT 1533.) During that first appointment, Dr. Tu treated Sam for a urinary tract infection. (9RT 1534.) He saw her again in June of 2009 to continue treatment for the infection. (9RT 1535.) He also gave her a pinch test and determined that she responded to painful stimuli. (*Ibid*.) He saw her once more in June of 2009 as a follow-up to a hospitalization at Beverly Hospital and then saw her again in October of 2010. During the October of 2010 visit, Dr. Tu

signed off on a document for a diet that Ho had prepared. (9RT 1537.) The diet itself had been prepared at the last nursing home and Sam was in the process of switching nursing homes. (9RT 1536-38.) He did not meet with Sam again after that visit. (9RT 1539.) At no point did Dr. Tu prescribe colloidal silver or discuss colloidal silver. (*Ibid*.)

F. Sam's Mental State

Psychologist Jeanette Merkel ("Dr. Merkel") conducted an evaluation of Sam in 2006. (10RT 1878.) She found that Sam had an IQ quotient of 9 and determined Sam to be "in the profound range of mental retardation, or what they now call intellectual disabilities." (10RT 1881.) She also determined that Sam's "gross motor skills fell in the range of 14 to 18 months." (10RT 1882.) Gross motor skills "are the skills that lead to the ability to ambulate and walk and skip and run and jump and ride a bike." (*Ibid*.) Dr. Merkel found Sam's social skills to be in the "range from seven to 21 months." (10RT 1884.) For language comprehension, Sam was in the five to 12 month range, and for language expression, Sam was in the three to seven month range. (10RT 1885.) Sam's capabilities in the activities of daily living were "at approximately one year, seven months." (*Ibid*.) Sam needed assisting with dressing, undressing, hygiene, bathing, and toileting. (10RT 1886.) Sam also wore diapers. (10RT 1887.) Sam was able to "manifest different emotional states." (10RT 1888.)

G. Attempts to Place Sam in a Nursing Facility

Nhon Ly ("Ly") is a social worker at the East Los Angeles Regional Center. (7RT 1027.) From June of 2007 until August of 2008, Ly initially testified that she was the service coordinator for Sam's case from June of 2007 until August of 2008, but later acknowledged she continued in that capacity until December of 2008. (7RT 1028, 1057.) During this period, Ly

communicated with and met with Ho. (7RT 1029.) At the beginning of this period, Sam "was living in a convalescent home named the Country Villa." (*Ibid*.) Sam then left Country Villa to go live at Oaks Villa, only to then leave Oaks Villa and live at Ho's residence. (7RT 1030.) Ho talked to Ly, however, about getting Sam into another facility. (7RT 1031.) As a result, Ly notified Ho about three or four nearby vacancies in facilities. (7RT 1032-33.) Ly recounted times when the facilities would initially accept Sam but then Ho would say that there was something wrong with the facility. (7RT 1036-37.)

Ly never completed an Individual Program Plan with Sam and Ho as Ho multiple times called and stated that she was busy. (7RT 1034.) Ly also informed Ho about In-Home Support Services. (7RT 1037.) Ho wrote a letter to Ly, however, in which Ho stated that she did not want literature about the In-Home Support Services sent to her residence and asked that Ly stop sending such literature. (7RT 1039.) Nonetheless, Ho continued to speak with Ly about the stress of caring for her sister. (7RT 1041.) Ly offered respite services, which involves paying the family "so that they can hire a person of their liking" who can "do things for the client." (*Ibid*.) Ho never tried to arrange such services with Ly. (7RT 1042.) Ly also informed Ho about day programs in which Sam could exercise herself and walk by herself, but Ho said Sam was not healthy enough to participate in such programs. (7RT 1042-43.)

When Ly first met with Ho, it appeared that Ho was very concerned about the welfare of her sister and wanted to find a permanent place for her. (7RT 1047.) Ly did have a successful 30-day Individual Program Plan meeting, distinguishable from the annual meeting, with Ho in 2007. (7RT 1049, 1054.) Ly confirmed that Ho did visit the facilities to which Ly referred her. (7RT 1052.) At some point, Ho requested a different service

coordinator. (7RT 1055.) Ly continued, however, to act as coordinator until December of 2008. (7RT 1057.)

In September of 2008, Wilma Jean Roberts ("Roberts") was a social service designee for Villa Oaks Convalescent Hospital in Pasadena. (11RT 2103.) A social service designee is "someone that the patients can come to whenever they need someone to talk to, the family can come and talk to when they want to talk to them." (11RT 2103-2104.) When Sam was admitted to the facility she weighed 83 pounds. (11RT 2110.) When she was discharged on September 13, 2008, she weighed 84 pounds. (*Ibid*.) Roberts characterized Ho as "very demanding" and recounted an instance when Ho "was yelling and screaming." (11RT 2110-11.)

Margarita Duran ("Duran") has been a social worker at the Eastern Los Angeles Regional Center for the Developmentally Disabled for 21 years. (12RT 2778-79.) At the time of testifying, she was the supervisor in the residential unit. (12RT 2779.) Although Duran never met Sam or Ho, she oversaw the service coordinators who managed their case, including George Rodriguez and Nhon Ly. (12RT 2779-80.)

Duran identified a faxed letter from Ho, dated December 18, 2008, that had been addressed to her, her manager, and the Chief of Consumer Services. (12RT 2781.) She received such letters from Ho at least once a week. (*Ibid*.) The letter contained a request for Sam to be assigned to a different service coordinator. (12RT 2783.) Ho stated in the letter several reasons she did not feel comfortable continue to work with Nhon Ly. (*Ibid*.) One of the reasons was that Ho had discovered vacancies and referrals on her own that Ly had not informed her about. (12RT 2783-84.) Upon reviewing the matter, Duran learned that Ho had actually previously requested to not be referred to Temple Gardens and the Harbor Home facilities, which were the referrals that Ly did not then tell Ho about. (12RT

2785.) Nonetheless, Duran replaced Ly with George Rodriguez ("Rodriguez") on Sam's case to appease Ho. (12RT 2786.)

Thus, Rodriguez became the service coordinator for Sam in January of 2009. (7RT 944.) In handling Sam's case, the only family member with whom Rodriguez communicated was Ho, although they never met in person. (7RT 944-945.) Rodriguez continued to oversee Sam's case until Sam's death. (7RT 945.)

Rodriguez reviewed Sam's placement history. Sam had been in a residential treatment facility from 1984 to 2002. From November of 2002 to April of 2003, Sam then lived with her sister, Ho. Sam then went into another residential treatment facility until 2006. From December of 2006 to April of 2007, Sam again lived with Ho. After leaving Ho's residence, she went to another facility only until June of 2007, then returned to live with Ho for just a few days, and then went to live at another facility. In September of 2008, Sam returned to living with Ho and continued to do so until her death. (7RT 947-948.)

As part of his work with clients, Rodriguez completed an Individual Program Plan along with the client and the client's family. This plan includes "planning for the person's services, their expressed wishes, what their preferred living arrangement is, and essentially documenting their current functioning." (7RT 949.) Standard practice provides for this review to be completed on an annual basis during the client's birth month. (7RT 950.) Rodriguez communicated in writing to Ho that it was time to complete an updated plan. (*Ibid*.) From 2009 to 2011, Ho never scheduled a meeting to update the plan. (*Ibid*.) Rodriguez continually reminded Ho during their correspondence about updating the plan. (7RT 951.)

Rodriguez regularly provided Ho with information regarding vacancies at facilities. (7RT 954.) He identified a vacancy in July of 2009

at a facility called Jo-Mi. (7RT 955.) However, the efforts to place Sam at Jo-Mi were not successful. (7RT 956.) While Rodriguez continued to search for a suitable facility, Rodriguez reminded Ho that In-Home Supportive Services were also available to assist with Sam's care. (7RT 957.) Rodriguez also informed Ho about day programs "that are designed for persons with developmental disabilities so that they remain active during the day." (7RT 957-958.)

Rodriguez notified Ho about vacancies at a facility named Neargrove House and a facility named Temple Garden Home 6 in August of 2009. (7RT 959-960) Rodriguez also informed Ho about a vacancy at the facility named Pure Joy II. (7RT 961.) Another vacancy at JanRay home was also presented to Ho but was unsuccessful. (7RT 961-962.) In January of 2010, Rodriguez informed Ho about three vacancies at different facilities, Special Adult Care Home, Neargrove House, and Temple Garden Home. (7RT 963.) None of these vacancies resulted in placement for Sam. (7RT 964.) Rodriguez informed Ho of another vacancy at Neargrove House and a vacancy at La Fonda Home in March of 2010. (7RT 964.) Again in June of 2010 Rodriguez informed Ho of a vacancy at Neargrove House. (7RT 964-965.) And in September of 2010, Rodriguez informed Ho of vacancies again at Special Adult Care Home, Neargrove House, and Temple Garden Home. (7RT 965.) After speaking with the administrators of these homes, Rodriguez concluded that there was a pattern of the homes' rejecting placement based on Ho's desire to dictate the terms of care, particularly as to diet. (7RT 966, 979.)

During this time, Ho had communicated to Rodriguez that she felt stressed and economically burdened by having to care for her sister. (7RT 967.) In one letter, Ho stated that they had to act fast in finding a place for Sam as Ho was suffering from carpal tunnel syndrome and caring for Sam was aggravating the symptoms. (7RT 969.)

Rodriguez acknowledged that there is no legal obligation for a client to accept the services offered by Eastern Los Angeles Regional Center. (7RT 975.)

In July of 2009, Cecilia Cuevas ("Cuevas") was a registered nurse and owner of the Jo-Mi Intermediate Care Facility for Developmentally Disabled with Nursing needs ("Jo-Mi"). (9RT 1578.) At that time, she met with Sam as a potential resident and Ho. (9RT 1580-81.) Ho expressed concern about the food at the facility and stated "that she want[ed] a specific type of food for her sister." (9RT 1584.) Cuevas explained that the diet would have to be reviewed by the attending physician at the facility. (*Ibid*.) Ho also stated that she would not allow the staff at Jo-Mi to conduct a physical examination of Sam prior to her admission. (9RT 1587.) Ho also expressed a desire to sleep with Sam in the bed or next to her sometimes. (9RT 1588.) Cuevas responded that family members are not allowed to sleep inside the facility. (*Ibid*.) For these reasons, Ho told Cuevas that placing Sam at the facility would not work. (*Ibid*.) Cuevas testified that, other than Ho's demands, Sam would have been a good fit for the facility. (9RT 1590.)

Nonetheless, Ho continued calling the facility to ask Cuevas to admit Sam. Cuevas provided Ho with information about the Visiting Nurse Association in order to obtain in-home help that could be covered by Medi-Cal. (9RT 1593.)

In November of 2009, Pamela Benson ("Benson") was a Qualified Mental Retardation Professional. She was the director of five Intermediate Care Facilities that were licensed by the Department of Public Health. She worked at the facility Pure Joy II in Whittier. (7RT 910-911.) The clients at Pure Joy II resided there 24 hours a day. (7RT 912.) Around October or November of 2009, Benson communicated with Rodriguez from the

Eastern Los Angeles Regional Center about a vacancy Sam at the facility. (7RT 912-913.) Benson proceeded to set up a meeting with Sam's family in order to discuss the facility with them and let them decided whether the facility would be a good fit. (7RT 913-914.)

In early November of 2009, Benson met with Sam and Ho. Benson's impression of Sam was that she was "non-verbal," in a wheelchair, and "on a high level of mental retardation, meaning that her functioning was very low." (7RT 915.) Sam also seemed to Benson "a little too frail," although Benson "wasn't concerned about that at the time." (*Ibid*.) Nonetheless, a conversation about Sam's diet led Benson to lead Sam and Ho to the facility's kitchen. (7RT 915-916.) When Ho "described a specific type of food she wanted [Sam] to eat," Benson responded, "That's not very nutritious." (7RT 916.) Ho insisted that Sam had to eat a particular food and offered to come onto the premises and prepare it, to which Benson answered that was not allowed. (*Ibid*.) Ho also stated that "she wanted to come any time of day or night." (*Ibid*.)

Benson believed that Sam was a good fit for the facility. (7RT 917.) However, Benson was "very nervous about accepting her in because of her sister." (*Ibid*.) Ultimately, Benson decided that Sam would not be admitted to the facility for this reason. (7RT 918-919.) Nonetheless, Benson believed that Ho was concerned about Sam. (7RT 926.)

In February of 2010, Lilian Sestiaga ("Sestiaga") worked as an administrator at an intermediate car facility for the developmentally disabled called Special Adult Care Home. (9RT 1503.) At that time, she met with Sam and Ho at the facility. (9RT 1505.) Sam was walking on her own. (9RT 1506.) It appeared to Sestiaga that Sam was non-verbal. (8RT 1507.) Ho talked about Sam's diet, "which mainly consisted of beans and fish." (*Ibid*.) Sestiaga asked Ho about the diet and Ho "was very adamant on following the fish and beans diet." (*Ibid*) Ho was also adamant that Sam

should be fed by the staff instead of taking bites of food on her own. (9RT 1510-11.) Sestiaga believed that Sam would have been a good fit for the facility except for the diet aspect. (9RT 1511.) Ultimately, Sam was denied admission to the facility on that basis. (9RT 1512.) Ho also indicated that she wanted a high amount of visitation with her sister at the facility. (8RT 1515-16.)

Despite the diet issue, Sestiaga did get the impression that Ho really wanted Sam placed in the facility. (9RT 1514-15.) Ho also followed up the meeting with several phone calls. (9RT 1515.)

H. Experts

1. Dr. Diana Homeier

Dr. Diana Homeier ("Dr. Homeier") is "a physician who specializes in geriatric medicine, which is the care of elderly patients." (10RT 1894.) Testifying as an expert for the prosecution in elder abuse, she opined that "there definitely was neglect in the car of Ms. Sam" based on an analysis of six factors. (10RT 1897.) The six factors were (1) the number and severity of the pressure ulcers, (2) malnutrition and weight loss, (3) neglect to seek medical care, (4) delay in seeking medical care, (5) "isolation, in that Ms. Sam was not allowed to be seen by some people who may have been able to help her," and (6) "that reports were made to law enforcement and Adult Protective Services by providers who recognized the neglect when it came through the emergency door." (10RT 1897-1898.)

Elaborating on the first factor, Dr. Homeier explained that "Ms. Sam had multiple pressure wounds ranging from Stage I through IV, a very large Stage IV pressure wound on her bottom that was very severe, and these pressures [*sic*] wounds did not appear to have received medical attention or adequate care in the setting that she was living." (10RT 1898.) She noted the extent of the "maceration of tissue, dark discoloration of tissue" in "the

perineal area, the vagina, and the anus" where "there was extensive breakdown … of skin." (10RT 1901.) This maceration "was all very continuous with the pressure ulcer that was on the right hip" and since "one area shows bone, the entire area would be considered a Stage IV pressure ulcer." (*Ibid*.) She identified additional areas in which a Stage II pressure ulcer was present as well. (10RT 1901-02.)

Several forces contribute to the formation of a pressure sore. One force is friction, which is "the force that is between the surface that the patient is lying on and the patient's skin." (10RT 1903.) A second force is "shearing force, which is where a patient is moved from one position to another and they're sort of slid across that surface, and sometimes the skin sticks to the surface that they're lying on and it's the tissue underneath the skin that moves, and then causes some damage there in the tissue underneath the skin." (10RT 1903-04.) A third factor is moisture, "often with patients who are not able to control their bowel or bladder and use a diaper, and so there may be urine or stool sitting in that area, and that can actually irritate the skin and macerate it and lead to pressure sores." (10RT 1904.) A fourth factor "is the patient's immobility or inability to move from one position to another, and also the sometimes cognitive inability to ask to be moved from one side to another." (*Ibid*.) The last factor is the patient's positioning. (*Ibid*.)

Discussing how long it takes for a Stage IV pressure sore to develop, Dr. Homeier explained that "if somebody does have the beginnings of a Stage I pressure ulcer and the pressure is not relieved, it can actually happen fairly quickly for it to progress to another stage; if they are getting some care of the wounds, it may take weeks to months for it to form into a Stage IV ulcer." (10RT 1908.)

Dr. Homeier explained that while there are some silver creams used as part of treatment, colloidal silver is not one of those creams. (10RT 1909.)

Dr. Homeier opined that a reasonable caregiver would have sought treatment for a pressure wound at a much earlier stage. (10RT 1911.)

As to the second factor of malnutrition, Dr. Homeier noted that Sam's reduction in body weight from 84 or 87 pounds in 2009 to 66 pounds when she was brought into the hospital represented an approximate 25 percent weight loss. (10RT 1912.) The lack of proper nutrition hampers the body's ability to fight off infection. (*Ibid*.)

As to the third factor of neglect to obtain medical care, Dr. Homeier noted that Sam had been brought to see Dr. Tu in October of 2010 and that a mammogram had been completed in November of 2010 but there were no subsequent visits until she was brought into Beverly hospital. (10RT 1914.)

Regarding the fourth factor of delay in seeking medical care, Dr. Homeier distinguished this factor from the third factor in that "delay in seeking care is when a caregiver does note that there's an issue and then delays getting care for that issue." (10RT 1914-15.) Dr. Homeier noted that in this case, Ho had "explained to the physician that [Sam] hadn't been eating for two days [and] that she hadn't been walking for two days. Those are critical signs in a patient." (10RT 1915.)

Dr. Homeier reviewed Sam's medical history and found that on April 4, 2007, Sam had been diagnosed with a Stage III pressure ulcer in her right buttock area, "and she was appropriately brought in for care." (10RT 1915.) After a few weeks of proper treatment, the wound had almost completely healed. (10RT 1918.)

As to the last factor regarding the reports to Adult Protective Services and law enforcement, Dr. Homeier noted that "[i]n this case, the

physicians, the nurses, [and] the social worker who saw Ms. Sam right away recognized that this was neglect." (10RT 1919.)

Based on her review of the records and her analysis using the above factors, Dr. Homeier determined that neglect caused Sam's death. (10RT 1919.) She elaborated that "neglect caused the pressure wounds, and the malnutrition … didn't allow for healing and allowed for worsening of pressure wounds, and then these pressure wounds became infected and ultimately caused her death, and so the death is related right back to the neglect for care." (10RT 1920.) Dr. Homeier added that she believes, based on her review of the medical literature and her own clinical experience, that pressure wounds are painful. (10RT 1922.)

Dr. Homeier explained that terminal skin failure theory "is a theory that, as a body is dying, the skin itself can die, even under conditions where there is proper care." (10RT 1927.) She added, however, that "[o]ne of the defining characteristics of this theory is that the skin is receiving proper care," which she did not believe was happening in this case. (*Ibid*.) She also added "[t]hat there's to date no real medical evidence that this really exists. Many people in geriatric medicine believe that what people are describing as these are really unavoidable pressure ulcers in terminally ill patients." (10RT 1935.)

2. Dr. John Fullerton

Dr. John Fullerton ("Dr. Fullerton"), testifying as an expert for the defense, is a physician certified in internal medicine and geriatrics. (12RT 2711.) He is also the director for palliative care at St. Mary's Medical Center. Palliative care, also known as "comfort care[,] is delivered when it's believed that a patient doesn't really have a long life expectancy, number one; and, number two, wouldn't really benefit from incentive or invasive kinds of treatments." (12RT 2719.)

Dr. Fullerton had never seen an individual with Sam's level of mental retardation live to be 60, as Sam did; instead, most individuals suffering from severe mental retardation die between 18 months old and five years old, with some individuals living up to the age of 30. (12RT 2722.) For Sam specifically, Dr. Fullerton believed a 30-year life expectancy would have been applied. (12RT 2751.)

Dr. Fullerton testified that in the last year prior to her death, Sam "had entered a terminal decline." (12RT 2722.) Signs indicating that an individual has entered terminal decline include "things like skin lesions developing and not healing" and a lack of interest in eating and drinking. (*Ibid*.) In fact, a person losing desire for food and drink is a "majority of the times part of the picture" in terminal decline. (12RT 2735.)

Dr. Fullerton had previously seen patients with the same severity of decubitus ulcers that Sam exhibited and described them as occurring "pretty regularly in a palliative care environment." (12RT 2723.) Upon reviewing the photographs of Sam's body, Dr. Fullerton concluded that Sam suffered from terminal skin failure. (12RT 2724.) He explained that "when patients are preterminal … or terminal,… the blood flow[s] … to the vital organs like the brain, the heart, the kidneys." (12RT 2725.) As the blood flows to these vital organs, however, blood is flowing away from the skin, which is itself an organ. (*Ibid*.) He elaborated that, as a result, "the skin behaves differently …. [s]o pressure ulcers can, or end-of-life ulcers, can occur more suddenly, they can develop more severely, [and] they typically don't heal normally." (*Ibid*.)

When a person is suffering from terminal skin failure, the appropriate response is "a palliative skin care approach, so not moving, disrupting the patient too often, particularly with the contractures there to the legs, and mostly symptomatic treatment." (12RT 2726.)

The fact that Sam was determined to suffer from pneumonia also played into Dr. Fullerton's analysis. (12RT 2727.) Dr. Fullerton explained that "[p]neumonia develops at the end of life for a variety of reasons, but like the skin lesions is typically felt to be not treatable. The antibiotics don't tend to work like they would have worked if someone wasn't in an end-of-life terminal failure condition." (*Ibid*.)

Another factor incorporated into Dr. Fullerton's analysis was the fact that Sam was born with a malformed brain. (12RT 2727.) Not only did the malformed brain limit her life expectancy, but "the fact that she ha[d] these grave disabilities related to her brain function [made] it much more difficult … for anyone medically to salvage her." (12RT 2728.) Additionally, the medical examiner noted the brain malformation as part of the cause of death in his report. (*Ibid*.)

Dr. Fullerton opined that there was a possibility that the ulcers on Sam were Kennedy ulcers, which develop very rapidly. He explained that a nurse named Kennedy had worked at a big wound care place in the Midwest when "she noticed this phenomena at the end of life … that, typically, in a butterfly fashion over the back, over the sacrum, the patients within 48 hours of death – sometimes [within] a week of death, but 48 hours in particular, would develop this butterfly-like lesion that then progressed extremely rapidly." (12RT 2729.) He added that a Kennedy ulcer could progress "even to a Stage IV within that time period." (*Ibid*.)

Based on his review of the record, Dr. Fullerton believed that Sam was not experiencing significant pain. (12RT 2731.) First, she would have been able to non-verbally indicate pain if she were feeling any pain. (12RT 2730.) Secondly, as pressure ulcers become more severe, "the sensory fibers that would transmit the pain to" Sam would be eradicated. (*Ibid*.) He compared the situation to that of a burn patient who feels less pain because the nerves have been burned through. (12RT 2731.)

As to what sleeping arrangements would have been best for Sam, Dr. Fullerton felt sufficiently confident in the relationship between Sam and Ho that Ho would know which arrangement was most comfortable for Sam. (12RT 2732.)

Given Sam's physical state, Dr. Fullerton concluded that if Sam had been in a palliative care facility, it would not have made a different as she would have still "died the way she died." (12RT 2734.) Having a nurse turn Sam's body would also not have made a difference in a terminal life situation. (12RT 2737.)

SCALE stands for Skin Changes At Life's End and, like its name, describes how the skin can develop differently towards the end of life. (12RT 2737.)

Dr. Fullerton did not believe that Sam was malnourished as she had been in the range of 70 pounds at certain times, while being in the range of 80 pounds at other times, and some weight loss is anticipated at the end of life. (12RT 2739.) That 70 pound range was based on information from Ho. (12RT 2764.) Dr. Fullerton explained it is common for weights to decrease by ten or more pounds. (12RT 2765.)

Dr. Fullerton has personally witnessed the rapid deterioration of the skin of patients in "hours to days." (12RT 2742.) Further, he did not see a problem with Ho's use of colloidal silver as silver is used "in some compounds in wound care." (12RT 2742.)

Dr. Fullerton did acknowledge it is possible for people to develop ulcers as a result of poor care due to neglect. (12RT 2752.) He also acknowledged that sepsis played a role in the cause of death too, although he believed the sepsis would have been present even without the infected decubitus ulcers due to Sam's pneumonia. (12RT 2754.) In terminal decline, "the host defenses to fight an infection, even with antibiotic, they

tend to not work….so any infection…at a certain source of the body, tends to spread through the bloodstream into other sites." (12RT 2755.)

Dr. Fullerton testified that a culture of the bacteria was required to determine if the cause of sepsis was from pneumonia or bedsores, but no culture was performed by Dr. Yulai Wang in this case. (12RT 2771-72.)

I. Additional Evidence Offered at Motion for New Trial

1. Expert Testimony of Pathologist Frank Sheridan

Following Ho's conviction in this case, the relevant medical records were submitted to Dr. Frank Sheridan, an anatomic pathologist, neuropathologist, and forensic pathologist. (5CT 1187-1193.) While Dr. Sheridan agreed with the autopsy report that Sam "died of sepsis due to gangrenous decubitus ulceration and/or bronchopneumonia," he disagreed with the purported "manner of death." (5CT 1188.) He first noted that the pneumonia was likely aspiration pneumonia, which "is typically rapid in progression due to the irritant effect of food and gastric acid on the alveolar tissue in the lungs." (*Ibid*.) Moreover, due to Sam's difficulties with eating, "aspiration pneumonia [was] a constant danger" that could have "occur[ed] even when the patient [was] being well cared for." (*Ibid*.)

Dr. Sheridan also concluded that Sam's malnourished stated did "not necessarily imply she was not being fed. There was liquid food material in the stomach at autopsy. Cora Sam's weight was not exceptionally low. She was a generally small person. Also, people in a terminal state will often appear undernourished or malnourished due to their generalized catabolic state." (5CT 1188.)

Dr. Sheridan agreed with Dr. Fullerton that "[t]he sepsis in this case could have been caused by the pneumonia *or* the infected decubitus ulcer, possibly a combination of the two." (5CT 1188, emphasis added.) Dr.

Sheridan also stated that he was "familiar with Kennedy terminal ulcers" and believed that Dr. Fullerton was in the best position to testify on that subject. (*Ibid*.) Dr. Sheridan additionally noted that, "[f]rom a pathology standpoint, it can be said that skin, or any other organ, when inadequately perfused, can develop very rapidly evolving infections with resulting gangrenous necrosis." (5CT 1188-1189.) Based on his analysis, Dr. Sheridan concluded that "there [was] not compelling evidence in this case to attribute Cora Sam's death to caretaker abuse or neglect." (5CT 1189.)

2. Expert Analysis of Canine Expert Testimony

Subsequent to Ho's convictions in this case, Steven D. Nicely ("Nicely") reviewed the evidence pertaining to the canine search.[2] Nicely has been working with police dogs since 1973. (5CT 1226.) In 1989, he began working with Global Training Academy in Texas, at which "he trained approximately 750 dogs for some form of police service." (*Ibid*.) Moreover, "[s]ince 1993[,] he has testified in court as an expert on police service dogs approximately 110 times." (*Ibid*.)

Nicely first questioned whether the canine's training and certification have "external validity," in which a "comparative analysis of the team's performance and training" is conducted. (5CT 1226.) He next questioned whether the canine was "under the *stimulus control* of the *discriminative stimulus*," which helps determine "the probability of the dog erroring and false responding." (*Ibid*., emphasis in original.) Nicely also questioned if there were any "actions taken in training and certification

[2] As stated in the motion for new trial, notes pertaining to the canine's training (5CT 1247-1250) were not provided to defense counsel prior to the motion for new trial and, therefore, were not provided to Nicely, until after Nicely had completed his report for the motion for new trial. (5CT 1111.) There is no indication in the record that these notes were ever provided to trial counsel, and no cross-examination referenced any of these notes. Moreover, these notes still did not contain the full certification and log of the canine. The statistics referenced in the notes are from 2013.

procedures to ensure the records were not recorded under *experimental bias*," such as through the use of double-blind testing. (*Ibid*., emphasis in original.) No records were provided to answer *any* of these questions.

Additionally, real world deployment of odor detector dogs still requires forensic science testing of the substance detected. (5CT 1227.) A detector dog's response can also be affected by a handler unconsciously cueing the dog. (5CT 1228.) This issue can be managed by having the handler "taken to additional similar type locations to have the dog sniff search them" without being told which is the real location of the search and which are the false locations. (5CT 1229.)

Nicely also noted the lack of a video record of the search, as is recommended. (5CT 1229.) Only with a video record can an independent assessment accurately be made of the dog team's performance, "particularly for the defense, [who] would most likely never [be] present at the [scene] when the dog [is] deployed." (*Ibid*.)

3. Declaration by Clinical Psychologist Dr. Romanoff

Defense presented in the motion for new trial an evaluation conducted by licensed clinical psychologist Dr. Richard I. Romanoff, although the court did not permit Dr. Romanoff to testify at the hearing on the motion. (5CT 1156-1185; 14RT 4205.) Dr. Romanoff determined that there is "strong support for a finding that Ms. Amy Ho suffers from a case of obsessive-compulsive personality disorder and likely also suffers from a hoarding disorder." (5CT 1157.) He also found "evidence of impaired reasoning and judgment by Ms. Ho in connection with her care of her sister in the final days of her sister's life." (*Ibid*.)

4. Declaration by Attorney Errol H. Stambler

Defense presented in the motion for new trial a declaration Errol H. Stambler, who has been a licensed attorney since 1973 and has been continuously certified by the California State Board of Legal Specialization as a Certified Criminal Law Specialist since 1982, although the Court did not permit Stambler to testify at the hearing. (5CT 1312; 14RT 4206.) After reviewing the evidence and record in this case, Stambler found, among other grounds for ineffective assistance of counsel, that "the height of ineffective assistance of counsel under the Sixth Amendment was [trial counsel] Shemaria's failure to investigate and explain the mental state defense of [Ms.] Ho." (5CT 1313.)

IV. ARGUMENT

A. Ho's Convictions Should Be Reversed for Insufficient Evidence

1. Standard of Review

It is well settled that in reviewing the sufficiency of a criminal conviction, the appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. To determine whether there is substantial evidence to support a conviction, the appellate court "must view the evidence in a light most favorable to [upholding the conviction] and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Johnson* (1980) 26 Cal.3d 557, 576 ("*Johnson*"), quoting *People v. Mosher* (1969) 1 Cal.3d 379, 395.) The appellate court must then determine "whether the evidence of each of the essential elements … is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding."

(*Johnson*, *supra*, 26 Cal.3d at 576, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 138, emphasis in original.)

Substantial evidence has been described as "of ponderable legal significance…reasonable in nature, credible, and of solid value." (*Johnson, supra*, 26 Cal.3d at p. 576, quoting *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) The substantial evidence test must be applied to each element of the offense charged. (*People v. Patino* (1979) 95 Cal.App.3d 11, 27.) When the evidence of guilt is so unsubstantial that the judgment may be regarded as having been based on "mere speculation," then reversal is then required. (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) The substantial evidence rule is the court's yardstick for determining whether a verdict meets this minimal standard of reasonableness. (*People v. Trevino* (1985) 39 Cal.3d 667, 695; overruled on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221; *People v. Reyes* (1974) 12 Cal.3d 486, 496-497.)

2. Ho's Conviction in Count One Should Be Reversed as the Evidence Did Not Support a Finding of Implied Malice

a. Second Degree Murder Requires A Mental State of Malice

Penal Code section 187, subdivision (a), defines murder as "the unlawful killing of a human being … with malice aforethought." (Pen. Code, § 187, subd. (a).) "The elements of second degree murder are: (1) an unlawful killing; (2) accomplished with malice aforethought, whether express or implied." (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 735.) CALCRIM lists the elements as: (1) The defendant committed an act that caused the death of another person; (2) When the defendant acted, he or she had a state of mind called malice aforethought; and (3) The defendant killed without lawful justification. (CALCRIM 520.) The act required for murder can also be the failure to act: "The 'omission of a duty

is in law the equivalent of an act…' [citation], and thus, a defendant's failure to perform an act that he or she has a legal duty to perform is identical to the defendant's affirmative performance of an act [citations]." (*People v. Latham* (2012) 203 Cal.App.4th 319, 327.)

Malice "is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188.) In the instant action, the prosecution proceeded on a theory of implied malice. (See 11RT 3093.) CALCRIM provides that a defendant acted with implied malice if: (1) She intentionally committed an act; (2) The natural and probable consequences of the act were dangerous to human life; (3) At the time she acted, she knew her act was dangerous to human life; and (4) She deliberately acted with conscious disregard for human life. (CALCRIM 520.)

Courts have elaborated upon the meaning of implied malice:

> "The concept of implied malice has both a physical and a mental component. (*People v. Patterson* [(1989) 49 Cal.3d 615, 626].) The physical component is satisfied by the performance of ' 'an act, the natural consequences of which are dangerous to life.' ' (*Ibid.*, quoting *People v. Watson* [(1981) 30 Cal.3d 290, 300].) The mental component … involves an act ' 'deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life….' ' (*People v. Dellinger* [(1989) 49 Cal.3d 1212, 1218-1219].)"

(*People v. Benitez* (1992) 4 Cal.4th 91, 106-107.)

It is important to note that "a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk

involved, i.e., a subjective standard." (*People v. Watson*, *supra*, 30 Cal.3d at p. 296-297, emphasis added.)

"Grossly inadequate care" does not, in and of itself, support a finding of implied malice. (*People v. Caffero* (1989) 207 Cal.App.3d 678, 685-686 (*Caffero*).) In *Caffero*, the trial court dismissed, pursuant to Penal Code section 995, second degree murder charges against two parents for the death of their infant daughter on the basis that felony child abuse was not "inherently dangerous to human life" and, therefore, the felony-murder rule could not be applied. (*Id.*, at pp. 680-681.) After the Court of Appeal held that felony child abuse could not be used for application of the felony-murder rule, the Court of Appeal then considered the question of whether sufficient evidence was presented at the preliminary hearing to support a finding of implied malice.

The facts in *Caffero*, *supra*, were as follows: The mother of the infant had initially contacted a hospital emergency room on December 31, 1986, to express concern about her daughter because her daughter was "jumpy" and "blinking and jerking"; however, the mother decided to wait and did not bring her daughter to the hospital until late on January 2. (*Caffero*, 207 Cal.App.3d at p. 681.) Although a nurse initially deemed the infant's condition "non-urgent," the second nurse to examine the infant immediately summoned a doctor. (*Ibid*.) The defendants' daughter died in the early morning hours of January 3 "of an overwhelming bacterial infection, Escherichia coli ('E. coli')." (*Ibid*.) At the hearing, one expert testified that the infant's "skin was stained from prolonged contact with fecal matter causing it to breakdown into open sores in the perianal area." (*Id.*, at p. 685.) Another expert testified that "these sores were the worst he had ever seen over many years of contact with sick children and probably required several days to develop." (*Ibid*.) A third expert agreed that the

infant's "perianal sores [were] the most severe he had ever seen on a child her age." (*Ibid*.)

The Court of Appeal found that it was "reasonably inferable that [the infant's] death was caused by grossly inadequate care at the hands of defendants, specifically their failure to maintain minimally acceptable standards of hygiene and to seek timely medical care for [their daughter]. However, there [was] no evidence defendants were actually aware their conduct endangered [their daughter's] life." (*Caffero*, 207 Cal.App.3d at p. 685.) The Court of Appeal acknowledged the testimony that the "sores probably began to develop in the days before defendants brought her to the hospital," but went on to note that "no evidence suggested defendants knew that they were life-threatening." (*Ibid*.) The Court of Appeal further noted that the mother "had applied a 'cream' to the affected area." (*Ibid*.) After reviewing the evidence, the Court of Appeal held that, "[a]lthough the uncontradicted evidence establishe[d] [the infant's] death was due to a shocking pattern of neglect, the evidence [did] not support the inference defendants acted with conscious or wanton disregard or human life and thus with malice aforethought." (*Id.*, at p. 686.)

b. No Evidence Supported a Finding of Malice

In the instant action, none of the evidence presented at trial supported a finding that Ho acted with any malice, express or implied; rather, the evidence demonstrated unequivocally that Ho believed she was acting in the best interests of her sister.

The evidence was undisputed that Ho had been consistently applying colloidal silver to her sister's wounds and had been dressing the wounds in gauze. While testimony at trial indicated that colloidal silver was not a suitable remedy and that Ho had been informed of that fact, the evidence only supported a finding that Ho *subjectively believed* that colloidal silver

was a suitable remedy.

As to the difficulties Ho caused in attempting to place her sister in a nursing facility, again, these difficulties were due to Ho's sincere belief that her sister needed to be restricted to a particular diet. The diet itself had been prepared by a nursing facility and signed off on by Dr. Gene Tu in October of 2010. (9RT 1536-1539) Accordingly, when Ho accompanied Sam to tour the various nursing facilities, she did not give the impression of someone who was intentionally causing problems but rather of someone who genuinely cared about her sister's wellbeing. Pamela Benson, who worked at the nursing facility Pure Joy II, believed that Ho was concerned about Sam. Lilian Sestiaga, the administrator at Special Adult Care Home, got the impression that, despite Ho's insistence on a particular diet, Ho truly wanted to place Sam in the facility. (9RT 1514-1515.) Similarly, Nhon Ly at the East Los Angeles Regional Center believed that Ho was very concerned about the welfare of her sister and wanted to permanently place her at a facility. (7RT 1047.)

In fact, Ho exerted a great deal of energy towards placing Sam in a facility. For example, in 2009, Ho at least once a week would fax letters to Margarita Durn, Dunr's manager, and the Chief of Consumer Services at the Eastern Los Angeles Regional Center regarding their assistance in placement of Sam at a facility. (12RT 2781.) One of her main requests at the time was for a different service coordinator as Ho, performing her own research on facilities independent of the organization, had discovered vacancies that Ly had not informed her about. (12RT 2783-2784.) Although the reason Ho was not informed about those vacancies was due to the fact that Ho had apparently previously indicated she did not want to be referred to those specific facilities, Ho's discovery of the vacancies on her own still reflects the fact that she was dedicating energy to placing Sam in a facility. In 2009, even after the nursing facility Jo-Mi rejected placement for Sam,

Ho continued calling the facility to ask that Sam be admitted. (9RT 1593).

While evidence suggested that Ho failed to cooperate with the Eastern Los Angeles Regional Center in arranging an Individual Program Plan meeting and that Ho wished to impose burdensome demands on the nursing facilities considering acceptance of Sam, none of the evidence supported a finding that Ho did so with any knowledge that she was endangering Sam. Rather, the evidence exclusively demonstrated that Ho cared deeply for her sister but had mistaken beliefs about the best methods for caring for her sister. Ho was committed to ensuring that Sam was fed a diet that Ho believed was the healthiest, that Sam was treated with colloidal silver that Ho believed to be the most effective remedy, and that Sam would be placed in a facility that shared the same viewpoints of treatment.

Whether or not Ho's failure to bring Sam to the hospital at an earlier time had any impact on Sam's death was debated by the experts. Yet no evidence was presented that Ho *actually appreciated* the risk being undertaken by failing to bring Sam to the hospital. As discussed previously, Ho's continued application of colloidal silver, a treatment Ho believed to be effective, is inconsistent with any finding that Ho was intentionally or knowingly placing Sam's life at risk.

Further, there was no motivation for Ho to intentionally place Sam at risk. Ho could have easily alleviated any financial or emotional burdens caused by caring for Sam by placing her in a facility. Yet she was committed to personally caring for her sister.

Ultimately, this case resembles the facts in *Caffero*, *supra*, in which the parents failed to take their daughter to the hospital in a timely manner and instead applied a cream to their daughter. (*Caffero*, 207 Cal.App.3d at p. 685.) And, like in *Caffero*, in which the Court of Appeal held that such conduct amounted to "grossly inadequate care" but not "implied malice," here, Ho's conduct may have also amounted to "grossly inadequate care"

but did not amount to implied malice. (*Ibid*.) As the evidence did not support a finding that Ho "*actually appreciated* the risk" (*People v. Watson*, *supra*, 30 Cal.3d at pp. 296-297, emphasis added), the requisite element of malice was not satisfied. Accordingly, the second-degree murder conviction in this case should be reversed.

3. Both Convictions Should Be Reversed as Insufficient Evidence Supported a Finding That Ho's Failure to Act Caused Sam's Death

a. Both Second-Degree Murder and Dependent Adult Abuse Resulting in Death Require a Finding that the Defendant's Conduct Caused the Death

As stated previously, one of the elements for second-degree murder is that "[t]he defendant committed an act that caused the death of another person." (CALCRIM 520; see also *People v. Latham*, *supra*, 204 Cal.App.4th at p. 327 [the act required for murder can also be the failure to act].) Similarly, the allegation under Penal Code section 368, subdivision (a), specifically requires a finding that the defendant proximately caused the decedent's death. (Pen. Code, § 368, subd. (b)(1); see CALCRIM 830.)

b. The Evidence Was Insufficient to Support a Finding that Any Failure to Act by Ho Caused Sam's Death

In the instant action, the evidence did not support a finding that Ho's failure to act caused Sam's death.

The first issue is whether any failure to provide adequate care caused Sam's wounds. Dr. Fullerton testified that Sam's wounds and lost weight indicated that, in the year prior to her death, Sam "had entered a terminal decline." (12RT 2722.) The decubitus ulcers suffered by Sam were

consistent with the same severity of ulcers that patients exhibited even in a palliative care environment. (12RT 2723.) These ulcers result from terminal skin failure. (12RT 2724.) Terminal skin failure occurs when there is an increase in blood flow towards the organs and a corresponding decrease in blood flow to the skin, such that decubitus ulcers can develop more suddenly and rapidly. (12RT 2725.) Dr. Fullerton specifically described "Kennedy ulcers" in which "patients within 48 hours of death – sometimes [within] a week of death, but 48 hours in particular, would develop this butterfly-like lesion that then progressed extremely rapidly." (12RT 2729.) In this case, the wounds caused by the terminal skin failure would have been untreatable. (12RT 2725-2727, 2734.) Sam's pneumonia would have been similarly untreatable. (12RT 2727.)

Further, dermatologist Dr. Robert Wang did not believe that the wounds were pressure sores. (10RT 1824.) In arguing that the wounds were pressure sores, and thus were due to a failure to care for Sam and reposition her regularly, the prosecution relied on the search of the residence conducted by the canine. During the search, the canine only picked up a scent of human remains in the shower, a pot and a suitcase. Canine handler Karina Peck, therefore, opined that Sam "was left in the shower" and that the suitcase and pot were simply cross-contact contamination. (9RT 1637, 1640.) Yet this search was not conducted until October 26, 2011, which was 16 days after Sam's death. Within that time span of over two weeks, it would be expected that much of the padding and bedding that was used for Sam would have already been discarded. Accordingly, given the amount of time between Sam's death and the canine search, the conclusions of Karina Peck should not be given much credibility. With no additional witnesses testifying to the type of care that Sam was provided in the residence, there was no evidence that Sam was kept in a single space such that she would have developed pressure sores.

While prosecution expert Dr. Homeier testified that the wounds were caused by neglect and that a lack of medical evidence supports the theory of terminal skin failure, both claims were undermined by Dr. Fullerton's direct observation of such wounds developing both suddenly and rapidly.

The second issue is whether those sores caused Sam's death. Dr. Yulai Wang, the coroner, wavered on the issue of whether the decubitus ulcers caused Sam's death. First, after identifying the cause of death as sepsis, a bacterial infection, he stated that sepsis was caused by both decubitus ulcers and pneumonia. (8RT 1230.) Then he clarified that what he meant was *either* the decubitus ulcers or pneumonia caused the sepsis, which was why he had written both down. (8RT 1249.) Then he again stated that both were responsible for the development of sepsis. (8RT 1251.) Dr. Fullerton testified that the sepsis would have been present even without the ulcers due to the pneumonia. (12RT 2754.) The failure to obtain a culture made it impossible to determine the source of the sepsis. (12RT 2771-2772.)

CALJIC 2.01 provides that "if the circumstantial evidence … permits two reasonable interpretations, one of which points to the defendant's guilt and the other to her innocence, you must adopt the interpretation that points to the defendant's innocence and reject that interpretation that points to her guilt." (CALJIC 2.01.) Applying this standard, here, where one interpretation supports a finding that the sepsis was caused by pressure ulcers and the other supports a finding that the sepsis was caused by pneumonia, the Court must "adopt the interpretation that points to the defendant's innocence," which would be that the sepsis was caused by pneumonia.

Accordingly, as there was insufficient evidence that the wounds, even if they were pressure sores, were caused by any failure to obtain adequate medical care, and as there was insufficient evidence that the

wounds causes the sepsis, the evidence did not support the causation element required on both counts; thus, the convictions on both counts must be reversed.

4. Alternatively, this Court Should Reduce the Second-Degree Murder Conviction to Involuntary Manslaughter

Like a trial court's authority under section 1181, subdivision (6), to reduce an offense when "the evidence shows the defendant to be not guilty of the degree of the crime to which he was convicted, but guilty of a lesser degree thereof," this Court has the same authority. (*People v. Ross* (1939) 34 Cal.App.2d 574, 575.) In the instant case, the trial court denied Ho's request to reduce the offense in her motion for new trial. (14RT 4221.)

Accordingly, if this Court finds that Ho did not subjectively appreciate the risk that she was placing Sam in, but finds that Ho's conduct still contributed to Sam's death, this Court should reduce Ho's conviction from second-degree murder to involuntary manslaughter. As described above, there was no evidence to support a finding that Ho subjectively appreciated the risk involved. Rather, the evidence supported a finding that Ho attempted time after time to place Sam in a facility, but that the facilities did not satisfy Ho's expectations.

Moreover, had there been no ineffective assistance of counsel, as described in further detail below, and had evidence been presented on Ho's mental state, as described in further detail below through Dr. Romanoff's report, it is likely the jury would have reached a different conclusion regarding Ho's culpability.

Given that Ho lacked the mental state required for second-degree murder, as described previously, a conviction for involuntary manslaughter would be more appropriate.

B. Ho's Convictions Should Be Reversed As She Received Ineffective Assistance of Counsel

1. Standard of Review

"Under both the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution, a criminal defendant has the right to the assistance of counsel. (E.g., *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*) [discussing federal constitutional rights]; *People v. Pope* [(1979) 23 Cal. 3d 412,) 422 [discussing both state and federal constitutional rights.].)" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." (U.S. Const., 6th Amend.) Article 1, section 15 of the California Constitution provides that a "defendant in a criminal case has the right...to have the assistance of counsel for the defendant's defense." (Cal. Const., Art. 1, § 15.)

To prevail on a claim of ineffective assistance of counsel, two prongs must be satisfied: (1) a deficient performance by counsel and (2) prejudice as a result of the deficient performance. (*Strickland*, *supra*, 466 U.S. at p. 687; see *Roberts, supra,* 195 Cal.App. 4th at p. 1129, citing *People v. Weaver* (2001) 26 Cal.4th 876, 961.) "To show prejudice, a defendant must show there is a reasonable probability that he or she would have received a more favorable result had counsel's performance not been deficient." (*In re Hill* (2011) 198 Cal.App.4th 1008, 1028 (*Hill*), citing *Strickland*, *supra*, 466 U.S. at p. 695.) " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*Hill*, *supra*, quoting *People v. Williams* (1997) 16 Cal.4th 153, 215.) "[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of

the evidence." (*Ledesma*, *supra*, 43 Cal.3d at 218, citing *In re Imbler* (1963) 60 Cal.2d 554, 560.)

Although claims of ineffective assistance of counsel are often presented in a writ of habeas corpus, it is well established that claims of ineffective assistance of counsel may be raised on direct appeal "if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

2. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Present a Mental Health Argument

In the instant action, trial counsel Joseph Shemaria provided ineffective assistance of counsel by failing to present evidence of Ho's mental health issues, which would have undermined the prosecution's argument that Ho acted with implied malice. As discussed previously, second-degree murder requires a mental state of malice aforethought, which can be express or implied. (*People v. Malfavon*, *supra*, 102 Cal.App.4th at p. 735.) Again, a defendant only possesses a mental state of implied malice if he or she "*actually appreciated* the risk involved" in the act or omission. (*People v. Watson*, *supra*, 30 Cal.3d at p. 296-297, emphasis added.) "Grossly inadequate care" does not by itself support a finding of implied malice. (*Caffero*, *supra*, 207 Cal.App.3d at pp. 685-686.)

Given the importance of Ho's mental state to a determination of whether her conduct qualified as second-degree murder, it was critical that the jury be presented with information of mental health issues suffered by Ho. As explained previously, following Ho's conviction in this case, Dr. Richard I. Romanoff, a licensed clinical psychologist, conducted a thorough evaluation of Ho. (5CT 1156-1185.) Dr. Romanoff concluded that there is "strong support for a finding that Ms. Amy Ho suffers from a case of

obsessive-compulsive personality disorder and likely also suffers from a hoarding disorder." (5CT 1157.) He also observed "evidence of impaired reasoning and judgment by Ms. Ho in connection with her care of her sister in the final days of her sister's life." (*Ibid*.)

The criteria for obsessive-compulsive personality disorder, as set forth in the DSM 5, include " 'a preoccupation with orderliness, perfectionism, and mental and interpersonal control, at the expense of flexibility, openness, and efficiency.' " (5CT 1157.) Individuals who suffer from this disorder " 'attempt to maintain a sense of control through painstaking attention to rules, trivial details, procedures, lists, schedules, or forms to the extent that the major point of the activity are lost.' " (*Ibid*.) They have an "extreme concern with 'having things done the one correct way.' " (5CT 1158.) This disorder sheds light on Ho's inflexible insistence that any facility that accept Sam provide Sam with the exact diet that Ho believed to be the only healthy diet. The disorder also illuminates Ho's fixed insistence on colloidal silver as the appropriate remedy for her sister. As explained by Dr. Romanoff, Ho's "often repeated descriptions of attempts to force her sister to swallow or to methodically apply colloidal silver and bandages makes complete sense when considered in the context of" Ho's obsessive-compulsive personality disorder; it is, therefore, "a fundamental misunderstanding to attribute these activities to any absence of care or concern by Ms. Ho for her sister." (5CT 1160.) Because Ho was "[p]rogrammed [by her illness] to rigidly persist with the pattern of activities that had worked in the past…, it was not until her sister's situation deteriorated to a point of no return that she finally recognized the seriousness of the situation in the hours preceding her arrival at the emergency room. (*Ibid*, second brackets in original.)

Dr. Romanoff also found, however, "clear and consistent evidence that from her early childhood years and continuously through her sister's

death, Ms. Ho maintained a consistently loving and caring attitude toward her sister. Regularly at her own expense, both financially and psychologically, she worked to care for her sister, in an effort to maker her life as pleasant and enjoyable as possible." (5CT 1158.) This "lifelong devotion to her sister, that included fastidious and extremely detail oriented care, often provided by her, and often demanded by her of others who were responsible for her sister's care, was a direct contributing factor to her sister's longevity." (*Ibid*.) Dr. Romanoff did not see "an lack of concern or care by Ms. Ho towards her sister" or "any difference or frustration by Ms. Ho towards her sister." (5CT 1159.)

Ms. Ho's personality disorders, combined with her dedication to her sister, contributed to a situation in which Ho's "perfectionism and rigidity directly interfered with her ability to recognize that she was reaching the limits of her own ability to provide care for her sister by herself, blinding her to her need to ask others for help, a need that was much more difficult to recognize or acknowledge because of her above diagnosed disorder." (5CT 1159.) By illustration, the "faxes sent by Ms. Ho," and statements made by both Ho and her husband, "support a finding that she was genuinely trying to place her sister in an appropriate placement, but because of her need to micro manage others, generated by her illness; and because of her need to impose a rigid set of guidelines on those caring for her sister, and to judge them by a standard of perfectionism that was impossible to achieve, that also flowed from her illness, she was unable to find an acceptable placement for her sister." (*Ibid*.) The lack of any benefit to Ho, financial or otherwise, indicated that Ho "was paying a consistently heavy price for this care, but persisted in providing it out of love and concern for her sister and out of a need to meet the internal demands placed on her by" her obsessive-compulsive personality disorder. (*Ibid*.)

As noted previously, Errol H. Stambler, who has been a licensed attorney since 1973 and has been continuously certified by the California State Board of Legal Specialization as a Certified Criminal Law Specialist since 1982, evaluated the evidence and record in this case. (5CT 1312.) He found that "the height of ineffective assistance of counsel under the Sixth Amendment was [trial counsel] Shemaria's failure to investigate and explain the mental state defense of [Ms.] Ho." (5CT 1313.) Stambler opined that Dr. Romanoff's testimony "would be a complete defense to all charges brought against Ms. Ho" as "[t]he testimony would clearly show to the jury that Ms. Ho cared for her sister and that Ms. Ho's entire life was devoted to the well-being of her sister." (5CT 1314.) Stambler further stated that "[t]he utter failure of having any expert testify as to the mental makeup and belief of the accused was ineffective assistance at best and malpractice at worst….The jury never heard about the motivation of care and love that Ms. Ho had toward her sister." Stambler elaborated:

> "Defense counsel for Ms. Ho actually must have realized the necessity for a mental health expert to testify [as] seen in his email [5CT 1212] when he writes to Ms. Ho on July 3, 2016, stating '[W]hatever was not done by accident, was therefore done 'willfully.' It is the lowest form of 'mental state' (assuming you can even call it a mental state) known in law other than strict liability.' The email goes on to say what a 'reasonable person' should realize which tends to beg the question of the mental status of Ms. Ho's belief that what she was doing for her sister was in her sister's best interest. The fact that Ms. Ho apparently devoted her entire life to the well-being of her sister requires, under *Strickland*, that the mental health issue of the defendant becomes central to her defense."

(5CT 1315.)

Had the jury been presented with this information regarding Ho's mental health issues and how these mental health issues affected Ho's care for Sam, it is reasonably likely that the jury would not have found that Ho

acted with implied malice. As Dr. Romanoff's analysis clarifies, Ho failed to recognize that she was providing inadequate care for Sam and continued to believe that she knew the best way to care for Sam and was providing that level of care. Thus, no strategic reason supported trial counsel's failure to investigate or present a defense based on Ms. Ho's mental health issues. As such, trial counsel's failure in this regard must be construed as a deficient performance. Moreover, since it is reasonably likely that the jury would have found that Ho did not possess a mental state of implied malice had they been informed of Ho's mental health issues and the relationship between those issues and her conduct, Ho was prejudiced by trial counsel's deficient performance.

As Ho received prejudicially ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, both convictions must be reversed.

3. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Present Testimony by a Pathologist

As discussed previously, trial counsel initially hired pathologist Dr. Bonnell to testify at trial, but, during trial, Dr. Bonnell suffered a second heart attack and was unable to testify. Trial counsel was then forced to rely solely on Dr. Fullerton's testimony. (11RT 2401-2402.) Although Dr. Fullerton did rely on Dr. Bonnell's findings for his testimony, Dr. Fullerton's reliance on Dr. Bonnell's reports was insufficient to compensate for the loss of Dr. Bonnell's testimony. The record does not indicate that trial counsel made any attempt to retain a new pathologist. Accordingly, trial counsel also provided ineffective assistance of counsel by failing to present the testimony of a pathologist, who could have best countered the claims of prosecution expert Dr. Homeier and explain that Sam's death did not indicate neglect or abuse.

As also described previously, following Ho's conviction in this case, the relevant medical records were submitted to Dr. Frank Sheridan, an anatomic pathologist, neuropathologist, and forensic pathologist. (5CT 1187-1193.) Although Dr. Sheridan agreed with the autopsy report that Sam "died of sepsis due to gangrenous decubitus ulceration and/or bronchopneumonia," he disagreed with the purported "manner of death." (5CT 1188.) He noted that the pneumonia was likely aspiration pneumonia, which "is typically rapid in progression due to the irritant effect of food and gastric acid on the alveolar tissue in the lungs." (*Ibid*.) Moreover, due to Sam's difficulties with eating, "aspiration pneumonia [was] a constant danger" that could have "occur[ed] even when the patient [was] being well cared for." (*Ibid*.)

Dr. Sheridan also concluded that Sam's malnourished stated did "not necessarily imply she was not being fed. There was liquid food material in the stomach at autopsy. Cora Sam's weight was not exceptionally low. She was a generally small person. Also, people in a terminal state will often appear undernourished or malnourished due to their generalized catabolic state." (5CT 1188.)

Dr. Sheridan agreed with Dr. Fullerton's assessment that "[t]he sepsis in this case could have been caused by the pneumonia *or* the infected decubitus ulcer, possibly a combination of the two." (5CT 1188, emphasis added.) Dr. Sheridan also stated that he was "familiar with Kennedy terminal ulcers" and believed that Dr. Fullerton was in the best position to testify on that subject. (*Ibid*.) Dr. Sheridan did additionally note that, "[f]rom a pathology standpoint, it can be said that skin, or any other organ, when inadequately perfused, can develop very rapidly evolving infections with resulting gangrenous necrosis." (5CT 1188-1189.)

Based on his analysis, Dr. Sheridan disagreed with Dr. Homeier's assessment and concluded that "there [was] not compelling evidence in this

case to attribute Cora Sam's death to caretaker abuse or neglect." (5CT 1189.)

Given that the testimony of a pathologist was critical to undermining the prosecution's theory of the case, trial counsel's failure to present such testimony demonstrated ineffective representation. As such testimony would have bolstered the defense case that Sam's death was not due to any neglect or abuse, Ho was substantially prejudiced by this deficient performance. As no strategic reason justified the failure to call a pathologist, Ho received prejudicially ineffective assistance of counsel under both the Sixth Amendment to the United States Constitution and article 1, section 15, of the California Constitution, such that both convictions must be reversed.

4. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Challenge the Search Warrant on Staleness Grounds

On October 25, 2011, fifteen days after Sam's death, law enforcement obtained a search warrant to search Ho and her husband's residence for "[t]he residual scent of human remains; and any and all biological and physical trace evidence; clothing or other objects bearing blood or physiological fluid-stains; fibers; human hairs; humans tissues or parts thereof." (5CT 1202.) Despite the issuance of the warrant and subsequent search occurring over two weeks after Sam's death, trial counsel made no effort to challenge the warrant on staleness grounds.

"Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search warrant is supported by probable cause. Such information is deemed stale unless it consists of facts so closely related to the time of the issuance of the warrant that it justifies a finding of probable cause at that time. The question of staleness turns on the facts of each particular case." (*People v.*

Hulland (2003) 110 Cal.App.4th 1646, 1652.)

Thus, whether or not information should be considered stale at the time of the issuance of a warrant depends upon the nature of the information and the nature o the alleged offense. (*People v. Wilson* (1986) 182 Cal.App.3d 742, 754-755; *People v. Hernandez* (1974) 43 Cal.App.3d 581, 586.) The United States Supreme Court has previously held that a twenty days delay between the sale of a controlled substance and the issuance of the search warrant negated the probable cause for finding contraband at the suspect's residence. (*SRGO v. United States* (1932) 287 U.S. 206.)

In the instant case, the 15 days of delay between Sam's death and the issuance of the search warrant was sufficiently long enough that probable cause no longer justified a search for the scent of human remains. In that two weeks, any bedding, clothing, or other materials used to care for Sam could have been cleaned or discarded, the floors could have been vacuumed, and the multiple fans that were on in the residence prior to the search (9RT 1619) were likely blowing around the organic material. As there was a very limited timeframe in which law enforcement could still have reasonably expected to find the majority of any discarded tissue, and as law enforcement failed to obtain the search warrant during that timeframe, probable cause did not exist for the search warrant and the evidence regarding the search of the residence by the dog should have been suppressed. For these reasons, trial counsel's failure to challenge the search warrant on staleness grounds was unquestionably a deficient performance.

Moreover, the failure to challenge the warrant was particularly prejudicial as this search was used to support Karina Peck's conclusion that Sam had been kept in the shower by Ho. This conclusion was not only emotionally compelling but also likely contributed to a finding by the jury

that Ho had been caring for Sam improperly.

As no strategic reason justified the failure to challenge the search warrant on staleness grounds, Ho received prejudicially ineffective assistance of counsel under both the Sixth Amendment to the United States Constitution and article 1, section 15, of the California Constitution, such that both convictions must be reversed.

5. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Zealously Advocate for Ho

Zealous advocacy is a cornerstone of effective representation. Yet in the instant case, e-mail correspondence between trial counsel and Ho (5CT 1212-1224) indicates that trial counsel asked Ho to hire a separate attorney to file a written motion because he was too busy, admitted to Ho that he forgot to argue a key point, and consistently berated Ho.

When trial counsel believed that the court was giving an erroneous jury instruction, he told Ho that he did not have time to file a written motion and asked for funds so that he could hire a different attorney: (5CT 1213.) Trial counsel wrote:

> "I have been working my butt off because the federal judge would not allow a continuance of a major sentencing I have on Wednesday morning and I cannot do the necessary brief that I believe should be filed with our judge prior to resumption of jury deliberations, or at least prior to 9:45 AM Tuesday morning …. If you were my Mom, sister, daughter, niece or anyone else near and dear to me I would be adamantly in favor of having an attorney right up a motion to reconstruct the jury on the issue of elder abuse. I am burned out tired of working and need some time to take care of personal matters in my own well-being, such as getting enough sleep and exercising. I do know the very best minds in criminal law here in Los Angeles and elsewhere that are basically geniuses on jury instructions. I can hire one of these attorneys and give them the necessary materials….I have met all of my obligations to you under our retainer agreement….Another attorney can write a brief…"

(5CT 1213.)

Besides acknowledging that he would not perform legal work necessary to the case, trial counsel also forgot to present a central argument in the case. One of the primary facts supporting an acquittal in the instant action was the lack of financial motivation. There was no insurance or other compensation that Ho received, or believed she would receive, upon Sam's death. Moreover, while Ho spent financial resources caring for Sam, Ho made that decision knowing that she could pass off that financial responsibility to any of the facilities willing to care for Sam. Trial counsel, however, failed to stress the lack of financial motivation to the jury. And as admitted in an e-mail he wrote to Ho, his failure to harp upon this issue was not based on strategy but based on his own forgetfulness: "I am kicking myself for forgetting to say a few things that may have been helpful….For example, in this case I did not hit upon the lack of a financial motive to commit murder." (5CT 1223.)

But perhaps most egregious was trial counsel's manner of communicating with Ho. He regularly berated her and at one point cut off contact with her. In one e-mail he wrote:

> "You have to be an idiot!!!!!! …. I do not need your help nor do I need your criticisms. You don't know when to shut up! …. Your are insulting to the hundredth degree and you don't even realize it. Sad. …. [Y]ou act identically to a out-of-town tourist visiting Las Vegas and going to a big hotel for the Sunday brunch. Being that they paid $39.95, they sit there for hours stuffing themselves as it is 'all-you-can-eat.' Dear Amy, you did not pay for and I did not promise to give you 'All-You-Can-Eat.' …. I'm sick and tired of your nickel and diming everybody that tries to help you.
>
> ….
>
> "I am angry that you had the audacity to write this largely meaningless email and, for professional reasons, forced me to respond with this long double email response. STOP WASTING MY TIME."

(5CT 1220.)

In another e-mail, he wrote to her, "[Y]our needs are endless, your emails are repetitive, long and the bottom line is you want everything done as inexpensively as possible." (5CT 1217.) Eventually, he told Ho, "I want to be left alone by you from here until future notice. I want absolutely no email from you in response to this or for any other reason. I need peace of mind and I do not want to heave from you." (5CT 1215.)

Trial counsel's refusal to perform necessary legal work, forgetting to argue a critical point, incessant chastising of Ho, and his eventual refusal to communicate with Ho, all reflect his failure to zealously advocate for his client. This deficient performance permeated the entire case and precluded Ho from receiving the defense she was entitled to under the Sixth Amendment to the United States Constitution and article 1, section 15, of the California Constitution. Accordingly, both convictions in the instant matter must be reversed.

6. The Totality of Trial Counsel's Errors Severely Prejudiced Ho and Denied Her Effective Assistance of Counsel

Prejudice may be shown as the result of trial counsel's cumulative errors. (*Harris by and through Ramseyer v. Wood* (1995) 64 F.3d 1432, 1438-1439.) In *Harris*, the Ninth Circuit found that trial counsel had committed multiple errors that "cumulatively prejudiced" the defense and, thus, affirmed the district court's grant of habeas corpus relief. (*Id.* at 1439.)

As detailed above, trial counsel failed to present a mental health argument, failed to present testimony by a pathologist, failed to challenge the search warrant on staleness grounds, and failed to zealously advocate on behalf of Ho. Each of these errors contributed to the prejudice caused by

trial counsel's ineffective assistance. The cumulative effect of these errors severely prejudiced Ho. As Ho was denied her right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article 1, section 15, of the California Constitution, both convictions in the instant matter must be reversed.

C. Ho's Convictions Should Be Reversed As the Court Erred in Admitting the Testimony of Chris Cardenas

Evidence Code section 352 provides "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) As such, "the trial court is the gatekeeper of the evidence to which the jury is exposed." (*People v. Dean* (2009) 174 Cal.App.4th 186, 199.)

In the instant action, the trial court abused its discretion as gatekeeper by failing to exclude nurse Chris Cardenas' testimony. Cardenas had his nursing license revoked by the Board of Registered Nursing after Cardenas committed multiple acts of misconduct. (5CT 1161.)

In 2010, Cardenas discharged a patient from a hospital without a physician's order while the patient was waiting for a transfer to a different facility. (*Id.*, at p. 12.) Cardenas also removed that patient's IV without a physician's order, an act that "caused potential harm to [the patient] and actual delay in his care." (*Ibid*.) Cardenas subsequently falsified that patient's medical records "by fraudulently stating in the medical records of [that patient] that discharge instructions had been ordered by a physician, when it had not." (*Id.*, at p. 13.)

"On or about March 7, 2008, through March 8, 2008, [Cardenas] obtained and administered to [a patient] three different prescription

medications without a doctor's order." (5CT 1152.) Cardenas "used a medical override to obtain Ativan, Xanex, and Vicodin from MedSelect, an automated medication dispenser. [Cardenas] withdrew the medication under different patient names, and then administered the medication to [the patient]." (*Ibid*.) The patient died on March 9, 2008. (*Ibid*.) Cardenas subsequently "made grossly inaccurate and or false entries in patient medical records." (5CT 1153.) As a result of this misconduct, Cardenas' nursing license was revoked, but the revocation was stayed for three years while Cardenas was placed on probation. (5CT 1140.)

Then, on September 3, 2010, Cardenas discharged a patient from a hospital without a physician's order while the patient was waiting for a transfer to a different facility. (5CT 1132.) Cardenas also removed that patient's IV without a physician's order, an act that "caused potential harm to [the patient] and actual delay in his care." (*Ibid*.) Cardenas subsequently falsified that patient's medical records "by fraudulently stating in the medical records of [that patient] that discharge instructions had been ordered by a physician, when it had not." (5CT 1133.) As a result of this misconduct, Cardenas' license was revoked, such that "[i]f he ever applies for licensure in the state of California, the Board shall treat it as a new application for licensure." (5CT 1125.)

As stated previously, Cardenas acknowledged that, at the time of testifying, his license was suspended as a result of the accusation that he gave Vicodin, Ativan, and Xanax to a patient without a doctor's order and that the patient died two days later. (6RT 649-650, 653, 655-656.) He also acknowledged lying about a doctor's order for the drugs. (6RT 657.) This incident occurred before Cardenas worked at Beverly hospital. (6RT 654.)

Given Cardenas' history of misconduct and falsifying records, his testimony in the instant matter was not reliable. Accordingly, the trial court erred in failing to act as a gatekeeper and exclude this prejudicial evidence

under Evidence Code section 352. As it is reasonably probable Ho would have obtained a more favorable outcome absent the court's abuse of discretion in admitting Cardenas' testimony, the convictions must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

Should this argument be deemed forfeited by counsel's failure to object, the failure to object should be considered ineffective assistance of counsel as the failure to object was deficient, since no strategy could have justified the failure to object, and the failure to object was prejudicial for the reasons described above. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *Strickland*, *supra*, 466 U.S. at pp. 684-685.)

D. Ho's Convictions Should Be Reversed as the Court Erred in Failing to Grant a Mistrial Following the Sudden Unavailability of a Crucial Defense Expert Witness

During trial, but prior to the defense presentation of its case, trial counsel was notified that Dr. Harry Bonnell ("Dr. Bonnell"), the primary defense pathologist who had been retained to testify as an expert in the instant matter, had suffered a second heart attack. (11RT 2401-2402.) As a result, he would be unable to testify at trial. (11RT 2402.) It was anticipated that Dr. Bonnell would testify that "bacteria is different in the lungs, for pneumonia, than it is for decubitus ulcers, and without doing a culture of the bacteria, you don't know if the sepsis is from the pneumonia, which would have been something natural in the process of dying, or if it was from the open sores, the ulcers." (11RT 2403.) He would have pointed out that "there would be no pain, that the sensory nerves are all in the skin and subcutaneous tissue." (*Ibid*.) He would have also explained the regular rate at which elderly individuals die from pneumonia. (11RT 2403-2404.) He would have testified about the role that Sam's brain damage played, since "in all the bodies that he's autopsied in his career, nobody had ever lived

past their teen years with that type of light brain and that kind of brain malformation." (11RT 2404.) He would have further testified that "Ho's conduct was not reckless, and may not have even been negligent." (*Ibid*.) He would have pointed out that there was still "food in her stomach," indicating that "[s]he was not malnourished." (*Ibid*.)

Dr. Bonnell had been on the case since September of 2012 and was on the approved list of pathologists for the Superior Court. (11RT 2405.) He was the "only witness who reviewed the evidence, saw the slides in the coroner's office, and he was hands on." (11RT 2402.) Dr. Bonnell had also previously worked with Dr. Yulai Wang, the coroner, on several other cases. (11RT 2407.) The jury had already been informed that they were to hear from two doctors. (*Ibid*.)

The Court denied a motion for a mistrial based on Dr. Bonnell's unavailability. (11RT 2418.) The Court reasoned that Dr. Fullerton and Dr. Bonnell were going to both offer similar testimony and that Dr. Fullerton would have the opportunity to rely upon Dr. Bonnell's findings. (11RT 2417-2418.) The Court also permitted a curative instruction to address the fact that the jury had been informed about the anticipated testimony. (11RT 2417.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854, citing *People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) In the instant case, the loss of the expert witness was, in trial counsel's words, "like piloting with a two-engine jet [and] losing the right engine on take off." (11RT 2402.) Dr. Bonnell was the *only* expert defense witness who had conducted a hands-on review of the evidence. Dr. Fullerton's secondhand reliance on Dr. Bonnell's findings, therefore, was inadequate to emphasize the uncertainty surrounding Sam's

cause of death. Moreover, Dr. Bonnell, who had previously worked with Dr. Yunai Wang on several cases, was in the best position to address Dr. Yunai Wang's wavering as to whether the sepsis was caused by the sores or by pneumonia. As discussed previously, the questions surrounding the causation element on both offenses was a crucial component of the defense case. Without the ability to present a strong case through the use of Dr. Bonnell's testimony that the cause of death could not be sufficiently determined, the defense was significantly hampered. Accordingly, as Ho was severely prejudiced by losing Dr. Bonnell as an expert witness, and as no curative instruction could compensate for that loss, Ho's convictions must be reversed.

E. Ho's Convictions Should Be Reversed as the Court Prejudicially Erred in Instructing the Jury That They Could Not Consider the Lesser Included Offenses Until They Had Agreed Upon a Not Guilty Verdict on the Greater Offenses

1. It Is Error for a Court to Instruct a Jury That They Cannot Consider the Lesser Included Offenses Until They Have Unanimously Reached a Not Guilty Verdict on the Greater Offenses

Here, in addition to being instructed on the charges of second-degree murder and dependent adult abuse resulting in death, the jury was also instructed on the lesser included charges of involuntary manslaughter (Pen. Code, § 192, subd. (b)) and misdemeanor dependent adult abuse (11RT 3038, 3045-3046.) The trial court also instructed the jury as follows:

> "Before you even consider a lesser crime, you all must unanimously vote not guilty on the greater crime. You cannot move on to the lesser if you all find the defendant – let's assume you find her guilty of second-degree murder, that's the greater crime, you cannot – then you don't need to move on to the lesser. You only move on to the lesser if you unanimously find the defendant not guilty of the greater crime.

(11RT 3045.)

In *Stone v. Superior Court* (1982) 31 Cal.3d 503 (*Stone*), the Supreme Court held that, in cases involving a lesser included offense, "[t]he jury must be cautioned … that it should first decide whether the defendant is guilty of the greater offense before considering the lesser offense, and that if it finds the defendant guilty of the greater offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense." (*Stone*, *supra*, 31 Cal.3d at p. 519.)

However, in *People v. Kurtzman* (1988) 46 Cal.3d 322 (*Kurtzman*), the Supreme Court clarified that "[t]he contention that *Stone* authorizes the trial judge to instruct a jury not even to consider lesser included offenses before deciding to acquit of the greater … rests on slender California authority. Indeed it rests primarily on a single word in *Stone* where … we stated the jury should be told to decide whether defendant was guilty of the greater offense before *considering* the lesser offense." (*Kurtzman*, *supra*, 46 Cal.3d at pp. 329-330, citing *Stone*, *supra*, 31 Cal.3d at p. 519, emphasis in original.) The Supreme Court in *Kurtzman* explained further:

> "When the word 'considering' in *Stone* is read in context, however, it becomes clear that the term was not intended to have such a broad-ranging effect. While *Stone*'s use of the concept of 'considering' the lesser, 'deciding' or 'finding' defendant's guilt on each offense, and 'returning a verdict' on a lesser offense has led to some confusion, the overall import of *Stone* is simply that the jury must acquit of the greater offense before returning a verdict on the lesser included offense, and no further control of the sequence of jury deliberations was intended."

(*Kurtzman*, *supra*, 46 Cal.3d at p. 330.)

When a court prejudicially offers an instruction in violation of *Kurtzman*, the affected counts must be reversed. (*People v. Olivas* (2016)

248 Cal.App.4th 758, 777 (*Olivas*).) In *Olivas*, the defendant was charged with multiple felony counts pertaining to continuous sexual abuse of a minor. (*Id.*, at pp. 760, 766-767.) Five of the counts (forcible lewd acts upon minor) were charged as alternate counts to five other counts (aggravated sexual assault of minor). (*Id.*, at pp. 766-767.) The jury, during deliberations, asked, " 'If we are 'hung' on a count (ie: 14), are we able to consider the alternate count (ie: 19?).' " (*Olivas*, *supra*, 248 Cal.App.4th at p. 772.) The court answered, "No." (*Ibid*.) Although defense counsel failed to object, the Court of Appeal considered the claim that the court had prejudicially erred in so answering. (*Ibid*.)

The Court of Appeal first determined that the trial court in *Olivas* committed a *Kurtzman* error by telling the jury that the alternative count could not even be considered until a not guilty verdict had been agreed upon. (*Olivas*, *supra*, 248 Cal.App.4th at p. 774-775.) The next question was whether the error was prejudicial under the standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Olivas*, *supra*, 348 Cal.App.4th at p. 775.) Based on some discrepancies in the victim's testimony, indications that the jury was at least hung on one of the counts for some time, and no indication in the record of any consideration of the alternate counts, the Court of Appeal held that the error was prejudicial. (*Id.*, at pp. 775-776.) Accordingly, the Court of Appeal reversed all affected ten counts, including both the primary counts and the alternate counts. (*Id.*, at p. 777.)

The ability to consider lesser included offenses is critical to obtaining a fair and appropriate verdict. As the Supreme Court has previously stated in justifying the sua sponte duty for courts to instruct on lesser included offense, permitting the jury to consider lesser included offenses "prevents the 'strategy, ignorance, or mistake' of *either* party from presenting the jury with an 'unwarranted all-or-nothing choice,' encourages

'a verdict…no harsher *or more lenient* than the evidence merits' ([Citation]), and thus protects the jury's 'truth-ascertainment function' ([Citation])." (*People v. Breverman* (1998) 19 Cal.4th 142, 155 (*Breverman*), quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 324 and *People v. Barton* (1995) 12 Cal.4th 186, 196 respectively, emphasis added by *Breverman* Court.)

2. The Trial Court Instructed the Jury In Violation of *Kurtzman* That They Could Not Consider the Lesser Included Offenses Until They Had Reached a Not Guilty Verdict on the Greater Offenses

In the instant case, the first question is whether a *Kurtzman* error occurred. The record clearly demonstrates that the court's instruction that the jury could not consider the lesser included offenses until a unanimous acquittal had been reached on the respective greater offenses was error. (11RT 3045.)

3. The Error Was Prejudicial

The second question is whether the error was prejudicial. A review of the evidence indicates that this case presented difficulties, many of which have been previously addressed. As to the second-degree murder conviction, to briefly summarize, the evidence supported a finding that Ho believed that she was acting in her sister's best interests by maintaining an active search for a nursing facility, insisting on a diet that had been signed off on by one of her sister's doctors, and applying colloidal silver. This evidence negated the element of implied malice. Involuntary manslaughter, on the other hand, only requires that "[a] reasonable person would have known that acting in that way would create such a risk" (CALCRIM 580; see Pen. Code, § 192, subd. (b)); it is an objective standard instead of a subjective one. Thus, had the jury been allowed to compare and contrast the

elements of second-degree murder and involuntary manslaughter, it is reasonably probable that the jury would have convicted Ho of involuntary manslaughter instead of murder.

As to the conviction for dependent adult abuse causing death, the misdemeanor dependent adult abuse charge did not require that Ho's negligence caused Sam's death. (11RT 3046.) Here, the experts disagreed as to whether Ho's failure to obtain professional medical attention for Sam at an earlier date contributed to her death. While Dr. Homeir testified that Ho's neglect to obtain medical care caused Sam's death, Dr. Fullerton testified that Sam suffered from terminal skin failure and that medical intervention would have been ineffective in preventing Sam's death. (10RT 1919, 12RT 2724, 2734, 2737.) And dermatologist Dr. Robert Wang disagreed with the assessment that the wounds were bedsores. (10RT 1824.) Thus, had the jury been able to deliberate whether or not Ho's negligence caused Sam's death, it is reasonably probable that the jury would have convicted Ho of misdemeanor dependent adult abuse instead of felony misdemeanor dependent adult abuse causing death.

Moreover, the record regarding the deliberations indicates that the deliberations were contentious. On the second day of jury deliberations, the jury asked about the meaning of the term "human life." (12 RT 3304.) On the fifth day of jury deliberations, one juror complained about a "hostile environment." (12RT 4203.) On the sixth day of jury deliberations, the trial court was notified that one juror had "brought in a book with the definition of 'kill' to aid in the deliberations." (12RT 4502.) The court, after questioning each of the jurors, ultimately allowed the jury to continue deliberations with the juror who had brought in the book. Later that afternoon, the jury reached its verdicts. (12RT 4531.) There is no indication in the record that the jury ever considered the lesser included offenses.

As stated previously, in *Olivas, supra,* based on some discrepancies

in the victim's testimony, indications that the jury was at least hung on one of the counts for some time, and no indication in the record of any consideration of the alternate counts, the Court of Appeal held that the *Kurtzman* error was prejudicial. (*Olivas*, *supra*, 348 Cal.App.4th at pp. 775-776.) Similarly, here, there was evidence negating the implied malice element for voluntary manslaughter, there was evidence that any neglect by Ho did not cause Sam's death, the record indicated that the week-long jury deliberations were contentious and motivated at least one juror to look up the word "kill," and there was no indication in the record that the jury gave any consideration to the lesser included counts, in accordance with the court's instructions. Accordingly, like in *Olivas*, the *Kurtzman* error was prejudicial and the convictions on both counts must be reversed.

4. Any Forfeiture of This Argument Is Ineffective Assistance of Counsel

Should this argument be deemed forfeited by counsel's failure to object, the failure to object should be considered ineffective assistance of counsel as the failure to object was deficient, since no strategy could have justified the failure to object, and the failure to object was prejudicial for the reasons described above. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *Strickland*, *supra*, 466 U.S. at pp. 684-685.)

F. The Convictions Should Be Reversed as the Court Erred in Failing to Order a Mistrial Following Juror Misconduct Involving the Dictionary Definition of "Kill" or "Murder" or "Reasonable Doubt"

1. Applicable Law

During deliberations, it became known that a juror brought in a dictionary and recited the definition either of "kill," "murder," or "reasonable doubt."

"A criminal defendant has a constitutional right to an impartial jury." (*People v. Wilson* (2008) 44 Cal.4th 758, 822; see U.S. Const., 6th Amend.) Further, the due process clauses of both the Fifth and Fourteenth Amendments prohibit the "depriv[ation] of life, liberty, or property, without due process of law." (U.S. Const., 5th & 14th Amends.)

The use of a dictionary by a juror to determine the meaning of a word that has a specified legal definition qualifies as juror misconduct. (*People v. Harper* (1986) 186 Cal.App.3d 1420, 1426-1427 (*Harper*).) "Use of a dictionary to obtain further understanding of the court's instructions poses a risk that the jury will misunderstand the meaning of terms which have a technical or unique usage in the law." (*People v. Karis* (1988) 46 Cal.3d 612, 642.) Use of a dictionary also violates the instruction set forth in CALJIC 1.03 that jurors "must not independently investigate … the law …. [or] conduct research, or disseminate information on any subject." (CALJIC 1.03.)

Although "jury misconduct is not prejudicial per se [citation], such misconduct raises a presumption of prejudice, which can be rebutted by proof that no prejudice actually resulted." (*People v. Ryner* (1985) 164 Cal.App.3d 1075, 1082 (*Ryner*), citing *People v. Pierce* (1979) 24 Cal.3d 199, 207.) In "determining whether the presumption has been rebutted," the Court should consider "the strength of the evidence that misconduct occurred; the nature and seriousness of the misconduct; whether the prosecutor's burden was lightened by the misconduct, the effect of the misconduct upon the defense case; and the probability that actual prejudice may have ensued. [Citations.]" (*Ibid*.) In evaluating the prejudicial effect, however, "jurors' statements as to the effect of the misconduct upon their ability to fairly and impartially decide the case cannot be considered. Evidence Code section 1150 prohibits use of evidence of the jurors'

subjective reasoning process either to establish misconduct or rebut the presumption of prejudice. [Citations.]" (*Id.*, at pp. 1082-1083.)

In *Harper*, *supra*, a juror in a murder trial recited the dictionary definition of murder to the other jurors during deliberation. (*Harper*, *supra*, 186 Cal.App.3d at 1427-1428.) Upon learning of the misconduct, the trial court admonished the jury to not consider the dictionary definition. (*Id.*, at pp. 1428-1429.) The Court of Appeal, in affirming the conviction, explained that, "[a]bsent evidence to the contrary, a jury is presumed to follow the instructions of the trial court. Having been given a specific admonishment in light of misconduct by one of their members, it seems probable the jurors would more closely adhere to the instructions of the trial court and thus reduce the chance for prejudice. [Citations]." (*Id.*, at pp. 1429-1430.)

On review, " 'since jury misconduct challenges the fundamental rights to an unprejudiced jury and the fairness of the trial proceedings, this issue is an independent appellate issue to be adjudicated by this court based upon the whole record.' " (*People v. Diaz* (1984) 152 Cal.App.3d 926, 933, quoting *People v. Brown* (1976) 61 Cal.App.3d 476, 481.)

2. The Trial Court Erred in Relying on Jurors' Statements About Their Own Impartiality in Finding That the Presumption of Prejudice Was Rebutted

On the sixth day of jury deliberations, the trial court was notified that one juror had "brought in a book with the definition of 'kill' to aid in the deliberations." (12RT 4502.) Multiple jurors stated that the juror proceeded to read the definition out loud (12RT 4510-4512, 4515, 4518), although a couple of the jurors denied ever hearing the definition read out loud (12RT 4508, 4516). Two jurors stated that the term being defined may have been "murder." (12RT 4511, 4520.) Another juror stated that the juror committing the misconduct had brought in the dictionary to define the term

"reasonable doubt." (12RT 4505.)

The trial court acknowledged that the use of a dictionary violates the instruction set forth in CALJIC 1.03 that jurors " 'must not independently investigate the law …. [or] conduct research or disseminate information on any subject.' " (12RT 4503, quoting CALJIC 1.03.) The trial court then stated that it intended "to follow the procedure as outlined in the case of [*Ryner*, *supra*], regarding prejudice and the presumption of prejudice, rebuttable presumption." (12RT 4503.)

The trial court, however, in questioning the jurors about the misconduct, inquired with some of the jurors about their ability to continue deciding the case impartially. The court asked juror number five, "Were you in any – you can't recall what was read, but were you in any way influenced by that?" (12RT 4512.) Juror number five answered, "No." (*Ibid*.) Juror numbers six, seven, eight, nine, ten and eleven also denied being influenced. (12RT 4517-4518, 4520-4522.) Juror number twelve did not recall the dictionary being brought in. (12RT 4523.) The court did not specifically ask jurors one, three and four whether they were influenced. The court also did not ask juror number two, the juror who brought in the dictionary, whether he was influenced. (12RT 4523-4526.) Based on the jurors' answers, the court found "that the presumption of prejudice ha[d] been overcome." (12RT 4526.)

Despite the fact that both the prosecutor and defense counsel agreed with the court's ruling, the record clearly demonstrates that the court violated the procedure outlined in *Ryner*, *supra*, by inquiring into the effect of the misconduct on the jurors' subjective reasoning process. *Ryner* specifically prohibits courts from considering "jurors' statements as to the effect of the misconduct upon their ability to fairly and impartially decide the case." (*Ryner*, *supra*, 164 Cal.App.3d at p. 1082.) Unlike in *Harper*, *supra*, where jurors' statements about their impartiality was not considered,

here, the trial erred in considering such statements.

As the inquiry into the effect of the misconduct was legally flawed, the finding that the presumption of prejudice had been overcome was also legally flawed and the convictions should be reversed.

3. The Presumption of Prejudice Was Not Overcome

Further, an application of the factors provided under *Ryner* supports a finding that the presumption of prejudice had not been overcome. First, there is no question that the misconduct occurred; even the court acknowledged as such. (12RT 4503.) As to the nature and seriousness of the conduct, the misconduct was extremely serious in the context of the case. This case asked the jury to decide whether Ho had committed an unlawful killing. The theory of the case, though, that the killing had occurred through a failure to obtain adequate medical care for her sister, did not involve the type of conduct that comes to mind for most people upon hearing the words "murder" or "kill." As such, the legal definition of "murder" and "kill" were critical to a fair legal evaluation of the case. The misconduct of reading out loud a dictionary definition of the word "kill," therefore, involved the central issue in this case. By contrast, in *Ryner*, *supra*, the misconduct was a friendly conversation between a testifying officer and some of the jurors, a conversation that did not involve any discussion of the case. (*Ryner*, *supra*, 164 Cal.App.3d at p. 1080-1081.) Where here, unlike in *Ryner*, the misconduct was directly related to the jurors' evaluation of the case, the misconduct must be construed as extremely serious.

At least one juror testified that the dictionary was used for the term "reasonable doubt" (12RT 4505), in which case there exists a concrete possibility that the prosecution's burden was lowered by the definition.

Even if only "kill" or "murder" were defined, however, the use of a dictionary definition may have affected the jurors' application of the law to the facts and, in so doing, lightened the prosecution's burden. Accordingly, the misconduct certainly affected the defense case and there is a strong probability that prejudice ensued. As discussed previously, the length of the deliberations, the fact that one juror complained of a hostile environment (12RT 4203), and the fact that a juror committed misconduct by reading out loud the definition of to kill, are strong indicators that there was a contentious debate about Ho's culpability in Sam's death. While it is unknown which side of the debate juror number two was initially on, his presentation of an extrajudicial definition of "kill" or "murder" to the jury was likely made to bolster support for his opinion on what the verdict should be. "A juror's disclosure of extraneous information to other jurors tends to demonstrate that the juror intended the forbidden information to influence the verdict and strengthens the likelihood of bias." (*People v. Nesler* (1997) 16 Cal.4th 561, 587, citing *In re Carpenter* (1995) 9 Cal.4th 634, 657.) If the dictionary definition lent any credibility to his argument in deliberations, there is a reasonable probability that it played a part in swaying other jurors to agree with his point of view. Given the facts of this case and the hostile environment of the jury deliberations, the instructions by the Court to ignore the dictionary definition were insufficient to remedy this prejudice.

The privacy of jury deliberations limits the ability of any outside party to completely determine to what extent misconduct prejudiced deliberations. For this reason, there has been established a presumption of prejudice which must be rebutted. And again, the jurors' statements about the influence of the misconduct cannot be considered. Accordingly, here, where the misconduct involved a critical issue in the case and where there is a strong probability that the misconduct was undertaken by one juror to

sway other jurors, the presumption of prejudice was not rebutted. As a result, Ho's constitutional rights to an impartial jury and to due process of law were violated such that Ho's convictions must be reversed.

4. Any Failure to Object Was Ineffective Assistance of Counsel

Should this argument be deemed forfeited by counsel's failure to object, the failure to object should be considered ineffective assistance of counsel as the failure to object was deficient, since no strategy could have justified the failure to object, and the failure to object was prejudicial for the reasons described above. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *Strickland*, *supra*, 466 U.S. at pp. 684-685.)

G. The Convictions Should Be Reversed as the Court Prejudicially Erred in Admitting the Testimony of Canine Handler Karina Peck

1. The Prosecution Failed to Establish a Proper Foundation For the Admission of Canine Handler Karina Peck's Testimony

Any time a party wishes to rely upon evidence derived from a novel scientific approach, that party bears the burden of establishing the reliability of such evidence. (*People v. Kelly* (1976) 17 Cal.3d 24, 30 (*Kelly*).) In *Kelly*, *supra*, the Supreme Court set forth a test, based on the test established in *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013 (*Frye*), to establish the reliability of the novel scientific approach. Satisfaction of the test requires that the proponent of the evidence demonstrate "(1) general acceptance in the relevant scientific community; (2) testimony by properly qualified experts; and (3) the application of correct scientific procedures in the case under review." (*People v. Fierro* (1991) 1 Cal.4th 173, citing *Kelly*, *supra*, 17 Cal.3d 24, 30; *Frye*, *supra*,

293 Fed. at p. 1014.)

For example, in *People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*), the Court of Appeal held it was error for the Court to not grant a defendant's request for a *Kelly* hearing where the prosecution presented evidence of the use of a scent transfer unit in a canine scent lineup. (*Mitchell*, *supra*, 110 Cal.App.4th at pp. 787-789.) The scent transfer unit is "a small vacuum-cleaner-like device …. [that] extracts scents from an object and transfers the scents to a sterile gauze pad." (*Id.*, at p. 779.) In holding that a *Kelly* hearing was required, the Court noted that "the scent transfer unit is a device that does not have a history of use in the field of law enforcement or in any other arena." (*Id.*, at p. 789.) The Court of Appeal then held that the *Kelly* test should have been applied to the scent identification lineup as well. (*Id.*, at p. 793.) The Court of Appeal specifically noted that the lack of scientific evidence left concerns about the effect of degrading environmental factors on scents. (*Id.*, at p. 792.) Nonetheless, the Court of Appeal held that the error was harmless due to the overwhelming evidence supporting the conviction. (*Id.*, at pp. 794-795.)

Similarly, in *People v. Willis* (2004) 115 Cal.App.4th 379 (*Willis*), the Court of Appeal held that the scent transfer unit, the vacuum device used to transfer scents from an object, "did not meet the requirements of *Kelly*." (*Willis*, *supra*, 115 Cal.App.4th at p. 385.) The Court noted that it was not "evident that the scent would not degrade or become contaminated." (*Ibid*.) The Court also noted that "[t]he dog handler who testified for the prosecution is not a scientist or an engineer; therefore, he [was] not qualified to testify about the characteristics of the STU or the unit's acceptance in the scientific community. There was also no proof that the dog handler used correct scientific procedures while employing the STU." (*Id.*, at pp. 385-386.)

In the instant action, the prosecution failed to satisfy the *Kelly* test as

to the novel use of a cadaver dog to determine the former location of a living person with decubitus ulcers. Although canine handler Karina Peck testified that skin tissue from decubitus ulcers bear the same scent as human remains (9RT 1613-1614), she did not testify that her canine, or any canine, had ever previously been used to detect skin tissue from decubitus ulcers. The prosecution did not offer any evidence of "general acceptance in the relevant scientific community" that cadaver dogs can be used for such a purpose. The only testimony offered by the prosecution on this topic came from Karina Peck, who has been trained in forensic science. While Peck may, therefore, be qualified to testify about the techniques involved in a forensic investigation, her background did not support a finding that she was qualified to testify about the *science* behind the techniques. Like in *Willis*, *supra*, "[t]he dog handler who testified for the prosecution [was] not a scientist or an engineer." (*Id.*, at p. 385.) Given that no information was provided as to whether a cadaver dog had ever previously been used to detect tissue from the decubitus ulcer of a living person, there was insufficient information to determine whether the correct scientific procedures had been applied in the instant case. Peck also failed to produce any documentation that would have affirmed the canine's ability to perform the task it has been credited with performing in the instant case. By illustration, the Ninth Circuit has previously "held that when a defendant requests dog-history discovery to pursue a motion to suppress, Federal Rule of Criminal Procedure 16 compels the government to disclose the 'handler's log,' as well as 'training records and score sheets, certification records, and training standards and manuals' pertaining to the dog." (*United States v. Thomas* (9th Cir. 2013) 726 F.3d 1086, 1096 ("*Thomas*"), quoting *United States v. Cedano-Arellano* (9th Cir. 2003) 332 F.3d 568, 570-571.) While the Ninth Circuit was addressing a discovery issue, the case illustrates the types of documentation that would be expected to corroborate

evidence produced through the use of a canine.

Moreover, in *Thomas*, *supra*, the issue was whether or not the results of a canine scent investigation were sufficient to establish *probable cause*, as opposed to its admissibility at trial. (*Thomas*, *supra*, 332 F.3d at p. 1096.) As the evidence in *Thomas* was insufficient to establish probable cause without a stronger foundation for the evidence, the similar evidence in this case was certainly insufficient to be admitted for evidentiary value without a stronger foundation for the evidence.

As described previously, Subsequent to Ho's convictions in this case, Steven D. Nicely ("Nicely"), who has been working with police dogs since 1973, reviewed the evidence pertaining to the canine search. Nicely has been working with police dogs since 1973. (5CT 1226.)

Nicely questioned whether the canine's training and certification have "external validity," whether the canine was "under the *stimulus control* of the *discriminative stimulus*" in order to determine "the probability of the dog erroring and false responding," and whether any "actions [were] taken in training and certification procedures to ensure the records were not recorded under *experimental bias*," such as through the use of double-blind testing. (*Ibid*., emphasis in original.)

Nicely then noted that real world deployment of odor detector dogs still requires forensic science testing of the substance detected. (5CT 1227.) A detector dog's response can also be affected by a handler unconsciously cueing the dog. (5CT 1228.) Nicely offered one way that this issue can be managed: "In this case the handler should have been taken to additional similar type locations to have the dog sniff search them. The target location should not have been pointed out to the handler, and sequence in which the team was deployed should have been randomly selected. For example, say there [were] 6 different locations selected to be searched by the dog team [and then] a dice could have been rolled and the number that is displayed

would have been the sequence in which the target location would have been present[ed] to the team for sniff searching." (5CT 1229.)

Nicely also noted the lack of a video record of the search, as is recommended. (5CT 1229.) Only with a video record can an independent assessment accurately be made of the dog team's performance, "particularly for the defense, [who] would most likely never [be] present at the [scene] when the dog [is] deployed." (*Ibid*.)

Nicely criticized some of the foundational statements that Peck made during her testimony. For example, Peck stated that her canine "only locates human remains," thereby "implying the dog does not ever make a mistake"; however, claiming that a "dog never makes a mistake disqualifies the speaker as a serious professional since everyone realizes this is impossible. [Citation.]" (5CT 1232, internal quotations omitted.) Moreover, no records were provided to support this claim. Peck in particular testified that the canine would not respond to fresh blood and would only respond to dried blood. (9RT 1614.) Yet again, no records were provided to support this claim. Moreover, it is unclear then in this case whether the canine in this case was responding to human tissue or dried blood since there was no forensic confirmation.

For all of these reasons, Nicely opines that "under no circumstances should a detector dog be used beyond establish[ing] probable cause to seize and have tested a substance." (5CT 1236.) Even more so than usual, Nicely's conclusion applies in the instant case where very little foundation was laid to support the evidentiary value of the testimony and the canine's findings.

Not only did the testimony and evidence fail to satisfy the foundational requirements set forth in *Kelly*, but the admission of the testimony and evidence was highly prejudicial. In particular, Peck opined, based on her canine's findings, that Sam "was left in the shower." (9RT

1640.) This conclusion, based on the canine's expressing a positive indicator primarily in the shower area, was not sufficiently supported by any science. Since Peck testified about no previous circumstances in which a canine was used to find skin tissue from a decubitus ulcer, Peck's opinion left many concerns. For instance, 16 days had passed between Sam's death and the canine search. As a result, much of the bedding or other materials used by Sam could have been disposed of. The numerous fans and air conditioners in the house (9RT 1619) could also have swept away scents and organic material. Secondly, it would seem reasonable that a person would lose more skin tissue while taking a shower than any other activity, since the water would be rinsing off any dead tissue. Yet by painting a portrait of Sam being kept in the shower, Peck created a horrific emotional image that certainly prejudiced the jury against Ho.

Moreover, Peck's testimony was the only testimony that attempted to illustrate how Sam was treated by Ho at home. With no testimony from eyewitnesses who described how Sam was treated in the home, Peck's testimony was the only evidence that the jury could rely upon. As such, Peck's testimony was critical for the prosecution to communicate to the jury exactly how Sam was being mistreated. Without such testimony, it is reasonably possible that the jury would have reached different verdicts in this case.

As the Court erred in admitting Peck's testimony without a proper foundation being established under *Kelly*, and as the error was prejudicial, Ho's convictions must be reversed.

2. Ho Received Ineffective Assistance of Counsel as Her Trial Counsel Failed to Challenge the Admission of Karina Peck's Testimony

Should this argument be deemed forfeited by counsel's failure to object, the failure to object should be considered ineffective assistance of

counsel as the failure to object was deficient, since no strategy could have justified the failure to object, and the failure to object was prejudicial for the reasons described above. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *Strickland*, *supra*, 466 U.S. at pp. 684-685.)

Here, given the importance of Peck's testimony to the prosecution case, any reasonably competent attorney would have challenged the foundation of the testimony and demanded a *Kelly* hearing on the use of a cadaver dog to detect skin tissue from a decubitus ulcer. As Criminal Law Specialist Errol Stambler stated, "[t]he expert report of Steven Nicely is an example of the failure of Mr. Shemaria in defending Ms. Ho. The defense further compounded its inadequacy by allowing the dog handler to speculate and conclude – without any scientific evidence – that Ms. Ho had her sister sleep in the shower." (5CT 1317.) Stambler also noted that "[t]here was no meaningful cross-examination [of Peck] by defense counsel." (5CT1318.) As such, according to Stambler, "[t]he actions of Mr. Shemaria are inexcusable. His conduct fell below the norm for competent counsel for the defense of elder abuse" and "below the standard of representation for a murder prosecution." (5CT 1317-1318.)

Moreover, there was no strategic reason not to request the hearing. The hearing would have occurred outside the presence of the jury so there would be now potential downside to requesting the hearing. Further, for the reasons described previously, admission of Peck's testimony on the use of the canine was severely prejudicial.

As Ho was denied her right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution, and as Ho was prejudiced by her counsel's ineffective assistance, Ho's convictions must be reversed.

H. The Trial Court Erred in Failing to Suppress Statements Made by Ho to Law Enforcement

1. Procedural Background

Trial counsel filed a motion to suppress Ho's statements under Evidence Code section 402 and Penal Code section 1538.5 for violations of Ho's rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution, including violation of her Miranda rights. (1CT 261.) Following a hearing, the trial court denied the motion. (3RT C-92.) Trial counsel then filed a Petition for Writ of Mamdamus/Prohibition with this Court. (*Ho v. Superior Court of Los Angeles County*, Court of Appeal Case no. B266470.) This Court denied the Petition on September 11, 2015.

2. Factual Background

As noted earlier, Montebello Police Department ("MPD") Officers Connors and Flores arrived to Beverly Hospital on the morning of October 10, 2011. Officer Connors questioned Ho in the Emergency Waiting Room. (2RT B-6.) While Officer Connors estimated that the conversation lasted 20 minutes (2RT B-7), Ho estimated that the conversation lasted 40 to 60 minutes. (3RT C-15.) About 30 minutes into the conversation, Officer Connors asked Ho for her driver's license. (3RT C-15.) Ho understood this request to be an order. (3RT C-72.) Officer Connors held onto the license for over an hour and did not return it until they were leaving the hospital for the police station. (3RT C-15 to C-16.) Officer Connors did not "recall" taking Ho's driver's license, but acknowledged that she normally asked witnesses for their licenses. (2RT B-23.)

At no point during the conversation did Officer Connors tell Ho that she was free to go. (3RT C-16.) Even when Ho went to the restroom, Officer Connors followed her, "knocked at the door and started talking to [her]." (3RT C-17.) Officer Connors admitted that she did not tell Ho that

she was free to leave, but stated that she told Ho that she (Ho) did not have to speak with her (Officer Connors). (2RT B-32.) Ho did not feel like she was free to go. (3RT C-22.)

After Officer Connors viewed Sam's body, she called Sgt. Flores and mentioned possible elder abuse and death by neglect. (2RT B-13, B-28.) When Sgt. Flores arrived at the hospital, he called the Los Angeles Sheriff's Department [LASD] to investigate the homicide, the standard procedure for MPD. (2RT B-13, B-94.) Det. Sulcer told Officer Chavez to transport Ho to MPD. (2RT B-54, B-56.) Det. Sulcer was aware that Officer Chavez would have to transport Ho in his police car. (2RT B-56.) The officers decided to impound Ho's vehicle as evidence. (2RT B-100.)

Although Ho stated that she wanted to drive her own vehicle (3RT C-21), Officer Chavez told her that she would have to be transported in the police car. (2RT B-89.) Officer Chavez denied that Ho said she wanted to take her own car. (2RT B-82.) Ho told Officer Chavez that she did not want to go in the police car. (3RT C-23.) But Officer Chavez reiterated that she had to get into the vehicle. (3RT C-24.) Ho also told Officer Chavez that she did not want to go to the police station because she wanted to go home to have a lunch that her husband had already prepared and to being making funeral arrangements. (3RT C-22 to C-23.) Ho also testified that if she had been able to drive her own car, she would not have gone to the station but would have been able to "call an attorney for assistance." (3RT C-56.) Ho believed that if she did not get into the car, she would be in trouble. (3RT C-24.)

Ho was transported to the MPD station at 12:24 p.m., locked in the back seat of Officer Chavez's vehicle. (2RT B-90; 3RT C-7, C-25.) Upon arrival, Ho entered the station through a side door, as opposed to the front door that is open to the public. (2RT B-90.) Her husband, Tim Ho, was also transported from their residence to the station at 10:43 a.m. (3RT C-7.)

The prosecution relied upon a consent to transportation form (1CT 291) that had been filled out by Officer Chavez and signed by Ho to establish that Ho agreed to be transported to the station. (2RT B-71.) Officer Chavez testified that Ho filled out the form at the hospital (2RT B-73); Ho, however, testified that she was not shown the form until five or ten minutes *after* she arrived at the station. (3RT C-25 to C-27.) Ho explained that she signed the form because Officer Chavez had in fact transported her already. (3RT C-28.) The time listed on the form, 9:31 a.m., is the time of the dispatch call, not the time that Ho signed the form. (2RT B-72.) The form also already listed a case number. (1CT 291.) Officer Connors did *not* see Ho sign the form at the hospital. (2RT B-33.) Det. Sulcer could not recall if he saw the signed form at the hospital. (2RT B-55.)

Ho asked to leave after signing the form, but Officer Chavez told her he had to talk to his supervisor, Sgt. Flores. (3RT C-28.) She was not allowed to leave even though she pointed out that the form said she was free to leave. (3RT C-29.)

Ho was at the station from 12:27 p.m. until after 7:00 p.m. (2RT B-34, B-74.) She was taken to Room 271, which was a witness room, not a suspect room. (2RT B-76.) The door to the room was unlocked. (*Ibid*.) Officer Chavez asked Ho to stay in the room. (2RT B-80.) She was not told specifically that she was free to leave (2RT B-63, B-104, B-105), despite officer testimony that she was actually free to leave. (2RT B-63, B-115.) She personally did not believe she had the right to leave. (3RT C-35.) She testified that one of the officers told her if she left, they would "have the entire police force after [her]." (3RT C-35.) She was told she had to stay at the station until she was interviewed by the detectives. (3RT C-31.)

Ho asked Officer Chavez for the Yellow pages while she was in the witness room in order to call an attorney, but none were provided. (3RT C-29 to C-30, C-32.) When she asked to go home to eat, that request was

denied and Sgt. Flores brought her a subway sandwich instead. (3RT C-32, C-50.)

Questioning of Ho by the detectives did not begin until around 3:10 p.m., almost three hours after she arrived at the station, and the questioning lasted for approximately two hours and 15 minutes. (2RT B-115, B-118.) About 15 minutes into the conversation, Det. Kenney told Ho, "[I]f you have any anxiety, the door is – the door to get out of here is … is … the one you came through." Ho answered, "Oh I'm fine, fine, fine." (2CT 336.) Det. Kenney continued, "We just want to make sure you know where the door is out." Ho responded, "Yeah, yeah. I understand." Det. Kenney then started to say, "You're here on your own…" and then Ho stated, "Now..now..now…yes, yes." (2CT 337.) Ho interpreted Det. Kenney's remarks as telling her that if she had an anxiety attack, she could step outside the room. (3RT C-53.)

Closer towards the end of the interview, Ho exclaimed, "Goodness, it's almost 5 o'clock…" (2CT 484.) Det. Espino responded, "We're almost done." (*Ibid*.) Ho then stated, "Okay. I, I am willing to … if you want more time with me, I am willing to spend more time." (2CT 485.)

The door to the interview room was closed but unlocked and Ho was not handcuffed. (2RT B-49, B-115.) At no point was Ho read her Miranda rights. (2RT B-120; 3RT C-35.) Ho was not arrested after the interview. (3RT C-59.)

3. Trial Court's Ruling

In denying the motion, the trial court found that, at the hospital, "law enforcement personnel was simply conducting her interview in conjunction with an investigatory inquiry and obtaining background information regarding the circumstances surrounding the death in question and about

what actually happened." (3RT C-87 to C-88.) The trial court determined that Ho was not in custody at that time. (3RT C-88.)

The trial court also found that Ho consented to be transported to the police station, whether or not she signed the form at the hospital or at the station. (3RT C-88.)

The trial court found "no evidence of police coercion or overbearing conduct or tactics utilized during the interview at the station" and found, on the contrary, that "[t]he DVD [of the interview at the station] reflects that the detectives never raised their voices, and appeared to remain calm. (3RT C-90.) The trial court also found that Ho "never expressed a desire to leave or refused to answer questions" during the interview." (3RT C-91.) Additionally, the trial court found that Ho "seemed to be, freely and voluntarily, wanting to tell her side of the story" during the interview. (3RT C-91.)

Thus, the trial court, "considering the totality of the circumstances surrounding the defendant's interview at the hospital location, transportation to the police station, and, ultimately, her interview at the station," determined that "a reasonable person under the same or similar circumstances would not have believed that she was in custody." (3RT C-91.)

4. Ho's Statements Should Have Been Suppressed as She Was Unlawfully Detained

a. A Detention Without Reasonable Suspicion Violates the Fourth Amendment and Requires Suppression of Any Evidence Subsequently Seized

Under the Fourth Amendment to the United States Constitution, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., 4th Amend.) This limitation on government power applies to the States as well as the federal government. (*Mapp v. Ohio* (1961) 367 U.S. 643, 643-660; *Wolf v. Colorado* (1949) 338 U.S. 25, 27-28.) California's constitution provides similar protection. (Cal. Const., Art. I, § 13.)

When a defendant challenges the propriety of government action under the Fourth Amendment, the questions are whether a search or seizure occurred and if so whether it was reasonable. If the challenged police conduct violates the Fourth Amendment, "the exclusionary rule requires that all evidence obtained as a result of such conduct be suppressed." (*People v. Williams* (1988) 45 Cal.3d 1268, 1299 (*Williams*).)

There exists three basic types of police encounters:

> Police contacts with individuals may be placed into three broad categories ranging from the least intrusive to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose: and formal arrests or comparable restraints on an individual's liberty. [Citations.]….[¶]….The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.]

(*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

Thus, "[a] detention occurs when an officer intentionally applies physical restraint or initiates a show of authority to which an objectively reasonable person innocent of wrongdoing would feel compelled to submit,

and to which such a person in fact submits. [Citations.]" (*People v. Linn* (2015) 241 Cal.App.4th 46, 57 (*Linn*).) Law enforcement "can be said to have seized an individual 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' [Citation.]" (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.)

A seizure without a warrant, such as occurred in this case, is presumptively unreasonable unless an exception is established by the prosecution. (*People v. Suff* (2014) 58 Cal.4th 1013, 1053 (*Suff*).) A detention is "reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

An officer's suspicion that an individual is involved in criminal activity must be based on facts that would cause any reasonable officer in that position " 'to suspect the same criminal activity and the same involvement by the person in question.' " (*In re James D.* (1987) 43 Cal.3d 903, 914.) Law enforcement personnel may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " (*Ibid.*)

That said, the subjective intent or motivations of the officer are not relevant; the facts must be such that the officer's suspicion is objectively reasonable. (*Brigham City v. Stuart* (2006) 547 U.S. 398, 404-405; *Whren v. United States* (1996) 517 U.S. 806, 813.) Officers may not rely on mere "hunches"; "an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in

complete good faith." (*People v. Loewen* (1983) 35 Cal.3d 117, 123; *People v Hernandez* (2008) 45 Cal.4th 295, 299.)

The totality of the circumstances is examined to see whether the detaining officer had the necessary "particularized and objective basis" for suspecting wrongdoing. (*United States v. Arvizu* (2002) 534 U.S. 266, 273.)

"If the challenged police conduct is shown to be violative of the Fourth Amendment, the exclusionary rule requires that all evidence obtained as a result of such conduct be suppressed. Such evidence includes not only what was seized in the course of the unlawful conduct itself--the so-called 'primary' evidence [citations]--but also what was subsequently obtained through the information gained by the police in the course of such conduct--the so-called 'derivative' or 'secondary' evidence. Thus, the 'fruit of the poisonous tree,' as well as the tree itself, must be excluded." (*People v. Mayfield* (1997) 14 Cal.4th 668, 760, citations omitted, abrogated on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, quoting *People v. Williams* (1988) 45 Cal.3d 1268, 1299.)

b. Standard of Appellate Review: Fourth Amendment Issues Present Mixed Questions of Fact and Law Subject to Independent Review

"In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated." (*People v. Saunders* (2006) 38 Cal.4th 1129, 1133-1134.) When there is no warrant, the government bears the burden of demonstrating a legal justification for search or seizure. (*People v. Williams* (1999) 20 Cal.4th 119, 127.)

"On appellate review of a motion to suppress," the reviewing court "must accept the trial court's resolution of disputed facts and its assessment of credibility [citation], but, the issue whether, under the facts found, a seizure or search was unreasonable is a question of law, as to which the

appellate court is bound to exercise its independent judgment. [Citations.]" (*People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.)

c. The Seizure of Ho's Driver's License Constituted an Unlawful Detention

As described earlier, about 30 minutes into Officer Connors' conversation with Ho at the hospital, Officer Connors asked Ho for her driver's license. (3RT C-15.) Ho understood this request to be an order. (3RT C-72.) Officer Connors held onto the license for over an hour and did not return it until they were leaving the hospital for the police station. (3RT C-15 to C-16.) This seizure of Ho's identification amounted to an unlawful seizure of Ho's person.

Although a *request* for identification does not amount to a seizure (*People v. Lopez* (1989) 212 Cal.App.3d 289, 292), the retention of the identification for over an hour did amount to a seizure of Ho's person. In *People v. Valenzuela* (1994) 28 Cal.App.4th 817 (*Valenzuela*), the Court of Appeal held that a defendant's consent to a search was not voluntary where law enforcement had already seized the defendant's green card. (*Valenzuela*, *supra*, 28 Cal.App.4th at p. 832.) And the Court of Appeal has also previously held that where an officer requests identification and tells an individual to wait in a vehicle while he runs a warrant check, that command amounted to a detention. (*Barber v. Superior Court* (1973) 30 Cal.App.3d 326, 330.)

Similarly, the United States Supreme Court has held that holding on to an individual's property can convey that the individual is not free to leave, even if the defendant initially handed over the property. (*Florida v. Royer* (1983) 460 U.S. 491, 496 (*Royer*).) In *Royer*, defendant was stopped at an airport by two detectives. When the detectives requested to see

defendant's airline ticket and driver's license, defendant handed them over. (*Id.* at 494.) Without returning defendant's property, the detectives asked defendant to accompany them to another location in the airport and defendant complied. (*Ibid.*) The detectives then obtained defendant's luggage, presented the luggage to defendant, and asked for defendant's consent to search. Without saying anything, defendant took out a key and unlocked one of the suitcases. A search of the suitcase revealed marijuana. (*Ibid.*) A second suitcase was also pried open with defendant's consent. (*Id.* at 495.) This initial interaction, from the detectives' first approach to the discovery of the marijuana, lasted approximately fifteen minutes. (*Ibid.*) The United States Supreme Court held that while "[a]sking for and examining [defendant's] ticket and his driver's license were no doubt permissible in themselves," once "the officers identified themselves as narcotics agents, told [defendant] that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that that he was free to depart, [defendant] was effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' " (*Id.* at 501-502, citations omitted.)

As these cases demonstrate, a reasonable person would not have believed that she was free to leave while law enforcement is holding onto her driver's license. Therefore, even before Ho's vehicle was impounded, Ho had been effectively seized by Officer Connors, as Ho's ability to leave the hospital was restricted. While Officer Connors claimed she told Ho that Ho did not have to talk to her (Office Connors), Officer Connors did not tell Ho that Ho was free to leave. (2RT B-32.)

As the seizure of Ho's driver's license amounted to a detention, the burden moves to the prosecution to justify the warrantless seizure. (*Suff*,

supra, 58 Cal.4th at p. 1053.) Here, the prosecution failed to meet that burden. Officer Connors first spoke with Ho before viewing Sam's body. (2RT B-5 to B-6.) Although Officer Connors did speak to Nurse Cardenas and Dr. Lopez prior to speaking to Ho (2RT B-5), the prosecution presented no evidence that Officer Connors had enough information to support a reasonable suspicion that Ho was involved in any criminal activity.

In ruling on Ho's suppression motion, the trial court did not make any factual finding as to the retention of the driver's license and did not address whether the retention of the license amounted to a detention. Thus, this Court should exercise its independent judgment both on the facts and the law. As the retention of Ho's driver's license for over an hour effectively restricted Ho from leaving the hospital, and as the prosecution did not satisfy their burden that the seizure was justified, all statements made by Ho at the hospital and subsequently at the police station should have been suppressed. (*Wong Sun v. United States* (1963) 371 U.S. 471, 488 (*Wong Sun*); *Mayfield*, *supra*, 14 Cal. 4th at p. 760.)

d. Even If the Initial Detention Was Lawful, the Detention Was Unlawfully Prolonged and Amounted to an Unlawful De Facto Arrest Unsupported by Probable Cause

Even if Ho could briefly be questioned at the hospital, Officer Connors held Ho's driver's license for over an hour. (3RT C-15 to C-16.) By the time Ho's license was returned to her, her vehicle was impounded and unavailable to her. Under these facts, the detention was unconstitutionally extended. Moreover, once her license was finally returned, Ho was told that she had to go to the police station in Officer Chavez's police vehicle and was locked in the back seat of the vehicle as she was transported to the station. (2RT B-82, B-89 to B-90; 3RT C-7, C-23 to C-25.) At the station, she was placed in a room and told to stay in that

room (2RT B-80), such that she could not leave the station to get lunch; lunch was brought to her. (3RT C-32, C-50.) She was not provided with Yellow Pages to call for an attorney when she requested. (3RT C-29 to C-30, C-32.) She was told she would be chased down if she left. (3RT C-35.) She was at the station for almost three hours before detectives began their interrogation and was at the station for a total of over six hours before she was free to leave. (2RT B-34, B-74, B-115, B-118.)

"[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." (*Illinois v. Caballes* (2005) 543 U.S. 405, 407 (*Caballes*), citing *United States v. Jacobsen* (1984) 466 U.S. 109, 124.) As the Court of Appeal has explained:

> "When a police officer has an objective, reasonable, articulable suspicion a person has committed a crime or is about to commit a crime, the officer may briefly detain the person to investigate. The detention must be temporary, last no longer than necessary for the officer to confirm or dispel the officer's suspicion, and be accomplished using the least intrusive means available under the circumstances. [Citations.] A detention that does not comply with these requirements is a de facto arrest requiring probable cause."

(*People v. Stier* (2008) 168 Cal.App.4th 21, 26-27.)

A "detention for custodial interrogation – regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." (*Dunaway v. New York* (1979) 442 U.S. 200, 216 (*Dunaway*).) Thus, in *Dunaway*, *supra*, the United States Supreme Court held that "police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation." (*Ibid*.)

For example, "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission." (*Caballes*, *supra*, 543 U.S. at p. 407; see *People v. McGaughran* (1979) 25 Cal.3d 577, 586 [detention unconstitutionally prolonged where defendant was detained for an additional amount of time beyond the time necessary to address the traffic violation in order for officer to conduct warrant check]; *Williams v. Superior Court* (1985) 168 Cal.App.3d 349, 357 [detention unlawfully prolonged beyond purpose of traffic stop]; *People v. Bellow* (1975) 45 Cal.App.3d 970, 972-973 [detention after concluding driver was not under the influence of alcohol or drugs was unconstitutional]; *People v. Grace* (1973) 32 Cal.App.3d 447, 451-452 [detention after determining brake light was functioning was unconstitutional].) In *Guillory v. Hill* (2015) 233 Cal.App.4th 240, a civil suit, the Court of Appeal held that the detention of individuals was unlawfully prolonged after law enforcement had completed their search pursuant to a search warrant.

Here, Ho's driver license was taken and held onto for over an hour. Before her license was returned, her vehicle was seized. The timeline of events indicates that she was thus held at the hospital for two hours, at least one hour after questioning by Officer Connors had ceased. While Officer Connors testified that Ho was free to go, Officer Connors knew that she did not tell Ho that she was free to go and knew that Ho's vehicle had been seized. In any event, Officer Connors' holding Ho's license and her vehicle disprove Officer Connors' testimony that Ho was free to leave.

Like in *Royer*, *supra*, 460 U.S. 491, in which the seizure of the defendant's airline ticket and driver's license conveyed that the defendant was not free to leave, here, the initial seizure of Ho's driver's license and subsequent impoundment of her vehicle conveyed that Ho was not free to leave. The same comparison can be made with *Valenzuela*, *supra*, 28

Cal.App.4th 817, in which law enforcement's holding onto the defendant's green card indicated that the defendant was not free to leave. Also, like in *Royer*, *supra*, in which the defendant was taken to a separate room for questioning, here, the transportation of Ho in a police vehicle and placement of Ho in a room at the police station further suggested that Ho was not free to leave. "These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' " (*Royer*, *supra*, 460 U.S. at p. 502.)

As officers did not have probable cause at this point to believe that Ho, had committed any offense, the prolonged detention, both at the hospital and at the station, along with the forced ride in a police vehicle and an interview in a closed room by two detectives, was an unlawful de facto arrest. Accordingly, the fruits of this unlawful de facto arrest, including both Ho's statements at the hospital and at the station, were required to be suppressed. (*Wong Sun*, *supra*, 371 U.S. at p. 488; *Williams*, *supra*, 45 Cal.3d at p. 1299.)

e. Any Consent by Ho Was Not Freely and Voluntarily Given

Any argument by respondent that Ho consented is undermined by the fact that any such consent was not freely and voluntarily given.

What constitutes a valid consent was defined in *Bumper v. North Carolina* (1968) 391 U.S. 543, 548-549, as consent that is freely and voluntarily given. The rules for voluntary consent in California were set forth in *People v. Strawder* (1973) 34 Cal.App.3d 370, 376 (*Strawder*) (disapproved on another ground in *People v. Bustamante* (1981) 30 Cal.3d 88):

> "We observe, preliminarily, that a search preceded by a voluntary, freely given consent is a reasonable and permissible search under constitutional standards. [Citations.]

> The consent must be voluntary and not in response to an express or implied assertion of authority. [Citation.] Whether a consent to search was freely and voluntarily given or was rather merely a nonvoluntary submission to an express or implied authority, is a question of fact resolvable upon reference to all the attendant circumstances. [Citations.] The burden, in each instance, is upon the government officials to show by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given. [Citations.]

(*Strawder*, *supra*, 34 Cal.App.3d at p. 376.)

Appellate courts have held purported consents to be invalid. In *People v. Challoner* (1982) 136 Cal.App.3d 779, 782, the Court of Appeal ruled that a consent given after an individual had been approached by numerous officers with drawn firearms was a 'submission to authority' and not a valid consent. In *Stern v. Superior Court* (1971) 18 Cal.App.3d 26, 30, an agreement to search while held at gun point was not a valid consent. In *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 725-726, the Court of Appeal held that statements by an officer implying that an accused would have something to hide if he did not give consent rendered the following consent invalid.

As discussed previously, in *Valenzuela*, *supra*, 28 Cal.App.4th at p. 811, the Court of Appeal held that a defendant's purported consent to a vehicle search was invalid where the consent was given while the officer held onto the defendant's green card. And, as also discussed previously, in *Royer*, *supra*, 460 U.S. at p. 502, law enforcement's holding onto a defendant's driver's license and plane ticket vitiated any consent to search.

Thus, like in *Valenzuela*, *supra*, and *Royer*, *supra*, here, the officer's retention of Ho's driver's license initially and the subsequent retention of Ho's vehicle invalidated any consent by Ho to continue speaking to the officers in the hospital or to be transported to the police station in Officer Chavez's vehicle. At the station, her request to go home to eat lunch was

denied and she was instead brought food at the station. (3RT C-32, C-50.) Her request for Yellow Pages so that she could call an attorney was denied. (2RT C-29 to C-30, C-32.) She was not explicitly told that she was free to leave, even if the door in the interview room was unlocked. (2RT B-63, B-115.) And the detention by law enforcement effectively lasted from the morning until 7:00 p.m. (2RT B-34.) Moreover, all of this was occurring in the aftermath of her sister's death. The only conclusion that can be drawn from these facts is that Ho was overwhelmed both emotionally by her sister's death and by the authority of law enforcement's demands on her such that any consent she gave could not be considered to have been freely and voluntarily given.

f. Ho Was Not Provided With the *Miranda* Warnings Despite Being Subjected to a Custodial Interrogation

In *Miranda v. Arizona* (1966) 384 U.S. 436, the United States Supreme Court established the procedure that governs officers interrogating a suspect. Officers must inform a defendant of her constitutional rights, particularly the right to remain silent, the fact that anything said can be used against her, the right to an attorney, and the fact that an attorney will be provided if she cannot afford one. (*Id.* at 444.) Failure to provide the warnings prior to an interrogation deprives the prosecution of the ability to use statements obtained in interrogation against the defendant. (*Id.* at 479.) These warnings are required when a suspect is subjected to "custodial interrogation," meaning "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Id.* at 444.)

Courts use an objective standard to determine whether or not a person is in custody for *Miranda* purposes. (*United States v. Beraun-Panez* (9th Cir. 1987) 812 F.2d 578, 580, citing *Berkemer v. McCarty* (1984) 468

U.S. 420 (*Berkemer*); see *United States v. Crisco* (9th Cir. 1984) 725 F.2d 1228, 1231, *cert. denied*, 466 U.S. 977.) A court "determine[s], based on the totality of the circumstances, whether 'a reasonable person in such circumstances would conclude after brief questioning [that] he or she would not be free to leave." (*Beraun-Panez,* 812 F.2d at 580, quoting *United States v. Hudgens* (9th Cir. 1986) 798 F.2d 1234, 1236.)

Although an officer's subjective views on the interrogation are irrelevant for determining custody, suspicions that are communicated to the suspect do have a bearing on determining custody. (*Stansbury v. California* (1994) 511 U.S. 318, 324.) "'Accusatory questioning is more likely to communicate to a reasonable person in the position of the suspect, that he is not free to leave' than would general and neutral investigative questions." (*People v. Alguilera* (1996) 51 Cal. App. 4th 1151, 1164; citation omitted.)

Further, as discussed previously, retention of an individual's property conveys to an individual that the individual is not free to leave. (*Royer*, *supra*, 460 U.S. at pp. 501-502.)

In the instant case, a review of the totality of the circumstances indicates that Ho was not free to leave at the hospital and was not free to leave at the police station such that she was subjected to a custodial interrogation. Again, like in *Royer*, *supra*, law enforcement made clear to Ho that she was not free to leave as both the documentation necessary to legally drive and then her mode of transportation were seized. (2RT B-100; 3RT C-15 to C-16.) She was transported in the back of a locked police vehicle to the station as she was told that she had to go to the station to speak with the detectives. (2RT B-89; 3RT C-24.) A request by Ho to leave to grab lunch was denied, first at the hospital and then at the station. (3RT C-22 to C-23, C-32, C-50.) A request by Ho for the Yellow Pages so that she could call an attorney was denied. (3RT C-29 to C-30, C-32.) She was told by law enforcement personnel that if she left the station, the police

would come after her. (3RT C-35.) And she was told to wait in the witness room for the detectives. (2RT B-80.) At this point, any reasonable person would believe they were not free to leave.

The lack of a clear police advisement that the subject is at liberty to decline to answer questions or free to leave is a significant indication of a custodial interrogation. A second factor indicative of a custodial setting is the nature of the questioning. While *Terry v. Ohio* (1968) 392 U.S. 1 allows for limited questioning to confirm an officer's suspicions (*Berkemer*, *supra*, 468 U.S. at p. 439), prolonged questioning is likely to create a coercive environment in which an individual would not feel free to leave. Because police and suspects should not have to guess as to when custody arises after a temporary stop, the *Berkemer* Court advised the practice of giving *Miranda* warnings at the earliest possible point that a police/citizen encounter evolves past a *Terry* stop. (See *Berkemer*, *supra*, 468 U.S. at p. 431, fn. 13.) Where the encounter progresses beyond a short investigatory stop, a custodial environment is more likely.

Here, the encounter lasted for over nine hours, from approximately 10:00 a.m. until after 7:00 p.m. (3RT B-34; 9RT 1518-1519.) The interrogation itself lasted over two hours, was anything but temporary, and Ho was not clearly advised she could leave the building (B-63, B-104 to B-105), as opposed to stepping out of the room, until the end of the interrogation.

Another factor commonly presented is the existence of a "police dominated" atmosphere. (*Berkemer*, *supra*, 468 U.S. at p. 439; *Miranda*, *supra*, 384 U.S. at p. 445.) Where police are in full control of the questioning environment, custody is more easily found. Circumstances might include: separation of the suspect from family or colleagues who could offer moral support [Ho was taken to the police station where she did not see her husband until the end of interrogation], isolation in nonpublic

questioning rooms [Ho was questioning behind closed (but unlocked) doors], threatening presence of several officers [two detectives were interrogating Ho], display of a weapon by an officer [the detectives were obviously armed, but they did not overtly display weapons to Ho], physical contact with the subject [Ho was forced to go to the police station and forced to stay], and an officer's use of language or tone of voice in a manner implying that compliance with the request might be compelled [she was told she had to go to the police station and told at the station that she would be chased down if she left].

Although the subjective view of the suspect does not determine whether she is in custody (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663 (*Yarborough*), citing *Stansbury v. California* (1994) 511 U.S. 318), the fact that Ho considered herself not free to leave is certainly relevant. Presumably, her conclusions were based on the events that had just transpired and on the "objective circumstances of the interrogation." (*Yarborough*, *supra*, 541 U.S. at p. 663.)

While Ho was initially "softened up" with general questions, the later questions were clearly designed to get admissions or a confession from Ho. Under all of the circumstances the questions were more than reasonably likely to elicit incriminating responses from Ho. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *United States v. Foster* (9th Cir. 2000) 227 F.3d 1096, 1103.) The questioning at the hospital, and certainly the questioning at the police station, amounted to a custodial interrogation and *Miranda* warnings were required. The failure to give these warnings required that all statements be suppressed.

Accordingly, the trial court erred in admitting the statements.

g. Law Enforcement Failed to Cease Questioning Ho After She Requested Yellow Pages to Contact an Attorney

It is well established at this point that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." (*Minnick v. Mississippi*, (1990) 498 U.S. 146, 153.)

Thus, here, regardless of whether or not *Miranda* was required, law enforcement could not question Ho after she requested an attorney. Prior to her interview with detectives, Ho told Officer Chavez that she wanted the Yellow Pages so that she could call an attorney. (3RT C-30.) This clear request for counsel prior to her interview with detectives required the suppression of all statements made during that subsequent interview.

h. The Admission of Ho's Statements Requires Reversal

The erroneous denial of a motion to suppress evidence on Fourth Amendment grounds is reviewed under the Chapman harmless-error standard, and reversal is required when the error affects a defendant's constitutional rights, unless the court can "declare a belief that it was harmless beyond a reasonable doubt." (Chapman v. California (1967) 386 U.S. 18, 23 (Chapman).) The beneficiary of the error, the prosecution, must prove beyond a reasonable doubt that the error did not affect the result and did not contribute to the decision. (Chapman, supra, 386 U.S. at p. 23; see People v. Memro (1995) 11 Cal.4th 786, 847 [applying Chapman standard to section 1538.5 error].)

In the instant case, there was extensive testimony at trial about Ho's statements to law enforcement. Officer Connors testified about Ho's statements, including Ho's statements that she was the primary caretaker for Sam, Sam's bruises and sores were a result of not eating, that she had

been treating Sam with colloidal silver, that Sam had been walking two days before and had still been alive when brought to the hospital, and that Ho believed the doctors would just feed Sam and send her home. (9RT 1522-1523, 1526-1527.) Deputy Espino testified not only about Ho's statements, but about how he believed her statements were false. He testified that Ho's statements about how Sam was still alive when she was brought to the hospital were inconsistent with the medical staff's conclusions. (11RT 2156.) He believed Ho contradicted herself by stating that Sam was losing weight at the Villa Oaks convalescent home, only to later state that Sam's weight when she moved in with Ho after Villa Oaks was in the 70s and that Ho had been told an ideal weight for Sam was between 70 and 80 pounds. (11RT 2159.) Deputy Espino also believed Ho contradicted herself when she first did not characterize the wounds as pressure sores but instead as "blemishes, a tearing of the skin," and then later said that Sam did have pressure sores, but they were from when she left Villa Oaks, only to then mostly retract that statement as well. (11RT 2160.) Deputy Espino also believed Ho contradicted herself by first stating that she brought Sam to the hospital to be fed but later stating that she brought Sam to the hospital so Sam would be admitted to a convalescent home." (11RT 2161.) Deputy Espino further testified that he was concerned by Ho's characterization of the sores as "not serious" and Ho's lack of interest in taking Sam to the doctor. (11RT 2162-63.)

These statements by Sam to law enforcement, along with Deputy Espino's characterization at trial of many of the statements as false or concerning, undoubtedly contributed to the verdict. As the prosecution has not demonstrated thad the failure to suppress her statements was harmless beyond a reasonable doubt, the convictions must be reversed. (*Chapman*, *supra*, 386 U.S. at p. 23.)

I. Under the Cumulative Error Doctrine, The Aggregation of Each of the Above Errors Deprived Ho of her Due Process Right to a Fair Trial

Should this Court conclude none of the foregoing errors compel reversal of the judgment standing alone, the judgment should nevertheless be reversed pursuant to the cumulative error doctrine. The rule recognizes that even in cases where no single error demands reversal, the defendant may nevertheless be deprived of federal due process in light of the cumulative effect of a number of errors. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488, fn. 15.) As for the state Constitution, the cases recognize that cumulative error must be assessed in any determination of prejudice within the meaning of article VI, section 13. (See *People v. Holt* (1984) 37 Cal. 3d 436, 459.)

The cumulative error rule is "the litmus test [for] whether [a] defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal. App. 3d 314, 349.) The cumulative error doctrine requires a reviewing court to "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Id.*) When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required. (*People v. Cuccia* (2008) 97 Cal. App. 4th 785, 795.)

The errors described herein cumulatively deprived Ho of her due process right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and article one, section 15, of the California Constitution. Thus, for the reasons described above, Ho's convictions must be reversed.

V. CONCLUSION

Starting from a young age and continuing through adulthood and into old age, Ho devoted a significant amount of her life to caring for her disabled sister. This devotion undoubtedly contributed to the fact that Sam greatly exceeded her life expectancy. As the evidence showed, Ho could easily have let Sam be taken care of by nursing facilities who had no personal connection to Sam's wellbeing, but Ho time and time again decided that she would rather give up her own time, energy, and money to personally care for Sam.

What Ho believed to be in Sam's best interests did not always correspond with what others believed in Sam's best interests and, unfortunately, the jury was not presented with evidence of Ho's own mental health issues that would have explained Ho's obstinance on certain matters such as Sam's diet and the application of colloidal silver to treat Sam's skin conditions. An account of these mental health issues was absolutely necessary to place some of Ho's decisions in their proper context and to demonstrate how these mental health issues affected Ho's judgment and her (lack of) intent. Yet not only was this evidence not presented before the jury, but trial counsel also failed to even request that the jury be given the opportunity to consider manslaughter as a more appropriate resolution of the facts.

Moreover, there was substantial evidence that the cause of death opinion by the coroner was plain wrong. Not only did the coroner initially waver about the cause of death in his testimony, but the evidence presented by Dr. Fullerton at trial and by Dr. Sheridan in the motion for new trial indicated that Sam's death was not caused by lack of care. Rather, the sepsis could have been caused by the sores *or* by the pneumonia, and even

the sores may have developed very rapidly in the immediate days prior to Sam's death.

Given these questions surrounding the manner of death, Ho's history of caring for her sister, counsel's failure to permit the jury to consider any evidence of Ho's own mental health issues, as relevant to her intent, and counsel's failure to permit the jury to consider whether manslaughter was more appropriate, in addition to all of the additional issues detailed above, justice requires that the conviction for murder in this case be reversed.

Respectfully submitted,

Dated: June 7, 2017

/S/ ALAN EISNER

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204, subdivision (c)(1), or 8.360, subdivision (b)(1), of the California Rules of Court, the enclosed brief of Amy Ho is produced using 13-point Roman type including footnotes and contains approximately 30,381 words, which is 4,881 more than the total words permitted by California Rules of Court, rule 8.360, subdivision (b). An application to file an oversized brief has been concurrently filed. Counsel relied on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: June 7, 2017

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