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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -vs- MARJORIE KNOLLER AND ROBERT NOEL, Defendants.	S.C. No. 181813-01 M.C. No. 1977360 S.C. No. 181813-02 M.C. No. 1977361 **DEFENDANT KNOLLER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL** Date: June 7, 2002 Time: 9:00 a.m. Dept.: Before The Hon. James Warren

I. INTRODUCTION

As defendant Knoller anticipated, the state has responded to her new trial motion in a manner that has made this not merely one of the most highly publicized murder prosecutions in the history of California, but one of the most legally salient. Its landmark importance, however, has nothing to do with the factor that brought it such tabloid notoriety: the horrifying manner in which a good woman died. Rather, the significance of this case now arises from the fact that in order to protect a murder conviction that it agrees "is unprecedented in California history," the

prosecution seeks from this Court a new definition of implied malice murder.

There will be many that applaud this bold move, reasoning that if the law on January 26th, 2001, did not make the unintended but grotesque mauling death of a good and decent person like Diane Whipple murder, then, to quote Dickens, the law is an ass. If the California Legislature and Supreme Court presently require that an intentional act with a high probability of death have been performed by Ms. Knoller to warrant her conviction of murder, and the act which led to Ms. Whipple's death merely involved some danger of bodily injury and a possibility of death, then it is time to show these august bodies the error of their ways by convicting Ms. Knoller of murder anyway.

But those who wrote our constitution recognized the danger to freedom posed by a prosecutorial apparatus willing to retroactively reshape the law to fit the facts in a politically charged case, or by a judiciary that puts its view of the law over that of a democratically elected Legislature. Furthermore, in a system of ordered liberty, trial courts may not defy the decrees of courts of superior jurisdiction. Both the Legislature and the Supreme Court have decreed that implied malice murder requires an intentional act with a high probability of resulting in death. This Court must independently weigh the evidence to determine whether that standard has been met in this case. Upon that review, it should set aside Ms. Knoller's murder conviction, because she committed no such act.

As to Knoller's claims of legal error, the prosecution in its response lauds the fact that the "Court went to extraordinary lengths and considerable expense to ensure Defendants' right to a fair trial," (Response at 1, 23). Ms. Knoller does not quarrel with that assessment. Presiding over this trial was a demanding and daunting task which the Court pursued with great energy and commitment. Knoller's motion does not question the Court's good faith, but the correctness under the law of a handful of its many rulings; though small in number, it was these rulings that determined the outcome of this case. A legally impeccable ruling by a court is not less sound if made with ill will. Conversely, an erroneous ruling of a court made with the best of intentions can

still deprive a defendant of a fair trial. As she did in her motion, Knoller respectfully submits such prejudicial errors occurred in this case.

II. THE COUNT ONE MURDER CONVICTION MUST BE SET ASIDE AS UNSUPPORTED BY SUFFICIENT EVIDENCE OF IMPLIED MALICE

A. The Undisputed Propositions Of Fact And Law

1. The District Attorney's response implicitly concedes that it did not advance any contention at trial that Marjorie Knoller acted (a) with express malice; or (b) with implied malice during Bane's assault on Diane Whipple in the hallway of their apartment building. Rather, as Knoller established in her motion, the prosecution rested its Count One charge entirely on the factual theory that Knoller committed the act and possessed the mental state required for a second degree murder conviction *before* she left her apartment on January 26, 2001, to take an unmuzzled dog or dogs out for a walk. (RT 5256-58, 5261-5262, 5395) In closing argument, Mr. Hammer agreed that the events in the hallway were completely irrelevant to the murder charge (RT 5290), and the prosecution's response describes the intentional act underlying the murder charge as one of letting the dogs out into the hallway "without muzzles or proper restraint." (Response at 4)

2. The District Attorney's response leaves undisputed Knoller's assertions that the prosecution introduced no evidence at trial that prior to January 26th, Bane or Hera had ever caused the death of a human on a dog walk or in any other circumstance; that it introduced no evidence that any member of the Presa Canario breed had ever caused the death of a human being under any circumstance; and that it introduced no evidence that a dog of any breed had ever caused the death of a human while being walked by, or in the presence of, its owner.

3. The prosecution does not contest that the only evidence bearing on the issue of dog fatalities came from Doctor Lockwood, the prosecution's expert, one of the country's leading authorities on the epidemiology of fatal dog bites, which he has studied since 1972. (RT 5152) Lockwood testified that in the more than 300 dog-caused fatalities that he had studied over that period, there never had been a case, as here, "of a healthy adult young woman who has been killed

by a dog when the owner is present. Usually the presence of the owner has been sufficient to prevent the attack." (RT 5191)

4. The District Attorney does not challenge the facts that the frequency of death in the thirty-odd events involving Bane and Hera prior to January 26, 2001, relied on by Mr. Hammer as proof of implied malice, was zero; that there were dozens, probably hundreds, of occasions on which Bane and Hera were out and about in San Francisco in Knoller's custody when they were friendly and non-threatening; that Lockwood, the prosecutor's own expert, testified that while there are millions of dog bites a year, most are not serious (RT 5178); and that Lockwood's research had fixed the annual probability of a dog bite resulting in human death as one one-hundred-thousandth of one percent, or one in ten million.

B. The Prosecution's Claim That It Need Not Prove A High Or Substantial Statistical Probability Of Death To Obtain A Conviction For Implied Malice Murder Cannot Be Entertained By This Court

In her motion for a new trial, Knoller predicted that it was unlikely the prosecution's response would contend that the present record contains proof beyond a reasonable doubt that there existed an objectively measurable high probability that Bane and/or Hera would kill a human being while being walked on January 26, 2001. Such an argument would have been unsupported by the evidence, and the prosecution to its credit has not made it.

That has left the state to its remaining alternative: to argue that the language used to instruct the jury on the required actus reus of implied malice—"the killing resulted from an intentional act [and] the natural consequences of that act are dangerous to human life" (RT 5241)—is not equivalent to, and thus does not require proof of, a high probability that the intentional act will result in death. On this pure question of law, the state is demonstrably wrong.

The state claims that Knoller's reliance on the "high probability of death" standard "mischaracterizes clear California law on implied malice" (Response at 2), because the "high probability of death" standard is really applicable not to implied malice second degree murder charges, but only to second degree felony murder offenses.

Defendant Knoller's repeated use of the "high probability of

> resulting in death" language is an obvious attempt to shift the legal standard away from implied malice by relying 'upon a distinct body of law that interprets the felony murder rule,' which was rejected in *Nieto-Benitez*, 4 Cal.4th at 106.

(Response at 3)

Having cited Nieto Benitez, the prosecution then argues that the language used to instruct the jury in this case conveys a different and necessarily less demanding standard than that of "high probability of death":

> Thus, the proper inquiry for this Court is whether the circumstances surrounding the Defendant Knoller's conduct show that she deliberately performed an act whose natural consequences were dangerous to human life.

(Response at 3)

The prosecution, whether intentionally or not, has grossly misrepresented the holding of Nieto Benitez to the Court. Nieto Benitez *was* an implied malice case, not a felony murder case, and the Supreme Court, rather than rejecting the applicability of the "high probability of death" standard in favor of a less demanding calculus in implied malice murder cases, specifically embraced it. "[T]he two linguistic formulations—'an act, the natural consequences of which are dangerous to life' and 'an act [committed] with a high probability that it will result in death' are equivalent and are intended to embody the same standard." Nieto Benitez, 4 Cal.4th at 111. Furthermore, Nieto Benitez specifically relied on People v. Watson (1981) 30 Cal.3d 290, *also an implied malice rather than a felony murder case*, which held:

> [W]hen a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. . . . [Citations.] *Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life*.

30 Cal.3d at 300 (emphasis added).

As the District Attorney eventually admits, the distinction found by Nieto-Benitez between felony-murder and implied malice murder is not between the "high probability of death" standard and some lesser one, but between the application of the "high probability" standard to an entire

class of felonies in the abstract, as is done in the felony murder context, and requiring a high probability of death as to the intentional act with which a defendant is charged, as is done in an implied malice case. (Response at 3, citing Nieto Benitez, 4 Cal. at 106, 107). Indeed, the prosecution's claim that the "high probability of death" standard is distinct to second degree felony-murder cases turns legal reality on its head, as the Supreme Court has expressly read the "high probability of death" standard developed in the implied malice context into the felony-murder doctrine.

> The definition of "inherently dangerous to life" in the context of the implied malice element of second degree murder is well established. An act is inherently dangerous to human life when there is "a *high probability* that it will result in death. A less stringent standard would inappropriately expand the scope of the second degree felony-murder rule reducing the seriousness of the act which a defendant must commit in order to be charged with murder.

People v. Patterson (1989) 49 Cal.3d 615, 627 (emphasis in original)

The equivalence between the two standards declared in Watson and Nieto Benitez is consistent with the California practice of using the terms "natural" and "probable" synonymously. Thus, in People v. Prettyman (1996) 14 Cal.4th 248, the Supreme Court held that a participant in a target offense can be held liable for a murder committed by a co-defendant when the murder committed by the confederate was a "natural and probable consequence" of the target crime that the defendant encouraged or facilitated. 14 Cal.4th at 267, 271. Furthermore, as stated in Knoller's earlier briefing, no court can hold that the "natural consequences dangerous to human life" test is a different and less demanding standard of implied malice than the "high probability that it will result in death" requirement because the Legislature has written the Watson standard, which equates the two, into statutory law. Penal Code § 192.

The issue now before the Court is not whether the jury was given proper instructions on implied malice murder. Rather it is what facts this Court must find in satisfying its obligation to independently weigh the sufficiency of the evidence. People v. Robarge (1953) 41 Cal.2d 628. While the prosecution is correct that "this Court [must inquire] whether the circumstances

surrounding the Defendant Knoller's conduct show that she deliberately performed an act whose natural consequences were dangerous to human life" (Response at 3), in doing so the Court must determine whether the state has proven beyond a reasonable doubt that Knoller, by leaving her apartment on January 26, 2001, with an unmuzzled dog, committed "an act with a high probability that it [would] result in death. . . ." Watson, 30 Cal.3d at 300. The state's plea that the Court refuse to perform this crucial task is nothing less than an invitation to reversible error.

C. The State Has Failed to Prove or Even to Argue That The Walking of Bane And/or Hera on January 26, 2001 Was "An Act With a High Probability That it [Would] Result in Death."

As noted, in its response the prosecution has failed to make any argument whatsoever that the evidence offered at trial established a "high probability" of death resulting from Ms. Knoller's act of leaving her apartment. Indeed, the state has made no argument that its evidence established *any* measurable statistical probability of death resulting from Ms. Knoller's intentional act of leaving the apartment with an unmuzzled dog.

Rather, the state complains bitterly that by invoking the concept of probability defendant Knoller has advanced

> the unsupported and outrageous claim that a second degree murder conviction can only be sustained with evidence of a prior death. This boils down to a "one death" rule. Defendant's proposition has no supporting authority.

(Response at 2)

The epithets of "unsupported and outrageous" mask the absence of a substantive reply to Knoller's contention. Plainly, Knoller's invocation of the requirement of a substantial and measurable probability of death is not legally "unsupported"; to the contrary, probability long has been a cornerstone of the law of implied malice murder in California.[1] That any probability determination requires the existence of prior events is self-evident. The Oxford English Dictionary

[1] People v. Thomas (1953) 41 Cal.2d 470, 480; accord, People v. Poddar (1974) 10 Cal.3d 750, 757; People v. Conley (1966) 64 Cal.2d 310, 321; People v. Washington (1965) 62 Cal.2d 777

defines probability as

> The amount of antecedent likelihood of a particular event as measured by the relative frequency of occurrence of events of the same kind in the whole course of experience.

Because probability at a given point in time is the "amount of antecedent likelihood of a particular event," there can be no probability of an event occurring until it or an event "of the same kind" has occurred at least once.

That a prior event in a similar situation is required to establish legal liability for a subsequent event of the same sort is established in California case law. The element of foreseeability required to impose a duty of care in tort law sets a much lower standard for liability than that required for implied malice murder, yet the California Supreme Court has held that the foreseeability needed to hold a landlord civilly liable for an assault occurring on his property "rarely, if ever, can be proven in the absence of *prior similar incidents* of violent crime on the landowner's premises." Ann M. v. Pacific Plaza Shopping Center (1998) 6 Cal.4th 666, 679 (emphasis added).

The prosecution belittles any introduction of the concept of probability into the implied malice calculus as an effort "to reduce implied malice cases to a numbers game." (Response at 3) But Ms. Knoller's invocation of statistical probability is well-grounded in precedent. In People v. Taylor (1992) 6 Cal.App.4th 1084, the Court was called upon to decide whether the furnishing of PCP was an act with a high probability of resulting in death. The Taylor Court canvassed the relevant case law, concluding that to meet the standard, the "imminent deadly consequences must be inherent in the act" at issue. Id. at 1099. The record in that case contained evidence that the odds of dying from a dose of PCP were "less than 1 in 10,000, and possibly much less," approximating the risk of death from a shot of Lidocaine in the dentist's office. Id. at 1089. Taylor said of the application of the "high probability" test that: "Although the outcome should not be based solely on statistics, neither should it be based upon isolated incidents which lack any statistical context." Id. at 1099 n.15. While finding that "[*s]ome* risk of death is always present" in

the selling of PCP, the Taylor Court "decline[d] to act as a superlegislature and enact the crime of murder for those rare and ofttimes strange instances when death results from furnishing" the drug. Id. at 1100-1101 (original emphasis).

In this case, there could be no probability that death would result from the walking of Bane and/or Hera absent proof that these particular dogs, or some other Presa Canario, or at least some dog of some breed, had killed a human being while being walked by, or in the presence of, its owner. Here, the record contains no evidence that Bane or Hera or any Presa Canario had ever killed a human, or that any dog had ever killed while in the presence of its owner. That being so, at the time Ms. Knoller left her apartment on January 26th to walk Bane and/or Hera, there was no measurable probability that the walk would result in death.

The prosecution argues that "the sheer size of these dogs and their teeth" created a "serious danger to life." (Response at 3-4) Let it be conceded that owning large and aggressive dogs can be dangerous. Doctor Lockwood's research demonstrates that German shepherds are twice as likely to be involved in a biting incident or fatal attack than their representation in the dog population would indicate. Lockwood, "The Ethnology and Epidemiology of Canine Aggression,"at 136. But it would be fatuous to suggest that owning or walking a German Shepherd is an act whose natural consequences are dangerous to human life or has a high probability of resulting in death. Lockwood notes that only one dog in 2,500,000 kills a person each year, while "the proportion of American humans who kill other human beings is more than 200 times this fraction." Id. at 137. If owning a dog, even a large and aggressive dog, could satisfy the actus reus of implied malice murder, the very act of parenting would do so far more easily.

As the prosecution recognizes in its response, a lawful act "which might produce death" can support a charge of involuntary manslaughter (Response at 5), not a murder charge. As the Court recognized in Taylor, the furnishing of PCP always presents "some danger" of death, but a likelihood of death resulting 1 in 10,000 times the drug is furnished does not constitute the "high

probability of death resulting" required for second degree murder. The state did not come close in this case to proving a probability equal to that found inadequate on the objective component of the implied malice murder test in Taylor. It thereby has failed to meet its burden of proof on Count One.

D. The State Failed To Prove The Subjective Elements Of Implied Malice Murder

Ms. Knoller argued in her opening brief that she could not possibly have subjectively realized the existence of a high probability of death resulting from the dog walk unless that probability in fact existed, which, as demonstrated above, and as the prosecution has essentially conceded, it did not. The state's case for second-degree murder fails on that basis alone. Watson, 30 Cal.3d at 296-97; People v. Protopappas (1988) 201 Cal.App.3d 152, 168 (implied malice requires: "wantonness, an extreme indifference to [the victim's] life, and subjective awareness of the very high probability of her death.").

The state argues in its response that "Defendant Knoller herself admitted that she knew that this breed of dog was meaner than a pit bull." (Response at 4). While pit bulls do kill humans more often than Saint Bernards—six deaths as opposed to three in 1997-1998[2]—the odds against a specific dog of either breed killing a human are many millions to one, as Doctor Lockwood's research proved.

The state also argues that "both Defendants were already on notice of the specific threat these dogs posed to the safety of other people" (Response at 4), mirroring its argument at trial that Ms. Knoller had "one hundred percent notice of the danger of the dogs" (RT 5285; see also RT 5395: "where people consciously disregard warnings, . . . that's implied malice.") There was no incident witnessed by or known to Knoller in which a Presa Canario, much less Bane or Hera, had killed a human. As noted, Doctor Martin's letter mentioning a prior incident in which a young boy was gravely mauled by large dogs in no way suggested that there was a high probability or likelihood that Bane or Hera would kill, as opposed to a possibility that a large dog could cause bodily injury. Warnings about dangerous actions are nowhere near sufficient to prove that *Knoller herself realized the dogs were likely to kill on January 26th*, which is precisely the class of knowledge required to constitute implied malice. The state plainly did not carry its burden of proof on the subjective elements of its murder charge.

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[2]Sacks, Lockwood, et.al., "Breeds Of Dogs Involved In Fatal Human Attacks In The United States Between 1979 and 1998," at 837.

III. THE ADMISSION OF THE ARYAN BROTHERHOOD EVIDENCE WAS DUE PROCESS ERROR THAT THE DISTRICT ATTORNEY HAS FAILED TO ESTABLISH WAS HARMLESS BEYOND A REASONABLE DOUBT

A. The Error

In her new trial motion, Ms. Knoller argued that this Court committed prejudicial due process error by permitting a host of testimonial and documentary evidence related to the Aryan Brotherhood prison gang. The claim is not, as the District Attorney suggests (Response at 13), that the evidence was only "tangentially relevant to the case"; the evidence had no relevance whatsoever to this case and therefore was entirely inadmissible.

In response, over and over again, the prosecution says the Aryan Brotherhood evidence was relevant on the mental state element of the second degree murder charge:

> [B]oth defendants fail to acknowledge that this evidence was highly relevant to the issue of Defendants' knowledge of the dangerousness of their dogs.
>
> *** * ***
>
> [T]his Court determined . . . that the nature of the Presa Canario breed and evidence of Defendants' ties to the Aryan Brotherhood were highly relevant to and probative of Defendants' knowledge and state of mind as it related to the propensities of their dogs.
>
> * * *
>
> The Defendants' association with the Aryan Brotherhood was highly probative to the central issue of Defendants' knowledge and their involvement in the Aryan Brotherhood scheme to breed, raise, and train aggressive dogs.

(Response at 13-15) This was precisely Mr. Hammer's argument to this Court in the pre-trial litigation of the issue. (RT 1771-74)

But to simply *assert* the relevance of evidence of prison gangs and the Aryan Botherhood on the issue of knowledge does nothing to *demonstrate* its conceivable relevance to that issue. The prosecution was entitled to and did offer evidence of how the dogs were obtained, housed, cared for, and ultimately transferred to the defendants. It offered evidence of correspondence between Schneider and Bretches, and the defendants, relating to the plan to raise Presa Canarios

and dogs in general. All of this evidence was relevant on the subject of Knoller's mental state—i.e., her knowledge that Presa Canarios in general and Bane and Hera specifically posed some level of danger. What the prosecution has not done is explain, once this relevance has been admitted, how evidence of prison gangs, of the Aryan Brotherhood, and of Knoller's "association" with that group, could add anything whatsoever probative to the jurors' evaluation of defendant's mental state.

This Court identified the critical difference between dog evidence and Aryan Brotherhood evidence early in the proceedings:

> Right now, the evidence quite frankly shows that there was an operation going on from the prison to raise and breed Presa Canario dogs and that in the course of time, the defendants became involved in that. That evidence is probably admissible.
>
> The next step. *That everybody involved in that was a member of the Aryan Brotherhood wraps it up and raises a different question, an additional question, and that is why the Court has to find out to satisfy whether or not that is relevant to anything that we are talking about or whether it happened to be a coincidence or a happenstance or something like that that has no independent evidentiary significance as it relates to the death of Diane Whipple's on January 26th, 2001.*

(RT 1/30/02)(emphasis added) And again, in its final ruling on this subject, the Court listed a series of subjects upon which the prosecution could validly offer evidence—Schneider and Bretches retained services of Coumbs, a dispute arose between Bretches and Coumbs, a lawsuit followed and dogs were transferred to various places, including defendants, there was communication between Bretches and Schneider, and the defendants. (RT 1779-80) But that ruling undercuts, rather than justifies, what the Court next said: "The fact that the Aryan Brotherhood is a prison gang is equally admissible." (RT 1781) Assume that a defendant was charged with vehicular homicide. Evidence that the defendant was late for a meeting would be admissible on the theory that it gave the defendant a motive to drive at an excessive speed. The fact that the meeting might be relevant, however, would in no way justify admitting the fact that the driver was an indicted Enron official on his way to confer with his lawyer.

The prosecution's mantric proclamation that Aryan Brotherhood evidence was admissible on knowledge, without an explanation of *how* that is so, makes obvious the frailty of its position here. The question raised by Knoller's due process claim—what did evidence of Schneider's and Bretches' membership in the Arayan Brotherhood, Knoller's "association" with that group, and Hawkes' crushing testimony about the letters written by Noel, have to do with defendant's awareness of Bane's or Hera's dangerousness?—is left unanswered by the District Attorney's brief. Hawkes' testimony, and the Aryan Brotherhood evidence in general, was not probative at all of the fact or nature of Bretches' and Schneider's plan to breed dogs or Knoller's knowledge thereof; it told the jury nothing directly about the dogs themselves.

The use to which the Aryan Brotherhood evidence was put, of course, was as proof of the character of Schneider, Bretches, Knoller and Noel. And that was the District Attorney's true motivation for using the evidence in this case. Mr. Hammer's argument was as simple as it was effective: members and associates of a criminal, violent, racist prison gang would not be interested in Chihuahuas; people like that would have wanted dangerous dogs.

Well aware that gang evidence has often been found to comprise an inadmissible and particularly prejudicial form of character evidence, the District Attorney avoids the topic of character in its new trial response. But the character basis for admission of the Aryan Brotherhood evidence is absolutely clear from Mr. Hammer's statements, both in and outside the presence of the jurors:

> If the defendants had been in cahoots with the members of Mother Teresa's order in raising dogs, it would be powerful evidence, I submit to the Court, that they had a benevolent intent regarding the dogs. Conversely, members of the Aryan Brotherhood -- and this is what the evidence will show -- are not likely to want friendly toy poodles on the outside world...
>
> Schneider wanted them to be like him, fierce, out in the world, and this is why the defendants regularly reported things like mugging a blind woman.

(RT 898)

> The Aryan Brotherhood is primarily -- is a prison gang. Without people like Mr. Noel and Ms. Knoller on the outside moving money

> around, giving legal aid, providing information about people on the outside, they cannot do their business. And that's what Devan Hawkes said.
>
> The truth is, Your Honor, that these dogs were part of an elaborate conspiracy, scheme, plan, by the prisoners and other members of the Aryan Brotherhood to train, to breed, to sell and to market -- and the Court saw those documents -- not poodles, not Chihuahuas, not Golden Retrievers or other lick therapists, but Presa Canarios -- violent, aggressive, large dogs that can kill people.
>
> So the fact that these inmates chose these kinds of dogs, brought other Aryan Brotherhood members and associates into their scheme to bring them into the outside world to raise money, to train them and to make them aggressive, is at the beginning of this case and it's at the end of the case.

(RT 1772)

> And all that evidence proves the fact that these almost 30 incidents were not an aberration. The defendants liked it. They enjoyed it. They wanted it. And they encouraged it. And what stands at the heart of that is the fact that these are the kind of dogs that the Aryan Brotherhood chose to raise, chose to sell, chose to market.

(RT 1774)

> It was not an accident that these were Presa Canarios. They weren't poodles, they weren't Chihuahuas even though Ms. Knoller again swore to the Grand Jury that her dog was no more dangerous than a Chihuahua -- under oath she said that, lying -- but a very special kind of dog. . . .
>
> That's why the Aryan Brotherhood evidence is in front of you. I have never, I will not and I will admonish you don't use it for anything else. But when you are deciding from all this stuff from Pelican Bay and all the design together with the defendants' individual involvement how much knowledge that gave them that these beasts were dangerous to human life because that's the issue before they even came to San Francisco, I submit to you that it goes right to the heart of that issue. If she brought Golden Retrievers in, that would be relevant, too. And if they were Golden Retrievers raised by Mother Theresa's order in Oregon, you would be hearing about that from the defense and it would be relevant. So that's the first point.

(RT 5375-76)

The Aryan Brotherhood testimony and documentary evidence was utterly irrelevant to Knoller's mental state except to the extent that it could be reasoned that people with bad

character have a bad mental state. But evidence proffered to prove the character of Schneider, Bretches, or Knoller was categorically admissible. In either case, the AB evidence had no valid purpose in this criminal trial and its use violated due process. See McKinney v. Rees (1993) 993 F.2d 1378 (use of character evidence in prosecution's case in chief violated not only California and federal rules of evidence but due process clause as well, requiring a new trial). As the Court said in McKinney, when "'there are no permissible inferences the jury may draw from the [character evidence] evidence, its admission [can] violate due process.' Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir.1991)." 993 F.2d at 1382-84.

The District Attorney additionally makes a series of extraordinary arguments regarding the admission, initially through expert Hawkes, of letters written by Noel which were the basis of Hawkes' opinion that Knoller was an "associate" of the Aryan Brotherhood—i.e. there was no objection when the letters were read to the jury (Response at 15), the letters were admissible as the basis for Hawkes' opinion (Response at 15), and Knoller testified about the letters during her direct examination and therefore waived any objection to their admission. (Response at 16).

These arguments have nothing to do with Knoller's claim of due process error as to the admission of the evidence of membership or association with the Aryan Brotherhood prison gang. On the issue of the error's preservation, Knoller clearly objected to the admission of the AB evidence (see e.g. RT 896), and the District Attorney does not suggest otherwise. Once the Court admitted the evidence over objection, there was no basis on which to further object to them being read to the jury. As to Hawkes, had this Court properly excluded all evidence concerning the Aryan Brotherhood, Hawkes would never have taken the stand. The fact that Hawkes was permitted to testify as an expert cannot render admissible testimony that was irrelevant and unduly prejudicial. If Hawkes had never been permitted to testify, the letters upon which he relied to opine that Knoller was an "associate" of the Aryan Brotherhood—letters which were also inadmissible hearsay as to Knoller (see Argument IV, infra)—would never have been placed before the jury. Indeed, any further objection to Hawkes' testimony and the documentary basis

for his opinion would have been utterly futile. See People v. Arias (1996) 13 Cal.4th 92, 159. As the prosecution correctly points out (Response at 15), once an expert is permitted to testify, he generally may describe the basis for his opinion. See People v. Montiel (1993) 5 Cal.4th 877, 919.[3]

Finally, the letters were admitted over objection during the prosecution's case in chief. If that was error, the error was not cured or waived by the fact that Knoller was then forced to discuss them, largely on cross-examination by the prosecutor, during her own testimony. Had this Court properly excluded the Aryan Brotherhood evidence, and the jury never learned during the prosecutor's case in chief of Noel's letters to Schneider and Bretches encouraging and applauding criminal and violent conduct, but altogether unrelated to dogs, Knoller would not have testified about the letters in her direct examination.

Having objected to Aryan Brotherhood evidence in general, and this Court's having ruled that "[t]he fact that the Aryan Brotherhood is a prison gang is equally admissible" (RT 1781), Knoller was under no obligation to object to every Aryan Brotherhood witness or Aryan Brotherhood question. There was no waiver of the due process claim.

B. The Prejudice

The prosecution offers two lines to argue that the due process error described above was harmless: "Nor could admission of this evidence have resulted in a miscarriage of justice. . . . As

[3] Ms. Ruiz did, of course, make the only objection left to her, which was to argue that the letters should not be admitted against her client. (RT 2956, 2961) That objection was overruled, and the jurors were permitted to consider the contents of the letters against Knoller.

shown above, overwhelming evidence supports both Defendants' convictions." (Response at 15)

The District Attorney ignores defendant's multi-pronged prejudice argument. But by doing so it has implicitly conceded the truth of the following propositions which were clearly asserted in Knoller's new trial motion:

- courts have long held that evidence of membership or ties to gang activity comprises powerfully prejudicial character evidence;
- impermissible evidence of a defendant's ties to a violent, racist, and incorrigible prison gang, amount to the most devastating sort of evidence of bad character imaginable;
- as a result of the Court's error, expert Hawkes told the jurors "In regards to size, [the Aryan Brotherhood is] not a gang that has a significant amount of members. However, the type of activity that they are involved in does command quite a bit of time from gang investigation units and me personally . . . ." (RT 2911);
- Hawkes told the jurors that Knoller was an associate of the Aryan Brotherhood, and as such was "someone who participates in criminal activity knowingly and who aids the gang." (RT 2980);
- as a result of the ruling, the jurors heard evidence, attributed to Knoller, of letters written by Noel, regarding stabbings, elimination of witnesses, informants, and gang enemies, and prison escapes;
- in his redirect examination of Hawkes, Mr. Hammer engaged in questioning which, while unrelated to the dogs, focused the jurors on the letters and the relationship of the defendants with Bretches and Schneider.

> Q. (By Mr. Hammer) Is it troubling to you that a lawyer writes to a -- a man who has been convicted of trying to kill a lawyer with a knife hidden in his rectum in a courtroom, that a lawyer writes to him about another situation saying kill the witness and then claim self-defense? Is that troubling to you, does that concern you?
>
> A. Well, each of these incidents concerns me that he's discussing, especially the individual he's discussing it with.

> Q. Who goes to the SHU, the -- the Secure Housing Unit, what kind of people?
>
> A. Well, Security Housing Unit is a special placement for those inmates who we cannot house safely in the general population setting, people who because of their violence or potential threat to disrupt our facilities, we end up having to place them in Security Housing Unit. People who stab other inmates, people who are part of a gang which is involved in an ongoing conspiracy to disrupt the prisons, these are the type of individuals that we have to house in the Security Housing Unit in order for our general population to operate.
>
> Q. People who try to escape?
>
> A. People who try to escape.
>
> Q. People who hide knives in their rectum and get into courtrooms and stab lawyers?
>
> A. Yes.

(RT 3019-3020);

- at the very start of his cross-examination of the defendant, Mr. Hammer asked a series of questions designed to focus the jurors on Ms. Knoller's "association" with the Aryan Brotherhood, and the Noel letters were a key subject of Knoller's cross-examination, though they do not mention dogs, dog training, or dog aggression;
- in his closing argument Mr. Hammer told the jury that the Aryan Brotherhood evidence was central to his case: "this case began with the Aryan Brotherhood and it ended with the Aryan Brotherhood." (RT 5375);
- in closing Mr. Hammer made precisely the character use of the Aryan Brotherhood evidence he said he would before trial, a use the state has essentially conceded was invalid;
- in closing the prosecutor focused on Noel's letters, again making a blatantly illegal character use of the evidence:

> And it wasn't just their deep involvement in this kennel which was designed to breed and raise and train aggressive dogs but you read those letters. I am not going to read them to you again, but who

> writes "The smuck probably deserved to be stabbed"? That is a lawyer. Who writes "If you try to escape, we will get out of the way so you have a clear shot"? That's a lawyer. Who discloses the location of the enemies of the Aryan Brotherhood to a member of the Aryan Brotherhood but somebody trying to help the Aryan Brotherhood?

(RT 5268)

- this Court has already made a "specific finding . . . that anything having to do with the Aryan Brotherhood and the defendants' association with it is very inflammatory, very prejudicial." (RT 1263)

In view of the foregoing, the prosecution plainly has failed to demonstrate that the due process error was harmless beyond a reasonable doubt.

C. The Limiting Instruction

Finally, the prosecution mentions the limiting instruction given the jurors regarding the Aryan Brotherhood evidence and says the jury must be presumed to have followed it. The District Attorney does not respond to defendant's lengthy argument that the instruction, in context, was without possible effect—the jurors logically could have used the Aryan Brotherhood evidence only to prove character, and it was precisely that purpose urged upon the jurors by Mr. Hammer. The prosecution's response ignores the California and federal authority (New Trial Motion at 49-50) which stand for the proposition that a limiting instruction cannot cure error which rises to the level of a constitutional violation. It neither cites nor discusses the California case—People v. Gibson (1976) 56 Cal.App.3d 119—which specifically holds that a limiting instruction like the one given in this case, which attempts to preclude improper character use of evidence admitted to prove character, has no effect at all. Gibson, 56 Cal.App.3d at 130 ("It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect.") The prosecution's utter failure to respond to Knoller's arguments is a concession that the instruction was ineffectual.

A final thought is in order. It was the Aryan Brotherhood ruling that led to the admission

of Noel's letters, which, while not referring to the AB, contained repeated expressions of criminal and violent intent by Noel. The Court specifically ruled that the jurors could use the letters against Knoller. The limiting instruction in no way prevented the jurors from using the statements in the letters written by Noel to Schneider against both Noel and Knoller, for any purpose whatsoever. The prosecutor focused on the letters in his cross-examination of Knoller and his closing argument. For that reason alone the instruction in no way avoided the prejudicial effect of the due process error. This Court should order a new trial.

IV. THE ADMISSION OF THE NOEL LETTERS AGAINST MS. KNOLLER VIOLATED THE CONFRONTATION CLAUSE, AND THE ERROR CANNOT BE RECTIFIED BY RELIANCE ON AN EVIDENTIARY THEORY NEVER PRESENTED OR CONSIDERED AT TRIAL

In her new trial motion, defendant Knoller contended that the Court's decision admitting against her various letters written by defendant Noel was error because it 1) was not founded on any established exception to the hearsay rule, and 2) violated her constitutional right to confront witnesses against her, as explained in People v. Aranda (1965) 63 Cal.2d 518, Bruton v. United States (1968) 391 U.S. 123, and related precedent. (New Trial Motion at 51-62) The District Attorney's response (Response at 16-19), is deficient in four fundamental respects.

First, contrary to the state's initial claim (Response at 16, 18), defense counsel's pretrial motions, argument, and objections at trial—none of which are addressed by the state—preserved both the constitutional challenge and the hearsay challenge to admission of the Noel letters against Ms. Knoller. Second, the state fails to provide a substantive response to the constitutional component of the claim because it does not meaningfully consider the facially incriminatory character of the letters, and fails completely to consider their incriminatory effect when considered in conjunction with other evidence in the case. (Response at 16-17) Third—and of great importance—the state defends this Court's decision to admit the letters by invoking the co-conspirator and authorized admission exceptions to the hearsay rule (Response at 17-18), but flatly ignores the Court's failure to conduct a hearing, to make preliminary findings, or to instruct the jury under either theory, neither of which is substantively viable in any event. Finally, the

Response (at 18-19) similarly ignores defendant's discussion of prejudice, relying instead on the logically indefensible claim that the letters were "cumulative" and on the conclusory assertion that the remaining evidence against Knoller was "overwhelming." None of the state's claims is persuasive.

A. The Undisputed Propositions Of Fact

Defendant Knoller addresses the state's legal analysis of her claims in the discussion that follows. As a preliminary matter, she notes that the prosecution effectively concedes a number of factual propositions which are critical for purposes of ruling on the instant claim. Specifically, by failing to contest the following matters, the Response establishes all of them as beyond serious dispute:

1. Prior to trial, the Court considered and rejected any claim that admission of the Noel letters would implicate the principles set forth in Aranda-Bruton. (New Trial Motion at 52; RT 952-956)

2. Ms. Knoller's counsel repeatedly, but unsuccessfully, objected at trial to admission of redacted Noel letters against Ms. Knoller. (New Trial Motion at 52-53; RT 2956-2961)

3. The Court founded its ruling that the Noel letters were admissible against Ms. Knoller on its finding of a "fluid interaction" between the defendants during the relevant time period. (New Trial Motion at 53; RT 3123-24)

4. As noted, the state implicitly concedes that at no time during the trial did this Court conduct a hearing to determine whether the statements in the Noel letters were admissible against Ms. Knoller on the theories that they were authorized admissions (Evidence Code § 1222) or statements of a co-conspirator (Evidence Code §1223). Similarly, the Court made no finding that the evidence was sufficient to permit introduction of the letters pursuant to either exception (Evidence Code § 403), nor did it instruct the jury that the letters could be considered only if the state demonstrated that the foundational criteria for admission under either exception had been satisfied.

5. Finally, Noel's redacted letters repeatedly attributed to Ms. Knoller various statements, beliefs and attitudes which the prosecution used relentlessly to build its case against Ms. Knoller during its case in chief, during cross-examination of Ms. Knoller, and at closing argument. (New Trial Motion at 55-62)

B. Defendant Knoller Did Not Waive Her Claim That Admission Of The Noel Letters Violated Her Rights Under The Confrontation Clause

The prosecution argues that defendant Knoller waived any Aranda-Bruton objection to the redacted Noel letters by purportedly 1) failing to object to their admission on this basis (Response at 16) and 2) failing to object to receipt of the redacted Noel letters into evidence (Response at 18). The arguments and rulings both before and during the trial, however, expose the claim as meritless.

To begin, Ms. Ruiz expressly raised concerns as to the cross admission of Noel written statements against Ms. Knoller when she filed her pre-trial motion for severance. See defendant Knoller's January 3, 2002 motion for severance, at 5-6. During oral argument on the motion, moreover, Ruiz cited the prosecution's expected introduction of the Noel letters, repeatedly predicting that no limiting instruction would effectively prevent the jury from using those letters for incriminatory purposes against Knoller. (RT 851-861) On this point, Ms. Ruiz cited and discussed, *inter alia*, People. v. Massie (1967) 66 Cal.2d 899, a California Supreme Court case which, invoking Aranda and specifically addressing the Confrontation Clause issues raised therein, found error in the trial court's failure to grant severance where a co-defendant's confession which also incriminated the defendant could not be effectively redacted to avoid undue prejudice. (RT 852-853, 856-857); Massie, 66 Cal.2d at 918-923. Ms. Ruiz also sought the impanelment of two juries as an alternative to a conventional joint trial. (RT 860)

In its discussion following Ms. Ruiz's argument, this Court indicated that it well understood the Aranda-Bruton/Confrontation Clause issue raised by defendants' motions. The Court stated:

> I have looked at all of the cases that you have cited. I spent a lot of time with the Massie case, we spent a great deal of time on that. *I*

also looked at all of the Aranda-Bruton issues that are raised here.

(RT 952)(emphasis added) When it later denied severance, the Court expressly ruled that admission of redacted letters against Knoller would not implicate any Aranda-Bruton concerns (RT 956), thus rejecting the specific constitutional objection renewed here. Under these circumstances, defendant's challenge to admission of the Noel letters under Aranda-Bruton and the Confrontation Clause is clearly preserved. People v. Morris. (1991) 53 Cal.3d 152, 189 ("The objection having been made and ruled upon, the issue was preserved. . . ."); People v. Archer (2000) 82 Cal.App.4th 1380, 1386 (claim of error under Aranda-Bruton remains cognizable where defendant prior to trial opposed prosecution's motion to introduce redacted statement and sought severance of his case from codefendant's or, alternatively, impanelment of two juries, notwithstanding failure to object to prosecution's proposed redaction or to raise Aranda objection at trial).[4]

There is yet another reason why the prosecution's waiver argument fails. In the wake of the Court's pre-trial rulings, and during the initial portion of the state's case-in-chief (i.e, during the testimony of Devan Hawkes), Ms. Ruiz again opposed the prosecution's use of the redacted Noel letters against Ms. Knoller, thus necessarily implicating the Evidence Code's prohibition against the introduction of hearsay in the absence of an applicable exception to the hearsay rule. See California Evidence Code § 1200(b). Again, however, the Court repeatedly overruled the objections, ultimately concluding that the "fluid interaction" between the defendants sufficed to

[4] People v. Hill (1992) 3 Cal.4th 959 and People v. Mitcham (1992) 1 Cal.4th 1027, cited in the state's Response at 16 and 18, are inapposite. In Hill, the defendant failed to present an Aranda-Bruton objection at trial, and, indeed, affirmatively sought admission of the challenged statements. Hill, 3 Cal.4th at 994-995. In Mitcham, the defendant never sought exclusion of the co-defendant's statement, requesting only that it be admitted solely against the co-defendant and that the jury be so admonished, a request granted by the trial court. Mitcham (1992) 1 Cal.4th 1027, 1044. Here, by contrast, defense counsel opposed admission of Noel's letters against Ms. Knoller and invoked Supreme Court authority founded on Aranda, and the arguments were expressly considered and rejected by the Court. Archer plainly controls.

overcome them. (RT 3123-24)

Defendant Knoller, of course, maintains that no such exception to the hearsay rule exists, but the point here is the Court's rejection of her objections rendered moot any further objection under Aranda-Bruton and the Confrontation Clause. Specifically, where, as here, the hearsay statements of a co-defendant incriminate the defendant, but nevertheless are properly found admissible against him under a well-established hearsay exception, no objection under the Confrontation Clause is *warranted*, as the state itself concedes. See Response at 18, n. 6; Bourjaily v. United States (1987) 483 U.S. 171; see also People v. Greenberger (1997) 58 Cal.App.4th 298, 327. Thus, having rejected Ms. Ruiz's hearsay challenge to the Noel letters and having ruled that the letters were equally admissible against both defendants, the Court necessarily informed defense counsel that a renewed objection under Aranda-Bruton was pointless. Accordingly, no such objection was needed to preserve the claim. Arias, 13 Cal.4th at 159.

Finally, the prosecution argues that because "other letters" were received as redacted into evidence without further objection by Ms. Ruiz, they are no longer subject to challenge under Aranda. (Response at 18) But this claim ignores the effect of Ms. Ruiz's objections to the initial Noel letters; as the Supreme Court stated in People v. Scott (1978) 21 Cal.3d 284, 291, "[W]here defendant's objections have been fully considered and overruled, we have said that they need not be repetitiously renewed. [Citations omitted]."[5]

C. The Admission Of The Noel Letters Violated Aranda-Bruton And The Confrontation Clause

The state next contends that the constitutional claim under Aranda-Bruton extends only to

[5] As is argued explicitly below (see Argument VIII), should the Court determine that defendant waived her challenge to the Noel letters under Aranda-Bruton and the Confrontation Clause, such waiver would constitute ineffective assistance of counsel within the meaning of Strickland v. Washington (1984) 466 U.S. 668. Given Ms. Ruiz's many attempts to exclude the letters, and otherwise preserve her client's confrontation rights, no tactical reason could possibly justify a failure to challenge the letters on these grounds, and their prejudicial impact, as discussed in the New Trial motion (at 55-62) was overwhelming.

claims that are facially incriminating, and that none of the letters cited by Ms. Knoller meet this description because "they do not directly address the charged offenses." (Response at 16-17) This argument merits only two comments.

First, as to the second component of its claim, the prosecution does not contest defendant's assertion that, as the state Supreme Court held in People v. Anderson (1987) 43 Cal.3d 1104, any statement by a non-testifying co-defendant implicates the Confrontation Clause and Aranda-Bruton, so long as it operates to inculpate the defendant "on the facts of the individual case." In this case, the Anderson analysis is especially apt . While in another context, the statements, attitudes, and conduct which Noel attributed to Knoller might be bereft of criminal significance, in this case they incriminated by inviting the jury to accept Noel's untested view of Knoller' conduct and mental state, and to weigh that view against her in the implied malice inquiry.

Observed through the prism of Noel's letters, Knoller allegedly applauded a dangerous criminal's knife attack and his manufacture of prison weaponry; approved of that criminal's escape; likely approved of Noel's "set-up" of the dangerous criminal's enemies; knew of, and laughed at, the dog-bite injury to Noel's hand; and shared Noel's contempt for the "timorous mousy little blond," whom Noel identified as Diane Whipple. Knoller, in other words, was hostile to the victim in this case, and, as a general matter, might well relish intentional violence to others and a volume of noxious criminal activity. The letters also presented the devastating image of Ms. Knoller failing to restrain the dogs in the very hallway where Ms. Whipple ultimately died. Given that the letters gave the state free rein in imposing on Knoller the world view of her husband (free from her ability to confront the evidence against her), and to apply that view to the elements of the charges, their incriminatory effect is unmistakable.

Second, Richardson v. Marsh (1987) 481 U.S. 200 (discussed in the New Trial Motion at 54) refutes the state's initial claim that Aranda-Bruton/Confrontation Clause principles are inapplicable to a co-defendant's statement unless it *facially* incriminates the defendant. (Response

at 17) Under Richardson, where the co-defendant statement incriminates the defendant only when linked with other evidence introduced later at trial, the state may surmount a Confrontation Clause challenge, but only where the court instructs the jury to disregard the statement in assessing the defendant's guilt and redacts any references to the existence of the defendant. Richardson, 481 U.S. at 212. No such instruction or redaction occurred here. Thus, to the extent that certain Noel letters are only incriminatory "in context," the constitutional violation nevertheless remains.[6]

D. Neither The Co-Conspirator Exception Nor The Authorized Admission Exception To The Hearsay Rule Permitted Use Of The Noel Letters Against Defendant Knoller, Establishing Evidentiary Error Wholly Apart From The Violation Of Aranda-Bruton

The centerpiece of the state's response to defendant's Aranda argument consists of a claim that the Noel letters were properly admitted because they fall within the hearsay exceptions applicable to statements of a co-conspirator (Evidence Code §1223) and authorized admissions (Evidence Code §1222). (Response at 17-18). This argument, however, founders in light of the actual disposition of defendant Knoller's hearsay objections, which the court rejected on the theory of the "fluid interaction" between the defendants.

Both of the hearsay exceptions now cited by the state are subject to the provisions of

[6] Nor is the Aranda-Bruton challenge overcome where the prosecution does not expressly proffer a co-defendant's statements for truth of the matter asserted. See People v. Anderson (1987) 43 Cal.3d 1104, 1124 ("The unreliability of a codefendant's incriminating statements is plainly not affected by the purpose for which they are introduced at trial. Nor is their impact").

Evidence Code § 403; see Assembly Committee Note to § 403 (a). Accordingly, admission of the Noel letters against defendant Knoller under either the co-conspirator or authorized admission exceptions would have required the Court to determine whether the state had made a showing sufficient to sustain a finding as to the existence of the preliminary facts applicable to those exceptions to the hearsay rule. Id. Where, as here the proffered evidence is potentially prejudicial to the defendant, the court should ordinarily make its preliminary fact determination outside the presence of the jury. B. Witkin, California Evidence, (4th ed. 2000), Presentation At Trial, § 50, p.83-84. Furthermore:

> It is the jury's function to determine the effect and value of the evidence addressed to it. Evidence Code § 312. Hence, the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question. The "question of admissibility . . . merges imperceptibly into the weight of the evidence, if admitted." Di Carlo v. United States, 6 F.2d 364, 367 (2d Cir.1925). *If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.*

Assembly Committee Note to § 403 (a) (Emphasis added). As the Note later explains:

> At times . . . it is not quite so clear that conditionally admissible evidence should be disregarded unless the preliminary fact is found to exist. *In such cases, the jury should be appropriately instructed.* For example, the theory upon which agent's and co-conspirator's statements are admissible is that the party is vicariously responsible for the acts and statements of agents and co-conspirators within the scope of the agency or conspiracy. *Yet, it is not always clear that statements made by a purported agent or co-conspirator should be disregarded if not made in furtherance of the agency or conspiracy. Hence, the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy.* People v. Geiger, 49 Cal. 643, 649 (1875); People v. Talbott, 65 Cal.App.2d 654, 663, 151 P.2d 317, 322 (1944). Subdivision (c), therefore, permits the judge in any case to instruct the jury to disregard conditionally admissible evidence unless it is persuaded of the existence of the preliminary fact; further, subdivision (c) requires the judge to give such an instruction whenever he is requested by a party to do so.

Assembly Committee Note to § 403 (c) (emphasis added); see also People v. Smith (1986) 187 Cal.App.3d 666, 679-680, *disapproved on other grounds*, People v. Bacigalupo (1992) 1 Cal.4th

103 (trial court committed error when it failed to instruct on foundational requirements for co-conspirator and adoptive admissions exceptions).

In this case, of course, the prosecution never offered the Noel letters under a specific hearsay exception. The Court therefore conducted no hearing nor made any specific factual determinations as to whether a conspiracy existed at the time of the Noel letters; whether Noel's statements were in furtherance of any given conspiracy; or whether Knoller had actually authorized the Noel admissions contained in the letters. The Court likewise did not instruct the jury to determine whether the prosecution had satisfied the foundational requirements for the cited exceptions. These omissions, of course, follow from the Court's ruling that the nature of the *interaction* between the defendants rendered the Noel letters wholly admissible against Knoller as a matter of law.

The absence of any preliminary rulings or instructions on the newly minted theories of admissibility is fatal to the state's claim. Having ruled that an alternative exception not found in the Evidence Code overcame defense counsel's objections to the letters, the Court *foreclosed* any request by defendant Knoller for either ruling *or* instruction as the foundational requirements for considering Noel's letters as the statements of a co-conspirator or authorized admissions. Arias, 13 Cal.4th at 159. The Court can hardly sustain the admission of the letters on the grounds of the Section 1222 or 1223 exceptions where, by its other rulings, the Court eliminated defendant's right to procedures designed to ensure that the foundational requirements for those exceptions are satisfied. Invocation of these exceptions to sustain the ruling in the absence of the requisite findings and instruction thus violates the requirements set forth in § 403(c) and in Smith. See also People v. Talbott (1944) 65 Cal.App.2d 654, 664 (Whenever the rule of evidence pertaining to the acts or declarations of a conspirator is invoked in a civil or criminal action, " . . . instructions are imperative, for, it is only by such means, that the issue of fact, introduced by resort to the rule, can be submitted to the jury. Assuming, therefore, that evidence, otherwise inadmissible, is received in such circumstances, it is at once evident that, in the absence of appropriate

instructions, such evidence would remain in the record in violation of the hearsay rule.")

Furthermore, even were the state's retroactive hearsay proffer cognizable here, it is absolutely insufficient as a substantive matter. Admission of a statement under the co-conspirator exception set forth in § 1223 requires findings, *inter alia*, that the disputed statement was made during the existence of a conspiracy, that the person against whom the statement is offered was then participating in the conspiracy, and that the statement was made in furtherance of the objective of the conspiracy. See § 1223; CALJIC 6.24; People v. Saling (1972) 7 Cal.3d 844, 852; see also People v. Smith (1907) 151 Cal. 619, 625-626 (statements which merely narrate past events are generally not made in furtherance of a conspiracy). Given that the only "conspiracy" to which the state referred involved the rearing of dogs (which in any case did not constitute a criminal agreement), it immediately appears that none of the Noel statements challenged by defendant Knoller (New Trial motion at 55-62) can be deemed to have been made "in furtherance" of any objective of that purported scheme,. See People v. Roberts (1992) 2 Cal.4th 271, 304 (cited in Response at 17 and holding that evidence was insufficient to support finding that statement furthered conspiracy where declarant's statement did not indicate request for help in achieving conspiratorial objective). The state having failed to demonstrate, even at this date, how the statements meet this criteria, the Court must reject its reliance on § 1223 out of hand.

The authorized admission exception set forth in Evidence Code § 1222 is equally inapposite. Putting aside its procedural requirements (see subdivision [b]), the provision conditions admissibility of the hearsay statement on an affirmative showing that it was "made *by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement*." Evidence Code § 1222(a). The prosecution cites the fact that Noel's letters were written on joint letterhead and that the defendants' activities were "entertwined" (sic) (Response at 18), but it does not, and indeed cannot, cite *any* precedent holding that these features may suffice to demonstrate actual authorization by Knoller. There is no joint letterhead

exception to the hearsay rule. The use of joint letterhead fails to demonstrate that Knoller was present when Noel wrote the letters, much less that she directed or agreed to their contents. Cf. People v. Lebell (1979) 89 Cal.App.3d 772, 779-780 (where defendant's voice was heard in the background of telephone conversation with co-defendant but there was no factual basis to surmise that defendant heard co-defendant's statements or had reason or opportunity to respond, foundation for adoptive admission was insufficient as a matter of law) Similarly, the general "entertwining" of defendants' activities is a far cry from a showing that Noel was Ms. Knoller's agent for purposes of making the specific statements challenged here. Sample v. Round Mountain Citrus Farm Co. (1916) 29 Cal.App. 547. The Legislature quite wisely has never approved a rule that a wife is presumed to have authorized the statements of her husband, or visa-versa.

This Court never ruled on the hearsay exceptions now invoked by the state, meaning defendant never had any opportunity to have the jury pass on them. In addition, the foundational showing as to both of the exceptions is insufficient as a matter of law. Accordingly, the trial court's ruling admitting the letters violated Aranda-Bruton and the Confrontation Clause. As the California Supreme Court stated in Roberts,

> Under state law and federal constitutional law, the rule [stated in Aranda-Bruton] does not apply to statements made by coconspirators during and in furtherance of the conspiracy. (People v. Brawley (1969) 1 Cal.3d 277, 286 [82 Cal.Rptr. 161, 461 P.2d 361]; Bourjaily v. United States, supra, 483 U.S. at pp. 181-184 [97 L.Ed.2d at pp. 156-158].) *But because the court erred in finding the statements to come within the coconspirator exception, defendant's state and federal rights were violated.*

2 Cal.4th at 304 (emphasis added)

E. The Letters Were Not Rendered Admissible As Supporting Evidence For The Opinion Rendered By Expert Hawkes Because Their Consideration As To Defendant Knoller Was Precluded By Law

In its discussion of the Aryan Brotherhood evidence, the prosecution contends (Response at 15) that some of the Noel letters challenged by Knoller were properly read to the jury because expert Hawkes was entitled to rely on them in rendering his opinion as to defendants' purported association with the Aryan Brotherhood. Defendant Knoller has established that the letters were

categorically inadmissible on this basis because the association evidence was itself inadmissible as a matter of law. (See Argument III, supra). There are, moreover, additional reasons why Hawkes' opinions did not permit use of the letters against Ms. Knoller.

First, Evidence Code § 801 permits an expert to rely on hearsay evidence in rendering an opinion where the hearsay is

> . . . of a type that may reasonably be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, *unless an expert is precluded by law from using such matter as a basis for his opinion*.

Id. (emphasis added). Pursuant to the final qualification, ". . . [A]n expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion." Law.Rev.Com.Comment to § 801; see also In Re Marriage of Hewitson (1983) 142 Cal.App. 3d 874, 886 (use of "comparable company method" in determining market value of closely held stock was "precluded by law" because prior judicial decision had determined that the method was unreliable).

As noted by the California Supreme Court in People v. Anderson (1987) 43 Cal.3d 1104:

> Broadly stated, the rule of *Bruton v. United States*--which is rooted in the confrontation clause and accordingly governs state as well as federal prosecutions (*Roberts v. Russell* (1968) 392 U.S. 293, 294, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100)--declares that a nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is *generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination*, even if a limiting instruction is given. (391 U.S. at pp. 126-137, 88 S.Ct. at pp. 1622-1628.)

43 Cal.3d at 1120.

In this case, Ms. Ruiz challenged the Noel letters under Aranda-Bruton and expressly and repeatedly objected to Hawkes' use of the Noel letters against defendant Knoller. (RT 2956-61) Given the Supreme Court's finding that such use is unconstitutional and unreliable as a matter of law, and given the controlling provisions of § 801, Hawkes' use of the Noel letters against Ms. Knoller was flatly prohibited.

Second, and of equal importance, while the Court gave an instruction to the effect that Aryan Brotherhood evidence should be linked to the defendants' knowledge concerning the dogs and their alleged proclivities (RT 5231-2), the Court's rulings at trial did not inform the jury that the Noel letters referenced by Hawkes related only to the Aryan Brotherhood and/or the Pelican Bay inmates; to the contrary, the rulings indicated that the letters were admissible against Knoller for all purposes. (RT 2956-7, 2961, 3123-4). The prosecution, of course, repeatedly used the letters' statements for the truth of the matters asserted therein during its case in chief, cross-examination of defendant Knoller, and in closing argument. (See New Trial Motion at 55-62) Even if introduction of the letters could have been proper if confined to the basis on which Hawkes rendered his opinion, the comprehensive use to which the prosecution put them at trial was wholly improper.

F. The Erroneous Admission Of The Letters Was Prejudicial

As noted, the state concludes its Aranda response with the claim that any error in admitting the Noel letters was harmless because the evidence against Ms. Knoller was "overwhelming" and the letters cumulative of all of the other evidence presented at trial. (Response, at 18-19) Defendant has refuted these claims in her opening motion (at 55-62) and in section C, above; simply put, the other evidence offered against her for purposes of a second-degree murder charge generally consisted of reports encounters in the neighborhood and, as such, was tenuous at best. The Noel letters supplied an qualitatively different, though wholly unwarranted, portrait of Ms. Knoller as indifferent to reports of physical assaults, dismissive of Diane Whipple, amused by physical injury, violence, and other criminal conduct, and incapable of controlling the dogs in the hallway outside her residence. Given its powerfully prejudicial utility to the prosecution's showing on conscious disregard (second degree murder) and gross criminal negligence (involuntary manslaughter), as reflected in the state's cross-examination and closing argument, the introduction of the letters cannot be deemed harmless under the relevant constitutional test (i.e., beyond a reasonable doubt,) or under the more relaxed standard set forth

in People v. Watson (1956) 46 Cal.2d 818, 836 (reversal required where reasonably probable result more favorable to defendant would obtain in absence of error). A new trial is in order.

V. THE COURT DENIED KNOLLER'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, AND TO TESTIFY ON HER OWN BEHALF, WHEN IT REFUSED TO PERMIT HER TESTIMONY AS TO STATEMENTS NOEL MADE TO HER ABOUT THE BITE TO NOEL'S FINGER BY BANE AT CHRISSY FIELD

In her new trial motion, defendant Knoller claimed that the Court violated her federal due process rights to present evidence and testify fully in her own defense when it sustained a prosecution objection to questions regarding statements made to Knoller by her husband shortly after he received an injury to his hand during a dog fight at Chrissy Field.

In making no argument to the contrary in its response, the prosecution has conceded the Court improperly sustained the objection. It argues, however, that because "Defendant's Knoller's trial counsel never raised the specific ground of admissibility she now raises in her motion for a new trial . . . [she] is precluded from raising the issue . . . ." (Response at 19) Knoller's counsel, however, had no obligation to object—on the basis asserted now or on any basis whatsoever—to the prosecutor's objection. Rather, it was this Court's obligation to rule correctly on the prosecutor's objection and motion to strike.

The prosecution relies on Evidence Code § 354. Under that section, for a verdict to be set aside on the basis of the exclusion of evidence, the "substance, purpose, and relevance of the excluded evidence" must be made known to the Court. Of course, here the objection was not on relevance, but on hearsay grounds. The substance, purpose, and relevance of the excluded evidence was obvious from the question itself. Indeed, Mr. Hammer objected *because* the answer would have severely damaged his case.[7]

[7] To the extent Ms. Ruiz waived Ms. Knoller's right to challenge the clearly erroneous ruling here, or on appeal, her conduct amounted to a deprivation of the defendant's Sixth Amendment right to counsel. See Argument VIII, infra. Any competent counsel would have asserted the proper basis for admission of the testimony. And given that Ms. Ruiz posed the question, she cannot have had a valid strategic reason for failing to obtain the testimony.

The prosecution also says the due process error was harmless because "Knoller admitted on cross-examination that she knew Bane almost bit off Defendant Noel's finger." (Response at 19) But the *fact* of Mr. Noel's injury and the *extent* of the injury had nothing to do with the evidence Knoller was prevented by this Court's erroneous ruling from placing before the jurors. Rather, as defendant made clear in her new trial motion, Knoller was prevented from telling the jurors what Noel told her about the *circumstances which caused* the injury. And it was these circumstances that had the most potential significance to the jurors' inquiry into Knoller's awareness of Bane's dangerousness.

Certainly if there had been evidence Noel had reported to his wife that when he received the injury the dog fight had ended, that Bane bit him for no reason whatsoever, and that the dog appeared to be unnaturally aggressive toward human beings, Mr. Hammer would have argued long and hard that the evidence was crucial to his case on the knowledge element. Such evidence would have fit neatly within the District Attorney's closing argument: "did [Knoller] realize the risks involved from everything she had seen *or heard*?" (RT 5263; see also 5254: "They knew with their own eyes what these dogs could do. They read about it, *they heard about it.*")(emphasis added). And, as defendant has noted, Mr. Hammer focused on the Chrissy Field incident because it was the only evidence in the case to support his view that Knoller understood Bane could cause physical injury: "defendant Knoller [did] know what damage the dogs could do if she lost control . . . . "[Noel] spent three days in the hospital. No question that's great bodily injury and showed the power of that one dog." (RT 5385)

But because the incident was so important to the case, Ms. Knoller was entitled by the federal due process clause to place before the jury her understanding—provided by her husband—of the circumstances of the Chrissy Field incident. She was entitled to tell the jurors Noel claimed the incident was entirely his fault, that Bane had not attacked him, but rather that he simply placed his hand into the dog's jaw during a fight in which, by all accounts, Bane was first attacked by the Malinois. Thus, as to the only incident in which either dog actually drew blood from a human

being, Knoller could have offered evidence that her belief was that the injury was not due at all to Bane's aggressiveness, but rather to her husband's lack of judgment in sticking his hand into the jaw of a large dog engaged in a fight instigated by another dog.

The prosecution understandably avoids the question of its burden on the harmlessness issue. To avoid a new trial it must demonstrate, beyond a reasonable doubt, *the absence of prejudice*. Chapman v. California (1967) 386 U.S. 18. Because this Court declined to permit Ms. Knoller's testimony, the record is silent on the substance of that testimony and therefore the prosecution cannot possibly carry its burden.

In any event, given that Knoller's knowledge of Bane's potential for dangerousness was made the centerpiece of this case—by the prosecution's evidence, the charges, the argument, and the jury instructions—it is irrational to suggest conceded error by this Court which precluded testimony by the *defendant herself* on an element of the crime could be harmless beyond a reasonable doubt. It was not. This Court should order a new trial.

VI. THE PROSECUTION HAVING EFFECTIVELY CONCEDED THAT DEFENSE COUNSEL MADE PROPER OBJECTIONS TO MR. HAMMER'S REBUTTAL ARGUMENT, THE COURT'S ORDER THAT COUNSEL WAS BARRED FROM RAISING ANY FURTHER OBJECTION UNDER THREAT OF INCARCERATION DEPRIVED KNOLLER OF HER CONSTITUTIONAL RIGHT TO COUNSEL AT A CRITICAL STAGE OF HER TRIAL, AN ERROR THAT CANNOT BE CONSIDERED HARMLESS AS TO ANY OF HER THREE CONVICTIONS

A. The Undisputed Propositions Of Fact And Law

In its response, the prosecution has either expressly or impliedly conceded the following matters of fact and law regarding Ms. Knoller's claim of a court-ordered deprivation of counsel during closing argument:

1. A criminal defendant is entitled, under the state and federal constitution, to representation by counsel at all critical stages of the proceedings against her, and closing argument is a critical stage of a trial. Powell v. Alabama (1932) 287 U.S. 45, 68-69; Herring v. New York (1975) 422 U.S. 853, 858; People v. Wade (1987) 43 Cal.3d 366, 390, opinion vacated on other grounds, People v. Wade (1988) 44 Cal.3d 975.

2. The raising of objections is not only an obligation of defense counsel, but a right of the defendant protected by the broader guarantees of the Fifth and Sixth Amendments. In Re Grant Cooper (1961) 55 Cal.2d 291, 302.

3. During Mr. Hammer's initial closing argument, no objections were made by either defense counsel. (RT 5253-5303) During the closing argument by counsel for Ms. Knoller, however, prosecutor Hammer interrupted Ms. Ruiz's discussion of the testimony of Esther Birkmaier with a speaking objection amounting to a claim that Ms. Ruiz had misstated the evidence, which the Court sustained.

4. During Mr. Hammer's rebuttal to the arguments of defense counsel, he asserted that one female prosecution witness had during cross-examination by Ms. Ruiz stated that she had not complained to Noel about his dogs because "he's got 240 pounds of dog on him" and Noel couldn't control them. (RT 5380) Knoller's defense counsel then made the following non-speaking objection: "Misstates the evidence, Your Honor." (RT 5380)

5. The objection was legally proper both because the misstatement of the evidence is a recognized ground for objection during closing argument[8] and because defense counsel must make that precise objection to preserve the issue for appeal. People v. Carrera (1989) 49 Cal.3d 291, 319-20.[9] Furthermore, this first objection was factually correct because there had been no witness who had testified under cross-examination by Ruiz in the manner Hammer alleged. While

[8] People v. Bradford (1997) 15 Cal.4th 1229,1341 (California Supreme Court notes defense counsel properly objected to prosecutor's closing argument as unsupported by the record); McCann v. Municipal Court (1990) 221 Cal.App.3d 527, 533 (trial judge properly sustained prosecutor's objection that defense attorney was misstating the evidence).

[9] "Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion (People v. Bell, supra, 49 Cal.3d 502, 542, 262 Cal.Rptr. 1, 778 P.2d 129; People v. Adcox (1988) 47 Cal.3d 207, 261, 253 Cal.Rptr. 55, 763 P.2d 906; People v. Poggi (1988) 45 Cal.3d 306, 335-336, 246 Cal.Rptr. 886, 753 P.2d 1082), defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry." People v. Visciotti (1992) 2 Cal.4th 1, 79.

the prosecution contends that on earlier occasions during the trial Ms. Ruiz made improper speaking objections (Response at 20 n.7), it cannot argue and has not claimed in its brief that the first defense objection during closing argument was anything other than legally and factually sound.

6. In response to defense counsel's initial objection, the Court responded: "Counsel, this is closing argument. There will be no further interruptions or you will be out of the courtroom." (RT 5380) The Court thus ordered counsel to make no objections of any kind irrespective of their content under threat of expulsion from the courtroom.

7. Defense counsel's next and last objection was also that of misstating the evidence, made to Mr. Hammer's reference to an incident involving Kathy Brooks in Alta Plaza Park. The objection was legally sound because Hammer stated that Bane was off-leash during the incident; in fact, Brooks had testified Bane was on leash during the Alta Plaza incident. The prosecution cannot offer and has not tendered any reason why Ms. Ruiz's second objection was not legally and factually sound.

8. The Court responded to the second defense objection:

> *Counsel, there will be no further objections*. The jury will recall the evidence. Ladies and gentlemen, it is improper and counsel's conduct is improper by standing up in closing argument and objecting to her recollection of what the evidence was. The jury will recall what the evidence is. Arguments of counsel are not evidence and it is improper. *And, Ms. Ruiz, please take your seat now and not get up again or the next objection will be made from the holding cell behind you.* Ladies and gentlemen, counsel are entitled to argue what they believe the evidence is. If they are wrong, the jury will recall that. What counsel say the evidence is is not the evidence. And it is not a proper objection to stand up in the middle of closing argument and insert your own interpretation of what the evidence is. Mr. Hammer, continue.

(RT 5396-97) The Court thus ordered counsel to make no objections of any kind irrespective of their content under threat of being jailed.

9. Subsequent to the time when the Court had forbidden defense counsel from making any further objection, Mr. Hammer argued that,

> *because this is a murder case* and you try to recreate Diane Whipple's time in that hallway, what is it she saw before that first

bite?

> Think about the ten minutes that she was ripped to death and her clothes ripped off her and then think about this because this is how she died because of their recklessness. Every time she tried to breathe, think of a breath in. Every time she tried to breathe, her throat closed in on itself, every time. And she crawled, this young woman despite her to try to get home and she tried to breathe again and her throat closed in again. She tried to breathe again and she was alone, she was alone unable to even talk. And the dog was still running loose with her and she tried to breathe again, and her voice closing down with two holes in her larynx and she crawled and she tried to push herself up and she crawled some more to try to get home and no one was there, no one.
>
> That's what these people's recklessness did, caused that kind of death.

(RT 5401-5402)

It is in the context of these propositions of fact and law that the remainder of the prosecution's response to Ms. Knoller's Sixth Amendment claim must be considered.

B. A Trial Court May Not Overrule A Valid Legal Objection By Defense Counsel, Much Less Impose An Absolute Prohibition On Any Future Objections From That Counsel, On The Ground That The Attorney In Question Had Previously Made Objections That The Court Had Overruled

As noted, the prosecution has not offered one single word of argument in its responsive briefing to the effect that the two objections raised by Ms. Ruiz during Mr. Hammer's closing argument were legally improper or factually without foundation. It thus implicitly has acknowledged that they should have been sustained. More importantly, the state has conceded that the two objections can provide no justification for this Court's extraordinary order, apparently unprecedented in California legal history, that defense counsel was prohibited under penalty of incarceration from making any further objections during the prosecution's closing argument.

Rather, the prosecution suggests that the Court's rulings on Ms. Ruiz's objections during closing argument and threat of jail "were proper, in light of the proceedings as a whole." (Response at 19). According to the prosecution : "Defense counsel, Nedra Ruiz, repeatedly compromised the trial process by making numerous speaking objections during trial, often

inserting her own interpretations of the evidence . . . . In light of this repeated improper conduct by Ms. Ruiz, this Court properly admonished counsel in order to control the orderly processes of the trial. . . ." (Response at 20). But the speaking objection first interjected into closing argument came not from Ms. Ruiz, but from Mr.Hammer,[10] and the Court sustained it without the slightest criticism. Ms. Ruiz's first objection—"Misstates the evidence, Your Honor," (RT 5380)—was most assuredly not a speaking objection.

Thus the prosecution necessarily advances the proposition that an attorney can be barred from making valid, constitutionally protected objections during closing on the ground that earlier during the taking of evidence the same counsel had made objections that the Court found without merit. The prosecution does not cite any case law to support its position because no court has ever issued so unsound a ruling. A legal misstep by defense counsel, real or perceived, cannot result in the forfeiture of a criminal defendant's right to counsel during the remainder of trial.

Were defense counsel to make a specific objection that a trial court found groundless, that court could surely declare that objection should not be made again, because counsel and her client would have afforded a "reasonable opportunity for appropriate objection or other indicated advocacy. . . ." Grant Cooper, 55 Cal.2d at 298. But a court may never on the basis of past overruled objections order counsel for a criminal defendant not to make any future objections, irrespective of their content or validity. Id. (Judge is without power to foreclose opportunity to

[10] MR. HAMMER: Your Honor, I'm going to interrupt. I think what I see at the top is you limiting that not for the truth of the matter and Ms. Ruiz is arguing for the truth of the matter. It's pretty obvious from the top of that. (RT 5360-61)

object by any order or admonition to sit down or to be quiet or not to address the court.) Yet that is what occurred here when the Court first stated to Ms Ruiz: "There will be no further interruptions or you will be out of the courtroom" (RT 5380); and later added: "And, Ms. Ruiz, please take your seat now and not get up again or the next objection will be made from the holding cell behind you." (RT 5396-97)

The prosecution's own brief demonstrates why a blanket ban on defense objections was particularly unjustified in this case. The state cites to ten examples of improper objections made by Ms. Ruiz during trial. (Response at 20 n.7). It then cites to over thirty objections of Ms. Ruiz that the Court sustained, and over twenty of the prosecution that the Court overruled. (Response at n.9, 10). The prosecution thus demonstrates that the adversaries at trial made both valid and invalid objections. That being so, the Court was obligated to permit Knoller's counsel to make each and every objection during Hammer's argument that Ms. Ruiz in good faith believed to be legally sound, as were the two objections she did advance. Sacher v. United States (1952) 343 U.S. 1, 9.

C. The Court's Order Constituted A Court-Ordered Deprivation Of Knoller's Right To Counsel Requiring Reversal

As established above and in Knoller's New Trial Motion, the Court's threat to expel Ms. Ruiz from the courtroom and jail her should she again object during prosecutor Hammer's closing argument constituted a court-ordered deprivation of the right to counsel during a critical stage of the proceedings. Grant Cooper, 55 Cal.2d at 302 ("[W]hen an attorney is presenting an objection or motion in contested litigation he is engaged in a trial, and reasonable opportunity to prepare and present his motion is as fundamental as is the right to counsel."); Cannon v. Commission of Judicial Qualifications (1975) 14 Cal.3d 678, 696-97 (the inhibition imposed on a defense attorney by a threat of removal constitutes a serious and unwarranted impairment of his client's right to counsel.) Such error requires reversal *per se*. Gideon v. Wainwright (1963) 372 U.S. 335 (court-ordered deprivation of the right to counsel amounts to structural error not subject to harmlessness analysis); Geders v. United States (1976) 425 U.S. 80 (bar on consultation between attorney and

client during overnight recess requires automatic reversal); Herring v. New York (1975) 422 U.S. 853 (bar on defense summation at bench trial required reversal without showing of prejudice); Ferguson v. Georgia (1961) 365 U.S. 570 (bar on direct examination of the defendant reversible error per se).

> The state argues that such error does not require automatic reversal in this case:
>
> > Here, no fundamental, complete, or total denial of counsel occurred because defense counsel was present during the remainder of the proceedings.

(Response at 21)

Yet the state's brief concedes that the test for reversal without a showing of prejudice is not the simple presence of counsel during some or most of a defendant's trial, but whether defense counsel was "prevented from assisting the accused during a critical stage of the proceeding." (Response at 21, citing United States v. Cronic (1984) 466 U.S. 648, 659 and n.25) That is precisely what occurred here.

The state also asserts: "Nor did the Court's admonishment completely bar all objections made by the defense counsel or interfere with her ability to lodge them. (Response at 21-22). This argument is intellectually indefensible. This Court may decide that its order was legally correct or incorrect, but it surely is not going to engage in a patent subterfuge and assert that the order was not intended to "completely bar all objections made by defense counsel" during the remainder of Mr. Hammer's argument. If the words "*And, Ms. Ruiz, please take your seat now and not get up again or the next objection will be made from the holding cell behind you*" did not "interfere with her ability to lodge" objections, what could have caused such interference: a threat to have the bailiff beat her with his baton? Under Cronic, if this Court's silencing order was error, and indeed it was, defendant Knoller would be entitled to a new trial on all charges absent any showing of prejudice.

D. Defendant Knoller's Convictions Also Would Have To Be Reversed Under The Chapman Standard of Review Of Federal Constitutional Error

Even were Ms. Knoller's convictions not subject to automatic reversal, they just as surely would have to be set aside under the Chapman standard of reviewing federal constitutional error. Chapman v. California (1967) 386 U.S. 18. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. at 23. Chapman requires the prosecution to prove the *absence of prejudice* beyond a reasonable doubt. That it cannot do in this case, because as established in her new trial motion, the prosecution took advantage of the Court's ban on defense objection to improperly appeal to the jurors to "consider the suffering of the victim." People v. Stansbury (1993) 4 Cal.4th 1017, 1057.

The state replies that "the prosecutor did not ask the jurors to place themselves in the place of Ms. Whipple." (Response at 23). This assertion is simply untrue. The prosecutor urged jurors to " [t]hink about the ten minutes that she was ripped to death and her clothes ripped off her and then think about this because this is how she died because of their recklessness. Every time she tried to breathe, think of a breath in." That is absolutely "an appeal to the jury to view the crime through the eyes of the victim," and it is indisputably misconduct under Stansbury, which the prosecution fails to discuss or even cite.

The prosecutor continued:

> Every time she tried to breathe, her throat closed in on itself, every time. And she crawled, this young woman despite her to try to get home and she tried to breathe again and her throat closed in again. She tried to breathe again and she was alone, she was alone unable to even talk. And the dog was still running loose with her and she tried to breathe again, and her voice closing down with two holes in her larynx and she crawled and she tried to push herself up and she crawled some more to try to get home and no one was there, no one.

(RT 5401-5402)

As held in People v. Fields (1983) 35 Cal.3d 329, another case ignored by the state, these remarks constituted misconduct in urging "the jury to depart from their duty to view the evidence objectively, and instead to view the case through the eyes of the victim." Id. at 362.

The state also argues that this appeal to passion and prejudice in Mr. Hammer's closing

argument "was especially relevant to the Pen. Code section 399 charge to rebut Defendant Knoller's claim that Diane Whipple just stood at the doorway and later would not remain still, thus aggravating the situation." (Response at 23).

This assertion is nothing if not disingenuous. A prosecutor's rebuttal argument is limited to rebuttal of the defense closing argument. See e.g. People v. McDaniel (1976) 16 Cal.3d 156, 177. Ms. Knoller's counsel did not mention the § 399 charge once in her closing argument. Just before he committed his act of misconduct, Mr. Hammer indicated that he now was going to direct his remarks at the implied malice murder charge because the defendants had not argued against the 399 charge in closing and thus had essentially conceded it.

> I am going to go one last time after talking about Ms. Ruiz's diversions to the law of implied malice and I want to say this before I do it. I didn't hear the defendants arguing mischievous dog statute yesterday. Sounds like they are kind of conceding that.

(RT 5395)

From that point to the completion of his rebuttal argument, Mr. Hammer only discussed the Count One murder charge. (RT 5395-5402) Most revealingly, he expressly stated that it was "because this is a murder case" that the jurors must "try to recreate Diane Whipple's time in that hallway. . . ," then launched into his description of Ms. Whipple's final moments in the hallway. (RT 5400) Yet Mr. Hammer knew that the hallway evidence was irrelevant to the murder offense.[11] There can be no doubt that the prosecutor's urgent plea that the jurors draw Diane Whipple's last breath as she did was solely intended to deflect the jury "from their duty to view the evidence objectively" on the murder charge. Fields, supra.

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[11] The prosecutor had earlier argued:

> *That's all irrelevant*. By the time she committed that intentional act of going in the hallway with two dogs, if you believe her on anything, one dog with no muzzle and no restraint with this dog (indicating) knowing what it would do, the crime was complete.

(RT 5256-57)

The denial of Ms. Knoller's Sixth Amendment right to have her counsel raise objections to the state's closing argument plainly requires a new trial under Chapman.

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VII. THE DUAL GUILTY VERDICTS ON COUNTS ONE AND TWO WERE LEGALLY IMPERMISSIBLE AND THE COURT COMMITTED INSTRUCTIONAL ERROR IN FAILING TO GIVE CALJIC 17.03; THE MURDER CONVICTION SHOULD BE REVERSED

A. Undisputed Propositions Of Fact And Law

1. In her motion, Knoller argued that both the Count One murder charge and the Count Two involuntary manslaughter charge required for conviction that the jury find defendant Knoller had committed the same intentional act that resulted in the death of Ms. Whipple. Knoller contended that the involuntary manslaughter charge was thus a lesser-included offense of the murder charge. The prosecution has now conceded that the murder charge in this case "necessarily includes involuntary manslaughter." (Response at 8)

2. The prosecution has cited and relied on the California Supreme Court's decision in People v. Pearson (1986) 42 Cal.3d 351, 355, which notes that "this court has long held that multiple convictions may *not* be based on necessarily included offenses." Id. at 355. (emphasis in original).

3. The giving of CALJIC 17.03 would have ensured that the jury did not convict of both the greater and lesser offense. It states in relevant part: "In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find [him] [her] not guilty of the other[.] The court cannot accept any verdict of guilty as to any lesser crime, unless you unanimously find and return a signed verdict form that defendant is not guilty as to the greater crime."

4. CALJIC 17.03 must be given sua sponte in a case such as this "where two or more counts are based on the same criminal act and the defendant is charged under alternate theories, there having been but one crime committed." The prosecution has relied on People v. Black

(1990) 222 Cal.App.3d 523, in its response, which holds that when charges of a greater and lesser-included offense rest on a single "act or transaction, the trial court ha[s] a sua sponte duty to give the jury CALJIC No. 17.03." Id. at 525. (Obligation to instruct on 17.03 included within trial court's "duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. . . .")

5. CALJIC 17.03 was not given at the time the jury was instructed by the Court. Rather, the jury was given an instruction that expressly permitted jurors to return guilty verdicts on both Counts One and Two, which they did.

6. The prosecution does not dispute that under Penal Code § 1161,[12] this Court had the power not to accept the dual verdicts on Counts One and Two.

7. The prosecution has expressly conceded that "[t]he two verdicts cannot stand. . . ." (Response at 12), and it is thus established that Knoller's dual convictions of a greater and lesser-included offense on Counts One and Two are illegal.

B. The Court Committed Error In Failing To Instruct On CALJIC 17.03 And In Accepting The Dual Verdicts Of Murder And Manslaughter

There can be no doubt that this Court erred in failing to give an instruction requiring the jury to chose between manslaughter and murder at the time it charged the jury. CALJIC 17.03 expressly informs the jury that when a greater and lesser-included offense are charged in the alternative in separate counts, "[i]n order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find [him] [her] not guilty of the other[.]" Black, cited by the prosecution, holds that this Court was under a legal

[12] "Section 1161 provides in pertinent part: 'When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if after the reconsideration, they return the verdict, it must be entered. . . . .'" Fields, 13 Cal.4th at 310.

duty to give CALJIC 17.03 in this case regardless of whether it was requested by either party. 222 Cal.App.3d at 525. The state's assertion that "[e]ven if Defendant Knoller had requested such an instruction, there is no such authority to support it" (Response at 7), thus is sheer nonsense.

Lacking the mandated teaching of CALJIC 17.03, the jury improperly returned a verdict of guilty on the manslaughter charge on March 20th without returning a verdict of not guilty on the murder charge. People v.Fields, 13 Cal.4th 289, 310. ("As our opinion today makes clear, under Kurtzman, when the jury returns a verdict on the lesser included offense, it must also return a corresponding verdict of acquittal on the greater offense. . . . If, contrary to Kurtzman, the jury renders only a verdict of conviction on the lesser included offense, without a corresponding verdict of acquittal on the greater offense, its verdict of conviction is incomplete 'under the law.'"). Under Penal Code § 1161, this Court erred at that time in accepting the verdict on Count Two instead of informing the jury that they had to also return a verdict of "not guilty" on Count One. Likewise, the following day, the Court should have refused to accept the dual verdicts on the greater and lesser offenses, instead requiring the jury to select between the two alternatives before it was dismissed.

The state has agreed that the "two verdicts cannot stand." (Response at 12). The remaining issue is which of the two must fall.

C. The Murder Conviction Must Be Set Aside

The only contention of the prosecution on this issue that must be taken seriously is that of harmless error: that while the dual verdicts are illegal, the greater should stand and the lesser fall. In making that argument, the prosecution relies on People v. Moran (1975) 1 Cal. 3d 755, 763, which states: "If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser must be reversed." Accord, People v. Wilson (1975) 50 Cal.App.3d 811, 815-816. (Response at 8)

There are two glaring problems with relying on Moran and Wilson to sustain the Count One murder conviction. In 1975, when both cases were decided, the obligation to instruct the jury

to choose between the greater and lesser-included offenses did not exist in California; rather, it was created by the Stone-Kurtzman-Fields troika of case law[13] to remedy the deficiencies of the Moran rule. See Kurtzman, 46 Cal.3d at 333 (citing Moran as example of lack of clarity in California law on what verdict jury should return). Thus neither Moran nor Wilson in any way assists this Court in assessing the impact of the instructional error herein at issue.

Secondly, Moran only operates where "the evidence supports the verdict as to a greater offense. . . ." The evidence here on the murder charge is, if not plainly insufficient, of the most tenuous nature. As Knoller has argued, it is fair to infer that the initial verdict of manslaughter represented the preference of some or most jurors, who were willing to vote for murder and manslaughter as long as both alternatives were available, but, if forced to make the selection that the law required, would have stayed with their original choice. Had jurors been properly instructed, it is likely they would not have returned a verdict of murder. The Count One murder conviction must be set aside.

VIII. DEFENSE COUNSEL'S INEFFECTIVENESS DEPRIVED MS. KNOLLER OF HER SIXTH AMENDMENT RIGHT TO COMPETENT REPRESENTATION

Throughout its brief, the prosecution has suggested that various objections were waived by defense counsel. In every instance, Knoller has responded that the objection was not waived, but if it was, the forfeiture amounted to a Sixth Amendment violation. In every case, there was no competent strategic reason for counsel's failure to preserve the issue properly because in every case she clearly *attempted* to do so—e.g., to seek exclusion or admission of evidence.

To establish that she was deprived of the effective assistance of counsel, a defendant must

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[13] Stone v. Superior Court (1982) 31 Cal.3d 503, 517; People v. Kurtzman (1988) 46 Cal.3d 322, 330; People v. Fields (1996) 13 Cal.4th 289, 309.

show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. People v. Ledesma (1987) 43 Cal.3d 171, 215-218. A "reasonable probability," however, does not require a showing that counsel's conduct more likely than not altered the outcome in the case, but simply "a probability sufficient to undermine confidence in the outcome." In re Cordero (1988) 46 Cal.3d 161, 180 (quoting Strickland v. Washington (1984) 466 U.S. 668, 693-4).

In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny and assess the reasonableness of counsel's acts or omissions as they stood at the time that counsel acted or failed to act. Ledesma, 43 Cal. 3d at 216. "However, 'deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. "[D]eference is not abdication" [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Cordero, 46 Cal.3d at 180 (quoting Ledesma, 43 Cal.3d at 216). Thus, under Strickland, decisions may not be viewed as "tactical," and hence do not merit deference, when they are the product of counsel's ignorance or lack of preparation. United States v. Gray (3rd Cir. 1989) 878 F.2d 702 , 711; Wade v. Armontrout (8th Cir. 1986) 798 F.2d 304, 307.

Criminal defense attorneys have a duty to act as active advocates on behalf of their clients. People v. Pope (1979) 23 Cal.3d 412, 424, citing United States v. DeCoster (D.C. Cir. 1973) 487 F.2d 1197. This duty includes the investigation of relevant questions of law and the submission of motions aimed at suppressing inadmissible evidence. Pope, 23 Cal. 3d at 425; see also, e.g., People v. Nation (1980) 26 Cal. 3d 169 (counsel's failure to challenge the admissibility of pretrial photographic identifications of the defendant deprived the defendant of effective assistance of counsel requiring reversal); People v. Zimmerman (1980) 102 Cal.App.3d 647 (counsel's failure

to object to impeachment evidence was ineffective assistance requiring reversal); People v. Sundlee (1977) 70 Cal.App.3d 477 (failure to object to tape recordings and transcripts as inadmissible hearsay was ineffective assistance requiring reversal); People v. Dorsey (1975) 46 Cal.App.3d 706 (failure to assert applicable privilege was ineffective assistance requiring reversal).

Should this Court decline to reach the merits of various issues raised above because of some failure on counsel's part properly to preserve the issues, Ms. Ruiz's conduct amounted to a deprivation of Ms. Knoller's Sixth Amendment right to the effective assistance of counsel. Thus, even if the prosecution's waiver arguments are credited, a new trial is in order.

CONCLUSION

For the reasons stated, this Court should vacate Ms. Knoller's murder conviction and order a new trial.

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Respectfully submitted,
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