IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	) **Third District**
Plaintiff and Respondent,	) **No. C068893**
	) **Shasta County**
	) **No. 05F8876**
vs.	)
	)
JOANNA LORRAINE PETERSON,	)
	)
Defendant and Appellant.	)
_____	)

APPEAL FROM THE SHASTA COUNTY SUPERIOR COURT

HONORABLE BRADLEY L. BOECKMAN, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

Law Office Of A.M. Weisman
P.O. Box 4236
Diamond Bar, CA 91765-0236
Telephone: (909) 465-6603
State Bar No. 107328
Attorney For Appellant
Joanna Lorraine Peterson
By Appointment of the Court of Appeal
Under The CCAP Independent Case System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	) **Third District**
Plaintiff and Respondent,	) **No. C068893**
	) **Shasta County**
	) **No. 05F8876**
vs.	)
	)
JOANNA LORRAINE PETERSON,	)
	)
Defendant and Appellant.	)
	)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment rendered after a guilty plea.[1] Appellant has applied for and been granted a timely certificate of probable cause, permitting an appellate challenge to the validity of the plea. (See Pen. Code, §1237.5; *People v. Johnson* (2009) 47 Cal.4th 668, 676.)

STATEMENT OF THE CASE

The information filed March 9, 2006, charged appellant and co-defendant Varner with first-degree murder, second-degree robbery, carjacking, kidnapping, kidnapping for robbery,

[1] Unless otherwise specified, all statutory references are to the Penal Code.

and kidnapping for carjacking. The information alleged five felony-murder special circumstances. (1CT 21-24.)[2]

On November 7, 2008, appellant entered into a written plea agreement with the prosecution. Pursuant to the agreement, appellant pled guilty to one count of second-degree murder, carrying a sentence of 15 years to life in prison. In exchange, appellant was required to testify against Varner at trial. (1CT 78-88.)

Appellant testified against Varner during the prosecution case and again during the defense case of the guilt phase of Varner's capital trial. (1RT 175 to 2RT 364; 2RT 375-397.) A jury convicted Varner of first-degree murder and other crimes and found true special circumstance allegations. The jurors returned a death-sentence verdict. (1CT 246; 2RT 416; 2AUGCT 304-339, 398.)

On April 22, 2010, the prosecution filed a Request For Findings Pursuant To The Negotiated Plea Agreement. (1CT 98-111.)

On April 23, 2010, the Court held a hearing to discuss whether it was appropriate for the trial judge to decide whether appellant testified truthfully during Varner's trial and whether appellant had committed a material breach of her plea agreement. (1CT 112; 2RT 400-407.)

---

[2] "CT" refers to the clerk's transcript. "RT" refers to the reporter's transcript. "AUGCT" refers to the augmented clerk's transcript. "AUGRT" refers to the augmented reporter's transcript.

On June 4, 2010, the prosecutor filed a Petition For Withdrawal Of The Negotiated Plea Agreement. (1CT 117.)

On June 7, 2010, the prosecutor filed an addendum to the Petition For Withdrawal Of The Negotiated Plea Agreement, attaching a copy of the transcript of appellant's November 2008, statement to the prosecution investigator and trial prosecutor. (1CT 121-173.)

On August 27, 2010, the Court granted the prosecution motion to set aside the plea agreement. The Court rescinded appellant's guilty plea. (1CT 178; 2RT 425.)

On April 5, 2011, defense counsel filed a statement seeking to disqualify Judge Gallagher pursuant to Code of Civil Procedure section 170.3. (1CT 186.)

On April 6, 2010, Judge Gallagher signed an order pursuant to Code of Civil Procedure section 170.3, subdivision (c)(3), consenting to his disqualification from presiding over this matter. (1CT 241.)

On May 4, 2011, defense counsel filed a motion to vacate the August 27, 2010, ruling by Judge Gallagher and to reinstate the plea agreement of November 7, 2008. (1CT 245.)

On May 10, 2011, the prosecution filed opposition to the motion to vacate Judge Gallagher's order of August 27, 2010. (1CT 252.)

On May 12, 2011, defense counsel filed a response to the prosecution response to the motion to vacate Judge Gallagher's ruling. (1CT 268.)

On May 16, 2011, Judge Boeckman heard arguments on the motion to vacate and continued the matter for further review. (2CT 308; 2RT 428-440.)

On June 6, 2011, the Court heard further argument and denied the defense motion to vacate. (2RT 441-454; 2CT 309.)

On July 27, 2011, appellant entered into a new plea agreement. Appellant pled guilty to one count of second-degree murder and one count of second-degree robbery. The Court sentenced appellant to a mitigated determinate term of 2 years for the robbery count and a consecutive indeterminate term of 15 years to life for the murder count. The Court awarded 2069 days of actual pre-sentencing custody credit (Pen. Code, §2933.2), imposed a restitution fine of $3,400 (Pen. Code, §1202.4), imposed and stayed a parole revocation fine of $3,400 (Pen. Code, §1202.45), imposed a $60 criminal conviction fee (Gov. Code, §70373), imposed a court security fee of $80 (Pen. Code, §1465.8, subd.(a)(1)), ordered appellant to pay $1,437.39 to the State Victim Compensation Fund as a joint and several obligation with the co-defendant, reserved jurisdiction to order future victim restitution, and ordered appellant to provide a DNA sample and other identifying samples. (2CT 313-319, 322-326; 2RT 457-466.)

On July 28, 2011, appellant filed a timely Notice of Appeal and Application For Certificate of Probable Cause. (2CT 327-329.) On July 29, 2011, the Court granted the application for a Certificate of Probable Cause. (2CT 329.)

STATEMENT OF FACTS

Appellant stands convicted by guilty plea. Evidence from the Varner capital trial constituted the basis for the litigation of the prosecution's motion to rescind the original plea agreement that is the focus of this appeal. The record has been augmented with pertinent portions of the Varner capital trial record that are essential to present a complete record for review of the issues in this appeal.

APPELLANT'S NOVEMBER 6, 2008 STATEMENT

The prosecutor and the prosecution investigator conducted a recorded interview of appellant on November 6, 2008. This recorded statement became the basis of the plea agreement. (1CT 79.)

Appellant said that she encountered Varner, who introduced himself as "Kevin (1CT 127)[3]," when Varner entered a motel room via the bathroom window. Peterson was in the motel room socializing with friends. (1CT 124, 132.) Varner wore a gold jumpsuit and black gloves. (1CT 138-140.) Peterson and Varner left together to procure methamphetamine. (1CT 124, 133.)

Varner had a fight with an acquaintance on the street. (1CT 124.) During the fight, Peterson saw Varner pick up a knife dropped by the person that he fought. (1CT 130-131.)

---

[3] Peterson said during this interview that Varner was known on the street as "Lucifer" or "Shady." (1CT 128.) There was testimony during the Varner guilt trial that Varner was known as Lucifer, Shadow, and Shady. (3AUGRT 619, 622, 723, 730-732, 736, 738, 739, 799.)

Varner and Peterson arrived at a State Street apartment complex that was the residence of the drug vendor. The drug vendor was not there. They decided to wait in the apartment parking lot. (1CT 124, 131, 132, 134) Ms. Mariedth drove up and began taking groceries to her apartment. (1CT 124, 131, 134.) Varner asked Ms. Mariedth for a ride to the Shasta Lake area. Ms. Mariedth said that she would give them a ride after she finished putting her groceries away. (1CT 124, 135-136, 141.) Peterson had seen Ms. Mariedth previously when Peterson formerly lived in the area. Peterson thought that Ms. Mariedth did not recognize Peterson that evening. (1CT 136-138.) Peterson denied that she and Varner entered Ms. Mariedth's home when Ms. Mariedth was there. (1CT 141.) Peterson could not explain why Ms. Mariedth's groceries were strewn all over the floor when police arrived. (1CT 142.)

Shortly after Ms. Mariedth drove off with them, Varner said that he had a gun[4] and a knife and threatened to kill Ms. Mariedth unless she did as he said. (1CT 124, 143-144.) Peterson was surprised. (1CT 124.) Varner demanded money from Ms. Mariedth. Peterson used that money to purchase cigarettes at a Circle K market. (1CT 124, 145-146.) Varner later used Ms. Mariedth's money to buy food at an In-N-Out Burger restaurant. (1CT 124, 149.) Peterson claimed that Varner made Ms. Mariedth eat some of the In-N-Out Burger food. (1CT 150.)

---

[4] Peterson said she never saw a gun on Varner that night. (1CT 139.)

At Varner's direction, Ms. Mariedth drove to the Whiskeytown National Cemetery. (1CT 124-125.) En route, Peterson asked Varner if he was going to let Ms. Mariedth go. Peterson at first said that Varner did not respond. She later said that Varner said no, because Ms. Mariedth could identify them to the police. (1CT 125, 146-147.) On arrival, Peterson went off alone to relieve herself behind a bush. (1CT 125.) Varner took the car keys, left Ms. Mariedth sitting inside the car, and talked to Peterson alone outside. Varner said that he intended to kill Ms. Mariedth to prevent her from reporting them to the police. (1CT 125.) Peterson claimed that she told Varner that she wanted nothing to do with that and refused to assist him. (1CT 125, 153.)

They re-entered the car. (1CT 125.) Peterson claimed that she curled into a ball in the back seat. (1CT 153.) Varner asked Ms. Mariedth if her back head-rest was removable and if she had any plastic bags. (1CT 125, 153.) Ms. Mariedth said no in response to both questions. (1CT 125, 153.) Varner found a plastic bag in the back seat. (1CT 125, 153-154.) Varner told Ms. Mariedth that she needed to die. (1CT 125.) Ms. Mariedth started hyperventilating[5], appeared frightened, said, "I know," and pleaded for Jesus' help. Ms. Mariedth pleaded for them to take the car and let her go. Varner refused.

[5] Ms. Mariedth's brother testified that Ms. Mariedth suffered from asthma and diabetes. (3AUGRT 581.)

Ms. Mariedth scratched Varner's face.[6] Varner hit Ms. Mariedth in the face a couple of times. (1CT 125, 151-152, 154, 158.) Peterson claimed that she was afraid. (1CT 125.)

Varner choked Ms. Mariedth from behind and put the plastic bag over her head. Ms. Mariedth kicked, screamed, and fought with Varner. (1CT 125, 154-155.) Peterson estimated that the struggle lasted between 20 and 25 minutes. (1CT 155-156.)

After Ms. Mariedth died, Varner at knifepoint forced Peterson to help him remove the body from the car and drag it away. (1CT 125, 155, 156-157.) They rolled the body down a ditch and covered it with bushes and a blanket from the car. (1CT 125, 158.) Varner put the bag used to suffocate Ms. Mariedth into the trunk. (1CT 159.)

Peterson drove when they left. Varner did not know how to drive. (1CT 125, 159.) They stopped at a Valero gas station, where Varner obtained matches. (1CT 160, 161.) Varner emptied trash from the car into a parking lot while an employee watched. (1CT 160, 161.) They returned to the Travel Inn. Varner took a CD player from the room of their acquaintances Casey and Jasmine, who were sleeping. (1CT 125, 160.) While driving around, they encountered Peterson's friend Matthew "Papa Bear" Miller and gave him a ride to buy gas. Varner gave Miller change from the car console to assist with the gas purchase. (1CT 125, 162-163.) They picked up

[6] Officers later observed a scratch on Varner's face after his arrest. (2AUGRT 331, 333.)

Sandra "Mama Bear" Miller and a gas container before purchasing gas at an AM/PM station. (1CT 125, 163-164.) They went shopping at a Wal-Mart store, where Peterson broke a $100 bill. (1CT 125-126, 164.)

They dropped off the Millers at a gas station. (1CT 126, 165.) Varner and Peterson went to find a drug vendor. (1CT 165.)

Varner then insisted on driving, lost control of the car, and crashed into a pole. The car slid into a ditch. (1CT 126, 165.) Varner and Peterson walked to the home of Peterson's friend Jennifer. They knocked on the door and requested assistance. Jennifer refused, saying it was too early in the morning. (1CT 126, 165.) They walked off. After they walked a short distance, Jennifer drove up and gave them a ride. (1CT 126, 165.)

Varner took Peterson to a motel room full of Mexicans. Varner spoke to the men in Spanish. (1CT 126, 166.) Varner was going to use Ms. Mariedth's checks to get a motel room, where he would clean up. (1CT 166.) Peterson did not understand what was said, felt uncomfortable, and walked away. Varner came after her and accompanied her to a Taco Bell restaurant, where they had a meal. (1CT 126, 166.)

Varner and Peterson hired a cab that took them back to the victim's apartment. (1CT 126.) They used the victim's keys to enter her home. (1CT 126.) They saw a neighbor sitting outside and told him that Peterson was the victim's niece. (1CT 126.) Varner noticed that his gloves were missing and used latex gloves that he found in the apartment. (1CT 167.) Varner

went through Ms. Mariedth's jewelry. (1CT 168.) About 10 minutes after they arrived, the police came to the apartment. (1CT 126, 169.) Varner barricaded the front door. (1CT 126-127.)[7] Varner exited via the bedroom window and jumped a fence. (1CT 127, 170.) Peterson left via the back window a short time later. (1CT 127.) An officer stopped and arrested Peterson. (1CT 127.)

APPELLANT'S JULY 7, 2009, STATEMENT

On July 7, 2009, at 8:15 p.m., the prosecutor and Detective Cogle re-interviewed appellant in the presence of then-counsel-of-record Babbits. (2AUGCT 444.) At that point, jury selection was underway for the Varner capital trial guilt phase. The evidentiary presentation during the guilt trial had not yet begun. (1AUGCT 41.) The prosecutor and Detective Cogle told appellant to be truthful in her trial testimony. (2AUGCT 444, 451-454.) Neither the prosecutor nor Detective Cogle at any time told appellant about any DNA test results.

Appellant said her drug of choice was methamphetamine. (2AUGCT 445.) Appellant said she did not remember using methamphetamine within 24 hours before November 27, 2005. (2AUGCT 445.) Appellant and Varner were searching for drugs that day. (2AUGCT 445.) Appellant had seen Varner before but did not socialize with him before that night. (2AUGCT 445-446.) Appellant said she cut her hand about a week before the

[7] Sergeant Bokavich found furniture blocking the front door. (1AUGRT 19.)

homicide when she tossed an open knife into the air and it sliced her hand on the way down. (2AUGCT 446.)

The prosecutor asked appellant if she ever wore the white gloves that were found in Ms. Mariedth's car. Appellant said she never wore them but moved them off the back seat to the floor behind the driver's seat when she entered the car and sat down. (2AUGCT 447.)

Appellant said that Varner took rings from Ms. Mariedth's home after the homicide. She denied that Varner removed rings from Ms. Mariedth's body. (2AUGCT 448.)[8]

Appellant denied using Ms. Mariedth's purse that night. She said the purse became entangled with her backpack, so she took it with her when she fled through the back window of Ms. Mariedth's apartment on the morning of November 27, 2005. (2AUGCT 448.)

Appellant said they encountered the Mr. Miller and gave him a ride to pick up his wife. (2AUGCT 450.)

Appellant discussed her juvenile wardship adjudication for assaulting a girl by a bus station. (2AUGCT 450.)

Appellant said that her biological father sent her some money and provided his telephone number for investigators to contact him. (2AUGCT 452.)

---

[8] David Mariedth testified that his sister always wore their late father's wedding band and other rings. He recognized four of the rings that his sister habitually wore when Officer Cogle showed him rings that were found in Varner's possession when arrested. (3AUGRT 583-586; 1AUGRT 29, 36, 72, 191-193; 2AUGRT 284-285; People's Exhibits 107-113.)

Appellant said that she used Ms. Mariedth's wallet and money that night. However, appellant said that the $100 bill that she used was her own money that she had from selling drugs a couple of days earlier. (2AUGCT 452.)

APPELLANT'S TESTIMONY IN THE VARNER TRIAL

Appellant testified that she was socializing in a friend's room at the Travel Inn Motel on November 26, 2005. (1RT 176.) Varner entered through a bathroom window, because he was not permitted on the premises. (1RT 176, 177.) Appellant had previously seen Varner in passing but did not know him. (1RT 176-177, 222.)[9] Varner told appellant that his name was Kevin. (1RT 222; 2RT 337.) They had never previously had a conversation. (1RT 177.) After about 45 minutes, Varner and appellant left together to procure methamphetamine. (1RT 177-178.) In downtown Redding, Varner had a fist fight with an acquaintance called Brandon. (1RT 178, 179, 249.) A knife fell out of Brandon's pocket during the fight. Varner took the knife with him. (1RT 179, 267.)

Varner and appellant went to the State Street Apartments to find a drug dealer. (1RT 179-180.) The person they sought was not there. (1RT 180.) They sat waiting in the apartment parking lot. (1RT 180.) Jeannette Mariedth drove up and parked in her parking spot. (1RT 181.) Appellant had previously lived in the neighborhood. Appellant had helped Ms.

---

[9] Gene Pringle testified that Varner and Peterson knew each other for a month or two before the homicide. They came to his apartment together once before the homicide. (3AUGRT 610.)

Mariedth unload groceries on one occasion before the night of the homicide. (1RT 183, 252-254.)[10] Appellant did not offer to assist Ms. Mariedth with her groceries on this occasion. (1RT 183-184.) Appellant testified that Ms. Mariedth did not recognize appellant on that evening. (1RT 256.)

While Ms. Mariedth was unloading groceries, Varner asked for a ride to Shasta Lake. Ms. Mariedth hesitated and said she would give them a ride after she finished unloading her groceries. (1RT 182-183, 184, 257.)

About 10 minutes after they entered the car, when they were on the road with no other cars nearby, Varner told Ms. Mariedth that he had a gun and a knife and would kill her if she did not cooperate. (1RT 184, 186, 262.) Ms. Mariedth appeared frightened by Varner's statement. (1RT 185.) Varner directed Ms. Mariedth to drive to a Circle K Market and demanded money from Ms. Mariedth. (1RT 185, 186.) Appellant used that money to buy cigarettes for herself and Varner. (1RT 187-188, 264-265.) Varner did not threaten appellant at the Circle K. (1RT 265.) Appellant did not say anything to anyone inside the Circle K Market about the situation in the car. (1RT 265-266.)

At Varner's direction, Ms. Mariedth drove to Palo Cedro. (1RT 189, 266.) Nothing was open in Palo Cedro. They

---

[10] Appellant testified that she called Ms. Mariedth's cell phone several times to request a ride but hung up without leaving a message. (1RT 255-256.) She talked to Ms. Mariedth a total of once before the night of the homicide. (1RT 256.) Appellant testified that she falsely told police that she had called Ms. Mariedth four or five times. (1RT 256.)

returned to Redding. (1RT 189, 268-269.) They bought food using the drive-through window of an In-N-Out Burger restaurant. (1RT 189-190, 270-271.) Varner told Ms. Mariedth what food to order, to pay for the food, and not to say anything. (1RT 190, 271.)

They drove to Whiskeytown at Varner's direction. Varner said that he needed to visit his little brother's grave. (1RT 190-191, 271.) During the drive to Whiskeytown, appellant asked Varner if he was going to let Ms. Mariedth go. Varner said no, not at the time. Appellant thought that they would let Ms. Mariedth go eventually. (1RT 191.)

Varner directed Ms. Mariedth to park in a dark, remote area by a water ditch. (1RT 192-193.) Peterson relieved herself outside near a bush. (1RT 193.) Outside the car, Varner told Peterson that they needed to kill Ms. Mariedth. Peterson refused to participate in killing Ms. Mariedth. Varner insisted that it was necessary to kill Ms. Mariedth, because she could identify them to the police. (1RT 193-194, 223.)

They re-entered the car. Appellant sat in the back passenger seat. Varner sat in the front passenger seat. (1RT 194.) Varner asked Ms. Mariedth if the head-rest came off her seat. Ms. Mariedth said no. (1RT 194-195.) Varner asked if there was a plastic bag in the back seat. Appellant lied and said no. (1RT 195.) Varner told Ms. Mariedth that she was going to die. Ms. Mariedth pleaded with Varner to spare her life. Ms. Mariedth pleaded for Jesus. Ms. Mariedth offered to

let Varner take her car and anything else that he wanted. (1RT 195.)

Varner climbed into the back seat, found a plastic bag on the floor, and put the plastic bag over Ms. Mariedth's head. (1RT 195-196.) Appellant curled into a ball in the back seat. (1RT 195.) Ms. Mariedth struggled. She kicked and fought for air. (1RT 196, 197, 198.) Ms. Mariedth screamed for Jesus and God to help her. (1RT 197.) Varner held the bag over Ms. Mariedth's head for about 20 minutes. (1RT 196.) Varner had his hands around Ms. Mariedth's mouth. (1RT 196.) Varner also put his hands around Ms. Mariedth's throat. (1RT 196, 197.) Varner punched Ms. Mariedth in the face three or four times. (1RT 197, 198.) Appellant testified that she was freaked-out in the back seat during Varner's attack on Ms. Mariedth. (1RT 197.) Appellant did nothing to try to help or save Ms. Mariedth, because she was scared and did not know what to do. (1RT 198, 200, 223.)

After Ms. Mariedth stopped moving, Varner and appellant got out of the car. (1RT 198.) Ms. Mariedth, a large woman, was too big for Varner to move by himself. (1RT 198-199.)

Varner told appellant to help him. Appellant pushed and Varner pulled to remove the body from the car. Varner rolled the body down an embankment into a ditch. The bag came off when the body moved out of the car. Appellant put the plastic bag into the car trunk. (1RT 199-200, 212.) Ms. Mariedth's shirt came off when Varner pushed her down the ditch. Appellant put the shirt into the car. (1RT 200.)

Appellant denied touching the bag during the struggle or at any time when it was on Ms. Mariedth's head. (1RT 200, 223.)

Appellant denied punching or hitting Ms. Mariedth. (1RT 200, 223; 2RT 397.)

Appellant denied putting her hands or anything else around Ms. Mariedth's throat or holding her down. (1RT 200, 223.)

Appellant during cross-examination said that her only participation in Ms. Mariedth's death was to assist Varner in moving the body. (2RT 330.)

Appellant drove the car when they left the crime scene. Varner did not know how to drive. (1RT 200.) At a gas station, Varner got matches and tossed garbage from the car onto the ground. (1RT 201.)

They returned to the Travel Inn. Varner took a CD player and some CD's from the room that they had previously visited. The room's occupants were asleep. (1RT 202.) Appellant believed that Varner would hurt her if she told anybody what happened. (1RT 202.)

Appellant and Varner were driving around when they ran into appellant's friend "Papa Bear" Miller around 1:30 a.m. near Hinkle's Market. (1RT 202-203, 204.) They gave Papa Bear a ride to his van, which was parked under a railroad bridge. (1RT 203.) Papa Bear's wife "Mama Bear" joined them. They took a gas can to buy gas for Papa Bear's van. (1RT 203-204.) Appellant told the Millers that the car was hers. (1RT 204.) At

an AM/PM station, appellant gave Mr. Miller some change to help with his gas purchase. (1RT 204-205.) Appellant tried to use a $100 bill to buy coffee and soda, but the store would not break a $100 bill at that hour. (1RT 205.) Appellant testified that the $100 bill was the proceeds from a sale of drugs. (1RT 205.) Appellant denied that she was using Ms. Mariedth's money at the time. (1RT 206.) The store employee permitted them to drink the coffee that they had poured, because it could not be put back. (1RT 206.)

They went shopping at Wal-Mart. (1RT 206-208.) Appellant used the $100 bill to pay for purchases at the Wal-Mart store. (1RT 208.) Appellant went through the Wal-Mart checkout once with Sandy Miller and once with the men afterwards. (1RT 209.) They dropped the Millers at a gas station and then went to search for someone to sell them methamphetamine. (1RT 209-210.)

Varner decided that he wanted to drive. (1RT 210.) Varner drove the car into a pole. It slid into a ditch. Varner extricated appellant from the car after her seatbelt would not unbuckle. (1RT 211.) Varner and appellant abandoned the car. (1RT 211-212.) Appellant began using Ms. Mariedth's purse and wallet then. (1RT 212.)

Varner took appellant to the Spanish Arms on Echo Street. (2RT 304, 305.) Nobody there wanted to help them. (2RT 304.)

Varner and appellant went to the home of appellant's friend Jennifer to ask for a ride to the motel area. (1RT 212.)

Jennifer at first refused but ultimately drove them to the motel area of downtown Redding around 6 a.m. (1RT 213; 2RT 305.) Varner and appellant walked to several downtown motels and knocked on doors but nobody answered. (1RT 213.) Appellant and Varner went to a Taco Bell, where they ate tacos. (1RT 213-214,)

Appellant and Varner took a cab from Taco Bell to South City Park. (1RT 214.) They walked to Ms. Mariedth's apartment. (1RT 214.) Appellant told a neighbor kid that was near the apartment that it was her aunt's apartment and that her aunt did not mind her being there. (1RT 214-215; 2RT 276.)

Appellant testified that she vomited in the bathroom of Ms. Mariedth's apartment. (1RT 215; 2RT 277.) Varner went through Ms. Mariedth's jewelry box and took some rings. (1RT 215-216; 2RT 278, 340.) Varner changed clothes at Ms. Mariedth's apartment. (2RT 340, 344.) The police arrived five or 10 minutes after Varner and appellant arrived at the apartment. (1RT 215; 2RT 278.) Varner fled out a back window. (1RT 216; 2RT 278.) Appellant fled out the back window shortly after Varner left. (1RT 216; 2RT 279.)

Appellant admitted during defense-case testimony that she had previously lied about which pants she wore on the night of the homicide. She denied that she lied for fear there was blood on the knees of her pants. Appellant previously said she wore black pants. She actually wore green drawstring pants during the homicide and later changed into black pants at

Ms. Mariedth's apartment. Appellant said that she did not know why she lied about which pants she wore. Appellant denied that she lied for fear there was blood on the pants that she wore. (2RT 385, 387, 391-392, 395.) Neither of these garments tested positive for blood stains. (2AUGRT 401, 410; 2AUGCT 421-422.)

The police stopped and arrested Peterson on the street shortly after Peterson left Ms. Mariedth's apartment. (1RT 216-217; 2RT 279, 280.)

Appellant testified that she lied when she first talked to police. Appellant was scared to tell the truth and to put herself at the homicide scene. (1RT 218.) Appellant initially denied that she was ever inside Ms. Mariedth's car. (1RT 217.) Appellant initially told police that she spent that night at her friend Cody's home. (1RT 217; 2RT 283, 288, 290.) Appellant denied that she was in the traffic collision in Ms. Mariedth's car. (1RT 217.) Appellant told the police that she did not know where Ms. Mariedth was. (1RT 218.) Appellant at first told police that she did not see Ms. Mariedth the night before. (2RT 281.) Appellant lied when she told police that she saw Ms. Mariedth three times before and talked to her five times on the telephone. (2RT 281-282.) Appellant told police that she did not tell a local boy that Ms. Mariedth was her aunt. (2RT 288.) Appellant lied when she told police that she did not know how "Kevin" got the door open and denied that she had the keys to Ms. Mariedth's apartment. (2RT 288.)

Appellant falsely told police that she had been walking with Varner but decided to go home to bed. Varner showed up two or three hours later with a white car that he said belonged to his uncle. (2RT 289, 296.) Appellant lied when she told police that she had no knowledge of any encounter that Varner may have had with Ms. Mariedth until after the car was wrecked. (2RT 289-290.)

The police told appellant that Varner was in custody and that Varner said they wrecked the car that morning. Appellant cried and rocked back and forth in her chair. (2RT 290.) Appellant asked the police to permit her to see Varner. (2RT 290.)

Appellant gave police a detailed description of drug dealer "Butch," who lived above Ms. Mariedth's apartment. (2RT 290-291.) However, appellant had never seen Butch. (2RT 291.) People had described Butch's unique characteristics to appellant. He had a shaved head and rams horn tattoos on his head. (2RT 332.)

Appellant lied to police when she pretended not to know that Varner had stolen property from Ms. Mariedth. (2RT 291.)

After the first round of questioning, police left appellant alone for a long time in the interrogation room. After returning, the police told appellant to tell the truth. They said that they knew that she lied. Appellant blurted out that Kevin killed Ms. Mariedth last night and cried hysterically. (2RT 292.) Appellant continued to lie in an effort to distance herself from the crime

when she told police that Kevin told her where the body was. (2RT 293, 296.)

Police told appellant that a cab driver identified appellant and Varner as fares that he drove from Taco Bell to South City Park that morning. Appellant then changed her story to fit the information that the police said they possessed. (2RT 286.)

Appellant ultimately led police to where the body was and showed police various places that she and Varner had gone that night. (1RT 218-219.) Appellant ultimately told the police what really happened. (1RT 219.)

Appellant testified that she understood that she could spend the rest of her life in prison, because she participated in the robbery and disposal of the body. (1RT 219; 2RT 330.) Appellant testified that she understood that she was considered an accomplice. (2RT 330-331.) Appellant testified that she understood the penalty for being an accomplice after-the-fact is 18 years to life. (2RT 331.) Appellant testified that it was explained to her that a robbery involving a death is felony-murder. It was explained to appellant that, because of her participation in the robbery and assisting in pulling the body out of the car, that appellant was equally responsible for what happened to the victim. (2RT 331.) Because of what was explained to her about the law, appellant pled guilty to second-degree murder and a prison term of 15 years to life. (2RT 332.)

Appellant testified that she understood that the plea agreement obligated her to testify truthfully. (1RT 220; 2RT 332, 335.)

Appellant testified that she understood that it was a judge's job to decide if she was being truthful in her testimony. (1RT 220.) Appellant testified that she could face harsher penalties if it was deemed that she was untruthful. (1RT 220.)

Appellant testified that, when she was 16 years old in November of 2004, appellant beat up another girl, bloodying the other girl's nose and giving her a black eye. Appellant threatened the girl involved in that incident not to talk to the police. Appellant was made a ward of the court as a result of that incident. (1RT 221.)

During the month before kidnapping, robbery, and murder of Ms. Mariedth, appellant was running amok while living on the streets. She sold methamphetamine. She used a lot of methamphetamine and marijuana. (1RT 221-222, 224-225, 251.)

Appellant denied that she and Varner used drugs during their 12 hours together that night. (1RT 222.)

Appellant testified that she obtained drugs from ex-boyfriend Israel Ray Conger. (1RT 236, 242-243.)[11]

Appellant before and during trial denied ever wearing the white cloth gloves that were found in the car. She was never pre-trial told that her DNA was found on the gloves. She may have moved the gloves around. (2RT 317, 326-327, 343, 392-393, 395-396; 2AUGCT 447.)

---

[11] Conger denied giving or selling drugs to appellant. He claimed that his disapproval of her drug use prompted him to terminate their relationship. (4AUGRT 951.)

AUGMENTED RECORD FROM THE VARNER TRIAL

The Court and prosecutor based the motion, litigation, and decision on the motion to rescind the plea agreement on evidence presented during the Varner guilt trial, along with the November 6, 2008, and July 7, 2009, statements by appellant and the litigation of the Varner motion for new trial. The record has been augmented to include this information, which is summarized here.

The prosecutor during opening statement said that Peterson "is no angel and I'm not ever asking to you [sic] see her that way." (4AUGRT 870, lines 9-10.)

The prosecutor during opening statement told the jurors to focus upon the fact that Varner admitted that he inflicted the fatal injuries and that he was motivated by a desire for the victim's car, money, and rings. (4AUGRT 871.) The autopsy results corroborated Varner's admissions. The victim died of suffocation and asphyxiation, as well as major blunt force trauma to her face. (4AUGRT 870-871.)

Early on the morning of November 27, 2005, Matthew "Papa Bear" Miller, a transient and friend of Peterson, was walking about downtown Redding in search of change so that he could buy gas for his van. Peterson happened to drive up in a small white car with Varner. (3AUGRT 678-680.) Peterson said that the car was hers. (3AUGRT 687.) Peterson gave Miller a ride to his van to pick up his wife and gas can. (3AUGRT 680.) Peterson drove the Millers to buy gas. She

contributed change from the car's console to the gas purchase. (3AUGRT 680, 706.) Peterson offered to buy additional gasoline and snacks for the Millers. However, she tried to pay the AM/PM clerk with a $100 bill. The clerk could not accept that form of payment. (3AUGRT 681, 707-708.) Peterson drove the Millers to Wal-Mart, where Peterson and Mrs. Miller made purchases to break the $100 bill. (3AUGRT 684-685, 710-711.) After shopping at Wal-Mart, Peterson and Varner told the Millers that they wanted to purchase drugs. They dropped the Millers off at a Valero gas station and said they would return. (3AUGRT 685-686, 688.) The Millers waited for a couple of hours, but Varner and Peterson never returned. The Millers decided to walk back across town to their van. (3AUGRT 691.) During their trek, the Millers serendipitously encountered officers impounding the white car that Peterson had been driving. (1AUGRT 45-46, 61; 3AUGRT 692.) Mr. Miller was arrested on outstanding warrants. (1AUGRT 64; 3AUGRT 693.)

The victim's car was found abandoned in Redding early on the morning of November 27, 2005. A bloody plastic bag was found in the trunk. (People's Exhibit 29; 1AUGRT 3-5, 43-50, 62-63.) The Millers asked police for their gasoline can for their van from inside the car trunk. Police found the bloody plastic bag used in the homicide when they opened the car trunk. (1AUGRT 46, 61-62.)

Peterson's fingerprints were found on the car's exterior. (2AUGRT 367, 374; People's Exhibit 24.) No latent fingerprints

matching the victim or Varner were found on the interior or exterior of the car. (2AUGRT 367, 374.)

Autopsy pathologist Dr. Comfort testified that the victim died of manual strangulation and suffocation by a plastic bag. Blunt force facial trauma contributed to her death. (2AUGRT 522.) Ms. Mariedth was not killed by kicking or stomping her throat. (2AUGRT 550.) Ms. Mariedth had injuries suggesting a beating by and struggle with the killer. (2AUGRT 524-530.) Shoulder abrasions suggested that the body was dragged across a rough surface. (2AUGRT 529-530.) The killer could have worn gloves. (2AUGRT 559.) There was evidence that Varner wore black gloves that night. (1CT 139; People's Exhibit 135.)

The victim's stomach was empty, indicating that she had not consumed any food for a number of hours before she died. (2AUGRT 530-531.)

Fingernail clippings were taken from Ms. Mariedth's body by pathologist Dr. Comfort. (2AUGRT 557.) No DNA from the right-hand fingernail clippings constituted a match or possible match to Varner or appellant. (2AUGRT 444-446, 455.) Peterson could not be excluded as a source of minor profile DNA on a clipping from a fingernail from the decedent's left hand. (2AUGRT 446, 455.) Varner could not be excluded as a source of DNA found on a separate clipping from the decedent's left hand. (2AUGRT 447, 455.)

The items retrieved from the car included a pair of white cloth gloves. One glove, item G-11, was found on the back passenger-side seat. The other glove, item G-34, was found on the back passenger-side floor. (2AUGRT 345.) No blood was found on the white gloves. (2AUGRT 411, 412, 480.)

DNA Analyst Kacer explained that she uses the terms major and minor DNA contributor to refer, respectively, to larger and smaller contributors to the DNA contained in a given sample. (2AUGRT 481.)

DNA analyst Kacer testified that Peterson's DNA profile matched the major DNA profile found in a swab taken from the outside one of the white cloth gloves, item G-11, which was found on the back seat of the decedent's car. Peterson's DNA profile could not be excluded as the source of DNA found on a swab taken from the inside that white cloth glove. (2AUGRT 448, 456.) Ms. Mariedth could not be excluded as the source of minor female DNA profiles found in swabs taken from the inside and outside of item G-11. (2AUGRT 448, 456.) A mix of DNA from at least six males was found in the swab taken from the outside of item G-11. (2AUGRT 448, 456.) A mix of DNA from at least four males was found in the swab taken from the inside of item G-11. (2AUGRT 449, 456.)

Peterson's DNA profile matched the major DNA profile found on a swab collected from the inside of item G-34. Peterson could not be excluded as the source of the major DNA profile found in a swab taken from the exterior of Item G-34. (2AUGRT 451-452, 456-457.) Ms. Mariedth could not be

excluded as a possible source of minor DNA profiles found in both swabs taken from item G-34. (2AUGRT 451, 452, 456, 457.) Autosomal DNA testing yielded DNA for one additional unidentified person for both swabs taken from item G-34. (2AUGRT 451, 452, 456, 457.) Male-only Y-STR DNA testing indicated a mix of DNA from at least four males for the swab taken from the outside of item G-34 and at least six males for the swab taken from the inside of item G-34. (2AUGRT 451, 452, 456, 457.)

DNA analyst Kacer never received or examined the white cloth gloves. She received and analyzed only swabs taken from the white cloth gloves. (2AUGRT 412, 413, 466.) The DNA obtained from the white cloth gloves was the result of contact with the gloves. (2AUGRT 480.) No blood was detected on either of the white gloves. (2AUGRT 411, 412, 480.)

When interrogated, Varner ultimately admitted that he suggested to Ms. Mariedth that he had a gun and suffocated, manually strangled, choked, and punched Ms. Mariedth and inflicted the fatal injuries. (People's Exhibits 126A, 126B, 127; 1AUGRT 198, 203; 2AUGCT 579, 581; 3AUGCT 601, 639, 640, 643, 648, 649, 652, 653, 654.) Varner ultimately admitted that he robbed and killed Ms. Mariedth, because he wanted her rings, her car, and her money. Varner wanted to buy methamphetamine and to get revenge on a man who hit Varner in the face. (People's Exhibit 126B; 2AUGCT 562; 3AUGCT 598-600, 613, 615, 643, 655, 656-660.)

Varner told detectives that he was when arrested wearing draw-string pants and a belt that Peterson wore during the homicide. Varner wore a gold sweatsuit during the homicide but later changed clothes on the street after fleeing from Ms. Mariedth's apartment. Peterson changed her pants when they were together at Ms. Mariedth's apartment. (People's Exhibits 126B, 127; 3AUGCT 592-594.)

Cab driver Tobin and Matthew Miller told police that Varner wore gold sweatpants and a gold sweatshirt with a hood on the morning of November 27, 2005. (3AUGRT 674, 694-695.) Tobin told police that Peterson wore black clothing. (3AUGRT 674.) Officer Cogle found gold sweatpants and a heavy jacket in the laundry room of Gene Pringle's apartment complex. (1AUGRT 76.)[12] Blood collected from the gold sweatpants matched Ms. Mariedth's DNA profile. (1AUGRT 454.)

Varner during his interrogation said that Peterson killed Ms. Mariedth by stomping her on the throat or kicking her in the throat and jumping on her. (3AUGCT 586, 640, 648-650; People's Exhibit 126B.) Pathologist Dr. Comfort testified that Ms. Mariedth was not killed by one kick or by being stomped on the throat. (2AUGRT 550.)

The victim's blood was found on the rear passenger side bumper of the victim's car. (2AUGRT 389, 393-394, 452, 457.)

---

[12] Varner visited Pringle's home that morning and left Ms. Mariedth's keys with Pringle. Pringle and his fiancée Margaret Nalley later

The blood found in the plastic bag from the trunk of the victim's car matched the victim's DNA profile. (2AUGRT 457.)

David Mariedth was notified that his sister's car was found abandoned. After determining that his sister had not reported to work and had not called her employer, David Mariedth reported his sister missing. (1AUGRT 5-6, 12, 49; 3AUGRT 582.) A short time later, David Mariedth and Redding Police Officers went to the victim's apartment to search for her. (3AUGRT 582.) At the apartment, they encountered a neighbor's son, Larry Bonds. Bonds told police that he saw a man and a woman enter the apartment a short time before police arrived. While police were there, Bonds pointed-out Peterson, who was walking away, as the woman that had entered the apartment. Peterson was apprehended. (1AUGRT 8-9, 14-15, 50-51, 57-58, 193; 2AUGRT 565-577.) When arrested, Peterson had the victim's purse in her backpack. (1AUGRT 16-17, 32, 240-248, 265-268.)

Peterson showed Corporal Langley various places involved in this case and led Langley to the body in Whiskeytown National Park Cemetery. 3AUGRT 626-634.)

Peterson had a scratch on her right hand, a small cut on her left palm, and a faded bruise on her upper right arm when arrested. (People's Exhibits 57, 58, 141, 142; 2AUGRT 240, 254, 256-257, 260.) Smears on Peterson's right palm and right wrist resembled dried blood. (1AUGRT 258.) A ring on

---

gave the keys to police after seeing Varner's picture on a television news report. (3AUGRT 604-605, 620-621.)

Peterson's left ring finger appeared tight-fitting, but Peterson's hands did not appear swollen. Peterson had a faded slight bruise on her upper left thigh. (1AUGRT 262, 264-265; People's Exhibit 143.)

Surveillance videos obtained from two Valero gas stations, an AM/PM market, and a Wal-Mart store corroborated statements regarding the travels of Peterson and Varner on the night and early morning of the homicide. (People's Exhibits 134, 135, 136, 137.)

After fleeing Ms. Mariedth's apartment but before his arrest, Varner visited the apartment of Gene Pringle and Margaret Nalley and left Ms. Mariedth's key ring with them. (3AUGRT 604-605, 609, 620-621.) Varner had blood on his shirt when he visited Pringle that morning. (3AUGRT 606, 607.)

Police found groceries strewn about in Ms. Mariedth's living room that morning. (1AUGRT 19, 39-41.) A knife and homemade sheath were found on a bed in the apartment. (1AUGRT 19, 21, 191.) The bedroom window was closed when police arrived but open after Peters and Varner left the apartment. (1AUGRT 7, 13, 15-16, 20-21.)

SUMMARY OF VARNER MOTION FOR NEW TRIAL LITIGATION

Varner filed a new trial motion on March 30, 2010. (2AUGCT 405.) One of the grounds proffered in the new trial motion was alleged perjury by Peterson. Varner argued that

Peterson gave untruthful testimony that was apparent to the Court and counsel but whose influence on the jurors could not be known. Varner alleged that the trial prosecutor during argument said that Peterson was a liar and murderer but that her testimony implicating Varner was corroborated. (2AUGCT 410, lines 1-9.)

The prosecution filed an opposition to the motion for new trial on April 7, 2010. (2AUGCT 418.) The prosecution asserted that Peterson admitted during trial that she lied about which pants she wore when the homicide occurred. However, that lie was not material and hence did not constitute perjury. No blood or other physical evidence linked to the homicide was found on the draw-string pants that Peterson was allegedly wearing at the time of the homicide nor on the black pants that Peterson wore when arrested. (2AUGCT 421-422.)

The parties during the hearing submitted on the pleadings. (4AUGRT 831.) The Court made a finding that the trial prosecutor did not knowingly suborn perjury. (4AUGRT 835.) The jurors were fully informed that Peterson lied about which pants she wore during the homicide. (4AUGRT 835.) The jurors were informed about the accomplice testimony rules. (4AUGRT 835.) "Thus, even assuming Peterson gave deceptive, misleading or dishonest testimony, which she did, in my estimation, that did not violate Miss Kafel's ethical obligation as a prosecutor and it does not justify a new trial." (4AUGRT 835-836.) The Court denied the motion for new trial on all proffered grounds. (4AUGRT 839.)

STATEMENT OF FACTS PERTINENT TO THE LITIGATION OF THE MOTION TO RESCIND THE PLEA AGREEMENT

THE PLEA AGREEMENT

On November 7, 2008, the prosecution and appellant entered into a written plea agreement, exchanging a second-degree murder conviction and sentence of 15 years to life for appellant's truthful testimony against co-defendant Varner. (1CT 82.) The agreement provided that petitioner's taped statement of November 6, 2008, was true, correct, and complete. A "material misrepresentation" could provide grounds for revoking the agreement and reinstating all charges. (1CT 79.) The agreement provided that the purpose for entering into the agreement was to ensure that appellant would testify against Varner during his jury trial. (1CT 79.) The agreement required appellant to answer truthfully to questions posed to her during trial and to cooperate fully with the continuing investigation of the case by the District Attorney and police. (1CT 79, 80-81.)

The plea agreement provided a procedure for determining whether one or more violations of the agreement occurred. The prosecution could petition the trial judge for a hearing. However, the trial judge would not necessarily determine the question of whether a breach occurred. "If the trial judge is deemed unavailable or unable to preside over the hearing, the

issue shall be resolved by the presiding judge of the Shasta County Superior Court or his designee. The People will be required to prove by a preponderance of the evidence that Peterson has violated a term of this agreement. Proof of noncompliance with this agreement may be made by transcripts, police reports, taped statements, or other hearsay evidence." (1CT 82, lines 19-25.)

A Shasta County Superior Court Judge approved the agreement in writing on November 7, 2008. (1CT 88.)

THE JULY 7, 2009, JAIL INTERVIEW

The prosecutor asked appellant if she ever wore the white gloves that were found in Ms. Mariedth's car. Appellant said she never wore them but moved them off the back seat to the floor behind the driver's seat when she entered the car and sat down. The prosecutor and her investigator did not tell appellant anything about DNA test results for either of the white cloth gloves. (2AUGCT 447.)

For the sake of judicial economy, the summary of the remainder of the July 7, 2009, statement provided previously in the Statement of Facts is incorporated by reference.

THE POST- TRIAL PLEA REVOCATION PROCEEDINGS

On April 22, 2010, the prosecution filed a Request For Findings Pursuant to the Negotiated Plea Agreement. (1CT 98.) The prosecutor requested that the court make a finding

whether appellant fulfilled her obligation under the plea agreement previously filed with the court. (1CT 98.)

On April 23, 2010, the Court convened a hearing. (2RT 400.)

The prosecutor on the record stated a concern that having the trial judge make factual findings regarding appellant's truthfulness as a witness in the Varner trial would require the court to depart from its role as a "neutral arbiter. (2RT 400, lines 30-33.)

The prosecutor stated on the record that appellant had fulfilled her plea agreement obligations and had not engaged in any material misrepresentations that would affect the Varner trial.

"MS. KAFEL: I – I believe the People's position is, in consideration of the plea agreement and the wording of the plea agreement, Miss Peterson has fulfilled the plea agreement. She's made, in the People's eyes, no material misrepresentation that affected our trial and she was consistent with the prior statement she had given to the People. So, if it lies on the People to make that decision, we believe she's fulfilled her obligation." (2RT 401, lines 20-27.)

The prosecutor then stated that her motivation in asking the Court to make findings was "to make sure, in that she was a material witness in – in a significant case, that if there were any issues wherein the court felt that she was untruthful such that they would affect that verdict, we could have them ferreted out now." (2RT 401-402.)

The prosecutor, when queried by the court, expressed a concern that on cross-examination during trial appellant admitted that appellant had lied previously regarding which pair of pants she wore during the homicide. (2RT 402.) The prosecutor went on to say that this question had been litigated in Varner's unsuccessful new trial motion. (2RT 402, lines 17-20.)

The prosecutor then asked if the Court felt that appellant testified materially falsely on subjects other than which pants she wore. (2RT 402, lines 31-34.)

The Court expressed its opinion that appellant "testified falsely about several things" and offered to "point to evidence in the record that would support that necessarily." (2RT 403, lines 1-32.) The Court stated that it made notes during appellant's testimony against Varner that "she's not credible." (2RT 403, lines 5-7.) "But I don't know that I would ever be able to say that those are material." (2RT 403, lines 8-9.)

The prosecutor requested the opportunity to review the transcript of appellant's testimony and to compare it with interview transcripts before filing a "motion to have that plea nullified." (2RT 403, lines 23-28.)

The Court volunteered its opinion that appellant was dishonest during trial regarding her role in the killing. The Court expressed an opinion that "there was evidence that pointed toward her as being more deeply involved." (2RT 403, lines 31-35.) The Court hastened to add that it denied the Varner motion for new trial, because any feeling that appellant

minimized her involvement in the homicide, "did not and [sic] absolve him one iota in my estimation..." (2RT 404, lines 1-3.)

The Court commented that DNA evidence from inside a pair of gloves found in the victim's car was linked to appellant. Appellant denied wearing the gloves. (2RT 404, lines 4-9.) The Court said it felt that appellant was not credible in her testimony about her prior relationship with the decedent. (2RT 404, lines 14-19.) The Court said that appellant could have selected the victim because of their prior relationship. The Court said it did not believe appellant's denial at trial that this was so. (2RT 404, lines 24-29.) The Court stated that appellant's admission that she repeatedly lied to police would have to be considered in assessing her credibility as a witness. (2RT 404, lines 30-34.)

The Court commented that appellant had lied about which pair of pants she wore. However, there was no physical or scientific evidence recovered from the pants actually worn to show that appellant actually participated in the killing. Appellant admitted the lie regarding the pants during her trial testimony. (2RT 405, lines 1-9.)

The Court said that appellant's admission to previously selling methamphetamine was in the Court's estimation "evasive and inconsistent" regarding "her prior drug history." (2RT 405, lines 13-24.) The Court read from its notes, expressing in more colorful language its opinion that appellant lacked credibility as a trial witness. (2RT 405, line 30 to 2RT 406, line 6.)

On June 4, 2010, the prosecutor filed a Petition For Withdrawal Of The Negotiated Plea Agreement. (1CT 117.) The petition expressly stated that it was based on appellant's denial during trial that she ever wore a pair of white gloves found in the victim's car after the homicide. (1CT 117.) Appellant in her November 6, 2008, interview said that she moved a pair of gloves that was later found in the car. She denied that she wore any gloves on the night of the murder. (1CT 117-118.) The prosecutor stated in the petition that a DNA analysis was completed after November 6, 2008, but before trial. (1CT 118.) During trial, on August 13, 2009, criminalist Kacer testified that DNA found outside one of the gloves that were found in the car contained a profile that "matched" appellant, although the victim could not be excluded as a contributor to DNA on the sample. (1CT 118.) DNA found outside the other glove could have been contributed by appellant and/or the victim. (1CT 118.) DNA from inside the first glove could have been provided by appellant and the victim. (1CT 118.) DNA from inside the second glove "matched" appellant. (1CT 118.) Other DNA from inside the second glove could have been contributed by the victim. (1CT 118.) The prosecutor did not provide any information on where precisely the gloves were found, nor on where on the gloves the DNA samples were found. Nor did the prosecutor specify what type of biological material was found on the gloves. The prosecutor never alleged that blood was found anywhere on the gloves or on any of appellant's clothing.

The petition stated that the reason for seeking to set aside the plea agreement was the contradiction between the DNA evidence and appellant's statement. (1CT 118.)

On June 7, 2010, the prosecutor filed an addendum to the petition, lodging a copy of appellant's November 6, 2008, statement with the Court. (1CT 121.)

On August 27, 2010, the Court convened a hearing on the petition to rescind appellant's plea agreement. (2RT 408.)

The prosecutor stated that her focus was on the issue of the white gloves and related DNA evidence, as well as appellant's statements and testimony. (2RT 411.) The prosecutor stated that, at some unspecified date after the November 6, 2008, statement, but well in advance of trial, the prosecutor received the Department of Justice DNA analysis report on the white gloves found in the victim's car. (2RT 411.)

The prosecutor stated on the record that there was no blood on the gloves. (2RT 411, line 20.)

The prosecutor stated on the record that she had appellant re-interviewed on July 7, 2009, regarding the DNA testing and the white gloves. The prosecutor provided the Court with a transcript of the July 7, 2009, interview. (2RT 411.) "[W]e specifically asked her about the white gloves, and she told us she had never put the gloves on, that she had moved the gloves but they had never been worn or used by her." (2RT 411, line 25 to 2RT 412, line 4.)

The prosecutor stated on the record that during trial appellant was specifically questioned by the prosecutor and

defense counsel for Varner regarding the white gloves. (2RT 412, lines 5-7.)

The prosecutor stated that the white gloves DNA evidence was material, because it was possible that, if she wore the white gloves, appellant could have participated in the fatal physical assault on the victim without sustaining injuries on herself and without being bloodied. (2RT 412, lines 7-15.) On this basis, the prosecutor asked to withdraw the plea agreement. (2RT 412, lines 25-27.)

Defense counsel argued two things. First, she urged that appellant testified truthfully. Appellant consistently denied wearing gloves during the attack and denied participating in the fatal physical assault. There was no evidence regarding the position of the gloves when found and whether the gloves were inside-out at any point. (2RT 413, line 10 to 2RT 414, line 18.) The fact that appellant's fingerprints were found on the car supported appellant's denial that she wore gloves in the car. (2RT 414, lines 19-25.)

Defense counsel argued that, even if appellant was untruthful and had at some point worn gloves, this point was not material. (2RT 414-415.) No blood was found on the gloves. (2RT 415, lines 5-9.) Defense counsel erroneously stated that blood was found on appellant's clothing. No blood was found on the clothing that appellant wore during the homicide or the clothing that she was wearing when arrested. (2RT 415, lines 10-13; 2AUGRT 401-404, 408, 410.) Defense argued that placing a plastic bag over the victim's head during the

strangulation obviated any need to use gloves to eliminate depositing fingerprints during strangulation. (2RT 415, lines 14-19.) Appellant testified that "a great amount of blood" collected inside the bag used in the strangulation. When the bag came off the victim's head, that would have released blood. If appellant wore gloves and personally participated in the homicide, blood would have been deposited on the gloves. (2RT 415, lines 20-25.)

Defense counsel stated her opinion that, on the basis of these facts, wearing or not wearing gloves would not materially affect whether Varner committed the murder. (2RT 415, lines 26-28.)

Defense counsel then reminded the Court

"that the jury heard Miss Peterson's testimony, heard all of the evidence in the case, and was able to weigh all the evidence in the case against Miss Peterson's testimony and convict Mr. Varner. So if it were material that she lied about wearing gloves, we might have had a different verdict, but we have what the People are now saying is such a glowing lie, because, obviously, if she was lying about wearing these gloves, then there's something else going on and her testimony is somehow not believable, but the jury already convicted Mr. Varner with that. So I don't think we have a material misstatement, if there is one at all, because of the simple fact the jury was able to weigh all of the evidence and come up with a conviction." (2RT 416, lines 1-15.)

The Court said that it did not agree with defense counsel's theory of materiality. (2RT 416, lines 16-22.) The Court stated for the record that appellant in her testimony claimed that she tried to dissuade Varner from killing the victim and denied participating in the killing. "[S]o, it became difficult to understand under what theory it was she decided to go ahead and plead guilty." (2RT 417, lines 1-10.)[13]

Defense counsel stated for the record her recollection that appellant admitted during trial that she was guilty of robbery and that the prosecutor and appellant discussed the felony-murder rule, explaining that appellant pled to second-degree murder to avoid a harsher potential sentence under a first-degree, felony-murder theory. (2RT 418, lines 1-12.)

Defense counsel stated for the record that appellant's fingerprints are in the car. Appellant admitted she was there and participated in events related to the homicide. Appellant's admissions were consistent each time she was interviewed. (2RT 418-419.) "So I don't think this glove issue is material, in light of everything else that was presented." (2RT 419, lines 3-4.)

---

[13] The prosecutor during trial elicited appellant's testimony that appellant had been given to understand that she was liable under a felony-murder theory for the homicide, despite her denials of participation in the killing. She chose to enter into the plea agreement to avoid the harsher sentence that would accompany a conviction of first-degree murder and one or more special-circumstance findings. (2RT 331, 331-332, 332.)

The Court stated that its notes specified a number of instances in which the Court felt that appellant lied during her trial testimony. (2RT 419.)

The prosecutor stated on the record that she was the one that elicited appellant's testimony that she did not wear gloves. (2RT 420, lines 19-28.) The prosecutor stated that no blood was ever found on any of appellant's clothing. (2RT 421, lines 1-5.) The prosecutor stated her belief that wearing gloves could have prevented appellant from being bloodied despite participation in the fatal physical assault. (2RT 421, lines 19-24.)

The Court stated its opinion that the evidence linking DNA found inside the gloves to appellant contradicted appellant's denials that she wore gloves that night. (2RT 422, lines 1-10, 12-19.) The Court also stated its opinion that appellant's admission during trial that she lied about which pair of pants she wore during the homicide "was important." (2RT 422, lines 20-23.) The Court acknowledged that there was no blood or other evidence on the pants to suggest that appellant participated in the fatal physical assault. (2RT 422, lines 24-28.) However, the Court felt that the fact that appellant lied about which pair of pants she wore indicated that she was more involved in the killing "than she was willing to admit." (2RT 422-423.)

The Court stated its opinion that appellant's admitted lies, along with other lies that the Court felt were told, caused the Court to believe that appellant breached the plea agreement

and was not entitled to the benefit of the plea bargain. (2RT 424, lines 7-15.)

Defense counsel concluded her argument by stating that appellant admitted on the stand that she had lied about the pants. That admission supported a conclusion that appellant was truthful about the gloves, "because we know that when caught in a lie, she will say that she lied. And she was presented with the fact that her DNA was on these gloves, and then went through and in questioning by Miss Kafel still maintained that she never wore the gloves and simply just moved them, and with that, I – I'd be done." (2RT 425, lines 3-11.)

The Court ruled that appellant "materially breached the agreement by giving false testimony" and rescinded the plea agreement and guilty plea. (2RT 425, lines 15-20.)

THE DISQUALIFICATION AND MOTION TO VACATE JUDGE GALLAGHER'S RULING

In December, 2010, attorney Borges replaced attorney Babbits as appellant's counsel of record. (1CT 183; 4AUGRT 1015.)

On April 5, 2011, defense counsel filed a motion to disqualify Judge Gallagher for personal bias against appellant. Counsel's declaration stated a belief that Judge Gallagher was actually biased against appellant before April 23, 2010. (1CT 186-192.)

On April 6, 2011, Judge Gallagher signed an order consenting to his disqualification for bias against appellant. (1CT 241.)

On May 4, 2011, appellant filed a Motion To Vacate (Declare Null And Void) Ruling Made August 27, 2010 By The Honorable William D. Gallagher. (1CT 245.) The motion sought to vacate the ruling setting aside the plea agreement based on a theory that, by reason of an existing bias against appellant, Judge Gallagher was disqualified to preside over the hearings on the petition to withdraw the plea agreement and, by reason of prejudgment, was disqualified from ruling on the petition. (1CT 245-250.)

The prosecutor filed a response on May 10, 2011, in which she asserted that the fact that Judge Gallagher formed opinions about appellant's credibility as a witness before the petition was filed did not disqualify him from making findings on whether appellant gave false testimony on material facts during trial. (1CT 253.)

On May 12, 2011, defense counsel replied in writing to the prosecutor's response by disagreeing with the prosecutor's assertion that Judge Gallagher was entitled to decide in advance of the petition whether he believed appellant lied during Varner's trial. (1CT 268-271.)

During the May 15, 2011, hearing, Judge Boeckman on the record stated his disagreement with the defense position that it was inappropriate for Judge Gallagher to decide before

ruling on the petitioner whether he disbelieved appellant's trial testimony. (2RT 434, lines 4-19.)

Defense counsel stated for the record his belief that, under the terms of the plea agreement, a judge who has been disqualified for bias under Code of Civil Procedure section 170.3, is unavailable to hear and determine the issue of the defendant's truthfulness and whether there has been a material misrepresentation that invalidates the plea bargain. (2RT 435-436.)

After further discussion, the Court continued the matter to permit review of the relevant evidence and to afford the parties an opportunity to submit supplemental briefing, if they so chose. (2RT 438-439.)

On June 6, 2011, the Court, after further discussion on the issue of whether Judge Gallagher was properly disqualified for bias, denied the motion. (2RT 441-454.)

ARGUMENT

I. THE COURT IMPROPERLY INVALIDATED THE PLEA AGREEMENT AFTER THE PROSECUTION REAPED THE BENEFIT OF ITS BARGAIN

A. INTRODUCTION

The prosecution reaped the benefit of its plea bargain. The prosecution achieved its objective of using appellant to obtain a capital murder conviction and death penalty verdict against Varner.

Long before appellant testified during the Varner capital trial, the prosecution possessed the DNA evidence that allegedly was the basis for the motion to vacate the plea agreement. The prosecution questioned appellant about the DNA evidence in an interview that occurred on July 7, 2009, during the jury selection process of the Varner capital trial. Neither the prosecutor nor her investigator informed appellant during the July 7, 2009, interview that there was DNA evidence linking appellant to the white cloth gloves found in the car. Appellant admitted moving the gloves so that she could sit in the car but denied wearing the gloves. (2AUGCT 447; see 1AUGCT 41 [minute order of July 7, 2009, documenting ongoing voir dire process].)

During Varner's trial, appellant was questioned by both prosecution and defense attorneys regarding the gloves found in the car and the DNA test results. The gloves found in the car and the DNA test results were discussed by attorneys for both

sides during the Varner guilt-trial arguments. Having received full evidence and arguments on this topic, the jurors made a credibility determination, convicted Varner of all charges, and found true the special circumstance allegations. The jurors subsequently sentenced Varner to death.

During the hearing on the motion to vacate, the prosecutor presented no new evidence. The Court and parties during the hearing discussed and considered only evidence that was known to the parties at the time of Varner's trial and that was presented during Varner's trial.

The record establishes that the prosecution received the full benefit of its bargain with appellant. The Court improperly invalidated the original plea agreement. The judgment should be reversed with instructions to reinstate the original plea agreement.

B. THE RELEVANT FACTS

The prosecution's motion to vacate the plea agreement was based on the alleged inconsistency between the DNA test results linking appellant to swabs collected from the white cloth gloves found in the decedent's car and appellant's consistent denial that she wore gloves during the homicide. (1CT 117-118.)

The petition stated that appellant in her November 6, 2008, statement said that she did not wear any gloves that night but did move a pair of gloves that was later found in the decedent's car. (1CT 117-118.)

At some point after November 6, 2008, but before trial, DNA analysis was completed. The prosecutor on July 7, 2009, questioned appellant about DNA evidence linking appellant to the gloves found in the car. Consistently with her November 6, 2008, statement, appellant again said that she did not wear gloves that night but had moved gloves that were in the car. (1CT 118; 2AUGCT 447.)

Analysts found no blood on the white cloth gloves. (2AUGRT 411, 412, 480.)

Peterson's fingerprints were matched to a latent print found on the rear driver's side door frame of Ms. Mariedth's car. (2AUGRT 367.) Nobody else's fingerprints were matched to any latent prints anywhere on the car. (2AUGRT 367.)

During trial, DNA analyst Kacer testified to her DNA test results linking appellant to the swabs collected from the white cloth gloves found in the backseat area of Ms. Mariedth's car. (1CT 118; 2AUGRT 448-452, 456-457, 466, 477, 479-482.) During trial, appellant was asked about the gloves and DNA evidence pertaining to the gloves. Consistently with her statements of November 6, 2008, and July 7, 2009, appellant again said that she did not wear gloves that night but had moved gloves that were in the car. Appellant also testified that she was not told before trial that her DNA profile was matched to DNA samples obtained from the gloves. (2RT 317, 326-327, 343, 392-393, 395-396.)

During the hearing of August 27, 2010, no new evidence was presented. The prosecutor stated for the record that there

was no blood found on the gloves. (2RT 411, line 20.) The prosecutor presented a transcript of appellant's July 7, 2009, statement regarding the DNA evidence and the gloves. (2RT 411; 2AUGCT 444-454.) The prosecutor stated that appellant said on November 6, 2008, and July 7, 2009, that she did not wear the gloves but had moved them. (2RT 411-412.) The prosecutor stated on the record that appellant during trial again said that she moved the gloves but did not wear them. (2RT 412, lines 5-7.) The jurors during trial heard the DNA and other forensic evidence and appellant's denial that she wore the gloves. (2RT 412; 1CT 118; 2AUGRT 411, 412, 448-452, 456-457, 466, 477, 479-482; 2RT 317, 326-327, 343, 392-393, 395-396.)

Defense counsel during the hearing urged that appellant testified truthfully. Appellant consistently denied wearing the gloves and consistently admitted moving the gloves. (2RT 413, line 10 to 2RT 414, line 18; 2RT 418-419.) The fact that appellant's fingerprints were found in the car tended to support appellant's denial that she wore the gloves. (2RT 414.) Defense counsel argued that, even if appellant wore the gloves, a false denial would not be material. No blood was found on the gloves. (2RT 414-415.) Defense counsel further argued that the jurors heard all this same evidence, made a credibility determination, and convicted Varner. The jurors' decision tended to refute an argument of material falsehood. (2RT 416.) In response to comments about appellant lying regarding which pants she wore, defense counsel pointed out that appellant at

trial admitted that she had lied about which pants she wore during the homicide. (2RT 425.)

The prosecutor admitted that no blood was found on appellant's clothing or the gloves. (2RT 411, 421.)

The Court vacated the plea agreement. (2RT 425.)

C. A PROSECUTOR THAT HAS REAPED THE BENEFIT OF HER BARGAIN CANNOT THEREAFTER INVALIDATE THE PLEA AGREEMENT WITH THE WITNESS

The prosecution cannot invalidate a plea agreement if the prosecution has reaped the benefit of its bargain with the witness.

In *People v. Brunner* (1973) 32 Cal.App.3d 908, Brunner was indicted for the murder of Gary Hinman. Brunner successfully moved to dismiss the indictment. The prosecutor had previously promised Brunner immunity in exchange for providing information and testimony regarding the Hinman murder. The prosecutor's objective was to procure convictions of the most culpable participants in the Hinman murder. The prosecution appealed dismissal of the Brunner indictment.

Brunner had testified at Beausoleil's trial regarding the participation of Brunner, Beaulsoleil, Manson, and others in the Hinman murder. Beaulsoleil was convicted. Brunner subsequently provided Beaulsoleil with an affidavit recanting Brunner's trial testimony. However, during the hearing on Beaulsoleil's new trial motion, Brunner ultimately recanted the

recantation. The new trial motion was denied. During Manson's trial for the Hinman murder, Brunner denied participating in the murder and invoked the privilege against self-incrimination. The prosecutor used Brunner's testimony from the Beausoleil trial during the Manson trial on the Hinman murder. Manson was convicted of Hinman's murder.

The Court of Appeal in *Brunner* held that the prosecutor could not renege on its promise of immunity to Brunner. The prosecution obtained substantially what it bargained for: the murder convictions of the most reprehensible Hinman killers.

"While it is indisputable that the People can bargain only for testimony and not for results, the issue here is not the validity of the bargain but the extent of a party's performance under the bargain. Performance can be measured, at least in part, by results. Since the People got their hoped-for results through the use of Brunner's testimony, we conclude, albeit somewhat pragmatically, that enough of the bargain was kept to make it operative. We note that validation of the grant of immunity from prosecution for murder does not bar prosecution for perjury and that the grand jury has indicted Brunner on four counts of perjury arising out of her testimony in these cases." (*People v. Brunner* (1973) 32 Cal.App.3d 908, 916.)

In contrast, the cases in which Courts have granted prosecution motions to vacate plea agreements have involved situations in which the prosecution could not use the witness at trial and therefore could not receive the benefit of the plea bargain.

In *People v. Collins* (1996) 45 Cal.App.4th 849, a murder prosecution, the plea agreement was invalidated after information was obtained *before* accomplice Johnson's trial that precluded the prosecution from using Collins as a trial witness against Johnson. The prosecution could not obtain the benefit of the plea agreement with Collins.

Originally, Collins gave a statement that Johnson was the killer but that Collins was with Johnson and participated in a burglary with Johnson when the killing occurred. Collins testified against Johnson during Johnson's preliminary hearing. Other witnesses subsequently disclosed to the prosecution that Collins told them that he personally participated in the murder. Collins subsequently admitted to the prosecution's investigator that he personally participated in the attack on the homicide victim. The prosecutor decided that Collins could not be used as a trial witness against Johnson. The prosecutor dismissed and re-filed charges against Johnson, conducted a new preliminary hearing without using Collins as a witness, and conducted the Johnson trial without using Collins as a witness. On these facts, the *Collins* court found *Brunner* factually distinguishable. The prosecution did not obtain the benefit of its bargain with Collins. Because Collins did not substantially perform his obligations, the prosecutor did not receive so much benefit that fairness mandated that the plea bargain should remain operative. (*People v. Collins* (1996) 45 Cal.App.4th 849, 867-868.)

In *People v. Vargas* (2001) 91 Cal.App.4th 506, a prosecution involving multiple counts of conspiracy, murder, and other violent and gang-related offenses, the prosecution entered into a plea agreement to use Vargas as a witness against other participants in exchange for lenity. However, the prosecution subsequently discovered that Vargas had lied on material matters that prevented the prosecution from being able to use Vargas as a witness. During the pre-trial hearing on the motion to vacate the plea agreement, the prosecutor presented evidence regarding Vargas' polygraph examination. Vargas testified during the hearing. The trial had not yet begun. The new evidence of the polygraph examination and Vargas' hearing testimony persuaded the Court that Vargas previously provided materially false information and granted the pre-trial motion to vacate the plea agreement. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 534.)

D. THE PROSECUTION OBTAINED THE FULL BENEFIT OF ITS BARGAIN AND SHOULD THEREFORE HAVE HONORED THE ORIGINAL PLEA AGREEMENT

It was improper and fundamentally unfair to vacate the original plea agreement after the prosecution obtained the full benefit of its bargain.

The prosecution discovered no new evidence after it successfully used appellant as a trial witness in its quest for a capital conviction of co-defendant Varner.

No new evidence was presented during the hearing on the prosecution's motion to withdraw appellant's plea agreement. (Contrast: *People v. Collins* (1996) 45 Cal.App.4th 849, 867-868 [new evidence established that the witness's statements and preliminary hearing testimony were false; the prosecution on that basis did not use Collins as a witness against Johnson]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 533-534 [new evidence presented during hearing supported a finding that Vargas' statements were materially false; the prosecution did not use Vargas as a witness against the other defendants].)

No new evidence was presented to support a finding that appellant gave materially false testimony or engaged in material falsity in the two statements to the prosecutor on which the plea agreement was based. Indeed, the jurors heard all the same evidence that was considered during the hearing on this issue. The jurors made a credibility determination: They convicted Varner of first-degree murder, found true special circumstance allegations, and sentenced Varner to death. (2AUGCT 304-306, 322-323, 398.)

The question is whether the claimed falsehood would have affected the verdict.

[T]he jury was well aware that [Peterson] was no paragon of virtue." (*In re Wright* (1978) 78 Cal.App.3d 788, 816.)

With respect to the admitted lie regarding the pants, as well as the inconsistency between appellant's denial of wearing gloves and the DNA evidence, all this information was before

the jurors. The jurors heard the DNA and forensic evidence. (1CT 118; 2RT 412; 2AUGRT 367, 411, 412, 448-452, 456-457, 466, 477, 479-482.) The jurors heard appellant's testimony on these points. (2RT 411-414, 418-419.)

The prosecutor never moved to strike appellant's testimony.

Given appellant's utility to the prosecution in her damning testimony regarding Varner's conduct, the prosecution's action in proceeding with appellant as a witness is understandable.

The prosecution's subsequent claim – not supported by any new evidence – that appellant's trial testimony was false cannot be reconciled with the prosecution's reliance upon appellant as a key witness in its crusade to convict and execute Varner. (See, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 830-831.)

The prosecutor's post-trial motion to vacate the plea agreement is troubling on this record. The prosecutor during these proceedings claimed that she had been bothered by the inconsistency between the DNA test results and appellant's persistent denials that she wore gloves on the night of the homicide. Yet the prosecutor chose to proceed with appellant as a key prosecution witness, notwithstanding the prosecutor's supposed belief that appellant's denial that she wore gloves was false. (See, e.g., *Napue v. Illinois* (1959) 360 U.S. 264, 269; *In re Jackson* (1992) 3 Cal.4th 578, 595-596.)

Although the motion to vacate claimed that appellant gave materially false trial testimony, the prosecutor never charged

appellant with perjury. This fact tends to undermine the credibility of the prosecutor's claim that appellant gave materially false trial testimony. (Cf. *People v. Brunner* (1973) 32 Cal.App.3d 908, 916 [prosecutor charged witness with perjury based on repudiation of testimony against accomplices].)

In her opposition to Varner's new trial motion, the trial prosecutor expressly argued that appellant did not commit perjury during Varner's murder trial. (2AUGCT 420-422.)

It would raise very serious ethical questions if the prosecutor truly believed that the capital judgment against Varner was based on perjury. The record in this case contains the trial prosecutor's express admission that she knew all the relevant facts well in advance of trial. (1CT 117-118; 2RT 411.) Notwithstanding this knowledge, the prosecutor used appellant as a key prosecution witness. (See Pen. Code, §128 [providing for capital punishment or life in prison without parole for *every person* who, by perjury *or subornation of perjury* procures the conviction and execution of any innocent person in a capital case].)

The prosecutor's pursuit of the motion to vacate the plea agreement constituted a very public declaration that the prosecutor did not believe the key prosecution witness against Varner. Such a public declaration could jeopardize the capital judgment that the prosecutor has obtained against Varner. Varner will pursue an automatic appeal and habeas corpus litigation. Yet the prosecutor previously took the opposite

position when opposing Varner's motion for new trial. (2\AUGCT 420-422.)

Oddly, after undertaking such great effort to rescind the plea agreement, and to defend against a subsequent motion to nullify that ruling, the prosecutor entered into a new plea agreement with appellant for nearly the same sentence as the original plea agreement – but without requiring appellant to do anything. (2CT 313-320.)

It is difficult to fathom the strategic purpose motivating the prosecutor's post-trial activities in this case. In light of the events as they have unfolded, one might speculate that the prosecutor was dissatisfied with the plea bargain and was seeking to extract a higher price from appellant.

However, buyer's remorse is not a valid basis upon which to revoke a plea agreement. A contract cannot be set aside on the basis of a desire to obtain a more favorable price after the other party has performed its obligations.

A civil contract cannot be set aside merely because the party seeking to set aside the agreement has come to experience buyer's remorse. (See, e.g., *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 261.)

A party cannot evade his contractual obligations based on a subsequent desire for a better deal. Having enjoyed the benefits of the contract, the party cannot reject its obligations. (See, e.g., *Alfaro v. Community Housing Improvement System & Planning Assn.* (2009) 171 Cal.App.4th 1356, 1378 [rejecting homeowners' challenge to affordable housing deed restriction

for homes acquired pursuant to affordable housing program]; *Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 257-258 [rejecting homeowner's challenge to equity-sharing provision of contract under which subsidized housing was purchased].)

A stipulated judgment cannot properly be set aside based on one party's "buyer's remorse". (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 686.)

E. CONCLUSION

To recapitulate:

The evidence presented during the hearing on the prosecutor's motion to vacate the plea agreement established that the prosecutor obtained the full benefit of the plea agreement with appellant.

Appellant performed all obligations imposed by the agreement.

All relevant facts were known by the prosecutor well in advance of trial.

All relevant facts were presented to the jurors. The jurors made credibility determinations and decided to convict Varner of all charges, find true all the allegations, and impose the death penalty.

The prosecutor successfully defended against Varner's new trial motion in which Varner argued that appellant provided materially false trial testimony.

After fending-off Varner's new-trial motion challenge, the prosecutor reversed its position. Having obtained everything that it desired as a result of appellant's performance pursuant to the plea agreement, the prosecutor then moved to set aside the agreement. In doing so, the prosecutor publicly declared that it believed appellant provided materially false testimony during a capital trial – even though all relevant facts were personally known by the trial prosecutor well in advance of trial. In so doing, the prosecutor has jeopardized the capital judgment that she fought so hard to obtain against Varner. On this record, the prosecutor's actions might in future subject the trial prosecutor herself to penal consequences.

The record before this Court establishes that it was fundamentally unfair to rescind the original plea agreement. The judgment should be reversed with directions to reinstate the original plea agreement. (See, e.g., *People v. Brunner* (1973) 32 Cal.App.3d 908, 916.)

II. JUDICIAL ESTOPPEL SHOULD APPLY TO PRECLUDE REVOCATION OF THE ORIGINAL PLEA AGREEMENT

A. INTRODUCTION

The doctrine of judicial estoppel should have been applied to preclude the prosecution from pursuing rescission of the original plea agreement. The ruling rescinding the plea agreement should be reversed.

B. THE STANDARD OF REVIEW

The determination of whether judicial estoppel should apply to the facts is a question of law that is reviewed de novo. (E.g. *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 597-598.)

The trial court's findings of fact pertinent to the application of the judicial estoppel doctrine are reviewed for substantial evidence. (E.g. *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 597; *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 959, fn. 8; *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.)

C. THE JUDICIAL ESTOPPEL DOCTRINE

The doctrine of judicial estoppel precludes a litigant from gaining an unfair advantage by successfully asserting one position and then in subsequent litigation taking an incompatible position. The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. Application of the doctrine is discretionary. (*People v. Castillo* (2010) 49 Cal.4th 145, 155, 158; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.)

The doctrine of judicial estoppel applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the

two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*People v. Castillo* (2010) 49 Cal.4th 145, 155; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

"The doctrine of judicial estoppel is designed to protect the integrity of the legal system as a whole, and does not require a showing of detrimental reliance by a party." (*People v. Castillo* (2010) 49 Cal.4th 145, 156.)

Judicial estoppel is an equitable doctrine. Its application is discretionary. (*People v. Castillo* (2010) 49 Cal.4th 145, 156.)

D. THE RELEVANT FACTS

As discussed in the Statement of the Case and Statement of Facts section of this brief, appellant in all her pre-trial statements and trial testimony consistently said that she at some point moved the white cloth gloves that were later found in the back seat of the decedent's car. Appellant in her statements and trial testimony consistently denied that she wore the white cloth gloves on the night of the homicide. No blood was found on the white cloth gloves. DNA testing linked appellant to swabs collected from the white cloth gloves.

Appellant was questioned by the prosecutor regarding the white cloth gloves and other issues on July 7, 2009. Appellant

during that interview denied wearing the white cloth gloves. Appellant said that she moved the gloves so that she could sit on the back passenger seat. Neither the prosecutor nor her investigator told appellant about the DNA test results. (2AUGCT 447.)

Appellant was questioned by the prosecutor and by Varner's counsel during trial regarding the DNA evidence and the gloves. Appellant said that she moved the gloves but denied wearing the gloves. (2RT 317, 326-327, 343, 392-393, 395-396.)

Varner moved for a new trial. Varner claimed that appellant, the only percipient prosecution witness to the homicide, lacked credibility because of her subsequent admission that she initially gave false testimony regarding which pants she wore during the homicide. (2AUGCT 410.)

The prosecutor successfully opposed Varner's new trial motion. The prosecutor asserted that appellant admitted lying about the pants. The prosecutor asserted that any untruthfulness was not material. (2AUGCT 420-422.) The Court concluded that there was no material falsity affecting the result during Varner's trial. The Court denied the new trial motion on all grounds. (4AUGRT 835-836, 839.)

After successfully obtaining a capital murder conviction and death sentence against Varner, and then fending-off Varner's claims during the motion for new trial, the prosecutor took a completely incompatible position when it sought to rescind the original plea agreement on the ground of material

falsity. (2RT 402, lines 17-20.) No new evidence was presented in support of this claim. The prosecutor and Court relied upon the Varner trial record. (2RT 411-412, 425.)

E. PROCEDURAL DEFAULT PRINCIPLES SHOULD NOT BAR APPLICATION OF THE JUDICIAL ESTOPPEL DOCTRINE

Appellant's counsel in the Superior Court failed to file any written opposition to the prosecutor's motion to vacate the plea agreement.

Appellant's counsel in the Superior Court never mentioned the term "judicial estoppel" during the hearing. However, appellant's counsel did oppose the prosecution's motion by asserting that no new facts were presented. All of the evidence before the Court had been presented to the jurors during trial. (2RT 416, lines 1-15; 2RT 419, lines 3-4; 2RT 425, lines 3-11.) The prosecutor during the April 23, 2010, hearing mentioned that the prosecutor took a contrary position during the litigation of the Varner new trial motion. (2RT 402, lines 17-20.) The Court during the April 23, 2010, hearing acknowledged that it had heard the arguments presented during Varner's new trial motion and had ruled against Varner. (2RT 404, lines 1-3.)

The fact that the prosecutor had taken inconsistent positions on this same issue was thus before, and known to, the Court. The relevant facts were before the Court. The record before the Court showed that the prosecutor had taken

inconsistent positions and that the elements for applying the doctrine of judicial estoppel were satisfied. This record thus suffices to preserve the issue for review. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [a claim of error is preserved if the objection alerts the court to the issue, since a particular form of objection is not required]; *People v. Clark* (1992) 3 Cal.4th 41, 124 [same]; *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [same]; *In re Justin B.* (1999) 69 Cal.App.4th 879, 888 [same]; see also *People v. Torres* (1950) 98 Cal.App.2d 189, 192 [the court is presumed to know the law].)

In the alternative, this Court should reach this issue by determining that defense counsel rendered ineffective assistance in failing to articulate this objection. On this record, there is no rational strategic purpose that defense counsel could have had for failing to pursue a judicial estoppel theory "except for failing to realize that such an objection was available." (*People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366.) This issue is therefore cognizable on appeal under an ineffective assistance of counsel theory. (*People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366.)

F. JUDICIAL ESTOPPEL SHOULD APPLY

On this record, judicial estoppel principles should apply to preclude rescission of the original plea agreement.

All the elements required for judicial estoppel are present on this record. The prosecutor took two inconsistent positions

in judicial proceedings. During the Varner motion for new trial, the prosecutor asserted that appellant was truthful at trial and that any untruthfulness was not material. (2AUGCT 420-422.) The prosecutor was successful in asserting the first position during the litigation of the Varner new trial motion. (4AUGRT 835-836, 839; 2RT 402, lines 17-20.) The two positions are totally inconsistent. The record establishes that the first position was not taken as a result of ignorance, fraud, or mistake. The prosecutor made it clear on the record that she knew of the DNA results and of appellant's statements regarding those test results in advance of trial and still proceeded to trial. (1CT 117-118; 2RT 411-412.) This issue was explored during appellant's trial testimony. (2RT 317, 326-327, 343, 392-393, 395-396.) (*People v. Castillo* (2010) 49 Cal.4th 145, 155.)

The integrity of the judicial process requires the application of the judicial estoppel doctrine in this case. (See, e.g., *People v. Castillo* (2010) 49 Cal.4th 145, 156.) The prosecutor has taken inconsistent positions. The trial prosecutor first asserted that appellant was truthful and that any untruthfulness was not material, in order to obtain a first-degree murder conviction and sentence of death against Varner and then again in her campaign to defeat Varner's new trial motion. After obtaining a capital sentence against Varner and fending-off Varner's motion for new trial, the prosecutor did an about-face. After using appellant to obtain the death penalty against Varner, the prosecutor pulled the rug out from under appellant

by moving to vacate the original plea agreement based on a refutation of the position assumed when the prosecutor opposed Varner's motion for new trial. Permitting the prosecutor to do this undermines the integrity of the judicial system. This is precisely the situation that the doctrine of judicial estoppel was designed to address and prevent. (See, e.g., *People v. Castillo* (2010) 49 Cal.4th 145, 156.)

G. CONCLUSION

For all the foregoing reasons, the doctrine of judicial estoppel requires reversing the judgment and the reinstating the original plea agreement.

III. COLLATERAL ESTOPPEL SHOULD PRECLUDE REVOKING THE ORIGINAL PLEA AGREEMENT

A. INTRODUCTION

The Court during the proceedings on the Varner motion for new trial rejected an argument that appellant testified materially falsely during the Varner trial. (4AUGRT 835-836, 839; 2RT 404, lines 1-3.) Principles of collateral estoppel require reversing the contrary ruling rendered during the proceedings on the motion to vacate the plea agreement.

B. THE STANDARD OF REVIEW

The determination of whether collateral estoppel applies to the facts of the case is a question of law subject to de novo review on appeal. The findings of fact on which the application of collateral estoppel is based are subject to review for substantial evidentiary support. (See, e.g., *Blix St. Records v.*

Cassidy (2010) 191 Cal.App.4th 39, 46 [discussing judicial estoppel].)

C. THIS ISSUE IS REVIEWABLE

Appellant's counsel in the Superior Court failed to file any written opposition to the prosecutor's motion to vacate the plea agreement.

Appellant's counsel in the Superior Court never mentioned the term "collateral estoppel" during the hearing. However, appellant's counsel did oppose the prosecution's motion by asserting that no new facts were presented. All of the evidence before the Court had been presented to the jurors during trial. (2RT 416, lines 1-15; 2RT 419, lines 3-4; 2RT 425, lines 3-11.) The prosecutor during the April 23, 2010, hearing mentioned that the prosecutor took a contrary position during the litigation of the Varner new trial motion. (2RT 402, lines 17-20.) The Court during the April 23, 2010, hearing acknowledged that it had heard the arguments presented during Varner's new trial motion and had ruled against Varner. (2RT 404, lines 1-3.) The very same prosecutor and same judge were involved in the litigation of both the Varner new trial motion and the motion to rescind appellant's plea agreement.

The relevant facts were thus before the Court. This record thus suffices to preserve the issue for review. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [a claim of error is preserved if the objection alerts the court to the issue, since a particular form of objection is not required]; *People v.*

Clark (1992) 3 Cal.4th 41, 124 [same]; *People v. Williams* (1988) 44 Cal.3d 883, 906-907 [same]; *In re Justin B.* (1999) 69 Cal.App.4th 879, 888 [same]; see also *People v. Torres* (1950) 98 Cal.App.2d 189, 192 [the court is presumed to know the law].)

In the alternative, this Court should reach this issue by determining that defense counsel rendered ineffective assistance in failing to articulate this objection. On this record, there is no rational strategic purpose that defense counsel could have had for failing to pursue a collateral estoppel theory "except for failing to realize that such an objection was available." (*People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366.) This issue is therefore cognizable on appeal under an ineffective assistance of counsel theory. (*People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366.)

D. THE COLLATERAL ESTOPPEL DOCTRINE

The doctrine of collateral estoppel precludes relitigation of an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910 [finding that collateral estoppel applied to prevent relitigation of the meaning of the term "employee"]; *People v. Felix* (2008) 169 Cal.App.4th 607, 615; *Vezina v.*

Continental Casualty Co. (1977) 66 Cal.App.3d 665, 672 [plaintiff was barred by collateral estoppel principles from bringing subsequent action based on an insurance policy that covered employees only when acting in capacity as employees; in prior personal injury action against employee and insured company, it was determined that employee had not been acting in scope of employment at time of accident]; *People v. Sims* (1982) 32 Cal.3d 468, 484.)

E. THE RELEVANT FACTS

As discussed in the Statement of the Case and Statement of Facts section of this brief, appellant in all her pre-trial statements and trial testimony consistently said that she at some point moved the white cloth gloves that were later found in the back seat area of the decedent's car. Appellant in her statements and trial testimony consistently denied that she wore the white cloth gloves that night or ever. No blood was found on the white cloth gloves. DNA testing linked appellant to swabs collected from the white cloth gloves.

Appellant was questioned by the prosecutor regarding the white cloth gloves and other evidentiary issues on July 7, 2009. Appellant during that interview denied wearing the white cloth gloves. Appellant admitted moving the gloves so that she could sit in the back seat of the car. Neither the prosecutor nor the prosecution investigator told appellant about the DNA test results. (2AUGCT 447.) Appellant was questioned by the prosecutor and by Varner's counsel during trial regarding the

DNA evidence and the gloves. Appellant said that she moved the gloves but denied wearing the gloves. (2RT 317, 326-327, 343, 392-393, 395-396.)

Varner moved for a new trial. Varner claimed that appellant, the only percipient prosecution witness to the homicide, lacked credibility on the basis of her admitted lie regarding which pants she wore during the homicide. (2AUGCT 410.)

The prosecutor successfully opposed Varner's new trial motion. The prosecutor asserted that appellant admitted during trial that she previously testified falsely about which pants she wore during the homicide. The prosecutor asserted that the lie about the pants was not material. (2AUGCT 420-422.) The Court concluded that there was no material falsity affecting the result during Varner's trial. (4RT 835-836, 839; 2RT 404, lines 1-3.)

After successfully fending-off Varner's claims during the motion for new trial, the prosecutor sought to rescind the original plea agreement on the ground of material falsity. (1CT 117-173.) No new evidence was presented in support of this claim. The Court based its ruling vacating the original plea agreement on the Varner trial record. (2RT 425.)

F. COLLATERAL ESTOPPEL SHOULD HAVE BARRED THE PROSECUTION FROM PREVAILING ON AN ARGUMENT THAT APPELLANT GAVE MATERIALLY FALSE TESTIMONY DURING THE VARNER TRIAL

All the elements necessary for collateral estoppel to apply are present in this record. During the litigation of the Varner new trial motion, the prosecutor and Varner litigated the identical issue. Varner asserted that appellant testified materially falsely during trial. The prosecutor opposed that argument. (2AUGCT 410, 420-422.) There was a final ruling on this issue during the prior proceeding. The Court rendered a finding that appellant did not give materially false trial testimony. (4AUGRT 835-836, 839.) The same prosecutor that litigated this issue in the Varner new trial motion proceedings litigated this issue during the proceedings to vacate the plea agreement. Principles of collateral estoppel should therefore require reversal of the contrary ruling subsequently rendered during the hearing on the motion to vacate the plea agreement. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910; *Vezina v. Continental Casualty Co.* (1977) 66 Cal.App.3d 665, 672.)

IV. THE RULING REVOKING THE ORIGINAL PLEA AGREEMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. INTRODUCTION

A prerequisite to rescinding a plea agreement for a breach on the part of the defendant is the presentation of substantial evidence establishing the asserted breach. The required evidence was never presented in this case. The ruling vacating the plea agreement should be reversed.

B. THE STANDARD OF REVIEW

A motion to revoke a plea bargain that is conditioned upon truthful statements and testimony by the defendant requires evidence proving that the defendant materially breached the agreement. A Court's ruling on a prosecution motion to revoke a plea agreement on the ground of breach by the defendant must be supported by substantial evidence. (See, e.g., *People v. Collins* (1996) 45 Cal.App.4th 849, 865; *United States v. Verrusio* (7th Cir. 1986) 803 F.2d 885, 889; *United States v. Simmons* (4th Cir. 1976) 537 F.2d 1260, 1261-1262; *United States v. Brown* (4th Cir. 1974) 500 F.2d 375; *Neeld v. State* (Fla.App.2008) 977 So.2d 740, 740, 742-743, 745.)

C. THE LITIGATION OF THIS ISSUE IN THE TRIAL COURT

The original plea agreement provided for an evidentiary hearing to resolve any claims by the prosecution that appellant violated the plea agreement. The plea agreement provided that hearsay evidence could be presented in support of a motion to revoke the plea agreement and that a preponderance standard of proof would apply. (1CT 82, lines 14-25.)

On April 22, 2010, the prosecutor filed a Request For Findings Pursuant to the Negotiated Plea Agreement. (1CT 98.) The prosecutor requested that the court make a finding whether appellant fulfilled her obligation under the plea agreement previously filed with the court. (1CT 98.) During the April 23, 2010, hearing the prosecutor stated that she believed appellant had always given consistent statements and testified consistently with her statements and, on that basis that she believed appellant fulfilled her plea agreement obligations. (2RT 401, lines 20-27.) The prosecutor indicated that she had filed her request for findings in an abundance of caution to ferret-out potential problems with the judgment in the Varner death penalty case. (2RT 401-402.) The prosecutor subsequently said that appellant admitted during the Varner trial that she lied about which pants she wore the night of the homicide. However, that question had been litigated and resolved favorably to the prosecution in Varner's post-verdict motion for new trial. (2RT 402, lines 17-20.)

The prosecutor solicited the Court's opinion on whether appellant testified materially falsely on other issues. (2RT 402, lines 31-34.) The Court expressed its opinion that appellant testified falsely on several unspecified points and that the Court had formed the impression that appellant's trial testimony was "not credible." (2RT 403, lines 5-7.) The Court added that it did not know if any of appellant's trial testimony against Varner was materially false. (2RT 403, lines 8-9.) The Court commented that it believed that appellant had been dishonest regarding her role in the killing. (2RT 403, lines 31-35.) However, the Court had decided during the litigation of Varner's new trial motion that any minimization by appellant of her role in the homicide did not absolve Varner. (2RT 404, lines 1-3.) The Court expressed its opinion that appellant lied when she denied wearing gloves during the homicide. (2RT 404.) The Court also expressed the opinion that appellant may have selected the victim because of their relationship and that the Court disbelieved appellant's denial that she did so. (2RT 404.)

On June 4, 2010, the prosecutor filed a Petition For Withdrawal Of The Negotiated Plea Agreement. (1CT 117.) The petition expressly stated that it was based on appellant's denial during trial that she ever wore a pair of white gloves found in the victim's car after the homicide. (1CT 117.) Appellant in her November 6, 2008, interview said that she moved a pair of gloves that was later found in the car. She denied that she wore any gloves on the night of the murder. (1CT 117-118.) The prosecutor stated in the petition that a

DNA analysis was completed after November 6, 2008, but before trial. (1CT 118.) During trial, on August 13, 2009, criminalist Kacer testified that DNA found outside one of the white cloth gloves that were found in the car contained a profile that "matched" appellant, although the victim could not be excluded as a contributor to DNA on the sample. (1CT 118.) DNA found outside the other white cloth glove found in the backseat area of the victim's car could have been contributed by appellant and/or the victim. (1CT 118.) DNA from inside the first white cloth glove could have been provided by appellant and the victim. (1CT 118.) DNA from inside the second white cloth glove "matched" appellant. (1CT 118.) Other DNA from inside the second white cloth glove could have been contributed by the victim. (1CT 118.) The prosecutor did not provide any information on where precisely the samples from the white cloth gloves were found. Nor did the prosecutor specify what type of biological material was found on the gloves. The prosecutor never alleged that blood was found anywhere on the gloves or on any of appellant's clothing.

On June 7, 2010, the prosecutor lodged a copy of appellant's November 6, 2008, statement with the Court. (1CT 121.) This statement has been summarized in the Statement of Facts section of this brief, *supra*. For the sake of judicial economy, the summary of appellant's November 6, 2008, statement contained in the Statement of Facts is incorporated by reference. Appellant's testimony from the Varner trial has been included in the Reporter's Transcript filed in this appeal.

This testimony has been summarized in the Statement of Facts section of this brief, *supra*. For the sake of judicial economy, the summary of appellant's Varner trial testimony contained in the Statement of Facts is incorporated by reference.

The hearing on the prosecutor's petition to revoke the plea agreement was convened on August 27, 2010. (2RT 408.) The prosecutor stated that she received the results of DNA testing on the white gloves found in the car after appellant's November 6, 2008, statement and before trial began. (2RT 411.) The prosecutor stated on the record that there was no blood on the gloves. (2RT 411, line 20.) The prosecutor stated on the record that she had appellant re-interviewed on July 7, 2009, regarding the DNA testing and the white gloves. The prosecutor provided the Court with a transcript of the July 7, 2009, interview. (2RT 411.) "[W]e specifically asked her about the white gloves, and she told us she had never put the gloves on, that she had moved the gloves but they had never been worn or used by her." (2RT 411, line 25 to 2RT 412, line 4.)

The prosecutor stated on the record that during trial appellant was specifically questioned by the prosecutor and defense counsel for Varner regarding the white gloves. (2RT 412, lines 5-7.)

The prosecutor stated that the white cloth gloves DNA evidence was material, because it was possible that, if she wore the white gloves, appellant could have participated in the fatal physical assault on the victim without sustaining injuries on herself and without being bloodied. (2RT 412, lines 7-15.) On

this basis, the prosecutor asked to withdraw the plea agreement. (2RT 412, lines 25-27.)

Defense counsel urged that appellant testified truthfully. Appellant in her statements and trial testimony always maintained that she did not wear gloves at the time of the homicide. Appellant said that she moved the white cloth gloves found in the car but did not wear them. There was no evidence regarding the position of the white cloth gloves when found and whether the white cloth gloves were inside-out at any point. (2RT 413, line 10 to 2RT 414, line 18.) Further, appellant's fingerprints were found on the car. That fact would tend to prove that appellant was not wearing gloves when she was in the car. (2RT 414, lines 19-25.)

Defense counsel urged that, even if appellant at some point wore the white cloth gloves that were found in the car, that point was not material. (2RT 414-415.) No blood was found on the white cloth gloves. (2RT 415, lines 5-9.) Defense counsel erroneously said that blood was found on appellant's clothing. (2RT 415, lines 10-13.) No blood was found on any clothing that appellant wore during the homicide or when arrested. (2AUGRT 401-404, 408, 410.)

Defense counsel argued that placing a plastic bag over the victim's head during the strangulation eliminated any need for gloves to preclude creating latent fingerprint impressions during the strangulation. (2RT 415, lines 14-19.) Appellant testified that "a great amount of blood" collected inside the bag that was used during the strangulation. When the bag was

removed, blood would have spilled. If appellant wore gloves and personally participated in the killing, blood would have been deposited on the gloves. (2RT 415, lines 20-25.)

Defense counsel stated her opinion that, on the basis of these facts, whether appellant wore the white cloth gloves would not materially affect the jurors' determination of whether Varner committed the murder. (2RT 415, lines 26-28.)

Defense counsel then reminded the Court

"that the jury heard Miss Peterson's testimony, heard all of the evidence in the case, and was able to weigh all the evidence in the case against Miss Peterson's testimony and convict Mr. Varner. So if it were material that she lied about wearing gloves, we might have had a different verdict, but we have what the People are now saying is such a glowing lie, because, obviously, if she was lying about wearing these gloves, then there's something else going on and her testimony is somehow not believable, but the jury already convicted Mr. Varner with that. So I don't think we have a material misstatement, if there is one at all, because of the simple fact the jury was able to weigh all of the evidence and come up with a conviction." (2RT 416, lines 1-15.)

Defense counsel stated for the record that appellant's fingerprints were found on the car. Appellant admitted she was there and participated in events related to the homicide. Appellant's admissions were consistent each time she was interviewed. (2RT 418-419.) "So I don't think this glove issue

is material, in light of everything else that was presented." (2RT 419, lines 3-4.)

The prosecutor stated that it was the prosecutor that elicited appellant's testimony that appellant did not wear gloves. (2RT 420, lines 19-28.) The prosecutor stated that no blood was ever found on any of appellant's clothing. (2RT 421, lines 1-5.) The prosecutor stated her belief that wearing gloves could have prevented appellant from being bloodied despite participation in the fatal physical assault. (2RT 421, lines 19-24.)

Defense counsel concluded her argument by stating that appellant admitted on the stand that she had lied about the pants that she wore on the night of the homicide. That judicial admission supported a conclusion that appellant was truthful about the white cloth gloves, "because we know that when caught in a lie, she will say that she lied. And she was presented with the fact that her DNA was on these gloves, and then went through and in questioning by Miss Kafel still maintained that she never wore the gloves and simply just moved them, and with that, I – I'd be done." (2RT 425, lines 3-11.)

The Court ruled that appellant "materially breached the agreement by giving false testimony" and ordered the plea vacated and set aside. (2RT 425, lines 15-20.)

D. THE FINDING THAT APPELLANT FALSELY DENIED PARTICIPATING IN THE HOMICIDE WAS

NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The record does not contain substantial evidence to support the Court's finding that appellant lied when she denied participating in the fatal physical assault on Ms. Mariedth.

Substantial evidence means evidence that is reasonable, credible, and of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Speculation and conjecture do not constitute substantial evidence. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Tripp* (2007) 151 Cal.App.4th 951, 959; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Speculation of what might have been done, known, or intended does not provide a sufficient basis from which a fact-finder could infer actions, knowledge, or intent. (See, e.g., *People v. Tripp* (2007) 151 Cal.App.4th 951, 959 [reversing conviction that relied on speculation of what the defendant may have known].)

Appellant consistently denied wearing any gloves during the night of the homicide in her statements and trial testimony, both before and after the DNA results were disclosed to her. Appellant consistently maintained that she did not participate in the fatal assault. Appellant admitted participating in the robbery. Appellant admitted being present during the homicide but denied participating in the fatal physical assault on Ms. Mariedth. Appellant admitted helping to move the body after Ms. Mariedth was killed. Appellant admitted driving the victim's

car for several hours after the homicide and going to the victim's apartment with Varner.

During cross-examination at trial, appellant admitted that she previously lied about which pair of pants she wore during the night of the homicide. (2RT 405, lines 1-9.) However, no blood was found on the pants that she wore during the homicide or the pants that she wore at the time of arrest. (2RT 411-412; 2AUGRT 401-404, 408, 410.)

Appellant consistently denied wearing any gloves on the night of the homicide. (1CT 117-118; 2RT 2RT 317, 326-327, 343, 392-393, 395-396.) There was evidence that DNA swabs taken from the gloves were linked to appellant *and* Ms. Mariedth. (1CT 118; 2AUGRT 412-413, 448-452, 456-457, 466.) No blood was found on the gloves. (2RT 411; 2AUGRT 411, 412, 480.) The prosecutor stated on the record that no blood was found anywhere on appellant's clothes. (2RT 411, 421.) However, appellant's fingerprints were found on the car. (2RT 414; 2AUGRT 367.) The presence of appellant's fingerprints on the car tends to militate against an inference that appellant wore gloves to preclude leaving fingerprint impressions.

The Court maintained that it believed that Varner was the slayer and was properly convicted on that basis. (2RT 404; 4AUGRT 835-836, 839.) The Court conjectured that the presence of appellant's DNA on swabs collected from the white cloth gloves found in the car suggested that appellant could have participated in the homicide in some unspecified manner.

(2RT 422-424.) However, there was no *evidence* to indicate what role appellant may have played in the homicide, other than that to which she testified.

Published cases upholding rulings vacating plea agreements have generally relied upon far more solid evidence than that proffered by the prosecution in this case.

In *People v. Collins* (1996) 45 Cal.App.4th 849, Collins in the statements forming the basis for the plea agreement admitted that he was present during the homicide. However, Collins said that his cohort Johnson unexpectedly attacked and killed the victim without Collins' participation. (*People v. Collins* (1996) 45 Cal.App.4th 849, 857.) Collins testified during Johnson's preliminary hearing consistently with the statements that were given as the basis for the plea bargain. (*People v. Collins* (1996) 45 Cal.App.4th 849, 857.) Subsequently, other witnesses and Collins gave statements establishing that Collins had falsely denied participating in the homicide. Collins admitted to investigators and others that he not only assisted the killer but also violently assaulted the victim and killed him. During the hearing on this issue, evidence of these statements was presented and was relied upon for the ruling revoking the plea bargain. The prosecution in *Collins* was unable to use *Collins*' testimony at trial against Johnson by reason of the substantial and material falsity disclosed by Collins. Collins had entered into an agreement based on assurances that he was present but did not assist in killing the victim. However, it turned out that Collins took an active role in the killing.

In our case, in contrast, there was no testimony by anyone establishing that appellant lied when she denied participating in killing Ms. Mariedth. Appellant never admitted to participating in the killing. Although DNA analysis linked swabs taken from the white cloth gloves found in the car to appellant, there was no evidence linking the white cloth gloves *to the homicide*. There was no blood on the white cloth gloves. (2AUGRT 411, 412, 480.) Nor did any test results establish that there was any of Ms. Mariedth's blood on appellant's clothing or person. In contrast, Ms. Mariedth's blood was found on clothing that Varner wore during the killing. (2AUGRT 405-407, 409-410, 454.) There was a substantial amount of Ms. Mariedth's blood found in the bag that was used to smother Ms. Mariedth. (1AUGRT 3-5, 47-49, 62-63; 2AUGRT 310-311, 414, 453, 457; 3AUGRT 696-697.)

The Court's conclusion that appellant lied when she denied participating in the homicide is thus not supported by substantial evidence. Rather, it is based on speculation and conjecture. Speculation and conjecture do not provide a proper foundation for any ruling dispositive of a person's life or liberty, such as revoking a plea agreement. The Court's ruling vacating the plea agreement should therefore be reversed. (See, e.g., *People v. Tripp* (2007) 151 Cal.App.4th 951, 959 [reversing conviction reliant on conjecture rather than substantial evidence].)

E. THE FINDING OF A MATERIAL

MISREPRESENTATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Assuming only for the sake of discussion that appellant lied when she denied wearing the gloves at any time, that alleged lie did not constitute a sufficient material misrepresentation to warrant vacating the plea agreement.

In *People v. Brunner* (1973) 32 Cal.App.3d 908, 916, the prosecution promised immunity to Brunner in exchange for testimony against members of the Manson Family in the Hinman murder. Brunner testified against Beausoleil, resulting in his conviction. Although Brunner was uncooperative in the trial of Charles Manson, her prior testimony from the Beausoleil trial was used and Manson was convicted of the Hinman murder. The Court of Appeal commented that the prosecution received the benefit of the plea bargain. On that basis, the alleged breach of the plea agreement was not material. The prosecution was precluded from reneging on its promise of immunity to Brunner.

"We look on the matter somewhat differently, because in our opinion the People got substantially what they bargained for. The purpose of their bargain was to secure murder convictions of the most reprehensible of the Hinman killers. Brunner testified at the Beausoleil trial, and Beausoleil was convicted. She testified at the Manson trial, was impeached by the Beausoleil trial testimony, and Manson was convicted." (*People v. Brunner* (1973) 32 Cal.App.3d 908, 916.)

"While it is indisputable that the People can bargain only for testimony and not for results, the issue here is not the validity of the bargain but the extent of a party's performance under the bargain. Performance can be measured, at least in part, by results. Since the People got their hoped-for results through the use of Brunner's testimony, we conclude, albeit somewhat pragmatically, that enough of the bargain was kept to make it operative. We note that validation of the grant of immunity from prosecution for murder does not bar prosecution for perjury and that the grand jury has indicted Brunner on four counts of perjury arising out of her testimony in these cases." (*People v. Brunner* (1973) 32 Cal.App.3d 908, 916.)

In *United States v. Vogt* (8th Cir. 1990) 901 F.2d 100, 101-102, Vogt entered into an agreement with the prosecution. The government promised to dismiss an indictment against Vogt. Vogt was required to testify against various defendants involved in a drug trafficking conspiracy. It was subsequently determined, on the basis of post-polygraph admissions by Vogt and statements by other witnesses, that Vogt was untruthful about cut-off date for his participation in the drug conspiracy. Although the government learned that Vogt had breached the plea agreement by not providing complete and truthful information about the duration of his participation in the drug trafficking conspiracy, the prosecution continued to solicit and accept the benefit of the plea bargain. The prosecution required Vogt to appear in court three times and to testify twice before the Grand Jury. The prosecution did not move to vacate

the plea until 10 weeks after it allegedly discovered the breach. By continuing to solicit and accept the benefit of the plea bargain, i.e., Vogt's testimony, during the 10-week period between discovery of the alleged breach and the motion to vacate the plea bargain, the prosecution had by its actions impliedly promised to perform the agreement despite the alleged breach. (*United States v. Vogt* (8th Cir. 1990) 901 F.2d 100, 101-102.)

In our case, the prosecutor admitted that she received the DNA test results after the plea bargain was signed on November 7, 2008, but well in advance of trial. (1CT 117-118; 2RT 411.) The prosecutor had appellant interviewed on July 7, 2009. Appellant was questioned about the DNA evidence and still denied wearing gloves during the homicide and denied participating in the killing. (1CT 117; 2RT 411-412; 2AUGCT 447.) Appellant was questioned about the DNA evidence and the gloves by the prosecutor and Varner's defense counsel during trial. (2RT 317, 326-327, 343, 392-393, 395-396.) The jurors during trial heard this information, as well as the other information discussed on the record during the August 27, 2010, hearing. The fact that the jurors heard all the relevant facts, including appellant's admission that she had repeatedly lied to police (1RT 217-218; 2RT 281-283, 288-293, 296) and that she had lied on direct examination about which pants she wore (2RT 385, 387, 391-392, 395), yet still convicted Varner and voted to impose the death penalty, provides powerful proof that appellant's alleged credibility problems were not material.

The Court's own actions in this case undermine the Court's ruling on this issue. Varner moved for a new trial. According to the record, a key issue in the litigation of Varner's motion for new trial was an attack on appellant's credibility as a key witness against Varner. (2AUGCT 410, 420-422; 4AUGRT 835-836, 839.) The Court on the record in this case acknowledged that it denied the new trial motion. Although appellant was a key witness against Varner, the Court concluded that appellant's alleged lies did not affect the judgment. (2RT 404.)

On this record, the Court's finding that appellant engaged in a material breach of the plea agreement is not supported by substantial evidence. As in *Brunner,* the prosecution received the benefit of its bargain. In contrast, to the situation in *Collins*, the prosecution was able to use appellant as a witness during Varner's trial. As in *Vogt*, the prosecution learned of the alleged lie about the gloves well in advance of trial. The prosecutor questioned appellant about the DNA evidence and the gloves before trial began. After obtaining DNA test results and asking appellant about the gloves, the prosecutor used appellant's testimony during trial to procure Varner's conviction and the imposition of the death penalty. All these facts establish that there is no substantial evidence to support the Court's finding that appellant materially breached the plea agreement. The Court's theory that appellant *could have* contributed to the killing (2RT 403, 404) was a matter of conjecture and speculation. Speculation and conjecture do not

provide a proper foundation for any ruling dispositive of a person's life or liberty, such as revoking a plea agreement. The Court's ruling vacating the plea agreement should therefore be reversed. (See, e.g., *People v. Tripp* (2007) 151 Cal.App.4th 951, 959 [reversing conviction reliant on conjecture rather than substantial evidence].)

F. THE ORIGINAL PLEA AGREEMENT SHOULD BE REINSTATED

For all the reasons discussed above, the Court's ruling revoking the plea agreement is not supported by substantial evidence. The judgment should be reversed. The original plea agreement should be reinstated. (See, e.g., *United States v. Vogt* (8th Cir. 1990) 901 F.2d 100, 102-103; *People v. Brunner* (1973) 32 Cal.App.3d 908, 916.)

V. THE ORDER RESCINDING THE PLEA AGREEMENT SHOULD HAVE BEEN VACATED BECAUSE OF JUDICIAL DISQUALIFICATION

A. INTRODUCTION

By reason of facts establishing judicial disqualification, Judge Gallagher should not have presided over and ruled upon the litigation of the prosecution's motion to vacate the plea agreement. Judge Boeckman should have vacated Judge Gallagher's order revoking the plea agreement. The judgment should be reversed to remedy this error.

B. PROCEDURAL HISTORY

Petitioner and co-defendant Varner were jointly charged with the murder, robbery, carjacking, kidnapping, kidnapping for robbery, kidnapping for carjacking, and carjacking of Ms. Mariedth. The information alleged five felony-murder special circumstances. (1CT 21-24.)

On November 7, 2008, petitioner and the prosecution entered into a plea agreement. Appellant pled guilty to one count of second-degree murder. The other charges and allegations were dismissed. Petitioner was to receive a prison sentence of 15 years to life. Appellant was required to cooperate with the prosecution investigation, to provide complete and truthful information, and to testify against Varner at trial. (1CT 78-88.)

In her November 6, 2008, interview, petitioner said that she moved a pair of white cloth gloves that was subsequently found by investigators in Ms. Mariedth's car after the homicide. (1CT 117.) Appellant in her November 6, 2008, interview denied that she wore any gloves on the night of the homicide. (1CT 117-118.) After November 6, 2008, the prosecutor received a Department of Justice DNA analysis report. The report indicated that swabs collected from outside and inside the gloves contained DNA that could have come from appellant and Ms. Mariedth. (1CT 118.) The record fails to contain information on what measures may have been taken to prevent cross-contamination or the precise locations on the gloves from

which the samples were taken. No blood was found on the gloves or on any of the clothing that appellant wore during the homicide. (2AUGRT 401-404, 408, 410-412, 480.)

On July 7, 2009, before trial, the prosecutor re-interviewed appellant in the jail. The prosecutor specifically asked appellant about her contact with the gloves. Appellant again said that she had moved the gloves but denied wearing any gloves during the homicide. Neither the prosecutor nor her investigator told appellant about any DNA test results. (2RT 411-412; 2AUGCT 447.)

During Varner's trial, appellant was questioned by the prosecutor and Varner's defense counsel regarding the gloves. Appellant denied that the gloves found in the car were hers. Consistently with her statements of November 6, 2008, and July 7, 2009, appellant testified that she moved the gloves but never wore them. (2RT 317, lines 12-14; 2RT 326-327, 343, 392-393, 395-396.)

Jurors convicted Varner of all the charges, found true all special circumstance findings, and sentenced Varner to death. (2AUGCT 304-339, 398.)

Varner filed a motion for new trial. In the motion, Varner, inter alia, challenged his conviction based on his allegation that appellant, the only percipient witness to the homicide, was untruthful. (2AUGCT 410.) The prosecution opposition to Varner's new trial motion asserted that appellant was truthful and that any untruthfulness in her testimony was not material to

the proceedings. (2AUGCT 420-422.) On March 30, 2010, the Court denied the motion for new trial. (4AUGRT 835-836, 839.)

On April 22, 2010, the prosecutor filed a written request for the Court to make a finding whether appellant fulfilled her plea agreement obligations. (1CT 98.)

On April 23, 2010, the Court conducted a hearing on the prosecution's request. (2RT 400.) The prosecutor during the hearing expressed the view that appellant had fulfilled her plea agreement obligations and did not make any material misrepresentations that affected the trial. The prosecutor expressly stated that appellant "was consistent with the prior statement she had given to the People." (2RT 401, lines 20-27.) The prosecutor further stated that she had filed her request in an abundance of caution to determine whether the Court felt that appellant had been untruthful in a way that could affect the verdict. (2RT 401-402.)

During the hearing, Judge Gallagher repeatedly expressed an opinion that appellant lacked credibility and was untruthful during her trial testimony. (2RT 403, lines 1-35.) Judge Gallagher volunteered his opinion that appellant had minimized her role in the killing and expressed an opinion that appellant was "more deeply involved." (2RT 403, lines 31-35.) However, Judge Gallagher stated that he had denied Varner's motion for new trial based on his view that appellant's minimization of her role in the homicide did not absolve Varner of his culpability for the killing. (2RT 404, lines 1-3.) Judge Gallagher mentioned that appellant denied wearing gloves, but

DNA evidence from the gloves was linked to appellant. (2RT 404, lines 4-9.) Judge Gallagher speculated that appellant selected the victim because of their prior relationship and further expressly stated that he did not believe appellant's denial at trial that this was so. (2RT 404, lines 14-19, 24-29.) Judge Gallagher commented that appellant admitted at trial that she had lied about which pair of pants she wore during the homicide. However, there was no physical or scientific evidence recovered from either pair of pants to show that appellant physically participated in the killing. (2RT 405, lines 1-9.) Judge Gallagher read from his personal notes of the trial and expressed in colorful terms his opinion that appellant lacked credibility as a trial witness. (2RT 405, line 30 to 2RT 406, line 6.)

On June 4, 2010, the prosecutor filed a Petition For Withdrawal Of The Negotiated Plea Agreement. (1CT 117.) The petition expressly stated that it was based on appellant's denial that she ever wore a pair of gloves during the homicide and DNA evidence linking appellant to a pair of white cloth gloves found in the decedent's car after the homicide. (1CT 117-118.)

On June 7, 2010, the prosecutor lodged a copy of appellant's November 6, 2008, statement with the Court. (1CT 121.)

On August 27, 2010, Judge Gallagher heard the prosecution's motion to vacate the plea agreement. (2RT 408.) The prosecutor stated that the basis for the motion was

appellant's denial that she wore the gloves found in the car and DNA evidence linking appellant to the gloves. (2RT 411.) The prosecutor on the record stated that, after appellant's November 6, 2008, statement but before trial, the prosecutor received the Department of Justice DNA test results pertaining to the gloves found in the decedent's car. (2RT 411.)

The prosecutor stated on the record that there was no blood on the gloves. (2RT 411, line 20.) The prosecutor stated that no blood was ever found on any of appellant's clothing. (2RT 421, lines 1-5.) Judge Gallagher acknowledged that there was no blood or other evidence on the pants to suggest that appellant participated in the fatal physical assault. (2RT 422, lines 24-28.)

The prosecutor stated on the record that she had appellant re-interviewed on July 7, 2009, regarding the DNA testing and the white gloves. The prosecutor provided the Court with a transcript of the July 7, 2009, interview. (2RT 411.) "[W]e specifically asked her about the white gloves, and she told us she had never put the gloves on, that she had moved the gloves but they had never been worn or used by her." (2RT 411, line 25 to 2RT 412, line 4.)

The prosecutor stated on the record that during trial appellant was specifically questioned by the prosecutor and defense counsel for Varner regarding the white gloves. (2RT 412, lines 5-7.)

During the hearing, Judge Gallagher stated that his notes specified instances in which Judge Gallagher felt that appellant

lied during her testmony. (2RT 419.) Judge Gallagher's notes were not filed nor made an exhibit. Judge Gallagher expressed the opinion that appellant's admission during trial to having lied to police and during trial, as well as aspects of appellant's testimony that Judge Gallagher disbelieved, caused Judge Gallagher to believe that appellant breached the plea agreement and was not entitled to the benefit of the plea bargain. (2RT 424, lines 7-15.) Judge Gallagher ruled that appellant "materially breached the agreement by giving false testimony" and ordered the plea to be vacated. (2RT 425, lines 15-20.)

On December 20, 2010, attorney Borges replaced attorney Babbits as counsel of record for appellant. (1CT 183.)

On April 5, 2011, appellant's new counsel filed a Code of Civil Procedure section 170.3, subdivision (a) application to disqualify Judge Gallagher from presiding over this matter based on actual bias against appellant. (1CT 186-240.) Counsel's declaration stated a belief that Judge Gallagher was actually biased against appellant before April 23, 2010. (1CT 186-192.)

On April 6, 2011, Judge Gallagher signed an order consenting to his disqualification pursuant to Code of Civil Procedure section 170.3, subdivision (c)(3). (1CT 241.)

On May 4, 2011, appellant filed a motion to vacate Judge Gallagher's ruling of August 27, 2010, based on the disqualification that occurred before that ruling. (1CT 245-251.)

The prosecutor filed a response on May 10, 2011, in which she asserted that the fact that Judge Gallagher formed opinions about appellant's credibility as a witness before the petition was filed did not disqualify him from making findings on whether appellant gave false testimony on material facts during trial. (1CT 253.)

On May 12, 2011, defense counsel filed a written reply to the prosecution's opposition, disagreeing with the prosecutor's assertion that Judge Gallagher was entitled to decide in advance of the petition whether he believed appellant lied during Varner's trial. (1CT 268-271.)

During the May 15, 2011, hearing, Judge Boeckman on the record stated his disagreement with the defense position that it was inappropriate for Judge Gallagher to decide before ruling on the petition whether he disbelieved appellant's trial testimony. (2RT 434, lines 4-19.)

Defense counsel stated for the record his belief that, under the terms of the plea agreement, a judge who has been disqualified for bias under Code of Civil Procedure section 170.3, is unavailable to hear and determine the issue of the defendant's truthfulness and whether there has been a material misrepresentation that invalidates the plea bargain. (2RT 435-436.)

After further discussion, the Court continued the matter to permit review of the relevant evidence and to afford the parties an opportunity to submit supplemental briefing, if they so chose. (2RT 438-439.)

On June 6, 2011, the Court, after further discussion on the issue of whether Judge Gallagher was properly disqualified for bias, denied the motion. (2RT 441-454.)

C. JUDICIAL DISQUALIFICATION OCCURS WHEN THE FACTS GIVING RISE TO DISQUALIFICATION ARISE

Disqualification for judicial bias occurs when the facts giving rise to disqualification arise, not subsequently when disqualification is established by a ruling.

"[Judicial] disqualification occurs when the facts creating disqualification arise, not when disqualification is established." (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776; accord *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 43; see also *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 422-427.)

The focus for purposes of determining when disqualification occurs is upon the facts establishing disqualification, not the subsequent judicial determination of those facts.

"[I]t is the *fact* of disqualification that controls, not subsequent judicial action on that disqualification." (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 777 [italics in original]; accord *Giometti v, Etienne* (1934) 219 Cal. 687, 689.)

D. RULINGS MADE BY A DISQUALIFIED JUDGE MUST BE SET ASIDE

Rulings made by a disqualified judge must be set aside, regardless of the merits of the ruling. (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 777; accord *Tatum v. Southern Pacific* (1967) 250 Cal.App.2d 40, 43; *McCauley v. Superior Court* (1961) 190 Cal.App.2d 562, 565.)

"[I]t is no answer to say that the judgment was correct because the statute does not say that the judge is disqualified to decide erroneously but that he shall not decide at all." (*Tatum v. Southern Pacific* (1967) 250 Cal.App.2d 40, 43.)

E. A JUDGE WHO HAS EXPRESSED HIS OPINION THAT HE COULD NOT BELIEVE A WITNESS BASED ON PRESIDING OVER PROCEEDINGS IN WHICH THE WITNESSES HAVE TESTIFIED IS DISQUALIFIED FROM PRESIDING OVER FUTURE PROCEEDINGS INVOLVING THOSE WITNESSES

A judge who has expressed an opinion that he disbelieves a witness based on presiding over one or more past proceedings is disqualified from presiding over future proceedings involving that witness.

In *Evans v. Superior Court* (1930) 107 Cal.App.372, 383, the judge expressed his opinion that he could not believe certain witnesses that were material to future trials because of his opinion of their testimony in earlier trials. The judge

responded to an allegation of judicial bias by asserting that his opinion of the two future witnesses was a product of his judicial function in the earlier trials involving those witnesses. The Court of Appeal determined that the judge was disqualified from presiding over the future proceedings.

"Assuming that the trial judge was correct in his fierce discommendation of petitioners, they nevertheless are entitled to go before a judge of another department of the court, one who will assume that they are telling the truth until the contrary has been shown and where no attaint of perjury will follow them." (*Evans v. Superior Court* (1930) 107 Cal.App.372, 383.)

In *Chastain v. Superior Court* (1936) 14 Cal.App.2d 97, 101, a judge heard two previous trials involving witnesses and parties that he determined had sworn falsely. This Court determined that the judge was disqualified from presiding over further proceedings requiring a determination of the witnesses' credibility.

"The California authorities have definitely declared the rule of law to be that a trial judge who has charged a party litigant with having committed perjury in testifying at the trial with respect to a material issue when the judge of the case concedes that he still retains that same opinion of the litigant's veracity is disqualified under the provisions of section 170 of the Code of Civil Procedure from again trying the same cause." (*Chastain v. Superior Court* (1936) 14 Cal.App.2d 97, 101.)

The California Supreme Court has declared that a judge's expressed opinion that a party has testified falsely, even if

based on evidence before the judge, is disqualified from presiding over a retrial of the case. (*Keating v. Superior Court* (1955) 45 Cal.2d 440, 444.)

F. JUDGE GALLAGHER WAS DISQUALIFIED FROM DETERMINING WHETHER APPELLANT FULFILLED HER PLEA AGREEMENT OBLIGATIONS

Disqualification occurs when the facts creating disqualification arise, not subsequently when a ruling establishes disqualification. (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776; *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 43; *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 422-427.)

As summarized in detail previously in subpart B of this argument, the record establishes that Judge Gallagher on April 23, 2010, expressed his opinion on the record that appellant testified falsely during trial. Judge Gallagher's prejudgment of the critical issue of appellant's credibility disqualified him from presiding over further proceedings convened to determine that issue. (E.g. *Keating v. Superior Court* (1955) 45 Cal.2d 440, 444; *Chastain v. Superior Court* (1936) 14 Cal.App.2d 97, 101; *Evans v. Superior Court* (1930) 107 Cal.App.372, 383.)

G. JUDGE GALLAGHER'S RULING VACATING THE PLEA AGREEMENT SHOULD BE SET ASIDE

Decisions of the California Supreme Court and Courts of Appeal have held that orders of disqualified judges are void and must be vacated. (*Christie v. City of El Centro* (2006) 135

Cal.App.4th 767, 779; accord *Giometti v. Etienne* (1934) 219 Cal. 687, 689; *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 363-364; *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1323; *In re Jenkins* (1999) 70 Cal.App.4th 1162, 1165-1167; *In re Jose S.* (1978) 78 Cal.App.3d 619, 628.)

Other Court of Appeal decisions have suggested that orders made by a disqualified judge are voidable. (See, e.g., *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 939-940; *People v. Barrera* (1999) 70 Cal.App.4th 541, 549-551; *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 423-424; *In re Christian J.* (1984) 155 Cal.App.3d 276, 279-280.)

The California Supreme Court has never reconsidered or modified its decision in *Giometti v. Etienne* (1934) 219 Cal. 687, 689, which ruled that orders made by a disqualified judge are void and must be set aside. The California Supreme Court decision in *Giometti* is the binding authority in this Court. (See, e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 780.)

Under the binding authority of *Giometti*, Judge Gallagher's ruling of August 27, 2010, is void and must be rescinded.

Even if Judge Gallagher's order revoking the plea agreement was deemed voidable rather than void, appellant timely moved to set aside the order in the trial court before the matter became final. "Thus, whether void or voidable, the order

must be vacated." (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 780.) The order vacating the plea agreement was a nullity, because Judge Gallagher was disqualified before the hearing on the motion and thus acted without jurisdiction.

H. CONCLUSION

For all the foregoing reasons, Judge Gallagher was disqualified to rule on the motion to vacate the plea agreement. His ruling is therefore invalid and should be set aside.

VI. THE COURT APPLIED AN INCORRECT STANDARD OF MATERIALITY

A. INTRODUCTION

During the hearing on the prosecution's motion to withdraw the plea agreement, defense counsel asserted that, even if appellant lied about whether the wore the gloves, the alleged falsity was not material. Based on facts, including the presence of appellant's fingerprints in the car and the absence of blood on appellant's clothing and the gloves, whether appellant wore gloves or not would not materially affect the issue of whether Varner committed the charged murder. The jurors heard the DNA evidence, appellant's denial that she wore gloves, appellant's admission that she repeatedly lied to police, and appellant's admission on cross-examination that she had lied on direct examination about which pants she wore during the homicide. Notwithstanding this information, the jurors convicted Varner of first-degree murder, found true the alleged special circumstances, and voted to impose the death penalty.

The prosecutor obtained the benefit of the plea agreement. (2RT 414-416, 419-419, 425.)

The Court disputed whether the standard of materiality discussed by defense counsel was correct. (2RT 416, lines 16-22.) However, the Court did not explain what standard of materiality it was applying.

On this record, the alleged falsity was not material. The Court appears to have rejected the correct standard of materiality. The judgment should be reversed to remedy this error.

B. THE STANDARD OF REVIEW

This argument poses a disputed question of law: the correct standard for determining materiality. This question of law is subject to de novo review. (See, e.g., *Haworth v. Superior Court (Ossakow)* (2010) 50 Cal.4th 372, 385; *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 355.)

C. THE CORRECT STANDARD FOR DETERMINING WHETHER FALSE EVIDENCE IS MATERIAL IN A CRIMINAL PROCEEDING

The standard for determining whether false evidence presented in a criminal trial was material is well-established. The question is whether the false evidence with reasonable probability could have affected the verdict. (*In re Malone* (1996) 12 Cal.4th 935, 965; *In re Sassounian* (1995) 9 Cal.4th 535, 546; *In re Wright* (1978) 78 Cal.App.3d 788, 814.)

D. THE COURT REJECTED THE CORRECT LEGAL STANDARD OF MATERIALITY

Defense counsel during the hearing on this issue urged that, even if appellant falsely denied that she wore the white cloth gloves found in the backseat of the decedent's car, that alleged fact in the totality of circumstances would not have affected the verdict. (2RT 414-416, 419-419, 425.) The Court disagreed with defense counsel's assertion that the standard of materiality was the probable effect of the allegedly false information on the verdict. The Court did not state what standard of materiality that it did believe should apply. (2RT 416.)

The standard that the Court rejected was the correct standard for determining materiality. (See, e.g., *In re Malone* (1996) 12 Cal.4th 935, 965; *In re Sassounian* (1995) 9 Cal.4th 535, 546; *In re Wright* (1978) 78 Cal.App.3d 788, 814.)

E. THE COURT'S REJECTION OF THE GOVERNING LEGAL STANDARD OF MATERIALITY WAS PREJUDICIAL ERROR

Regardless of the prejudice standard applied (Compare: *Chapman v. California* (1967) 386 U.S. 18, 23-24 [reversal for federal constitutional error is required unless the record establishes beyond a reasonable doubt that the error was harmless to the outcome at trial]; with *People v. Watson* (1956) 46 Cal.2d 818, 836 [state-law error requires reversal if it is reasonably probable that the error affected the outcome]), the

Court's rejection of the correct standard of materiality on this record was prejudicial.

The record before this Court establishes that material falsehood was not established.

The prosecutor on the record admitted that she received the DNA test results after the plea bargain was signed on November 7, 2008, but well in advance of trial. (1CT 117-118; 2RT 411.) The prosecutor had appellant interviewed on July 7, 2009. Appellant was questioned about the white cloth gloves and still denied wearing gloves during the homicide and denied participating in the killing. Neither the prosecutor nor the prosecution investigator told appellant about any DNA test results during the July 7, 2009, interview. (1CT 117; 2RT 411-412; 2AUG CT 447.) Appellant was questioned about the DNA evidence and the gloves by the prosecutor and Varner's defense counsel during trial. (2RT 317, 326-327, 343, 392-393, 395-396.) The jurors during trial heard this information, as well as the other information discussed on the record during the August 27, 2010, hearing. The fact that the jurors heard all the relevant facts, including appellant's admission that she had repeatedly lied to police (1RT 217-218; 2RT 281-283, 288-293, 296) and that she had lied on direct examination about which pants she wore (2RT 385, 387, 391-392, 395), and still convicted Varner, provides powerful proof that appellant's alleged credibility problems were not material.

The Court's own actions in this case undermine the Court's ruling on this issue. Varner moved for a new trial.

According to the record, a key issue in the litigation of Varner's motion for new trial was an attack on appellant's credibility as a key witness against Varner. (2AUGCT 410, 420-422.) The Court denied the new trial motion, finding that there was no material falsity and no subornation of perjury. (4AUGRT 835-836.) Although appellant was a key witness against Varner, the Court concluded that appellant's alleged lies did not affect the judgment. (4AUGRT 835-836; 2RT 404.)

The judgment should be reversed to remedy the Court's erroneous rejection of the governing standard of materiality during the hearing on this issue.

VII. THE IMPROPER RESCISSION OF THE PLEA AGREEMENT VIOLATED DUE PROCESS

A. INTRODUCTION

The procedures involved in the rescission of the plea agreement violated the federal constitution's guarantee of Due Process.

B. DENIAL OF AN IMPARTIAL ADJUDICATOR VIOLATED PROCEDURAL DUE PROCESS

As detailed in argument V of this brief, Judge Gallagher presided over the hearing of this matter despite the fact that he was by reason of actual bias disqualified. The denial of an impartial judge violated Due Process.

A biased decisionmaker is constitutionally unacceptable. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46; *In re Murchison*

(1955) 349 U.S. 133, 136; *Tumey v. Ohio* (1927) 273 U.S. 510, 532.)

It is axiomatic that a fair trial in a fair tribunal is a requirement of Procedural Due Process and is necessary to insure a fair trial. (*In re Murchison* (1955) 349 U.S. 133, 136; accord *Withrow v. Larkin* (1975) 421 U.S. 35, 46.)

"This most basic tenet of our judicial system helps to ensure both litigants' and the public's confidence that each case has been fairly adjudicated by a neutral and detached arbiter. An appearance of impropriety, regardless of whether such impropriety is actually present or proven, erodes that confidence and weakens our system of justice." (*Hurles v. Ryan* (9th Cir. 2011) 650 F.3d 1301, 1309.)

To protect the right to a fair trial, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires judicial recusal where the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

As detailed in argument V of this brief, Judge Gallagher long in advance of the adjudication of the prosecution motion to vacate the plea agreement expressed prejudgment of the very issue that he was charged with deciding.

On this record, appellant was denied Procedural Due Process under circumstances evidencing a probability of actual bias on the part of the judge.

C. APPELLANT WAS DENIED DUE PROCESS BY THE

JUDGE'S RELIANCE UPON HIS RECOLLECTION AND NOTES IN LIEU OF AN EVIDENTIARY RECORD

As detailed in the Statement of Facts and in arguments I and IV of this brief, Judge Gallagher conducted the hearing on the prosecution's motion to withdraw the plea agreement, and based largely upon his decision, on his recollection of testimony and notes. This procedure violated Procedural Due Process.

The Ninth Circuit has characterized this type of "procedure" as "not a procedure at all." (*Hurles v. Ryan* (9th Cir. 2011) 650 F.3d 1301, 1312.)

It is improper for a court to resolve factual disputes by relying on personal knowledge or recollection rather than evidentiary presentation. (E.g. *Buffalo v. Sunn* (9th Cir. 1988) 854 F.2d 1158, 1165; accord *Hurles v. Ryan* (9th Cir. 2011) 650 F.3d 1301, 1312.)

For purposes of appellate review, reliance upon a court's personal knowledge or recollection normally precludes assessment of the merits of the Court's decision. (*In re Murchison* (1955) 349 U.S. 133, 138; *Buffalo v. Sunn* (9th Cir. 1988) 854 F.2d 1158, 1165.)[14]

The conduct of the hearing on this issue thus violated Procedural Due Process.

D. VIOLATION OF STATE LAW IN DETERMINING

[14] In this case, however, the record has been augmented with relevant and substantial portions of the Varner guilt-phase trial record relevant to the hearing and revocation of the plea agreement giving rise to this appeal.

THE MOTIONS AT ISSUE IN THIS APPEAL VIOLATED SUBSTANTIVE DUE PROCESS

To the extent that they violated state-law rules and standards, the rulings at issue in arguments I through VI of this brief violated the federal constitution's guarantee of Substantive Due Process. (See, e.g., *Reno v. Flores* (1993) 507 U.S. 292, 316 [O'Connor, J., conc. op.]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 80; *Meachum v. Fano* (1976) 427 U.S. 215, 225-226; *Wolff v. McDonnell* (1974) 418 U.S. 539, 557-558; *Howard v. Grinage* (6th Cir. 1996) 82 F.3d 1343, 1349-1353.)

E. CONCLUSION

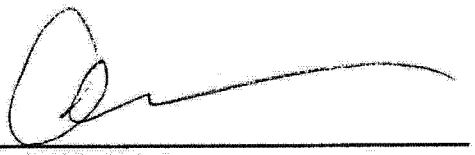
For all the reasons discussed herein, the rulings challenged in arguments I through VI, inclusive, of this brief violated the Federal Constitution's guarantee of Due Process under the Fifth and Fourteenth Amendments, as applied to the States via the Fourteenth Amendment.

CONCLUSION

For all the reasons discussed herein, the judgment must be reversed.

Dated: January 10, 2012

Respectfully Submitted,
Law Office Of A.M. Weisman

By: /s/ 
A.M. Weisman
Attorney For Appellant
Joanna Lorraine Peterson

WORD COUNT CERTIFICATION

I, A.M. Weisman, am counsel for appellant. In compliance with rule 8.360(b)(1) of the California Rules of Court, effective January 1, 2007, I hereby certify that, in reliance on the word count of the computer program used to prepare this document, the word count of the body of this document, excluding tables, any attachment permitted under rule 8.204(d), and this Certificate, is 25,098 words. The applicable word-count limit prescribed by rule 8.360(b)(1) is 25,500 words. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on the date of January 10, 2012, at Diamond Bar, California.

Signed: By: /s/ 
A.M. Weisman, Attorney For Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, A. M. Weisman, am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is P.O. Box 4236, Diamond Bar, California 91765-0236. On January 10, 2012, I served the foregoing **Appellant's Opening Brief** on Interested Parties in this action, **People v. Peterson, Third District No. C068893**, by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Central California Appellate Program
2407 "J" Street, Ste. 301
Sacramento, CA 95816

Ms. Joanna Lorraine Peterson
CDCR No. WE2243
VSPW
P.O. Box 96
Chowchilla, CA 93610
LEGAL MAIL – CONFIDENTIAL

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Office of the District Attorney
1355 West Street
Redding, CA 96001

Felony Appeals Clerk
Shasta County Superior Court
1500 Court Street, Room 201
Redding, CA 96001

I caused such envelopes with postage thereon fully paid to be deposited in the United States Mail at Diamond Bar, California. I declare under penalty of perjury that the foregoing is true and correct. Executed on January 10, 2012, at Diamond Bar, California.

By: /s/
A.M. Weisman