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 REPLY BRIEF

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I. ARGUMENT

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

The presumption of innocence and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require the prosecution to prove every element of every crime charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364; *Sandstrom v. Montana* (1978) 442 U.S. 510, 520; *Tot v. United States* (1943) 319 U.S. 463, 466; U.S. Const. 5th & 14th Amends.)

As discussed in appellant's opening brief, in reviewing a judgment for sufficiency of the evidence, " 'it is not enough for the

respondent simply to point to 'some' evidence supporting the finding' "; rather, the reviewing court must determine " 'whether the evidence of each of the essential elements … is *substantial*.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 138 [emphasis in original] [footnote omitted].) "[E]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Thompson* (1980) 27 Cal.3d 303, 324, quoting *People v. Redmond* (1969) 71 Cal.3d 735, 799.) "[T]here must be evidence to support an inference and the prosecution may not fill an evidentiary gap with speculation." (*People v. Felix* (2001) 92 Cal.App.4th 905, 912, citing *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573.)

1. Insufficient Evidence of Implied Malice Was Presented

Respondent first argued that sufficient evidence of implied malice to support the murder conviction "was presented at trial, showing appellant [Amy Ho] knew her conduct was dangerous to [Cora Sam's] life but did not care her conduct would hurt [Sam]." (Respondent's Brief ("RB") 39.) Respondent's argument largely centered on all of the indications that *should* have made Ho recognized what medical care Sam needed. As to evidence supporting a finding that Ho actually knew and appreciated Sam's medical condition, respondent only argued that "no one taking care of someone in [Sam's] condition could possible be unaware of the massive sores across her body, the exposed bone on her hip, the gangrene that had set in, or the tremendous weight loss she endured." (RB 47.) The evidence presented at trial, however, demonstrated that Ho was aware of these conditions but believed

that those conditions were best treated by the application of colloidal silver and use of bandages to wrap the sores. (9RT 1522.) Ho characterized the colloidal silver as "a natural antibiotic." (*Ibid.*) Ho's use of the colloidal silver to treat her sister's serious condition may not have been medically appropriate or even rational, but it undermined any finding that this erroneous method of care was the product of implied malice.

Respondent also argued that Ho's attempts to place Sam in a facility were "belied by the testimony of the facility coordinators who found [Ho] was impossible to deal with and the fact that in three years she never found any facility she considered suitable." (RB 47.) However, as Pam Benson, who was the director of five care facilities, noted, she found Ho to be difficult but believed that Ho was concerned about Sam. (7RT 926.) Similarly, Lilian Sestiaga, an administrator at a care facility, formed the impression that Ho did really want to place Sam in the facility. (9RT 1514-1515.)

Indeed, Sam was never placed in a facility under Ho's care not for lack of trying on Ho's part but because Ho believed that the facilities did not satisfy the standards of care she expected for her sister. For example, at one facility, 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.) Ho also wanted to be able to sleepover at the facility to sometimes look after her sister, but was informed that family members were not allowed to sleep inside the facility. (9RT 1587-1588.) As service coordinator George Rodriguez ultimately determined, the care facilities were rejecting Sam because of Ho's desire to dictate the terms of care, particularly as to diet. (7RT 966, 979.) There was no indication that Ho's demands about the proper diet for Sam were the result of malice as opposed to erroneous beliefs.

Ho exerted a great amount of time and energy into looking for a suitable care facility for Sam. She sent weekly faxes to the Eastern Los Angeles Regional Center (12RT 2781), conducted her own independent research for facilities (12RT 2783-2784), and, at least at one facility, continued calling the facility to ask that Sam be admitted, even after Sam was rejected. (9RT 1593.) The fact that Ho "was impossible to deal with," as characterized by respondent (RB 47), does not discredit her genuine attempts to place her sister in a facility. Once again, there was no indication that Ho's specific expectations for a facility were the result of implied malice.

Respondent attempted to liken the instant case to *People v. Latham* (2012) 203 Cal.App.4th 319 (*Latham*), in which the parents ignored their child's medical needs and the child ultimately died as a result of suffering from diabetic ketoacidosis. (RB 42.) Importantly in *Latham*, however, the Court found that "there was some evidence from which the jury could have inferred that [the parents] were unconcerned with [their child's] fate, even *after* she had suffered cardiac arrest." (*Latham*, *supra*, 203 Cal.App.4th at p. 332.) The evidence in this case, however, demonstrated that Ho *did* care deeply about Sam's medical condition but believed that she had more insight as to how to treat Sam's condition than the medical professionals with whom she spoke. As described above, Ho applied what she believed to be the best medical treatment and expended a great deal of effort in trying to find a care facility that met Ho's requirements. Additionally, in *Latham*, *supra*, a neighbor ultimately had to contact medical personnel to obtain treatment for the child. (*Latham*, *supra*, 203 Cal.App.4th at p. 323.) In the instant case, however, Ho did bring Sam to the hospital, even if belatedly.

Thus, as discussed at length in appellant's opening brief (Appellant's Opening Brief ("AOB") 43-44), the instant case is more

akin to *People v. Caffero* (1989) 207 Cal.App.3d 678, in which 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. (*People v. Caffero*, *supra*, 207 Cal.App.3d at p. 686.)

While there is no question that Sam was suffering from significant medical issues that required care which Ho failed to provide, there was no evidence that Ho's failure to provide adequate care was the result of implied malice. Rather, all of the evidence indicated that Ho had her own personal beliefs about the best way to care for Ho and placed those personal beliefs above the advice that she received from professionals. Ho's response to her sister's medical condition was certainly unfortunate, but it was not murder. As there was no substantial evidence to support the requisite element of implied malice, the conviction for murder in count one must be reversed or, at minimum, reduced to voluntary manslaughter.

2. Insufficient Evidence Was Presented on Both Counts to Support a Finding that Any Failure to Act by Ho Caused Sam's Death

On both counts, there was insufficient evidence that any failure to act by Ho caused Sam's death. Respondent, as well as the prosecutor at trial, primarily relied on the testimony of Dr. Yulai Wang to prove causation. (RB 50-51.) As discussed in appellant's opening brief, however, Dr. Wang wavered on the issue of causation: First he stated that both the decubitus ulcers and the

pneumonia contributed to the sepsis (8RT 1230), then he stated "either one" could have caused the sepsis (8RT 1249), and then he again opined that both contributed to the sepsis. (8RT 1251.)

Moreover, Dr. Fullerton's testimony supported a finding that the pressure sores on Sam's skin were not the product of neglect but the product of "terminal skin failure," in which blood flow is redirected away from the skin towards vital organs. (12RT 2725.) Thus, even if the sores contributed to Sam's death alongside the pneumonia,[1] the cause of the sores was not any failure to act by Ms. Ho.

As there was insufficient evidence that Ho's failure to act actually resulted in Sam's developing the sores, and as there was insufficient evidence that the sores were actually a contributing factor to Sam's death, given that even Dr. Wang wavered on the issue, the evidence cannot be considered sufficiently substantial to support the causation element required for a murder conviction and a conviction for elder / dependent abuse resulting in death.

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[1] Respondent disagreed with the characterization in appellant's opening brief that Dr. Fullerton testified the pneumonia would have been untreatable, even without the sores. (RB 50, fn. 5.) Respondent explained that "that is not quite what Dr. Fullerton testified. He actually testified that, in terminal end-of-life cases, the antibiotics 'don't tend to work like they would have worked if someone wasn't in an end-of-life terminal failure condition.'" (RB 50, fn. 5, quoting 12RT 2727.) Respondent conveniently omitted the preceding sentence to Dr. Fullerton's statement. Dr. Fullerton's full statement was as follows: "Pneumonia 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." (12RT 2727, emphasis added.)

B. Ho Received Ineffective Assistance of Counsel

1. Trial Counsel Provided Prejudicially Deficient Representation by Failing to Present a Mental Health Defense

Respondent argued that Ho's mental health issues of hoarding and obsessive-compulsiveness bore little relevance to Ho's lack of adequate care of Sam. (RB 57.) Dr. Romanoff, however, explained exactly how Ho's obsessive-compulsive disorder provided important context for Ho's conduct:

> "[Ho's] often repeated descriptions of attempts to force her sister to swallow or to methodically apply colloidal silver and bandages makes good sense when considered in the context of her above described illness, and I believe it is a fundamental misunderstanding to attribute these activities to any absence of care or concern by Ms. Ho for her sister. Rather, it was precisely because of a growing and intensifying care and concern that Ms. Ho began to pursue, in an increasingly rigid and rushed fashion, the types of compulsive actions that had in the past resulted in improvement for her sister."

(5CT 1160.)

In other words, Ho's obsessive-compulsive disorder prompted Ho to elevate her own oft-repeated techniques for caring for her sister above the advice of professionals. Given that, along with causation, the other central issue in the case was Ho's mindset

with regards to caring for Sam, evidence of mental health issues that undermined a finding of implied malice should have been presented before the jury to consider.

Respondent also criticized this argument of ineffective assistance of counsel because the argument was "not base[d]…on information trial counsel had before him while preparing for trial." (RB 55.) A claim of ineffective assistance of counsel, however, is not undermined by trial counsel's lack of knowledge when trial counsel had " a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland v. Washington* (1984) 466 U.S. 668, 691 (*Strickland*).) Thus, to the extent that trial counsel was unaware of Ho's mental health issues, as respondent claims, trial counsel's failure to investigate Ho's mental health issues (which should have been apparent from Ho's disagreeing with hospital staff about whether or not her sister was dead) reflected a failure to investigate.

For example, in *Weeden v. Johnson* (9th Cir. 2017) 854 F.3d 1063 (*Weeden*), the defendant was convicted of attempted robbery and first-degree felony murder due to evidence indicating that he had a role in planning the robbery, which resulted in the death of a victim, even though he was not present when the robbery occurred. (*Weeden*, *supra*, 854 F.3d at pp. 1066-1067.) Like the instant case, the defendant in *Weeden*, represented by new counsel, "moved for a new trial, claiming that her trial counsel was ineffective for failing to investigate or present psychological evidence." (*Id.*, at p. 1067.) A psychological report included with the motion for new trial concluded that "although Weeden could comprehend the concept of robbery, 'it is extremely unlikely she would intend to commit robbery or knowingly participate in one,' and 'she would probably be slow to understand that a robbery was being considered by

others if their intentions were not clearly articulated.' " (*Ibid*.) After the Court of Appeal affirmed the convictions, the Supreme Court denied review and the United States District Court denied a habeas corpus petition. (*Id*., at pp. 1068-1069.)

The Ninth Circuit, however, "conclude[d] that the Court of Appeal's conclusion that Weeden's trial counsel provided effective representation was 'contrary to, or involved an unreasonable application of,' clearly established Supreme Court law." (*Weeden*, *supra*, 854 F.3d at p. 1069.) As the Ninth Circuit explained:

> "The correct inquiry is not whether psychological evidence would have supported a preconceived trial strategy, but whether Weeden's counsel had a duty to investigate such evidence in order to form a trial strategy, considering 'all the circumstances.' [Citation.] The answer is yes. The prosecution's felony murder theory required proof that Weeden had 'specific intent to commit the underlying felony,' [citation], so Weeden's 'mental condition' was an essential factor in deciding whether she 'actually had the required mental states for the crime.' [Citation.]"

(*Weeden*, *supra*, 854 F.3d at p. 1070; see *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006 [trial counsel's failure to adequately investigate defendant's mental health issues was ineffective and prejudicial].)

In the instant case, there was no question that Ho failed to provide adequate medical care for Sam. Thus, the critical issue was Ho's mental state in failing to provide adequate medical care. Defense counsel's failure to present any psychological evidence, such as the evidence described in Dr. Richard Romanoff's report,

cannot be considered to reflect a reasonable defense strategy. Ho's mental health issues, which, again, should have been apparent from Ho's interactions with medical staff at the hospital, should have been presented as the primary defense to the allegations against Ho. Like in *Weeden*, *supra*, where trial counsel had an obligation to investigate the defendant's "mental condition," since that was the crucial issue, here, trial counsel also had a duty to investigate a mental health defense. Based on Dr. Romanoff's findings, defense counsel should not only have investigated a mental health defense, but should have presented evidence of Ho's mental health issues that provide illuminating context for Ho's conduct.

Respondent also argued that "lay witness testimony" already established "the theme of [Ho's] devotion to her sister" and, therefore, "additional expert testimony on these points would not have had any effect on the outcome." (RB 56-57.) However, respondent's equating lay opinion testimony on Ho's emotional attitude towards her sister with a psychiatric doctor's testimony that Ho suffered from mental health issues which affected the way Ho cared for her sister is without merit. Testimony on Ho's mental health issues, such as those described in Dr. Romanoff's report, would have provided scientific illumination of the motivations behind Ho's conduct, illumination that could not be provided by lay opinion testimony that Ho cared about her sister.

When Ho's conduct is reviewed in the light of her mental health issues, "there is a reasonable probability that" had the evidence been presented, "the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) Without such evidence, the jury had no scientific basis for reconciling descriptions of Ho's devotion to her sister with Ho's inadequate care for her

sister; accordingly, the jury was forced to conclude that the inadequate care must have been intentional.

As Ho received prejudicially ineffective assistance of counsel due to trial counsel's failure to present any mental health defense, the convictions on both charges must be reversed. (See *Strickland*, *supra*, 466 U.S. at p. 687.) No reasonable strategy could have justified the failure to present the evidence. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581 (*Fosselman*).)

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

Respondent argued that when pathologist Dr. Harry Bonnell suddenly became unavailable during trial for medical reasons, trial counsel was not deficient for failing to obtain another expert because "counsel had no opportunity to find and retain another expert." (RB 58.) Respondent's argument is purely speculative. There is no indication in the record of any attempt to retain a new pathologist.

Trial counsel learned of Dr. Bonnell's unavailability on the morning of Saturday, June 25, 2016. (11RT 2401.) Witness testimony did not resume until Tuesday, June 28, 2016. (12RT 2701, 2709.) Accordingly, trial counsel had three full days to retain another pathologist to testify. The fact that Dr. John Fullerton covered some of the same ground as Dr. Bonnell's anticipated testimony did not erase the prejudice of failing to present a pathologist.

As detailed in appellant's opening brief (AOB 57-58), pathologist Dr. Frank Sheridan was retained after Ho's conviction to assist with Ho's motion for new trial. According to Dr. Sheridan, the type of pneumonia suffered by Sam could have "occur[red] even

when the patient [was] being well cared for." (5CT 1188.) Dr. Sheridan also noted that "people in a terminal state will often appear undernourished or malnourished due to their generalized catabolic state," even if they are being fed. (5CT 1188.) These facts, presented by a pathologist, would have cast a doubt on whether Sam's deterioration was actually the result of any neglect by Ho.

As the failure to present another pathologist was both deficient and prejudicial, the convictions in this case must be reversed. (See *Strickland*, *supra*, 466 U.S. at p. 687.) As indicated by the fact that trial counsel intended to present Dr. Bonnell's testimony, no reasonable strategy could have justified the failure to present another pathologist in his place. (See *Fosselman*, *supra*, 33 Cal.3d at p. 581.)

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

Respondent first argued that there was no ineffective assistance for failing to challenge the search warrant on staleness grounds because "the search warrant based on staleness grounds would have been meritless." (RB 61.)

Respondent conceded that "there was a possibility that cleaning the house would have reduced the scent." (RB 60.) Given the 15 days that lapsed between Sam's death and the issuance of the search warrant, there existed plenty of opportunity for all items used in caring for Sam to be cleaned or discarded. While respondent made an attempt to distinguish the instant case from cases involving drugs or contraband because drugs or contraband "could easily be removed from the premises" (RB 60), the same reasoning applies to

all materials used in caring for Sam. Just as a delay of 20 days 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), here, the delay of 15 days between Sam's death and the issuance of the search warrant negated the probable cause for finding evidence pertaining to Ho's care for Sam. Accordingly, challenging the search warrant would not have been meritless and it is likely the trial court would have suppressed the evidence obtained through the search warrant.

Moreover, despite respondent's claim that "[t]he scent evidence that [Sam] had been kept in the shower was not critical to the prosecution," such evidence actually formed the basis of the prosecutor's accusation against Ho. While defense presented evidence that the sores on Sam's body could have developed as a result of terminal skin failure, the prosecution presented evidence that Sam had been neglectfully kept in the shower (9RT 1640) and had developed the sores as a result of staying in a single position. (10RT 1904.) Accordingly, the evidence indicating that Sam was kept in the shower was critical for the prosecution to undermine the defense theory of terminal skin failure.

Altogether, defense counsel's failure to challenge the search warrant resulted in the introduction of evidence that undermined the defense theory of the case. No reasonable strategy could have justified the failure to challenge the search warrant. (See *Fosselman*, *supra*, 33 Cal.3d at p. 581.) As the failure to challenge the search warrant was both deficient and prejudicial, the convictions must be reversed. (See *Strickland*, *supra*, 466 U.S. at p. 687.)

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

Several instances of trial counsel's failure to zealously advocate for his client were presented in appellant's opening brief. (AOB 60-62.)

Respondent first argued that trial counsel's failure to file a written motion in support of a proposed instruction was not ineffective assistance because trial counsel still presented oral argument to the court. (RB 62.) As trial counsel acknowledged in an e-mail to Ho, however, he was unable to "do the necessary brief that [he] believe[d] should be filed with [the] judge prior to resumption of jury deliberations." (5CT 1213.) Trial counsel elaborated to Ho, "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 [*sic*] up a motion to reconstruct [*sic*] the jury on the issue of elder abuse. I am burned out tired of working and need some sleep and exercising." (*Ibid*.) Trial counsel also noted that "very few attorneys want to work on the Fourth of July weekend." (*Ibid*.)

Respondent argued that "'[c]ompetent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record.'" (RB 62, quoting *People v. Freeman* (1994) 8 Cal.4th 450, 509.) Here, however, trial counsel failed to file what he considered a "necessary brief" (5CT 1213), although he did file a proposed instruction with some supporting case law. (4CT 860.) Thus, even by trial counsel's own admission, trial counsel provided deficient representation to Ho.

Moreover, Ho was prejudiced by trial counsel's failure to zealously advocate on this issue. Trial counsel's jury instruction

emphasized that "criminal negligence must be found beyond a reasonable doubt." (4CT 860.) The instruction as given on reasonable doubt (4CT 896) did not clearly indicate that the jury must find *each element* to be true beyond a reasonable doubt. (See *Victor v. Nebraska* (1994) 511 U.S. 1 ["The government must prove beyond a reasonable doubt every element of a charged offense"]; *In re Winship*, *supra*, 397 U.S. 358.) As Ho's mental state in her failing to adequately care for Sam was the central issue in this case, trial counsel's failure to zealously advocate for an instruction that clarified the jury must find the negligence itself to be true beyond a reasonable doubt was prejudicial.

Respondent also argued that trial counsel's failure to present the critical argument of lack of financial motivation is insufficient for a finding of ineffective assistance of counsel. (RB 63.) As trial counsel stated in his e-mail to Ho, his failure to argue lack of financial motivation was *not* tactical: "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.) Ho was prejudiced by this failure due to the fact that, since Ho's mental state in failing to adequately care for her sister was the primary issue, evidence indicating that the failure to provide adequate care was *not* intentional was critical to obtaining an acquittal on the charges, especially the charge of murder.

Moreover, trial counsel's insults towards Ho (e.g., "You must be an idiot!!!!!!!" (5CT 1220)) emphasizes trial counsel's failure to zealously advocate for Ho. Respondent argued that " '[t]he mere ''lack of trust in, or inability to get along with,'' counsel is not sufficient grounds for substitution.'" (RB 64, quoting *People v. Taylor* (2010) 48 Cal.4th 574, 600.) Here, however, it was not Ho's "inability to get along with" trial counsel, but rather trial counsel's insulting

attitude towards Ho that is at issue. This insulting attitude further underscores the failures to zealously advocate described above.

Trial counsel's failure to zealously advocate for his client was deficient, prejudicial, and not justified by any reasonable strategy. (See *Strickland*, *supra*, 466 U.S. at p. 687; *Fosselman*, *supra*, 33 Cal.3d at p. 581.) Accordingly, the convictions must be reversed.

C. The Trial Court Erred in Admitting the Testimony of Chris Cardenas

As respondent acknowledged, "defense counsel showed the jury Cardenas' misconduct was far worse than simply prematurely discharging a patient, but also included giving Xanax, Ativan, and Vicodin to a patient without doctor's orders for medication." (RB 65.; see 5CT 1152-1153) Respondent also acknowledged "that the patient to whom Cardenas had given the drugs without a doctor's order had to be transferred to critical care the following day and then died the day after" and, as a result, Cardenas' license was revoked. (RB 65; see 5CT 1152, 1140.)

"[T]he trial court is the gatekeeper of the evidence to which the jury is exposed." (*People v. Dean* (2009) 174 Cal.App.4th 186, 199.) By permitting the introduction of Cardenas' testimony, despite the significant credibility issues with Cardenas as even acknowledged by respondent, the trial court here failed in its gatekeeping function. Alternatively, trial counsel's failure to seek exclusion of Cardenas' testimony under Evidence Code section 352 amounted to ineffective assistance of counsel as it was deficient, prejudicial, and not justified by any reasonable strategy. (See *Strickland*, *supra*, 466 U.S. at p. 687; *Fosselman*, *supra*, 33 Cal.3d at p. 581.)

The evidence was prejudicial as Cardenas, the first hospital employee to see Sam, gave testimony suggesting that Sam was already dead when she arrived at the hospital. (6RT 631-632.) That Ho had waited too long to bring Sam to the hospital was an important component of the prosecutor's case against Ho. Although, as respondent noted, other witnesses testified that it seemed Sam had died prior to her arrival at the hospital (RB 68), Cardenas was the only witness who saw Sam at the first moment she arrived and indicated the same conclusion.

As the failure to exclude the testimony was an abuse of discretion and prejudicial (or, alternatively, as trial counsel's failure to challenge the testimony was deficient and prejudicial), the convictions in this case must be reversed.

D. The Court Abused Its Discretion by Denying Ho's Motion for a Mistrial

Respondent argued that the trial court's denial of Ho's motion for a mistrial, following the sudden unavailability of expert witness Dr. Harry Bonnell due to medical reasons, was not an abuse of discretion. (RB 68-72.) Respondent's reasoning relied on the fact that Dr. [John] Fullerton, who did testify, "had the full opportunity to view Dr. Bonnell's notes and a curative instruction would be given to the jury." (RB 71.)

Whether Ho's inadequate care of Sam was causally related to Sam's death was a central issue in this case. Dr. Bonnell was prepared to explain why, without a culture of the bacteria, it was unclear "if the sepsis [was] 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.) While Dr. Fullerton also

presented testimony along the same lines (see 12RT 2771-72), Dr. Bonnell, unlike Dr. Fullerton, had conducted a hands-on review of the evidence, including viewing the slides in the coroner's office. (11RT 2402.) Dr. Bonnell had also previously worked with Dr. Yulai Wang, the coroner who testified in this case, on several other cases. (11RT 2407.) Additionally, the jury had already been informed that they were to hear from two doctors. (*Ibid*.)

Despite these reasons why Dr. Bonnell's testimony would be more influential than Dr. Fullerton's, respondent argued that "the mere fact that Dr. Bonnell might have been a more persuasive witness than Dr. Fullerton is not material." (RB 71.) Respondent cited no authority for this proposition.

There is no way to construe the inability to present a more influential witness as anything but prejudicial. As respondent acknowledged, in reviewing the denial of a motion for mistrial due to the sudden unavailability of an expert, this Court should consider "the nature of the testimony expected from the witness and its probable effect on the outcome of the trial." (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1095, citing *People v. Davis* (1973) 31 Cal.App.3d 106, 109, 111.) Here, Dr. Bonnell's stronger familiarity with the evidence in this case as well as his familiarity with coroner Dr. Wang would have made Dr. Bonnell a significantly more compelling witness than Dr. Fullerton. Given the critical nature of Dr. Bonnell's testimony on the causation of Sam's death, Ho should have been given an opportunity for a new trial in order to retain a new expert who could conduct a hands-on examination of the evidence in this case. Accordingly, the trial court's failure to grant Ho's motion for a mistrial was an abuse of discretion.

E. Ho's Convictions Should Be Reversed as the Court Prejudicially Erred in Instructing the Jury About the Procedure for Considering Lesser Included Offenses

1. The Court Erred in Instructing That They Could Not Consider the Lesser Included Offenses Until They had Agreed Upon a Not Guilty Verdict on the Greater Offense

Respondent argued that there was no instructional error under *People v. Kurtzman* (1988) 46 Cal.3d 322 (*Kurtzman*) because "[t]he trial court's instructions to the jury was in reference to the verdict forms, not the deliberations themselves." (RB 74.) Respondent's argument is undermined by the words of the instruction themselves: "**Before you even consider** a lesser crime, you all must unanimously vote not guilty on the greater crime." (11RT 3045, emphasis added.) It is clear, therefore, that the court was referring to the deliberations, the "consider[ation]" of the charges, and not the verdict forms.

Respondent also argued that "[c]onsistent with the *Kurtzman* holding, the instruction set forth in great detail the law that 'simply restricts a jury from returning a verdict on a lesser included offense before acquitting on a greater offense and does not preclude a jury from considering lesser offense[s] during its deliberations.'" (RB 74, quoting *Kurtzman*, *supra*, 46 Cal.3d at pp. 324-325.) Again, the wording of the instruction plainly states that the jury was prohibited from even "consider[ing]" the lesser included offense as opposed to "returning a verdict on a lesser included offense."

2. The Error Was Prejudicial

Respondent also argued the error was harmless because "[t]he evidence plainly established the greater offense was committed" and "[t]here was no indication this was a close case or the jury ever deadlocked about the greater offenses." (RB 75.)

As discussed previously, (see section I.A.1 herein and AOB sections IV.A.2 and IV.A.4), there was insufficient evidence that Ho had the mens rea required for murder and other evidence indicating that Ho's state of mind supported a conviction for involuntary manslaughter instead of murder.

Ho's conduct demonstrated that she cared deeply for her sister, but held mistaken beliefs on how to provide that care. She expended a great deal of energy trying to locate a suitable care facility for Sam, but difficulties arose because Ho's mistaken understanding of appropriate care contrasted with the approach to care provided by the facilities. Ho also applied what she, albeit mistakenly, believed to be the best medical remedy, colloidal silver, to Sam on a daily basis. Accordingly, Ho's conduct was consistent with involuntary manslaughter, "the commission of a lawful act which might produce death…without due caution and circumspection." (Pen. Code, § 192, subd. (b).)

Moreover, there was evidence that Sam's condition may have deteriorated rather suddenly within the couple days preceding her death. Dr. Fullerton opined that the ulcers on Sam were Kennedy ulcers, which develop very rapidly, often within the span of 48 hours. (12RT 2729.) Thus, there was a medical basis to support a finding that Ho may not have realized the severity of her sister's condition until too late.

As instructed, however, the jury was obligated to only first consider the charge of murder. Had the jury been given the opportunity to examine the offenses of murder and involuntary manslaughter side by side, it is reasonably probable that the jury would have concluded that the facts in the instant case fit more appropriately with involuntary manslaughter than murder.

The fact that the jury convicted Ho of murder without any indications to the court of being deadlocked at anytime does not remove the probability that a side by side comparison of the charges would have produced a different result. As has been explained by the Supreme Court, permitting the jury to consider lesser included offenses "prevents the 'strategy, ignorance, or mistake' of *either* party form 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, emphasis added by *Breverman*.) However, in the instant case, by not permitting the jury to even consider the lesser offense until it had acquitted Ho of the greater offense, the court undermined the rationale behind presenting a jury with the option of convicting on the lesser offense.

As the court committed a prejudicial *Kurtzman* error in instructing the jury, the conviction for murder must be reversed.

3. The Claim Was Not Forfeited

As respondent acknowledged, "[a]n appellate court may review an instruction without an objection, if the substantial rights of appellant were affected thereby." (RB 73, citing Pen. Code, §§ 1259, 1469; *People v. Rivera* 91984) 162 Cal.App.3d 141, 146; *People v.*

Arredondo (1975) 52 Cal.App.3d 973, 978.) Here, Ho's substantial rights were affected as she was entitled to have the jury consider the evidence as applied both to the elements of murder and the elements of involuntary manslaughter. Again, as noted by the Supreme Court, the ability of the jury to consider a lesser offense directly protects its "'truth-ascertainment function.'" (*People v. Breverman*, *supra*, (1998) 19 Cal.4th 142, 155.) Accordingly, this Court may consider her claim.

4. Alternatively, Any Forfeiture Was Ineffective Assistance of Counsel

As argued in appellant's opening brief, any forfeiture should be considered ineffective assistance of counsel (see AOB 72) as the failure to object to the erroneous instruction was deficient and not justified by any reasonable strategy and as the instruction was prejudicial for the reasons describe above in section I.E.2. (See *Strickland*, *supra*, 466 U.S. at p. 687; *Fosselman*, *supra*, 33 Cal.3d at p. 581.)

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

Respondent argued that a juror's use of a dictionary with regards to the definition of "kill"[2] was not prejudicial as "it appears

[2] There were conflicting statements among the jurors, with two jurors stating that the term defined may have been "murder" and another juror stating that the term defined may have been "reasonable doubt." (14RT 3905, 3911, 3920.)

that no one paid any attention to the reading" and "all the jurors…agreed that they were not influenced by the dictionary and that they would follow the court's instructions on the law rather than an outside source."(RB 79.)

First, as to the standard of review, respondent acknowledged that "juror misconduct raises a rebuttable presumption of prejudice," but then argued, citing *People v. San Nicolas* (2004) 34 Cal.4th 614, 696-697 (*San Nicolas*), that "the verdict is to be set aside only if there appears a 'substantial likelihood' of juror bias." (RB 80.) *San Nicolas*, however, made no mention of "substantial likelihood," and the pinpoint citations noted by respondent are not to be found in the case. Rather, *San Nicolas* explained that when a juror receives outside information about a case and "such misconduct is determined to be prejudicial, reversal is required." (*San Nicolas*, *supra*, 34 Cal.4th at p. 650, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 650-651; see *People v. Ryner* (1985) 164 Cal.App.3d 1075, 1082 (*Ryner*).)

Here, the presumption of prejudice was not rebutted. "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 Carptenter*, *supra*, 9 Cal.4th at p. 657.) The introduction of the dictionary definition was particularly prejudicial in this case as the circumstances of this case did not conform to the general idea of "murder" when contemplated by the public. The course of conduct here was not so much an issue as whether or not Ho's conduct amounted to the *legal* definition of murder. Thus, the introduction of the dictionary definition may have lightened the prosecutor's burden of satisfying all of the elements of the legal definition.

The fact that the juror's statements to the court indicated that they would not be swayed by the dictionary definitions was insufficient to rebut the prejudice: " '[T]he presumption of prejudice cannot be overcome by a juror's affidavit denying that misconduct had any effect on the deliberations. 'The law, in its wisdom, does not allow a juror to purge himself in that way.'" (*Ryner*, *supra*, 164 Cal.App.3d at p. 1083, quoting *People v. Phillips* (1981) 122 Cal.App.3d 69, 81.)

While in *People v. Harper* (1986) 186 Cal.App.3d 1420 (*Harper*), the Court of Appeal concluded that the presumption of prejudice stemming from the introduction of the dictionary definition of "murder" had been successfully rebutted, the same conclusion cannot be reached in the instant case. In *Harper*, the Court of Appeal noted that the juror who introduced the dictionary definition "was the lone holdout for first degree murder," such that any improper swaying of that juror "was an error to defendant's benefit, not his prejudice." (*Harper*, *supra*, 186 Cal.App.3d at p. 1439.) The record in this case does not indicate the occurrence of any similar circumstance. Although the *Harper* Court also noted that a specific admonishment "reduce[d] the chance for prejudice" (*id.*, at pp. 1439-1440), the presumption that a jury follows instructions should not outweigh the presumption of prejudice resulting from misconduct, especially here where the jury explicitly did not follow instructions in the first place by bringing in the dictionary. Moreover, in *Harper*, the victim was "shot five times." (*Id.*, at p. 1424.) Here, however, Sam's death was alleged to be the result of inadequate care provided by Ho. A jury would, therefore, be much more likely to wrestle with the issue of whether Ho's actions or lack thereof amounted to killing or murder than whether the *Harper* defendant's actions amounted to killing or murder.

Lastly, respondent also argued that the issue was forfeited by defense counsel's agreement with the trial court's decision finding no prejudice. (RB 81.) As argued in appellant's opening brief, however, any forfeiture amounted to ineffective assistance of counsel (AOB 78) as the failure to move for a mistrial even after the court's inquiry was deficient and prejudicial. Respondent failed to address this argument.

As the presumption of prejudice by the introduction of the dictionary definition was not successfully rebutted, the convictions must be reversed.

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

1. The Dog Scent Evidence Was Subject to a *Kelly* Hearing

Respondent argued that the admission of the dog scent evidence through the testimony of canine handler Karina Peck was not subject to a *Kelly*[3] hearing because "[t]he search conduct in [Ho's] case was very much like the tracking or trailing searches which are not subject to a *Kelly* hearing and unlike the scent identification lineups." (RB 85.)

Respondent relied on *People v. Craig* (1978) 86 Cal.App.3d 905 (*Craig*), in which evidence was admitted that a scent tracking dog had tracked a path from the place of a robbery to an apartment

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[3] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), superseded by statute with regards to polygraph evidence as stated in *People v. Wilkinson* (2004) 33 Cal.4th 821.

complex where the defendants were detained. (*Craig*, *supra*, 86 Cal.App.3d at p. 910.) In finding the evidence admissible, the Court of Appeal held that *Kelly* does not apply because dog tracking involves "specific recognition of one animal's ability to utilize a subjective, innate capability" rather than "problems of *general acceptance* in the scientific community of inanimate scientific techniques." (*Id.*, at p. 916, emphasis in original.)

Scent tracking of living persons, however, has a long history and relies on a dog's natural ability to track. By contrast, a dog's ability to pick up the scent of the *former* location of a living person with decubitus ulcers, two weeks after that person was last in that location, is not nearly as established. Thus, this case is more similar to *People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*), discussed in appellant's opening brief (AOB 79), in which the Court of Appeal held that a scent identification lineup was subject to a *Kelly* test. (*Mitchell*, *supra*, 110 Cal.App.4th at p. 793.) The Court of Appeal specifically noted the absence of scientific evidence regarding how environmental factors can degrade scents. (*Id.*, at p. 792.) The Court elaborated, " 'without scientific testimony establishing that dogs can indeed be so trained [to make determinations in a scent lineup], the court or the jury cannot determine whether a dog's training was adequate.' [Citation.]" (*Id.*, at p. 793.) Accordingly, like in *Mitchell*, the question of whether dogs can even be trained to pick up the scent of skin tissue from decubitus ulcers two weeks after the person with those ulcers was present in the location should have been subject to a *Kelly* hearing.

2. The Introduction of the Evidence Was Prejudicial

Respondent made no attempt to argue that the scent evidence used in this case would have survived a *Kelly* hearing; instead, respondent simply argued that the evidence was not subject to a *Kelly* hearing. As argued in appellant's opening brief, a *Kelly* hearing would have resulted in the exclusion of the evidence. (AOB 79-81.)

Respondent argued, however, that "it is not reasonably probable appellant would have been acquitted of murder absent admission of the scent identification evidence" because "[t]here was overwhelming evidence of [Ho's] guilt, even in the absence of the canine identification evidence, namely the undeniable evidence that [Ho] brought [Sam] to the hospital after rigor mortis had already set in and with pressure sores so severe that her bone was exposed and gangrene had set in." (RB 85, citation omitted; see *People v. Watson* (1956) 30 Cal.3d 290 [abuse of discretion standard].)

As discussed previously, the scent evidence formed the basis of the prosecutor's claim that Ho had kept Sam in the shower and that, as a result of not moving Sam, Sam developed pressures sores that ultimately resulted in her death. Thus, the scent evidence was a necessary link in the chain of causation that connected Ho's conduct to Sam's death. Without that link, there is an insufficient connection between Ho's conduct and Sam's death. Accordingly, it is reasonably probable that had the evidence been excluded, Ho would either have been acquitted on both counts, one of the counts, or that she would have been convicted of involuntary manslaughter instead of murder.

3. Any Forfeiture Should Be Construed As Ineffective Assistance of Counsel

Respondent argued that there was no ineffective assistance of counsel because "a *Kelly* objection would have been meritless. [Citations.]" (RB 83, fn. 6.) For the reasons described above, a *Kelly* objection would not have been meritless and would likely have resulted in exclusion of the evidence. Moreover, for the reasons described above, the admission of the evidence was prejudicial. As the failure to make a *Kelly* objection was both deficient and prejudicial, the convictions in this case must be reversed. (*Strickland*, *supra*, 466 U.S. at p. 687.) No reasonable strategy could have justified the failure to make a *Kelly* objection. (*Fosselman*, *supra*, 33 Cal.3d at p. 581.)

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

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

Respondent argued that Ho "was not 'detained' at the hospital" because "[s]he was not handcuffed, arrested, told that she was not free to move about, or forced to answer questions at gunpoint." (RB 103.) Courts have established, however, that seizure of identification cards can turn an otherwise consensual encounter into an encounter in which the individual is not free to leave. For example, as discussed in appellant's opening brief (AOB 93), in *People v. Valenzuela* (1994) 28 Cal.App.4th 817 (*Valenzuela*), law enforcement's seizure of a defendant's green card rendered the

search involuntary. As was noted by respondent (RB 104) and in appellant's opening brief, [4] the Court of Appeal was addressing the voluntariness of a search and not whether the defendant was free to leave. In stating why the search was involuntary, however, the Court of Appeal explained that the officer's holding onto the defendant's green card rendered the defendant unable to leave:

> "Defendant, an alien, could go nowhere while Agent Hudson held his green card. Agent Hudson was withholding the only document that evidenced defendant's right to be in the United States. [¶] Moreover, Agent Hudson had, from defendant's point of view, complete control over when, if ever, the green card would be returned."

(*Valenzuela*, *supra*, 28 Cal.App.4th at p. 832.) Thus, the seizure of the defendant's green card in *Valenzuela* rendered him not free to leave. "If a reasonable person in [defendant's] position believes in view of all the surrounding circumstances that he is not free to leave, a detention has occurred." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 940.)

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[4] Respondent argued that "contrary to appellant's assertions, the court in *Valenzuela* did not hold that an officer's retention of a 'green card' constituted a detention for Fourth Amendment purposes….The fact the immigration agent … took the driver's green card was relevant to a search of the car, not to whether he was actually detained. [Citation.]" (RB 104.) Respondent misconstrued Ho's argument. In appellant's opening brief, it was stated that in *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. [Citation.]" (AOB 93.)

Similarly, as discussed in appellant's opening brief (AOB 93-94) in *Florida v. Royer* (1983) 460 U.S. 491, 496 (*Royer*), the United States Supreme Court considered the fact that law enforcement held onto the defendant's airline and ticket and driver's license in concluding that the defendant was not free to leave. Respondent argued that "it was not the fact that narcotics agents held the defendant's identification that meant he was detained. The court in *Royer* rather found the confinement was tantamount to an arrest because the defendant was confined to a small room, accused of transporting narcotics, and it was conceded by the prosecution that the officers would not have let him leave the room if he tried to leave." (RB 105, citing *Royer*, *supra*, 460 U.S. at p. 491.) Again, respondent conveniently omitted the United States Supreme Court's explicit reference to the fact of the seizure of the ticket and driver's license in assessing whether a detention had occurred:

> "[W]hen the officers identified themselves as narcotics agents, told Royer 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 he was free to depart, [the 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 he was not free to leave.' [Citation.]"

(*Royer*, *supra*, 460 U.S. at pp. 501-502, emphasis added.)

Further, in another case, the Court of Appeal found that "[a]lthough [the defendant] was not restrained by the officer asking

for identification, **once [the defendant] complied with his request and submitted his identification officers, a reasonable person would not have felt free to leave**." (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227, emphasis added.) And in another case, the Court of Appeal "h[e]ld that when [the officer] stood at the passenger door and asked to see [the defendant's] driver's license the 'close encounter' became a detention because the circumstances of the encounter were sufficiently intimidating as to demonstrate that a reasonable person would have believed she was not free to leave if she had not responded." (*People v. Spicer* (1984) 157 Cal.App.3d 213, 218.) In another case, the Court of Appeal found that the officer's "decision to hold [the defendant's] driver's license had at least some coercive effect, as defendant's walking away without it would have limited her ability to function. [Citations]." (*People v. Linn* (2015) 241 Cal.App.4th 46, 65 (*Linn*). As the *Linn* Court explained, "Our case law indicates that other relevant factors" for determining whether a seizure has occurred "include…whether the police retained the defendant's documents…" (*Id.*, at p. 58.)

As these cases indicate, seizure of a person's driver's license should be strongly considered in evaluating whether a person is free to leave. In the instant case, it would have been illegal for Ho to drive away without her driver's license. It was not established that she had money on her in order to call a taxi or that she had someone available who could drive her home or that she had other easily accessible means of returning home. Like in *Linn*, *supra*, Ho's "ability to function" would have been limited without her driver's license. Thus, law enforcement's seizure and retention of her driver's license render her unable to freely leave such that she was effectively detained. Respondent only argued that no detention occurred;

respondent made no argument that the detention was lawful.[5] As a result of the unlawful detention, all statements made to law enforcement at the hospital should have been suppressed and all statements made to law enforcement immediately after at the police station should have been suppressed as fruit of the poisonous tree. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 760, abrogated on other grounds in *People v. Scott* (2015) 61 Cal.4th 363.)

2. Ho Was Not Provided with the *Miranda* Warnings Despite Being Subjected to Custodial Interrogation

Respondent argued that, "[b]ased on the totality of the circumstances, a reasonable person in [Ho's] position would not have believed she was in custody when questioned by the detectives." (RB 96.) Respondent noted that Ho was not handcuffed, the interview room was not locked, no weapons were drawn, and no "threatening or intimidating tactics" were used during the interrogation. (RB 95-96.)

Several other factors, however, weighed in favor of finding that Ho was in custody for *Miranda*[6] purposes. As discussed above and in appellant's opening brief, prior to law enforcement's taking Ho to the police station, Ho's driver's license was seized and retained for an extended period of time and her vehicle was impounded. (2RT B100; 3RT C15-C16.) Respondent argued that "there [was] no evidence in the record that her car was seized that

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[5] It was argued in appellant's opening brief that, even if the initial detention was lawful, the detention was unlawfully prolonged and amounted to an unlawful de facto arrest unsupported by probable cause. (AOB 95-98.)

[6] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

day. (RB 99.) However, Lieutenant Michael Flores, when asked about the fact that Ho was not going to be allowed to drive her own car to the police station, answered "[b]ecause the vehicle was being held for evidence." (2RT B100.) Lt. Flores also acknowledged that if Ho had asked to drive her own car to the station, he would have refused. (2RT B101.) These circumstances would indicate to a reasonable person that she was not free to leave.

Ho was accordingly transported to the police station in a police vehicle. (2RB B89; 3RT C24.) While Officer Chavez testified that Ho signed a consent form at the hospital to be transported to the station (2RB B71; 1CT 291), Ho explained that she was not shown the form until *after* she arrived at the station. (3RT C25-C27.) Officer Connors did not see Ho sign the form at the hospital (2RT B33) and Det. Sulcer could not recall if he saw the signed form at the hospital. (2RT B55.)

At the police station, Det. Sulcer and Det. Flores acknowledged that Ho was never explicitly told she was free to leave. (2RT B63, B104.) Ho testified that she was told she "was not free to leave" and told that she had "to stay at the station until [she was] interviewed by the two detectives." (3RT C31.) Officer Chavez acknowledged that he "asked [Ho] to stay in room 271." (2RT B80.) Respondent argued that the fact "she was told to wait in a witness room for the detectives" does not support a finding of custodial interrogation. (RB 99.) Being told to wait in a room in order to be interviewed by detectives, however, is a command that would cause a reasonable person to believe that she was not free to leave. Ho's belief that she was not free to leave was further confirmed when her request to go home and have soup was denied. (3RT C32.) That she thought kindly of the fact that Det. Flores brought her a sandwich, as noted by respondent (RB 100), does not alter the fact that she was

not free to leave. Similarly, Det. Flores' testimony that Ho was free to leave (2RT B98) does not change the fact that Ho was told to stay in the room and was not told that she could leave.

Ho also testified that she requested the Yellow Pages to call for an attorney but was not provided with one. (3RT C29-C30, C32.) Respondent argued that Ho "was free to move about in the police station and could have used her cellular telephone, assuming she had one, to call an attorney or a payphone." (RB 101.) First, it is not clear that she had a cell phone on her person. Secondly, Ho's request for the Yellow Pages indicates that she did not have other means of obtaining contact information for an attorney. The failure to comply with Ho's request for contact information for an attorney further conveyed that Ho was not free to leave. Moreover, Ho was told to wait in the interview room and was not explicitly told she could walk around the station. (2RT B63, B80, B104.)

Respondent relied on *United States v. Bassignani* (9th Cir. 2009) 575 F.3d 879 (*Bassignani*) as an example of a non-custodial interrogation. (RB 96-97.) First, this Court is "not bound by decisions of the lower federal courts, even on federal questions. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Additionally, the facts of *Bassignani* are readily distinguishable from the instant case as the defendant in *Bassignani* was interviewed in a closed conference room at his *workplace* rather than at a police station. (*Bassignani*, *supra*, 575 F.3d at p. 886.) Further, in Bassignani, the interview lasted approximately two and a half hours (*ibid*); here, however, Ho was kept at the station from 12:27 p.m. until after 7:00 p.m. (2RT B34, B74, B118.)

There are "[t]wo discrete inquiries [that] are essential to the determination" of whether a person is in custody for *Miranda* purposes: "first, what were the circumstances surrounding the

interrogation; and second, given those circumstances would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) Here, before Ho even left the hospital, her driver's license was seized and her car impounded. (2RT B100; 3RT C15-C16.) When her license was finally returned, she was brought to the police station in a police car. (2RB B89; 3RT C24.) She was **not** allowed to drive herself to the police station. (2RT B101.) She was kept at the police station for approximately seven hours. (2RT B34, B74, B118.) At the police station, she was told to wait in an interview room. (2RT B80.) When she requested to go home to have soup, that request was denied. (3RT C32.) When she requested the Yellow Pages in order to contact an attorney, no Yellow Pages were provided to her. (3RT C29-C30, C32.) Ho was never explicitly told that she was free to leave. (2RT B63, B104.) All of these circumstances would convey to a reasonable person that she was not at liberty to leave. Accordingly, Ho was in custody for *Miranda* purposes and law enforcement's failure to provide *Miranda* warnings (2RT B120) should have resulted in the exclusion of her statements.

3. Ho's Statements to Law Enforcement Were Not Voluntary

Respondent argued that Ho's statements to law enforcement were voluntary because "[t]he detectives were kind and sympathetic to [her]. They did not coerce her, claim to have specific evidence connecting her to the crimes, or make any threats or promises of leniency. Nothing in their method of questioning was improper." (RB 102-103.)

The same reasons that support a finding that Ho was in custody also support a finding that Ho's statements to the police were involuntary. In the immediate aftermath of her sister's death, Ho's driver's license was seized and her vehicle impounded. She was transported to the polices station in a police vehicle, kept at the police station for approximately seven hours, told to wait inside an interrogation room, denied a request to leave for dinner, denied Yellow Pages to contact an attorney, and never told explicitly that she was free to leave. The fact that the detectives were friendly does not negate these otherwise coercive circumstances.

As respondent acknowledged, "[t]he federal and state Constitutions both require the prosecution to show the voluntariness of a confession by a preponderance of the evidence." (RB 102, citing *Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Markham* (1989) 49 Cal.3d 63, 71.) It is well established that consent given as a submission to authority is not valid consent. (*People v. Strawder* (1973) 34 Cal.App.3d 370, 376, disapproved on another ground as set forth in *People v. Bustamante* (1981) 30 Cal.3d 88.) Here, the circumstances surrounding the interrogation, in the immediate aftermath of her sister's death, negated any consent by Ho to the interrogation.

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

Respondent argued that the rule articulated in *Munnick v. Mississippi* (1990) 498 U.S. 146, 153 (*Munnick*) and *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*), in which interrogation must cease upon request for counsel, did not apply to Ho's request for

Yellow Pages to contact an attorney because Ho was not subjected to a custodial interrogation. (RB 100.) For the reasons described above in section I.H.2, Ho was subjected to a custodial interrogation.

Respondent also argued that Ho "was free to move about in the police station and could have used her cellular telephone, assuming she had one, to call an attorney or a payphone." (RB 101.) First, Ho was told to wait in the interview room and was not explicitly told she could walk around the station. (2RT B63, B80, B104.) Moreover, whether or not she had other means of contacting an attorney is irrelevant to the inquiry under *Munnick*. The only question under *Munnick* is whether Ho *requested* an attorney.

Ho's request for information to allow her to contact an attorney can only be characterized as a request for an attorney. As the detectives failed to cease questioning Ho after her request, all statements obtained thereafter should have been suppressed.

5. The Admission of Ho's Statements Was Prejudicial and Requires Reversal of Both Convictions

Respondent argued that any erroneous admission of Ho's statements was not prejudicial under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) because "of the strong evidence other than her own statements establishing [Ho's] guilt." (RB 105.)

Respondent's argument fails to recognize that Ho's statements were heavily relied upon in an attempt to negate any finding that Ho was genuinely seeking to provide the best care for her sister. Deputy Espino testified extensively about the inconsistencies in Ho's statements, as detailed in appellant's opening brief. (AOB 105.) These inconsistencies likely conveyed to the jury that Ho was trying to conceal information about her care for her sister. As a result, the

jury was likely to conclude that the failure to be truthful reflected an unlawful intent. Additionally, Ho's statements were relied upon as evidence of Ho's application of colloidal silver (9RT 1522), a treatment that was criticized by Dr. David Voron. (8RT 1210-1212, 1223-1224.)

Accordingly, Ho's statements describing her approach to care for her sister were used by the prosecution to demonstrate that Ho had failed to provide adequate care. It cannot be said beyond a reasonable doubt that, without the evidence of Ho's statements, the jury would have still concluded Sam's death was the result of inadequate care by Ho. (See *Chapman*, *supra*, 386 U.S. at p. 24.) Accordingly, both convictions must be dismissed.

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

Respondent argued there was no cumulative prejudice because "either there were no errors or any error was clearly harmless" and the "[e]vidence of [Ho's] guilt was overwhelming." (RB 106.) For the reasons described above, however, each of the errors was prejudicial and the combination of the errors resulted in cumulative prejudice that deprived Ho of a fair trial and her due process rights. Accordingly, the convictions must be dismissed.

II. CONCLUSION

Altogether, the evidence demonstrated that Ho spent significant energy and time in an attempt to give her sister the best care possible. Ho was heavily invested in finding a facility for Sam

that met Ho's standards and regularly applied colloidal silver to Sam's wounds. While Ho's approach to care was unfortunately deficient, Ho's efforts in no way amounted to criminal conduct.

As the evidence presented at trial failed to adequately establish any unlawful intent and failed to adequately establish that Sam's death was the result of Ho's actions or inaction, the convictions must be reversed. Further, the various errors described above, both by the court and by defense counsel, require reversal of the convictions as well.

Respectfully submitted,

Dated: February 6, 2018

/S/ ALAN EISNER

ALAN EISNER / DMITRY GORIN
Attorneys for Appellant
AMY HO

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 10,425 words, which is less than the total words permitted by California Rules of Court, rule 8.360, subdivision (b). Counsel relied on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: February 6, 2018 */S/ ALAN EISNER*

ALAN EISNER / DMITRY GORIN
Attorneys for Appellant
AMY HO

PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that I am over the age of eighteen years; that my business address is Eisner Gorin LLP, 14401 Sylvan St., Ste. 112, Van Nuys, CA 91401, at whose discretion I served **APPELLANT'S REPLY BRIEF**

On February 6, 2018, following ordinary business practice, service was placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

Judge George G. Lomeli
Los Angeles Superior Court
210 W. Temple St., Dept. 107
Los Angeles, CA 90012

Los Angeles District Attorney's Office
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210 W. Temple St., 18th Floor
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Amy Ho, WF6476
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Chowchilla, CA 93610-1501

This proof of service is executed at Los Angeles, California, on February 6, 2018.

I declare under penalty or perjury that the foregoing is true and correct to the best of my knowledge.

/S/ NARINE GEVORGYAN
NARINE GEVORGYAN