IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY_____ Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOANNA LORRAINE PETERSON,

Defendant and Appellant.

Case No. C068893

Shasta County Superior Court, Case No. 05F8876
The Honorable Bradley L. Boeckman, Judge
The Honorable William H. Gallagher

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STATEMENT OF THE CASE

On March 6, 2006, the District Attorney of Shasta County filed an information in superior court, charging appellant, Joanna Lorraine Peterson, and codefendant, Scott Paul Varner, with the following offenses: in count 1, murder of Jeannette Renee Mariedth (Pen. Code,[1] § 187), in count 2, robbery of Jeannette Renee Mariedth (Pen. Code, § 211), in count 3, kidnapping of Jeannette Renee Mariedth (Pen. Code, § 207, subd. (a)), kidnapping of Jeannette Renee Mariedth for the purpose of robbery (Pen. Code, § 209, subd. (b)), in count 5, kidnapping of Jeannette Renee Mariedth for the purpose of carjacking, and in count 6, carjacking of Jeannette Renee Mariedth (Pen. Code, § 215, subd. (a)). (1 CT 21-22.)[2] Pursuant to section 190.2, subdivision (a)(17), and in association with count 1, it was alleged that the murder was committed during the course of: a kidnapping, a kidnapping for the purpose of robbery, a kidnapping for the purpose of carjacking, a carjacking, and a robbery, all of which are special circumstances. (1 CT 23-24.) Also in association with count 1, it was alleged that the murder was willful, deliberate, and premeditated pursuant to section 189. (1 CT 23.) In association with counts 1 through 6, it was further alleged that appellant was a person of 17 years of age at the time of the commission of the charged offenses within the meaning of Welfare and Institutions Code section 707, subdivision (d)(1). (1 CT 24.)

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[1] Unless otherwise designated, subsequent statutory references are to the Penal Code.

[2] The record in the case at bar consists of the following: a two-volume Clerk's Transcript on Appeal (cited herein as "1 CT" and "2 CT"), a two-volume Reporter's Transcript on Appeal (cited herein as "1 RT" and "2 RT"), a four-volume augmented Reporter's Transcript on Appeal, which was filed with this Court on December 30, 2011, (cited herein as "1 Aug. RT," "2 Aug. RT," "3 Aug. RT," and "4 Aug. RT"), and a three-volume augmented Clerk's Transcript on Appeal (cited herein as "1 Aug. CT," "2 Aug. CT," and "3 Aug. CT").

On March 17, 2006, appellant entered a plea of not guilty to the charges and denied the allegations. (1 CT 25.) On November 7, 2008, appellant entered into a written plea agreement with the district attorney. (1 CT 78-89.) Pursuant to the terms of the agreement, appellant agreed to cooperate with representatives of the Shasta County District Attorney's Office and the Redding Police Department and "testify fully and truthfully at all stages and proceedings" in Varner's case. (1 CT 78-79.) In exchange, appellant pled guilty to count 1, and the degree of murder was fixed at second. (1 CT 82, 85, 89.) The agreed upon sentence for count 1 was 15 years to life. (1 CT 82, 85, 89.) The remaining counts and allegations were to be dismissed. (1 CT 82, 85, 89.) Appellant also entered into a general time waiver to delay formal sentencing and entry of judgment until after either conviction and sentencing, or acquittal, of Varner. (1 CT 82.)

Appellant testified against Varner at his trial. (1 RT 175-272; 2 RT 274, 276-314, 355, 359-363, 375-397.) The jury convicted him of the charged offenses and returned a sentence of death. (1 CT 246; 2 Aug. CT 304-307, 309, 311, 313, 316, 320, 322-326, 328, 330, 332, 335, 339.)

On April 22, 2010, the prosecutor filed a Request for Findings Pursuant to the Negotiated Plea Agreement. (1 CT 98-99.) On April 23, 2010, the trial court held a hearing to consider whether it was appropriate for it to make findings with respect to the plea agreement. (1 CT 112; see also 2 RT 400-407.) On June 4, 2010, the prosecutor filed a Petition for Withdrawal of the Negotiated Plea Agreement wherein she requested that the trial court find that appellant had not fulfilled her obligations under the plea agreement. (1 CT 117-119.) On June 7, 2010, the prosecutor filed an additional Petition for Withdrawal of the Negotiated Plea Agreement and attached a transcript from a November 2008 interview of appellant. (1 CT 121-172.)

On April 23, 2010, the trial court held a hearing to consider whether it was appropriate for it to make findings with respect to appellant's performance under the plea agreement. (1 CT 112; see also 2 RT 400-407.)

On August 27, 2010, the court held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the conclusion of the hearing, the court ruled that appellant had "materially breached the agreement by giving false testimony during the Scott Varner case . . . ." (2 RT 425; see also 1 CT 176, 178.) Accordingly, the court ordered that the plea be vacated and set aside. (1 CT 176, 178; see also 2 RT 408, 425.)

On April 5, 2011, defense counsel filed a Statement of Disqualification of Judge William D. Gallagher pursuant to Code of Civil Procedure section 170.3, subdivision (c)(3). (1 CT 186.) On April 6, 2011, Judge Gallagher consented to the disqualification. (1 CT 241.) On April 12, 2011, the matter was reassigned to Judge Bradley L. Boeckman. (1 CT 242-243.) On May 4, 2011, defense counsel filed a motion to vacate the August 27, 2010, ruling by Judge Gallagher. (1 CT 245-253.) On May 10, 2011, the prosecutor filed a response to defense counsel's motion to vacate Judge Gallaher's August 27, 2010, ruling. (1 CT 252-253.) On May 12, 2011, defense counsel filed a response to the prosecutor's response. (1 CT 268-271.) On May 16, 2011, Judge Boeckman heard arguments from defense counsel and the prosecutor on the motion to vacate appellant's plea and continued the hearing until June 6, 2011. (2 CT 308; see also 2 RT 428-440.) On June 6, 2011, Judge Boeckman heard further arguments from counsel but subsequently denied defense counsel's motion. (2 CT 309; 2 RT 441-456.) On July 27, 2011, appellant pled guilty to counts 1 and 2. (2 CT 317-318, 322, 325; see also 2 RT 457-467.) The court sentenced her to an indeterminate term of 15 years to life on count 1 and the low term of two years on count 2. (2 CT 317-319, 322, 325; see also 2 RT 457-467.)

On July 28, 2011, appellant filed a timely notice of appeal and an application for a certificate of probable cause, the latter of which was granted on July 29, 2011. (2 CT 327-329.)

STATEMENT OF FACTS

Introduction

Pursuant to the terms and conditions of a plea agreement with the Shasta County District Attorney, appellant pled guilty to second degree murder in exchange for, among other things, providing truthful testimony at Varner's trial. Prior to entering into the plea agreement, appellant provided two statements regarding the circumstances surrounding Mariedth's murder, neither of which was part of the record in Varner's case. The record in the instant case has been augmented with portions of the record from Varner's trial. (See 1 Aug. RT, 2 Aug. RT, 3 Aug. RT, and 4 Aug. RT.) Because evidence from Varner's trial is relevant to the issues appellant raises in this appeal, respondent will begin by summarizing the evidence adduced at his trial.

A. Facts adduced at Varner's trial

On November 27, 2005, Matthew "Papa Bear" Miller and his wife, Sandra "Mama Bear" Miller were living out of their van, which was parked on a dirt road in Redding. (3 Aug. RT 677-678.) The van had run out of gasoline, so during the early morning hours, Mr. Miller was searching for spare change in parking lots in the downtown Redding area. (3 Aug. RT 678.)

At some point, appellant and Varner approached in a white car. (3 Aug. RT 679-680.) Mr. Miller entered the vehicle, and appellant drove him back to his van so that he could retrieve a container for gasoline. (3 Aug. RT 680.) They also picked up Mrs. Miller and went to an AM PM mini-mart on Lake Boulevard. (3 Aug. RT 680.) After he partially filled his

gasoline container, the group went to Wal-Mart. (3 Aug. RT 680-683.) Afterward, appellant and Varner dropped Mr. Miller and his wife off at a Valero gasoline station and they went to see some people who lived in an apartment off of Churn Creek. (3 Aug. RT 685-686, 688.) After waiting for their return for approximately two hours, Mr. and Mrs. Miller decided to walk up Churn Creek. (3 Aug. RT 691.) As they walked, they observed the car in which they had traveled with appellant and Varner "sitting in the mud." (3 Aug. RT 692.) A truck from the Redding Police Department was nearby. (3 Aug. RT 692.)

Law Enforcement's Response

Dean Stainberg, a sergeant with the Redding Police Department, was involved in the investigation of Jeannette Mariedth's murder. (1 Aug. RT 1-2.) On November 27, 2005, Sergeant Stainberg received information that Mariedth's car had been involved in a single-car accident. (1 Aug. RT 2-3.) An officer who was at the scene of the accident called Sergeant Stainberg to inform him that he had found a plastic bag with what appeared to be fresh drops of blood on it in the trunk of the vehicle. (1 Aug. RT 3-4.) Later that same morning, David Mariedth, Mariedth's brother, contacted Sergeant Stainberg to report Mariedth missing. (1 Aug. RT 5.) In response, Sergeant Stainberg went to Mariedth's apartment and, as he stood in the front parking lot of the apartment complex, he heard a group of people yelling that people were exiting through the back of the apartment. (1 Aug. RT 8.) He then saw a female running through an alley behind the apartments. (1 Aug. RT 9.) Sergeant Stainberg ordered the female to stop running, but she continued and was ultimately detained by Sergeant Bokavich. (1 Aug. RT 9.)

Once Sergeant Bokavich arrived at Mariedth's apartment, he learned from a man named Larry Bonds that a male and female were inside of the apartment. (1 Aug. RT 14-15.) Subsequently, Mr. Bonds stated, "There

she goes right now," referring to the female who had been in the apartment. (1 Aug. RT 15.) Sergeant Bokavich then ran after the woman, who he later identified as appellant. (1 Aug. RT 15-16.) Appellant was carrying a black purse in her right hand and a backpack over her left shoulder. (1 Aug. RT 16-17.) There was a piece of paper bearing Mariedth's name inside of the purse. (1 Aug. RT 16.)

After Sergeant Bokavich transported appellant to the investigations division, he returned to the area of Mariedth's apartment to search for a person who appellant had identified as "Kevin." (1 Aug. RT 24-25.) He subsequently made contact with Varner, who was ultimately apprehended by another officer. (1 Aug. RT 25-28.) At the time of his arrest, Varner was wearing numerous women's rings on his fingers. (1 Aug. RT 29, 72.)

On November 27, 2005, Lora Leighton, a community service officer with the Redding Police Department, was called out to the scene of a hit-and-run accident involving a vehicle with the license plate number EFL178. (1 Aug. RT 42-44.) While she was conducting an inventory of the vehicle, the Millers arrived and stated that they had previously traveled in the vehicle. (1 Aug. RT 46.)

Once Officer Leighton returned to the police station, she met with Mariedth's brother and then went to Mariedth's apartment. (1 Aug. RT 49-50.) At the apartment, Officer Leighton spoke with Larry Bonds, who indicated that he had seen two people enter Mariedth's apartment. (1 Aug. RT 50-51.) Mr. Bonds had seen a female fumbling with keys until she was able to open the door to Mariedth's apartment. (1 Aug. RT 51.) When Mr. Bonds looked at the woman, she said, "It's okay, it's my aunt," and she continued to fumble with the keys. (1 Aug. RT 51.) As Officer Leighton and other law enforcement officials were waiting to gain entry to Mariedth's apartment, Mr. Bonds said, "There she goes, walking down the

street." (1 Aug. RT 51.) Officer Leighton then saw a female walking down the street carrying a backpack. (1 Aug. RT 51.)

On November 27, 2005, Benjamin Love, who was then a police officer with the Redding Police Department, was called to the scene of a hit-and-run accident. (1 Aug. RT 59-60.) While on the scene, he spoke with Matthew and Sandra Miller, who explained that they had been passengers in the vehicle earlier that morning. (1 Aug. RT 61-62.) They had run out of gasoline, and the individuals who were in the car drove them to a gasoline station. (1 Aug. RT 62.) That morning, Officer Love heard a call on the radio regarding a foot pursuit of a suspect who may have been linked to case of the missing person. (1 Aug. RT 62, 64-65.) After he responded and gave chase, Officer Love arrested Varner. (1 Aug. RT 65-68.)

Casey Bokavich, a sergeant with the Redding Police Department, was assigned to investigate Mariedth's missing-person case. (1 Aug. RT 11.) On November 27, 2005, he was on his way to Mariedth's apartment at 1032 State Street when a cab driver by the name of Mr. Tobin gave him some information about a recent fare. (1 Aug. RT 11-13.) Subsequently, Mr. Tobin met Sergeant Bokavich at the location where Varner had been apprehended. (1 Aug. RT 30.) Mr. Tobin identified Varner as the person he had earlier dropped off near South City Park. (1 Aug. RT 30.)

Michael Tobin testified that on November 27, 2005, he was employed as a taxi cab driver. (3 Aug. RT 653-654.) Pursuant to a stipulation, had he continued to testify, he would have stated that he had picked up appellant and Varner at a Taco Bell restaurant on Market Street on the morning of November 27, 2005, and dropped them off at South City Park at approximately 10:00 a.m. (3 Aug. RT 673-674.) Appellant wore black clothing, and Varner wore a gold or yellowish-gold sweatshirt with a hood. (3 Aug. RT 674.)

On the evening of November 27, 2005, Bart Langley, who was then a police officer with the Redding Police Department, interviewed appellant in connection with his investigation of Mariedth's murder. (3 Aug. RT 625-626.) Appellant subsequently acknowledged that she had initially been untruthful during the interview to the extent that she denied having been in Mariedth's vehicle on the night of the murder and instead claimed that she had stayed with a friend named Cody. (1 RT 217-218 .) Ultimately, however, appellant led Officer Langley to Whiskeytown National Park Cemetery, where Mariedth's body was located. (1 RT 218; 3 Aug. RT 626-629.) Subsequently, appellant led Officer Langley to a Valero gasoline station on Eureka Way in the City of Redding. (1 RT 219; 3 Aug. RT 632.) There, they saw some trash, including In-N-Out restaurant containers, a cardboard cup holder, a package of salt, and some receipts in the parking lot. (3 Aug. RT 632.) Afterward, they went to an AM PM mini-mart on Lake Boulevard and to a Circle K store on Shasta Dam Boulevard in the City of Shasta Lake. (1 RT 219; 3 Aug. RT 633.)

Investigator Todd Cogle assisted in the investigation of Mariedth's disappearance. (1 Aug. RT 73-74.) On November 29, 2005, he went to 2092 East Street, an apartment complex that shares a parking lot with 2088 East Street. (1 Aug. RT 74.) He recovered a pair of gold or bronze sweatpants and a heavy jacket in one of the laundry rooms. (1 Aug. RT 75-76.) When Investigator Cogle searched the parking lot of the apartment complex, he discovered a pair of black gloves on the back of one of the cars parked in the lot. (1 Aug. RT 77-78.)

Peggy Porter, an officer with the Redding Police Department, was assigned to investigate Mariedth's disappearance and murder. (1 Aug. RT 227-228.) On November 27, 2005, she witnessed blood draws from appellant and Varner. (1 Aug. RT 233-236.) She collected and booked into evidence the clothing that appellant had been wearing while she was at the

Redding Police Department. (1 Aug. RT 236-237.) Officer Porter also took photographs of appellant, including her hands. (1 Aug. RT 238, 269.)

On November 27, 2005, William Darling, a crime scene technician with the Redding Police Department, was notified that Mariedth's body had been located. (2 Aug. RT 280, 285-286.) In response, Mr. Darling went beyond Whiskeytown Dam, traveling on the road to Need Camp, and directly across from a cemetery. (2 Aug. RT 286.) Mariedth's body was slightly over 50 feet away from the paved road. (2 Aug. RT 289.)

Mr. Darling also created a lettering system to assist in the cataloging and documentation of where various items of evidence had been located. (2 Aug. RT 279.) Scene "G" included items of evidence taken from Mariedth's vehicle. (2 Aug. RT 279-280.) Among the items he collected were a white glove and another glove, which were labeled G-11 and G-34, respectively. (2 Aug. RT 301-302, 306, 325-326, 345, 350-351.) The glove that was labeled G-11 was recovered from the right rear seat area, and the one that was labeled G-34 was recovered from the right rear floor area. (2 Aug. RT 345.) The gloves were located on the same side of the car. (2 Aug. RT 345.)

Medical and expert testimony

On December 6, 2005, Barbara Phillips, a latent print analyst with the California Department of Justice assigned to assist in the investigation of Mariedth's murder, examined for fingerprints a 1999 Chevy Cavalier bearing the license plate number 4EFL178. (2 Aug. RT 364.) She examined "[b]asically everywhere" with the exception of the seats and floorboards. (2 Aug. RT 365-366.) Her search uncovered the following: one usable fingerprint from the outside portion of the driver's side rear door; three from the front fender on the driver's side; and three from the interior passenger's side window. (2 Aug. RT 366.) The fingerprint from

the outside portion of the rear driver's side door matched appellant's right index finger. (2 Aug. RT 367.)

Sara Larson, a senior criminalist with the California Department of Justice, collected some hairs and fibers from the interior of a vehicle she examined in the presence of Ms. Phillips and Mr. Darling. (2 Aug. RT 380, 384, 387.) She also swabbed what appeared to be palm and fingerprint impressions and examined some stains she found in the vehicle's interior and on its exterior. (2 Aug. RT 387-389.)

Deanna Kacer, a California Department of Justice criminalist with a specialty in DNA analysis, received DNA samples from appellant and Mariedth. (2 Aug. RT 424-425, 440.) The DNA extracted from a stain on the cuff of appellant's sweatshirt was consistent with appellant's profile. (2 Aug. RT 442, 454.) Testing of a swab from the exterior of one of the black gloves revealed a DNA mixture of at least two individuals, but the possible sources could not be determined. (2 Aug. RT 443.) Testing of the swab from the interior of one of the black gloves revealed a low level male partial DNA profile, but Varner was excluded as a possible source of that DNA profile. (2 Aug. RT 443.) Testing of the swab from the interior and exterior of the other black glove produced a DNA mixture of at least two individuals, at least one of whom was male; however, appellant, Varner, and Mariedth were excluded as possible sources of that DNA mixture. (2 Aug. RT 443.) The DNA profile from a bloodstain on the front left pant leg of a pair of brown sweatpants matched Mariedth's profile. (2 Aug. RT 444.) A complex DNA mixture of at least three individuals was detected from the interior waistband of the brown sweatpants. (2 Aug. RT 444.) Appellant and Mariedth were excluded as possible sources of that mixture, but Varner could not be excluded. (2 Aug. RT 444.) DNA testing of one of the victim's fingernail clippings revealed a male contributor, a primary female contributor, and a minor female contributor. (2 Aug. RT 445-447.)

Testing of the exterior of one of the white gloves revealed that appellant was the primary female contributor. (2 Aug. RT 448, 456.) Appellant could not be excluded as a possible contributor to the primary female DNA profile extracted from the interior of the white glove. (2 Aug. RT 448, 451, 456.) A mixture of male and female DNA was detected on the exterior of the other white glove, and appellant could not be excluded as a possible source of the primary female profile. (2 Aug. RT 451, 456.) The DNA from the interior of the white glove matched appellant's profile. (2 Aug. RT 451-452, 456-457.)

DNA from a stain on the passenger's side rear bumper of Mariedth's vehicle matched Mariedth's profile. (2 Aug. RT 452, 457.) DNA from blood on the interior of a white plastic bag also matched Mariedth's profile. (2 Aug. RT 453-457.) No DNA typing results were detected from the exterior of the same white plastic bag. (2 Aug. RT 453.)

On November 29, 2005, Susan Comfort, a forensic pathologist with the Shasta County Sheriff Coroner's Office, performed an autopsy on Mariedth. (2 Aug. RT 516, 522.) Dr. Comfort opined that the cause of Mariedth's death was manual strangulation and suffocation with a plastic bag. (2 Aug. RT 522, 551.) Blunt force injuries were contributory causes of her death. (2 Aug. RT 522.) Mariedth had bruises and abrasions on her neck, a fracture of her hyoid bone, and hemorrhage in the muscles of the neck. (2 Aug. RT 522-523.) Mariedth's injuries, particularly those on her neck and face, suggested that she had been beaten and had struggled during the attack. (2 Aug. RT 523-524.) On both shoulders, she suffered multiple thin linear abrasions that ran parallel to each other, which may have been caused by having her body dragged across a rough surface. (2 Aug. RT 529.) Mariedth's gastric contents measured approximately one quarter of a teaspoon, indicating that she had probably not eaten for "hours and hours" before she died. (2 Aug. RT 530-531.) Dr. Comfort opined that the types

of injuries Mariedth had suffered were not consistent with having been stomped. (2 Aug. RT 533-534.)

Other Witnesses

In November 2005, Larry Bonds's mother was living at 1032 State Street, Apartment A, which is one of four apartments in the complex. (2 Aug. RT 565-566.) Mariedth lived in the same apartment complex. (2 Aug. RT 566.) Mariedth's apartment was directly to the right of Mr. Bonds's mother's apartment. (2 Aug. RT 566.) On November 27, 2005, Mr. Bonds saw appellant and Varner unlocking the door of Mariedth's apartment. (2 Aug. RT 568, 570-572.) One of the two claimed to be related to Mariedth. (2 Aug. RT 573.) After successfully unlocking the door, the pair entered her home, where they remained for approximately 20 minutes; thereafter, law enforcement officials arrived. (2 Aug. RT 568, 572.) At a previous hearing, Mr. Bonds testified that, at some subsequent point, he saw appellant walking down the road, and he suspected that she had come from the rear of the apartment. (2 Aug. RT 573-574.)

On November 27, 2005, after being informed that his sister's vehicle had been involved in a hit-and-run accident and learning that Mariedth had not reported to work, David Mariedth reported that she was missing. (3 Aug. RT 580, 582, 591, 593.) Mariedth lived on State Street in the City of Redding, and she owned a white Chevy Cavalier. (2 Aug. RT 580-582.)

B. Facts Relevant to the Rescission of Appellant's Plea Agreement

Appellant's November 6, 2008, Statement

In November 6, 2008, appellant submitted to an interview with Investigator Todd Cogle. (1 CT 122-172.) During the interview, appellant stated that on November 26, 2005, she had been at the Travel Inn with two individuals named Casey and Jasmine. (1 CT 124, 129.) Sometime around 7:30 or 8:00 p.m., Varner entered the room through the bathroom window.

(1 CT 124, 127, 132.) He was wearing a gold track suit and black gloves, and he introduced himself to appellant as "Kevin." (1 CT 127, 138-140.) At some point, appellant and Varner left, walking toward South City, to obtain methamphetamine. (1 CT 124, 129, 133.) The two were behind the Ready Inn when Varner encountered a man named Brandon with whom he fought. (1 CT 124, 129, 131.) During the fight, Brandon dropped what appeared to be a knife, which Varner picked up. (1 CT 130.)

Appellant and Varner went to see a man named "Butch," from whom they intended to purchase methamphetamine, but he was not home, so they sat in the parking lot of an apartment complex, where they encountered Mariedth. (1 CT 124, 130-135.) As Mariedth unloaded her groceries from her vehicle, Varner asked her for a ride to the Shasta Lake area. (1 CT 124, 134-135, 140-141.) Mariedth "kind of hesitated" but agreed to give them a ride after she unloaded her groceries. (1 CT 124, 135, 141.) Varner sat in the front passenger's seat, and appellant sat behind him in the rear passenger's seat. (1 CT 124, 142.) Varner then introduced himself and appellant to Mariedth. (1 CT 142.)

As they approached Redding, Varner said to Mariedth, "I have a gun and a knife and I will kill you." (1 CT 124, 143-144.) Varner then told her not to make any sudden movements or draw attention to herself. (1 CT 124.) Varner then asked her for money, and she gave him $20.00. (1 CT 124, 145.) The group stopped at a Circle K store near the entrance to the City of Shasta Lake. (1 CT 124, 145.) With the $20.00 that Varner gave her, appellant went inside the store, bought cigarettes, and gave the cigarettes and change to Varner. (1 CT 124, 145-146.) Varner then gave the change to Mariedth and the group continued driving. (1 CT 124, 146.)

At some point, the group stopped at an In-N-Out Burger restaurant, where Varner ordered some food. (1 CT 124, 149.) Appellant noticed that Mariedth had been "a little hesitant towards him." (1 CT 124.)

Subsequently, Varner indicated that he needed to visit his younger brother's gravesite and directed Mariedth to drive toward Whiskeytown. (1 CT 124-125, 150.) En route, appellant asked Varner if he intended to let Mariedth go, but he did not reply. (1 CT 125.) After the group passed an area known as Knee Camp,[3] Varner instructed Mariedth to back into an unpaved area that was next to a small ditch at the cemetery. (1 CT 125, 152.) Varner took the car keys from Mariedth and exited the vehicle. (1 CT 152.) After appellant went to the bathroom behind a bush, Varner called her over and informed her that they needed to kill Mariedth because he was concerned that she would call the police. (1 CT 125, 146-147, 152-153, 160.) Appellant refused to help Varner murder Mariedth. (1 CT 125.) Upon returning to the vehicle, Varner told Mariedth, "I'm gonna [sic] have to kill you," and, while hyperventilating, she responded, "Yes, I know." (1 CT 153.)

Varner subsequently asked Mariedth whether the headrest of the driver's seat could be removed and whether she had any plastic bags. (1 CT 125, 153-154.) Mariedth responded in the negative to both questions. (1 CT 125.) Varner crawled from the front seat to the rear of the vehicle, retrieved a plastic bag, and emptied its contents. (1 CT 125.) Varner told Mariedth that she needed to die, and Mariedth began to hyperventilate and plead for Jesus's help. (1 CT 125, 154.)

Varner began choking Mariedth and placed the bag over her head. (1 CT 125, 154.) Varner pulled her in between the seats and began hitting her and continued to choke her. (1 CT 125, 155.) Meanwhile, Mariedth was kicking and screaming and fighting back. (1 CT 125, 155-156.) Varner continued to hit her until she ceased moving, at which time he requested

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[3] At Varner's trial, this area was referred to and transcribed as "NEED Camp." (1 RT 192; 2 Aug. RT 286.)

appellant's help getting Mariedth out of the vehicle. (1 CT 125, 155.) Appellant initially refused to assist Varner, but when he withdrew a knife, she agreed to help remove Mariedth from the vehicle. (1 CT 125, 156-157.) Once they removed Mariedth's body from the vehicle, appellant reentered the vehicle while Varner rolled her body down the ditch and covered her with bushes and a blanket. (1 CT 125, 157-159.) When Varner returned to the vehicle, he had Mariedth's shirt in his possession. (1 CT 158.) He then surveyed the immediate area for evidence before depositing the bag that he had placed over Mariedth's head in the trunk of the vehicle. (1 CT 159.)

Varner asked appellant to drive, and the pair stopped at a store, where Varner purchased matches and emptied garbage from the vehicle onto the parking lot. (1 CT 159-161.) Subsequently, appellant and Varner returned to the Travel Inn, where Casey and Jasmine were sleeping, and Varner retrieved a compact disc player. (1 CT 125, 159-161.) Appellant and Varner then drove around for some time before they encountered a man who appellant referred to as "Papa Bear."[4] (1 CT 125, 162-163.) Varner gave Papa Bear some change for gasoline, and then they went to pick up "Mama Bear," who is Papa Bear's wife. (1 CT 125.) They continued to drive but stopped at an AM PM mini-mart, where they group purchased some gasoline for Papa Bear. (1 CT 125, 164.) They then went to Wal-Mart, where Varner purchased fuses for the compact disc player and a compact disc player. (1 CT 125-126, 164.) The group then continued to drive around and, at some point, Varner indicated that he knew where to obtain more drugs. (1 CT 126, 165.)

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[4] Appellant indicated that she had believed that the man's real name was Matthew Miller. (1 CT 125.)

Appellant and Varner dropped Mama and Papa Bear off at a Chevron station, and Varner indicated his desire to drive. (1 CT 126, 165.) Varner sped out of the parking lot and jerked the steering wheel, which caused the vehicle to slide into a pole in a ditch. (1 CT 126.) The car remained on, but it was not moving, so appellant and Varner retrieved appellant's backpack, a few bags, and Mariedth's purse. (1 CT 126.) The pair walked to the home of appellant's friend, Jennifer, who refused to help them. (1 CT 126, 165.) They then continued to walk when Jennifer pulled up alongside them and drove them to the Americana Inn, where they went to a room that was "full of Mexican's [sic]." (1 CT 126, 165-166.) Varner spoke to the individuals in Spanish, and appellant recalled thinking that he was speaking about Mariedth's checks and attempting to persuade them to rent a motel room. (1 CT 126, 166.) Appellant began to leave, but Varner followed her. (1 CT 126.) The two walked to a Taco Bell restaurant, where appellant and Varner had breakfast. (1 CT 126, 166.) Varner left his gloves in the restaurant. (1 CT 167.)

Appellant and Varner subsequently took a taxi cab to South City Park, where they spoke with an acquaintance of Varner's. (1 CT 168.) Subsequently, somewhere around 9:00 or 10:00 a.m., they went to the apartment complex where they had first encountered Mariedth. (1 CT 126, 167-168.) Using Mariedth's keys, they entered her home and were inside for between 10 to 20 minutes before law enforcement officials arrived. (1 CT 126, 169.) During that time, Varner had rummaged through Mariedth's jewelry boxes and taken some of her rings and a bracelet. (1 CT 126-127, 168.) Varner kept peering out the window to determine where the law enforcement officials were positioned. (1 CT 127.) At some point, Varner removed a screen from a window and exited through the window. (1 CT 127, 170.) He jumped over a fence and, when appellant told him that she could not also jump the fence, Varner replied, "Peace out." (1 CT 127.)

Appellant then crawled out of a bedroom window, jumped over a small fence, and began walking down the street. (1 CT 127.) As she walked, she heard a police officer approaching from behind. (1 CT 127.) The officer stopped her and ultimately arrested her. (1 CT 127.)

Appellant suspected that her fingerprints would appear in numerous places because she had not been wearing gloves. (1 CT 171.) She also admitted that her DNA would be found under one of Mariedth's fingernails. (1 CT 171.)

Appellant's July 7, 2009, Statement

On July 7, 2009, appellant submitted to another interview at which Investigator Todd Cogle, Deputy District Attorney Kelly Kafel, and Amy Babbits, appellant's attorney, were present. (2 Aug. CT 444.)

Appellant indicated that her drug of choice was methamphetamine, which she began using at age 12. (2 Aug. CT 445.) Although she and Varner had been in search of drugs, they had not used drugs while they were in each other's company. (2 Aug. CT 445; see also 1 RT 176-177.) However, appellant had smoked methamphetamine on November 26, 2005, and had smoked marijuana on the evening of November 27, 2005. (2 Aug. CT 445.)

Appellant recalled that she had previously met Varner as she left a friend's apartment. (2 Aug. CT 446.) But on that occasion, "it was just a nod of hello – nothing as to a conversation." (2 Aug. CT 446.) Appellant claimed that she had cut her hand approximately one week before Mariedth's murder when a butterfly knife she had been throwing in the air grazed her hand on its way down. (2 Aug. CT 446-447.)

Despite the fact that a pair of white gloves had been found in Mariedth's vehicle, appellant denied having worn gloves on the evening of Mariedth's murder. (2 Aug. CT 447.) However, appellant stated that she

had moved some gloves from the back seat of Mariedth's vehicle to the floor area behind the driver's seat. (2 Aug. CT 447.)

Appellant reiterated that Varner had taken Mariedth's rings from her home but not from her person. (2 Aug. CT 448.) She also admitted that she had taken Mariedth's purse because Varner had placed some of the contents of her backpack in Mariedth's purse when he wrecked the vehicle. (2 Aug. CT 448.)

Appellant further stated that after she and Varner had left the Travel Inn, they picked up Papa Bear. (2 Aug. CT 449-450.) Subsequently, they picked up Mama Bear near some railroad tracks and a golf course. (2 Aug. CT 450.)

Appellant also admitted that she had previously become a ward of the court following an assault and battery of another girl. (2 Aug. CT 450.)

Appellant stated that her biological father had sent her some money and provided his telephone number to her interviewers. (2 Aug. CT 451-452.)

Appellant acknowledged that she had used Mariedth's wallet as her own but claimed that she had not spent any of Mariedth's money. (2 Aug. CT 452.) She also admitted that she had initially been dishonest with regard to some of the statements she had made. (2 Aug. CT 452.)

Appellant's Trial Testimony

Appellant, who was 17 years old on November 26, 2005, was living on the streets at that time. (1 RT 175.) Her drug of choice was methamphetamine, but she also ingested marijuana. (1 RT 176.) Prior to that date, she had only met Varner once in passing. (1 RT 176.)

On November 26, 2005, appellant met Varner at a room at a Travel Inn. (1 RT 176.) He had been prohibited from being on the premises, so he entered the hotel room through the bathroom window. (1 RT 177.) Neither she nor Varner used drugs while in the hotel room. (1 RT 177.) After

approximately 45 minutes, appellant and Varner left in search of drugs. (1 RT 177-178.) As the pair walked toward State Street, they encountered a man named Brandon who engaged in a fight with Varner. (1 RT 178-179.) Appellant suspected that Brandon had dropped a knife during the scuffle and that Varner had picked it up. (1 RT 179.) After the fight ended, appellant and Varner continued to walk until they reached an apartment complex near State Street, which was located behind the Alono Club. (1 RT 179.) They went to that location because Varner had indicated that they could obtain drugs there. (1 RT 180.) They were unable to locate the individual from whom they had intended to obtain drugs, so they waited in the parking lot, hoping that he would arrive. (1 RT 179-180.) As they waited, Mariedth drove into the parking lot and parked in the stall nearest where appellant and Varner were seated. (1 RT 180-181, 183.) Mariedth got out of vehicle and began unloading groceries and placing them in her apartment, which was the one nearest to where appellant and Varner were seated. (1 RT 181-182.) Appellant and Mariedth previously lived in the same neighborhood, so appellant had seen her often. (1 RT 183.) On a prior occasion, appellant assisted Mariedth after she had dropped some groceries that she was unloading from her vehicle. (1 RT 183.)

At some point, Varner asked Mariedth for a ride to Shasta Lake. (1 RT 182-184.) Mariedth agreed to give appellant and Varner a ride, so they entered her vehicle, with Varner in the front passenger's seat and appellant in the rear right passenger's seat. (1 RT 184.) It was completely dark outside when they left the apartment complex. (1 RT 184.) After Mariedth had been driving for approximately 10 minutes, Varner, who suggested that he had a weapon by moving his hands under his shirt, told Mariedth that he had a gun and a knife and that he would kill her if she failed to cooperate. (1 RT 184-186.) Upon hearing the threat, Mariedth appeared "spooked." (1 RT 185.) Shortly thereafter, Varner demanded money from Mariedth,

and she complied by giving him some money from her wallet. (1 RT 185-187.) At Varner's insistence, the group went to a Circle K store on Lake Boulevard. (1 RT 186.) Once Mariedth parked the vehicle, Varner handed appellant the money that Mariedth had given him and ordered appellant to purchase some cigarettes. (1 RT 187.) After appellant purchased the cigarettes, she returned to the vehicle and handed Varner the cigarettes and the change. (1 RT 187-188.)

Varner subsequently directed Mariedth to drive to Palo Cedro. (1 RT 188-189.) No establishments were open in Palo Cedro, so they returned to town. (1 RT 189.) On the way, they stopped at an In-N-Out Burger restaurant. (1 RT 189-190.) Afterward, at Varner's direction, they went to Whiskeytown so that Varner could visit his younger brother's gravesite. (1 RT 190.) On the way, appellant asked Varner if they would eventually release Mariedth, and he responded that they would not do so at that time. (1 RT 191.) Appellant, however, believed that they would eventually release her. (1 RT 191.) Once they arrived in Whiskeytown, they proceeded toward Need Camp. (1 RT 192.) Varner ordered Mariedth to stop the vehicle on a dirt side road across the street from a cemetery. (1 RT 192-193.) Mariedth backed her car up along the dirt road near a small ditch. (1 RT 192-193.)

Appellant got out of the vehicle so that she could go to the bathroom. (1 RT 193.) When she returned, Varner was standing outside of the vehicle near the ditch. (1 RT 193.) He explained to appellant that they needed to kill Mariedth, and appellant responded that she would not participate in the murder. (1 RT 193.) Nonetheless, Varner reiterated that they needed to kill Mariedth because she was aware of their identities and she would report them to law enforcement officials. (1 RT 193-194, 222-223.) After approximately five minutes, appellant and Varner returned to their seats, again with Varner sitting in the front passenger's seat and appellant in the

rear passenger's seat. (1 RT 194.) Varner then asked Mariedth whether the head rest on her seat could be removed, and she replied that it could not. (1 RT 194-195.) Varner asked appellant whether there was a plastic bag in the back seat of the vehicle, and appellant told him that there was not. (1 RT 195.) Varner told Mariedth that she was going to die and she began pleading with him. (1 RT 195.) He then climbed into the back seat, retrieved a plastic bag that was on the floor, emptied it contents, and placed it over Mariedth's head. (1 RT 195-196.) Meanwhile, appellant was "curled into a ball in the back seat." (1 RT 195.) After the bag was placed over her head, Mariedth began kicking and fighting with Varner in an apparent attempt to breathe. (1 RT 196-197.) Varner held the bag in place over Mariedth's head while he choked her and punched her. (1 RT 197-198.) Simultaneously, Mariedth called out for Jesus to save her, saying, "Oh, God. Please help me." (1 RT 197.) During the last two minutes of Mariedth's struggle with Varner, she became lodged between the front two seats. (1 RT 197-198.) Mariedth struggled continuously, but appellant made no effort to help her. (1 RT 198.) Mariedth's efforts began to slow before stopping entirely. (1 RT 198.) In total, Varner had the bag over Mariedth's head for approximately 20 minutes. (1 RT 196-197.)

After Mariedth stopped moving, appellant and Varner got out of the vehicle. (1 RT 198.) Varner attempted to pull Mariedth's body out of the vehicle, but he was unable to do so and enlisted appellant's assistance. (1 RT 198-199.) Appellant pushed one end of Mariedth's body while Varner pulled the other end out of the vehicle. (1 RT 199.) Mariedth's body fell to the ground next to the driver's side door of the vehicle. (1 RT 199.) The plastic bag that had been covering Mariedth's head fell to the ground outside of the vehicle, but appellant retrieved it and placed it in the trunk of the vehicle. (1 RT 199-200, 212.) Mariedth's shirt came off at some point

while Varner pushed her body down a ditch. (1 RT 200.) Appellant retrieved the shirt and placed it in the car. (1 RT 200.)

Appellant and Varner subsequently left the Whiskeytown area, with appellant driving, and went to a gasoline station. (1 RT 200-201.) While at the gasoline station, Varner emptied some of the trash from the vehicle onto the ground. (1 RT 201.) Afterward, the pair returned to room 112 of the Travel Inn, which had been rented to appellant's friend Casey. (1 RT 201.) While there, appellant stood in the doorway while Varner retrieved a compact disc player and some compact discs. (1 RT 201-202.)

Appellant and Varner then drove around until approximately 1:30 a.m., at which time they encountered Papa Bear across the street from the Americana Motel. (1 RT 202-203.) They offered Papa Bear a ride to his van, where they also picked up his wife, Sandy "Mama Bear" Miller. (1 RT 203.) The Millers needed to fill a gasoline container, so the group went to the AM PM gasoline station near Lake Boulevard at approximately 2:30 a.m. (1 RT 203-204.) Appellant gave Papa Bear some money with which to fill his gasoline container. (1 RT 204-205.) The group then went to a Wal-Mart store in Redding. (1 RT 206-207.) After appellant made some purchases, the group left in search of methamphetamine. (1 RT 209-210.) Varner stated that the Millers would not be allowed to accompany him and appellant to the specified location, so the Millers were dropped off at a gasoline station. (1 RT 210.) At that point, Varner got in the driver's seat and appellant sat in the passenger's seat. (1 RT 210.) After Varner began driving, he lost control of the vehicle, crashed it into a pole, and it then slid into a ditch. (1 RT 211.) Appellant gathered her purchases from Wal-Mart, her backpack, and Mariedth's purse. (1 RT 212.) Varner removed the keys from the ignition, and he and appellant abandoned the car at the location where it had come to rest. (1 RT 211-212.) Appellant and Varner walked to the home of appellant's friend Jennifer to request a ride. (1 RT 212.)

Jennifer initially refused to give them a ride, but she reconsidered and ultimately drove them to the parking lot behind the Americana Motel in downtown Redding at approximately 6:00 a.m. (1 RT 213.) From there, appellant and Varner returned to the Travel Inn, but nobody responded after they knocked on the door, so they went to a Taco Bell restaurant. (1 RT 213.) Afterward, they hired a taxi cab to take them to South City Park. (1 RT 214.)

Appellant and Varner subsequently returned to Mariedth's apartment. (1 RT 214.) When they arrived, a young man from the neighborhood was seated on the front porch of the apartment next to Mariedth's apartment. (1 RT 214-215.) Appellant told the young man that she was Mariedth's niece and that she had permission to be there. (1 RT 215.) Appellant and Varner entered Mariedth's apartment, and appellant began to feel ill, so she went to the bathroom and vomited. (1 RT 215.) Meanwhile, Varner rummaged through a jewelry box and removed some rings, which he placed in his pocket. (1 RT 215-216.) Shortly thereafter, law enforcement officials arrived and knocked on the door. (1 RT 215-216.) In response, Varner removed the rear window of Mariedth's bedroom and appellant paced about the apartment. (1 RT 216.) At some point, appellant climbed out the back window and attempted to flee, but she was arrested by a police officer. (1 RT 216-217.) At the time of her arrest, appellant was still in possession of Mariedth's purse and her own backpack. (1 RT 216-217.)

Appellant was transported to an investigations office, where she made several untruthful statements about her involvement in the events surrounding Mariedth's kidnapping and murder. (1 RT 217-218.) Subsequently, she led law enforcement officials along the route that she and Varner had taken and told the truth about what had happened. (1 RT 218-219.)

Appellant stated that there was a pair of white gloves in Mariedth's vehicle, but she claimed that she had not worn them; instead, she acknowledged only that she had moved them. (2 RT 317, 326-327, 343, 392-393, 395-396.)

Appellant concluded her testimony by stating that she understood that, under the terms of her plea agreement, she was obligated to testify truthfully and that the trial court would determine whether she had done so. (1 RT 220.)

Varner's November 27, 2005, Interview with Law Enforcement Officials

On November 27, 2005, Varner submitted to an interview with various law enforcement officials, and the recorded interview was played for the jury. (2 Aug. CT 501; 2 Aug. RT 485-487, 495, 497, 499.) During the interview, he stated that appellant had picked him up with a woman named Jeanette near South City Park. (2 Aug. CT 520, 577-578.) Varner stated that a male and female (who he did not identify) had struck, kicked, and choked Mariedth. (3 Aug. CT 586.) Varner subsequently explained that, while he and appellant were outside of Mariedth's vehicle, appellant stated that she wanted to kill Mariedth. (3 Aug. CT 653-655.) Varner then reentered the vehicle and placed Mariedth in a chokehold. (3 Aug. CT 652-654.) He also admitted that he had initially placed a plastic bag over Mariedth's face, but when she fought back, "home girl" began pulling Mariedth's hair and pulling her between the seats. (3 Aug. CT 605, 614, 639-640, 649, 652.) He further claimed that appellant had worn gloves, and suggested that she had placed the bag over Mariedth's head. (3 Aug. CT 648.) Varner acknowledged that he had punched Mariedth in an effort to "knock her out" as she struggled. (3 Aug. CT 648-649.) He claimed that appellant then strangled Mariedth and jumped on her or kneed her. (3 Aug.

CT 649-650.) He also claimed that the female "gave the death blow" by "[s]tomping on her throat." (3 Aug. CT 586, 639.)

ARGUMENT

I. THE TRIAL COURT PROPERLY INVALIDATED THE PLEA AGREEMENT

Appellant contends that the trial court improperly invalidated the plea agreement after the prosecution had reaped the benefit of its bargain. (AOB 46-47, 50-58.) Because appellant breached the terms and conditions of the plea agreement by testifying untruthfully, the prosecution did not reap the benefit of the bargain and her claim is without merit.

A. Background

On November 7, 2008, appellant and the District Attorney of Shasta County entered into a written plea agreement wherein appellant pled guilty to second degree murder with a 15-year-to-life sentence in exchange for agreeing to "testify fully and truthfully at all stages and proceedings" in the case against Varner. (1 CT 78-85.) By entering into the agreement, appellant represented that her November 6, 2008, statement was "true, correct, and complete" and that a "material misrepresentation will be grounds for revoking this agreement and reinstating all charges contained in the Information, including enhancements." (1 CT 79.) The purpose of the agreement was to ensure that the jury in Varner's case heard appellant's testimony. (1 CT 79.) The only requirements of appellant were that she answer truthfully all questions asked of her by the court, the prosecution or the defense in the case against Varner and fully cooperate in the continuing investigation as requested by representatives of the district attorney's office or Redding Police Department. (1 CT 79.) The agreement also set forth a procedure for determining whether a violation had occurred that entailed the prosecutor petitioning the trial court for a hearing on the matter. (1 CT

82.) If the trial judge were unavailable or unable to preside over the hearing, the issue would be resolved by the presiding judge of the Shasta County Superior Court or his designee. (1 CT 82.) The agreement required the prosecutor to prove by a preponderance of the evidence that appellant had violated the terms of the agreement. (1 CT 82.)

On April 22, 2010, after Varner's trial, the prosecutor filed a Request for Findings Pursuant to the Negotiated Plea Agreement. (1 CT 98-99.) On April 23, 2010, the trial court held a hearing to consider whether it was appropriate for it to make such findings with respect to the plea agreement. (1 CT 112; see also 2 RT 400-407.) During that hearing, the prosecutor expressed her initial opinion that appellant had fulfilled her obligations under the agreement and that she had made "no material misrepresentation that affected [the Varner] trial and she was consistent with the prior statement she had given to the [prosecutor]." (2 RT 401.) However, the prosecutor also requested that the court grant her additional time to review appellant's trial testimony and her previous statements to determine whether there were inconsistencies prior to filing a motion to have the plea vacated and set aside. (2 RT 403.) Without ruling on the matter, the court asserted its preliminary finding that appellant had testified untruthfully about several matters but also expressed doubt about whether that untruthful testimony constituted a material misrepresentation. (2 RT 402-403.) The court cited as one example appellant's testimony that she had never worn the gloves, despite the DNA evidence from inside of the gloves that linked her to them. (2 RT 404.) Other examples of appellant's untruthfulness included: appellant's various conflicting statements to law enforcement officials; appellant's "confessed dishonesty" on the witness stand regarding which pants she wore on the night of the murder; appellant's inconsistent statements regarding the duration of her and Mariedth's acquaintance; and appellant's evasive and inconsistent

testimony regarding her prior drug use. (2 RT 404-405.) The court also noted its general impressions regarding appellant having appeared evasive, inconsistent, and non-credible. (2 RT 405-406.)

On June 4, 2010, the prosecutor filed a Petition for Withdrawal of the Negotiated Plea Agreement wherein she requested that the trial court find that appellant had not fulfilled her obligation under the plea agreement. (1 CT 117-119.) In the motion, the prosecutor stated that on November 6, 2008, appellant had acknowledged that she had moved a pair of gloves, but she had claimed that she did not wear gloves on the night of Mariedth's murder. (1 CT 117-118.) The prosecutor also noted that appellant testified at Varner's trial that she had touched, but not worn, a pair of white gloves that was found in Mariedth's vehicle after her death. (1 CT 117.) Testing of the exterior of one of the white gloves revealed that appellant was the primary female contributor. (2 Aug. RT 448, 456.) Appellant could not be excluded as a possible contributor to the primary female DNA profile extracted from the interior of the white glove. (2 Aug. RT 448, 451, 456.) A mixture of male and female DNA was detected on the exterior of the other white glove, and appellant could not be excluded as a possible source of the primary female profile. (2 Aug. RT 451, 456.) The DNA from the interior of the white glove matched appellant's profile. (2 Aug. RT 451-452, 456-457.) The prosecutor further asserted that the DNA analysis of the white gloves had not been completed until after November 6, 2008. (1 CT 118.)

On June 7, 2010, the prosecutor filed an additional Petition for Withdrawal of the Negotiated Plea Agreement and attached a transcript from the November 2008 interview of appellant. (1 CT 121-172.) The prosecutor directed the court's attention to appellant's statement that she had not worn gloves on the night of Mariedth's murder. (1 CT 171.)

On August 27, 2010, the court held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the hearing, the prosecutor argued that appellant had repeatedly stated that she had not worn gloves, but her DNA was detected on the inside of the white gloves, a fact that the prosecutor deemed a material misrepresentation. (2 RT 411-412.) Defense counsel argued that appellant's statement that she had not worn gloves was truthful because "she never wavered in any way about not wearing the gloves." (2 RT 413.) She also argued that, even if appellant had been untruthful about wearing the gloves, the statement did not constitute a material misrepresentation. (2 RT 415-416, 419.)

In addition to the DNA evidence, the court deemed important the fact that appellant had lied about which pants she had worn at the time of the murder. (2 RT 422-423.) After hearing argument from defense counsel and the prosecutor, the court asserted as follows:

> . . . This . . . agreement was about [appellant] being honest about her own role in this crime, and . . . I'm convinced absolutely that she was not honest, and the DNA evidence found on the inside of the glove is more or less the lynchpin. It is the key critical piece of evidence that demonstrates that she wasn't honest, because as I . . . sat thinking about it during trial and realizing that this slow and torturous death of the victim run out over some lengthy period of time, minutes, obviously, that was an event in which there were multiple activities, potentially, by Mr. Varner and [appellant], some of which was strangulation, and it would have been opportune for [appellant] to have used those gloves to assist in the strangulation or assault on Miss Mariedth, and she didn't want to admit that, because it's apparent what that would have suggested. That would have subjected her to the greater risk of being found out about being an actual participant in the killing.
>
> [¶] . . . [¶]
>
> It was about her being honest about her own role, start to finish, and I think it's the DNA evidence and . . . again, I know this

> may not be part of your consideration, but it certainly is a part of the trial process and part of the agreement, her other admitted lies and those that I found just as the trier of fact on this issue cause me to believe that she did not live up to the plea agreement, that there were material misrepresentations during her testimony and . . . she is not entitled [to] the benefit of that bargain.

(2 RT 423-424.)

Accordingly, the court ordered that the plea be vacated and set aside. (1 CT 176, 178; see also 2 RT 408, 425.)

B. Relevant Law

The process of plea bargaining "contemplates an agreement negotiated by the People and the defendant and approved by the court." (*People v. Orin* (1975) 13 Cal.3d 937, 942.) The California Supreme Court and the United States Supreme Court have asserted that "plea bargaining is based upon 'reciprocal benefits' or 'mutuality of advantage' between the prosecution and the defendant." (*People v. Collins* (1996) 45 Cal.App.4th 849, 862; see also *People v. Collins* (1978) 21 Cal.3d 208, 214; *Brady v. United States* (1970) 397 U.S. 742, 752.) "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." (*People v. Shepeard* (1985) 169 Cal.App.3d 580, 586, disapproved on other grounds in *People v. Martin* (1986) 42 Cal.3d 437, 451, fn. 13.) "The power of the court to set aside a plea bargain on the ground of breach by a defendant of its terms is beyond question." (*People v. Vargas* (2001) 91 Cal.App.4th 506, 533.)

The California Supreme Court has explained that

> an agreement which requires only that the witness testify fully and truthfully is valid, and indeed such a requirement would seem necessary to prevent the witness from sabotaging the bargain. We believe the requirements of due process, as explained in *Medina* [(1974) 41 Cal.App.3d 438], are met if the agreement thus permits the witness to testify freely at trial and to

> respond to any claim that he breached the agreement by showing that the testimony he gave was a full and truthful account.

(*People v. Fields* (1983) 35 Cal.3d 329, 361.)

C. Analysis

In the present case, appellant specifically agreed that she would "testify fully and truthfully" in the case against Varner in exchange for being allowed to plead guilty to second degree murder and receive a sentence of 15 years to life. (1 CT 78-79, 82.) Moreover, appellant agreed that "a material misrepresentation" would be grounds for revoking the agreement and reinstating all charges contained in the information. (1 CT 79.) The agreement also set forth a procedure for determining whether a violation had occurred that contemplated the prosecutor petitioning the trial court that presided over the case for a hearing on the matter. (1 CT 82.) The agreement required the prosecutor to prove by a preponderance of the evidence that appellant had violated the terms of the agreement. (1 CT 82.) When appellant testified untruthfully about not having worn the gloves, she violated the terms and conditions of the plea agreement, which authorized the prosecutor to move to vacate and set the plea agreement aside. The violation also triggered the trial court's authority to determine whether appellant had violated the terms and conditions of the agreement.

In arguing that the trial court improperly invalidated her plea agreement, appellant cites to *People v. Brunner* (1973) 32 Cal.App.3d 908. (See AOB 50-51.) Appellant's reliance on *Brunner* is unavailing. In *Brunner*, the defendant was granted immunity based on her testimony regarding the murder of Gary Hinman. (*People v. Brunner*, *supra*, 32 Cal.App.3d at pp. 910-911.) The defendant testified at the trial of Robert Beausoleil for the Hinman murder to the effect that she, Beausoleil, and another woman had held Hinman captive for three days, beaten him, stabbed him, and smothered him. (*Id.* at p. 911.) She also testified that

Charles Manson, who was armed with a knife, had been present at the home where Hinman was held captive. (*Ibid.*) Beausoleil was convicted of Hinman's murder. (*Ibid.*) Subsequently, Beausoleil filed a motion for a new trial and submitted an affidavit by the defendant in which she disavowed her entire testimony at his trial. (*Ibid.*) The following year, the defendant testified at Manson's trial, and she denied participation in Hinman's murder and also denied any knowledge of Manson's participation. (*Ibid.*) Later that same year, a grand jury indicted the defendant for Hinman's murder, and she moved to dismiss the indictment on the basis that she had been promised immunity from prosecution in exchange for her testimony regarding the murder. (*Id.* at pp. 910-912.) The trial court granted the defendant's motion and permanently restrained the district attorney from prosecuting her for Hinman's murder. (*Id.* at p. 910.)

Appellant's case is distinguishable from *Brunner* in many respects. In *Brunner*, the defendant acquired immunity under "an oral agreement whose terms she may not have fully understood." (*People v. Brunner*, *supra*, 32 Cal.App.3d at p. 917.) Here, by contrast, appellant's plea agreement was reduced to writing, she agreed to testify fully and truthfully at all stages of Varner's trial, she indicated that she had understood its terms, and she freely and voluntarily accepted its terms and conditions. (1 CT 78-84; see also 1 RT 151-152, 155-156.) To be sure she understood the thrust of her plea agreement, the court asked appellant:

> [Do] you know that the central feature of this agreement is your unhesitating, absolute and complete truthfulness in every way imaginable in the future . . . no matter who's posing the questions, doing the investigation, or calling you to testify, and that you should understand is the central, most important feature of you receiving the benefit of your bargain[?]

(1 RT 155.)

Appellant answered the question in the affirmative, signaling her understanding of the consideration required under the plea agreement. (1 RT 155.) After that exchange, the court further explained the plea agreement as follows:

> And if it isn't clear, also, let me add that this is a contract. You are, essentially, entering into a contract between yourself and the district attorney. And performance of that contract is, in every respect, performance under this plea agreement is . . . what entitles you to receive the benefit of your bargain.
>
> Absence of performance will result in . . . the D.A. [attempting to] say you breached the agreement, and therefore, your plea will be set aside and you'll face all of the current charges that you're facing today.
>
> And, so, as I said earlier, the central, most important feature for you is absolute truth in all future sentences.

(2 RT 156.)

Moreover, in reaching its conclusion in *Brunner*, the Court of Appeal reasoned that "enough of the bargain was kept to make it operative." (*People v. Brunner*, *supra*, 32 Cal.App.3d at p. 916.) In other words, ". . . the People got what they bargained for. The purpose of their bargain was to secure murder convictions of the most reprehensible of the Hinman killers." (*Id.* at p. 916.) But the Court of Appeal in *Brunner* also asserted, "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." (*People v. Brunner*, *supra*, 32 Cal.App.3d at p. 916.) Here, the express purpose of the plea agreement was "to ensure that the trier of fact in [the Varner prosecution would] be allowed to hear the testimony of [appellant]." (1 CT 79.) The plea agreement was conditioned only on appellant testifying "fully and truthfully" at all proceedings against Varner, not on achieving any particular result. (1 CT 78-80.) Indeed, as the *Brunner* court noted, a

prosecutor may not bargain for results but only for full and truthful testimony. (*People v. Brunner*, *supra*, 32 Cal.App.3d at p. 916.) That is precisely what the prosecutor bargained for in the instant case. When appellant testified untruthfully, she failed to perform as required under the terms and conditions of the plea agreement.

Appellant also cites to *People v. Collins, supra,* 45 Cal.App.4th 849 and *People v. Vargas, supra,* 91 Cal.App.4th 506 to illustrate that plea agreements may be set aside when the prosecution does not reap the benefit of the bargains. In *Collins*, the defendant provided an initial statement in which he implicated Christopher Johnson in the murder of Drew Martin and, while denying any participation in the attack, acknowledged his presence at the scene of the crime. (*People v. Collins*, *supra*, 45 Cal.App.4th at pp. 855-856.) He subsequently entered into a plea agreement wherein he agreed to cooperate with law enforcement officials, including providing truthful and complete statements and testimony regarding the actions of all persons involved in the murder. (*Id.* at p. 857.) In exchange, the district attorney would charge him with one count of accessory after the fact (§ 32) and agree to his commitment to the California Youth Authority (CYA). (*Ibid.*) The plea agreement specifically conditioned the defendant's CYA commitment upon his continuing performance of "'all of the terms of the Agreement'" and, in the event he testified untruthfully, the "'entire Agreement [became] null and void.'" (*Ibid.*) The defendant stated that he understood the terms and conditions of the agreement, and he was committed to CYA. (*Ibid.*)

As specified in the agreement, the defendant testified as a witness for the prosecution at Johnson's preliminary hearing, testimony that was consistent with the statement he had provided previously. (*People v. Collins*, *supra*, 45 Cal.App.4th at p. 857.) After the defendant had been committed to CYA, his cousin told an investigator from the district

attorney's office that the defendant had been untruthful in his previous statements and that he had kicked Martin in the groin during the attack. (*Id.* at p. 858.) The defendant provided a subsequent statement in which he acknowledged that he had been untruthful in his previous statements. (*Ibid.*) Specifically, he admitted that he had gone with Johnson to Martin's home to burglarize it, and he implicated Marc Dailey in carrying some of Martin's property into the defendant's cousin's home. (*Ibid.*) Dailey subsequently provided a statement and was granted immunity. (*Ibid.*)

The defendant provided a series of additional statements in which he admitted greater involvement in Martin's murder. (*People v. Collins*, *supra*, 45 Cal.App.4th at pp. 858-860.) The prosecutor chose not to use the defendant as a witness and moved to have his plea set aside. (*Id.* at p. 860.) The court granted the prosecution's motion and set aside the plea on the basis that the defendant had materially breached the agreement by testifying untruthfully at Johnson's preliminary hearing. (*Ibid.*)

The *Collins* court explained that "[t]he reciprocal nature of a plea bargain agreement mandates that either party to the agreement be entitled to enforce the agreement in a situation where the party is deprived of the benefit of the bargain." (*People v. Collins*, *supra*, 45 Cal.App.4th at p. 863.) Once the prosecutor in the case at bar was deprived of the benefit of the bargain—appellant's truthful testimony at Varner's trial—the reciprocal nature of the plea agreement was lost. The *Collins* court also noted that failing to hold a defendant to the terms of his bargain would undermine the integrity of the judicial process. (*Id.* at p. 863.) Here, just as in *Collins*, the "defendant's breach of [the] bargain included testifying falsely, conduct which is manifestly corrosive of our system of justice." (*Id.* at pp. 863-864.)

Additionally, in *Collins*, the trial court determined that "rather than benefiting the Johnson prosecution, defendant hindered and delayed it."

(*People v. Collins*, *supra*, 45 Cal.App.4th at p. 867.) The same can be said regarding appellant's role in the present case. Indeed, in her closing argument, the prosecutor had to acknowledge that appellant was a "liar." (4 Aug. RT 902.) She further admitted that she did not "have a lot of good things to say about [appellant]." (4 Aug. RT 903.) The prosecutor even urged the jury to

> believe her or don't believe her. It's all on you. If you believe part of her and don't believe part of her, that is absolutely your option to do. I concede to you she's a liar . . . and concede to you she's a murderer. So I don't know that I'd expect any better from her.
>
> [¶] . . . [¶]
>
> To the extent that [appellant's] testimony is required to convict Mr. Varner, exclude it. The People's key witness in this case was Mr. Varner's interview that day, the DNA, the physical evidence, the videos. We could prove it without [appellant].

(4 Aug. RT 903.)

Had appellant testified fully and truthfully, as required by the plea agreement, the prosecutor would not have had to make these concessions. And her truthful testimony could have only bolstered her credibility and benefitted, rather than potentially hindered, the Varner prosecution.

In *People v. Vargas, supra,* 91 Cal.App.4th 506, the defendant was charged with conspiracy to commit murder, robbery, assault with a deadly weapon, arson, burglary, extortion, intimidation of witnesses, terrorist threats, escape, possession of a concealable firearm by a convicted felon, and distribution of heroin, cocaine, phencyclidine (PCP), and methamphetamine. (*People v. Vargas, supra,* 91 Cal.App.4th at pp. 517-518.) The defendant entered into a plea agreement with the district attorney that required him to, among other things, "truthfully disclose all information with respect to the activities of himself and others concerning all matters about which agents or representatives of The People inquire of

him." (*Id.* at p. 532.) The agreement further required the defendant to "truthfully testify at any trial . . . with respect to any matter related to this case about which The People may request his testimony or pursuant to order of the court." (*Id.* at p. 532.) After the defendant made two statements, the prosecutor moved to vacate the plea agreement on the basis that the defendant had violated its terms by providing the prosecution with material information that was false. (*Id.* at pp. 532, 534.) Following a hearing, the court granted the motion on the basis that the defendant had made conflicting statements during two interviews with the prosecution and lacked credibility in many respects. (*Id.* at pp. 532-533.)

The instant case is distinguishable from *Vargas* in that, in *Vargas*, the defendant made contradictory statements that came to light before trial. Here, by contrast, appellant continued to repeat her untruthful statement about the gloves. Indeed, in addressing itself to this point, the trial court asserted, "The consistency of the story may suggest something, but telling the lie more than once doesn't make it true the more times you tell it. It just may be that you're a consistent liar." (2 RT 419.) Further, just as in *Vargas*, the court relied upon more than just the untruthful statements made by appellant in determining that she had violated the terms and conditions of the plea agreement. The court also noted:

> Now, I understand that there was . . . no DNA evidence or any other evidence found on the pants that she actually was wearing to show that she was involved, . . . or that she had the victim's blood or any other kind of DNA on the actual pants she was wearing, but she was lying about which pants she actually did have on, and it wasn't even a mistake. She admitted . . . she was lying, which suggested a pattern of trying to avoid the possibility of being caught with other damaging evidence that would have made the point that she was more deeply involved in the killing of Miss Mariedth than she was willing to admit.

(2 RT 423.) At the April 23, 2010, hearing, the court noted its general impressions regarding appellant having appeared evasive, inconsistent, and

non-credible. (2 RT 405-406.) The *Vargas* court concluded that the defendant "was not credible in many respects." (*People v. Vargas*, *supra*, 91 Cal.App.4th at p. 533.) Here, too, in addition to her untruthful statements, appellant was also not credible in many respects, as correctly noted by the trial court.

Appellant argues that 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. (AOB 54.) Preliminarily, respondent notes that the plea agreement referenced only the November 6, 2008, statement, which appellant provided the day before she entered her initial plea. (1 CT 78-79, 89, 122; see also 1 RT 150-158.) Under the terms of the plea agreement, appellant represented that the statement she had made on November 6, 2008, was "true, correct, and complete." (1 CT 79.) She also agreed to answer truthfully all questions asked of her by the court, prosecution, or defense in the case against Varner. (1 CT 78-80.) The plea agreement did not compel appellant to testify in any particular manner or consistent with any previous statements she had provided. According to appellant's November 6, 2008, statement, she had not worn gloves on the night of Mariedth's murder. (1 CT 171.) According to her July 7, 2009, statement, she again denied having worn gloves on the night of Mariedth's murder. (1 CT 444, 447.) However, appellant admitted that she had moved the gloves from the back seat of the vehicle to the floor area behind the driver's side seat. (1 CT 447.) During the Varner trial, the prosecutor gave appellant a number of opportunities to explain the presence of her DNA on the gloves. (See 2 RT 317, 343, 392-393, 395-396.) That no new evidence was discovered is of little import, as the prosecutor had no way of knowing whether appellant would testify truthfully while under oath at Varner's trial. When appellant's untruthful testimony came to light at Varner's trial,

the prosecutor was entitled to petition the court to vacate and set aside appellant's plea.

Appellant also cites the fact that the district attorney did not charge her with perjury as a result of her untruthful testimony as a fact that "tends to undermine the credibility of the prosecutor's claim that appellant gave materially false trial testimony." (AOB 55-56.) But this fact is of little import because the prosecutor was not required to charge appellant with perjury if a violation of the agreement occurred. Instead, the agreement specified that appellant "may be prosecuted for any perjury committed by her in the course of testifying pursuant to this agreement . . . ." (1 CT 81.)

Based on this permissive language, the district attorney reserved the option of charging appellant with perjury. The fact that appellant was not charged does not negate the fact that she violated the terms and conditions of the plea agreement by testifying untruthfully.

For all of the foregoing reasons, appellant's first claim on appeal must fail.

II. JUDICIAL ESTOPPEL DOES NOT APPLY TO PRECLUDE REVOCATION OF THE ORIGINAL PLEA AGREEMENT

Appellant claims that the doctrine of judicial estoppel should have been applied to preclude the prosecution from pursuing rescission of the original plea agreement. (AOB 59.) Respondent counters that the contention is meritless because judicial estoppel does not apply to theories of liability in a criminal prosecution and, regardless, even if it did, the facts of the instant matter do not necessitate estopping the prosecutor from seeking to set aside the plea agreement.

A. Background

Appellant provided a statement to an investigator from the district attorney's office on November 6, 2008, during which she claimed that she had not worn gloves on the night of Mariedth's murder. (1 CT 171.) On

July 7, 2009, appellant submitted to an additional interview that was attended by defense counsel and the prosecutor. (1 CT 444.) During that interview, she again denied having worn gloves on the night of Mariedth's murder. (1 CT 447.) However, appellant admitted that she had moved the gloves from the back seat of the vehicle to the floor area behind the driver's side seat. (1 CT 447.) At Varner's trial, appellant testified that there was a pair of white gloves in Mariedth's vehicle, but she claimed that she had not worn them; instead, she acknowledged that she had moved them. (2 RT 317, 326-327, 343, 392-393, 395-396.)

On March 30, 2010, defense counsel for Varner filed a motion for a new trial based on, among other things, the prosecutor's use of appellant's perjured testimony. (2 Aug. CT 405-416.) On April 7, 2010, the prosecutor filed written opposition to the motion in which she noted appellant's admission that she had been untruthful about the pants she had worn on the evening of Mariedth's death. (2 Aug. RT 418-424.) However, the prosecutor argued that the untruthful statement regarding the pants she had worn was not material to any issue in Varner's case. (2 Aug. RT 421-422.)

On April 22, 2010, the prosecutor filed a Request for Findings Pursuant to the Negotiated Plea Agreement. (1 CT 98-99.) On April 23, 2010, the trial court held a hearing to consider whether it was appropriate for it to make findings with respect to appellant's performance under the plea agreement. (1 CT 112; see also 2 RT 400-407.) On June 4, 2010, the prosecutor filed a Petition for Withdrawal of the Negotiated Plea Agreement wherein she requested that the trial court find that appellant had not fulfilled her obligation under the plea agreement. (1 CT 117-119.) On June 7, 2010, the prosecutor filed an additional Petition for Withdrawal of the Negotiated Plea Agreement and attached a transcript from the

November 2008 interview of appellant. (1 CT 121-172.) At no time did defense counsel file written opposition to the prosecutor's motions.

On August 27, 2010, the court held a hearing to consider whether appellant's plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the conclusion of the hearing, the court concluded that appellant had "materially breached the agreement by giving false testimony during the Scott Varner case . . . ." (2 RT 425; see also 1 CT 176, 178.) Accordingly, the court ordered that the plea be vacated and set aside. (1 CT 176, 178; see also 2 RT 408, 425.)

B. Appellant Has Forfeited Her Current Claim

As an initial matter, appellant has forfeited her claim that the prosecutor should have been judicially estopped from petitioning the trial court to vacate and set aside her plea agreement. (AOB 59.) A "right may be lost not only by waiver but also by forfeiture, that is, the failure to assert the right in timely fashion." (*People v. Barnum* (2003) 29 Cal.4th 1210, 1224.) "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

"The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court." (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649; see also *In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) "It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial." (*Children's Hosp. and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776.) As one Court of Appeal explained:

> Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant. "'In the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them.'" [Citation.]

(*North Coast Business Park v. Nielsen Construction Co., supra,* 17 Cal.App.4th at pp. 28-29.)

Therefore, as a general rule, "'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

Despite the prosecutor filing a request for findings pursuant to the plea agreement and two petitions for withdrawal of the plea agreement, defense counsel did not respond to any of the motions to argue that the prosecutor was judicially estopped from rescinding the plea agreement.

On August 27, 2010, the court held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the hearing, the prosecutor argued that appellant had repeatedly stated that she had not worn gloves, but her DNA was present on the inside of the white gloves, a fact that the prosecutor deemed a material misrepresentation. (2 RT 411-412.) Defense counsel argued that appellant's statement that she had not worn gloves was truthful because "she never wavered in any way about not wearing the gloves." (2 RT 413.) She also argued that, even if appellant had been untruthful about wearing the gloves, the statement did not constitute a material misrepresentation. (2 RT 415-416, 419.) At no point did defense counsel argue that the

prosecutor should have been estopped from seeking to have appellant's plea vacated and set aside.

Thus, appellant's claim that the doctrine of judicial estoppel should have been applied to preclude the prosecution from pursuing rescission of the original plea agreement (AOB 59) has been forfeited. Appellant, however, also contends, in the alternative, that defense counsel rendered ineffective assistancy by failing ot raise the judicial estoppel doctrine below as a bar to the prosecutor's petition to vacate and set asdie the plea. Accordingly, although the issue was forfeited below, respondent will proceed to the merits of the claim.

C. Relevant Law

Judicial estoppel will be applied 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 (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

(*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, citations omitted.) In order for the doctrine of judicial estoppel to apply, the seemingly conflicting positions must be clearly inconsistent so that one necessarily excludes the other. (*Id.* at p. 182.) "The doctrine is designed not to protect any party, but to protect the integrity of the judicial process." (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262, citation omitted.) Application of the doctrine is discretionary. (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.)

As the *Watts* court noted, the doctrine has not been applied to estop the People in a criminal prosecution. To the contrary:

> It has been stated that the doctrine has not been applied against the prosecution in criminal actions (see *Nichols v. Scott* (5th Cir.

> 1995) 69 F.3d 1255, 1272; *U.S. v. McCaskey* (5th Cir. 1993) 9 F.3d 368, 378; *U.S. v. Kattar* (1st Cir. 1988) 840 F.2d 118, 129-130, fn. 7), and neither party has cited, nor has independent research uncovered, a case where the doctrine actually has been applied to grant some form of relief in a case such as this.

(*People v. Watts*, *supra*, 76 Cal.App.4th at p. 1262, footnote omitted.) The *Watts* court further noted that the doctrine is commonly applied within the context of inconsistent claims in two different proceedings in the employment law context. In this regard, the court asserted as follows:

> The most common application of the doctrine probably is in employment cases. Courts have used it to deny relief to an employee who obtains workers' compensation for "total disability," and then seeks to recover damages from his or her employer on a basis inconsistent with an assertion of total disability, such as that he or she is a qualified person with a disability entitled to reasonable accommodation from the employer under the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101-12213), or that he or she was terminated by the employer for age discrimination. (See *Dush v. Appleton Elec. Co.* (8th Cir. 1997) 124 F.3d 957, 961-962; *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 605-606.)

(*Id.* at p. 1262, fn. 3.)

The Court of Appeal in *Watts* also acknowledged that two federal courts of appeal have considered the possible applicability of judicial estoppel in the extreme situation where the prosecution was alleged to have knowingly pursued two inconsistent theories in different trials to secure the conviction of two different defendants for the same crime. (*Id.* at p. 1262-1263.) Assuming judicial estoppel were conceptually possible in the criminal context, the *Watts* court held that even in this extreme situation, judicial estoppel would be inappropriate absent a showing of prosecutorial misconduct. (*Id.* at p. 1263.) That is, unlike the party-plaintiff in the employment context who should be aware of the relevant facts, the

prosecutor is only aware of the facts based on what he obtains from the witnesses. As the court noted:

> The prosecutor's theory in a given proceeding necessarily is based on what the prosecutor learns prior to, and during, that proceeding. The prosecutor, after all, was neither a participant nor a witness, and has no knowledge of the facts other than those gleaned from the witnesses and other available evidence. Thus, the prosecutor's argument is not that a particular set of facts is the true set of facts; but that the *evidence shows* that a particular set of facts is the true set of facts.

(*Ibid.*)[5]

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[5] In the capital context, our Supreme Court vacated a death judgment where the prosecution inconsistently argued in two trials that two defendants inflicted the same fatal blows when only one defendant could have done so. (*In re Sakarias* (2005) 35 Cal.4th 140, 160 ["At least where the punishment involved is death, due process is as offended by the People's inconsistent and irreconcilable attribution of culpability-increasing acts as by the inconsistent and irreconcilable attribution of crimes," citations omitted]; *ibid.* ["These two theories are irreconcilable; that Waidla alone inflicted each of these wounds, as the prosecutor maintained at his trial, and that Sakarias alone also did so, as the prosecutor maintained at his trial, is not possible. One or the other theory (or both, if each man inflicted some but not all of the wounds) must be false"].) Further, the Court's holding was based on not only inherently irreconcilable theories as to which defendant inflicted the mortal wounds, it was also based on the intentional manipulation of evidence. (*Id.* at p. 172 ["the prosecutor's deliberate omission of evidence for the purpose of making possible his use of inconsistent and irreconcilable theories makes Sakarias's trial such an extreme case," internal quotation marks and citation omitted].) The doctrine of judicial estoppel formed no part of the *Sakarias* Court's opinion, which was based on due process. (*Id.* at p. 160.)

By contrast, judicial estoppel is not a federal constitutional requirement; it is a common law equitable principle. (*New Hampshire v. Maine* (2001) 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 ["judicial estoppel is an equitable doctrine invoked by a court at its discretion," internal quotation marks and citation omitted]; *Nichols v. Scott*, (5th Cir. 1995) 69 F.3d 1255, 1272["there is no indication in the authorities that [judicial estoppel] is constitutionally mandated"]; *United States v.*

(continued...)

Like California, other jurisdictions have declined to recognize the doctrine of judicial estoppel to estop the government in a criminal case. (See, e.g., *United States v. Grap* (8th Cir. 2004) 368 F.3d 824, 830 [defendant "has not identified any criminal case in which we have enforced an estoppel against the government"]; *Nichols v. Scott, supra*, 69 F.3d at p. 1272 ["it has apparently never been applied against the government in a criminal case," citations omitted]; *United States v. Kattar*, (1st Cir. 1988) 840 F.2d 118, 129-130, fn. 7 ["as far as we can tell, th[e] obscure doctrine [of judicial estoppel] has never been applied against the government in a criminal proceeding"]; *Roberts v. State* (2004) 278 Ga. 610, 612-613 [604 S.E.2d 781, 783] ["judicial estoppel should not be applied in criminal proceedings against either the State or the defendant"]; *id.* at p. 612 ["Inasmuch as the case at bar is a criminal prosecution, application of the doctrine of judicial estoppel is inappropriate"]; *State v. Abbott* (1960) 64 N.J.Super. 191, 203 [165 A.2d 537, 543] [application of judicial estoppel against the State is particularly inappropriate in criminal prosecutions "where the welfare and safety of the community are the paramount considerations"], rev'd on other grounds, aff'd in this respect in *State v. Abbott* (1961) 36 N.J. 63 [174 A.2d 881]; *Whitacre Partnership v. Biosignia, Inc.* (2004) 358 N.C. 1, 30 [591 S.E.2d 870] ["As an initial matter, our recognition of judicial estoppel is limited to civil proceedings"]; cf. *Morris v. California, supra,* 966 F.2d at p. 453 ["No circuit has ever

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(...continued)
McCaskey, (5th Cir. 1993) 9 F.3d 368, 378 ["We have recognized the applicability of this common law doctrine in this circuit," citation omitted]; *Morris v. State of California* (9th Cir. 1991) 966 F.2d 448, 453 ["the doctrine of judicial estoppel is an equitable doctrine invoked by the court at its discretion," internal quotation marks and citation omitted].)

applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence"].)

Indeed, the doctrine of judicial estoppel is rarely (if ever) successfully invoked against the government as a litigant in any context. (See, e.g., *Office of Personnel Management v. Richmond* (1990) 496 U.S. 414, 422 [110 S.Ct. 2465, 110 L.Ed.2d 387] ["we have reversed every finding of estoppel [against the government] that we have reviewed"]; *Heckler v. Community Health Svcs. of Crawford County* (1984) 467 U.S. 51, 60 [104 S.Ct. 2218, 81 L.Ed.2d 42] ["When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant"].) In short, the doctrine of judicial estoppel has never been applied to "estop" any part of a criminal prosecution in this jurisdiction (or, to respondent's knowledge, in any jurisdiction), and appellant's contention must fail for this reason alone.

"Ordinarily, the existence of waiver and estoppel are questions of fact and, as a consequence, the trial court's determination is binding on the appellate court if it is supported by substantial evidence." (*People v. Collins*, *supra*, 45 Cal.App.4th at p. 865.)

D. Analysis

Assuming, however, that (1) judicial estoppel were theoretically possible in a criminal prosecution and (2) appellant had not forfeited the claim by failing to raise it below, the facts of the instant case do not support the conclusion that the trial court's ruling rescinding the plea agreement should be reversed. Specifically, appellant has failed to demonstrate that the two positions taken by the prosecutor are totally inconsistent.

Contrary to appellant's assertion, the prosecutor did not take two inconsistent positions in judicial proceedings. In support of his motion for a new trial, counsel for Varner claimed that the prosecutor offered appellant's perjured testimony at Varner's trial. (2 Aug. CT 409-410.) In her opposition to the motion, the prosecutor noted that appellant had admitted that she had been untruthful about which pants she had worn on the evening of Mariedth's death. (2 Aug. RT 418-424.) However, the prosecutor argued that the untruthful statement regarding the pants she had worn was not material to any issue in Varner's case. (2 Aug. RT 421-422.) At the hearing regarding the motion to vacate and set aside appellant's plea, the prosecutor continued to maintain the position that appellant had been untruthful, but she identified another matter about which appellant had been untruthful—the white gloves. (2 RT 411-412, 420-421.) The trial court's ruling on Varner's motion for a new trial confirmed that the prosecutor did not take inconsistent positions. At that hearing, the court asserted as follows:

> This court finds that Miss Kafel [the prosecutor] did not knowingly offer or present perjured testimony. Ms. Kafel in fact, I'm sure, believes that most of what [appellant stated] was true. More importantly, she never vouched for [appellant] and the fact that [appellant] admitted lying in her testimony is not a matter for which Miss Kafel is responsible, despite the fact that it became apparent through cross examination that [appellant] had lied about the pants she was wearing during the murder. Moreover, the jury was fully informed that the details of [appellant's] plea bargain and the limitations on consideration of her testimony as an accomplice. Thus, even assuming [appellant] 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.

(4 Aug. RT 835-836.)

As one Court of Appeal noted, "defendant's breach of his bargain included testifying falsely, conduct which is manifestly corrosive of our system of justice." (*People v. Collins*, *supra*, 45 Cal.App.4th at pp. 863-864.) In the instant case, the application of the doctrine of judicial estoppel would only serve to pervert justice, as it would reward appellant's dishonesty. (See *People v. Watts*, *supra*, 76 Cal.App.4th at pp. 1261-1262.)

Appellant, however, also contends, in the alternative, that defense counsel rendered ineffective assistance by failing to raise the judicial estoppel doctrine below as a bar to the prosecutor's petition for vacating and setting aside the plea agreement. (AOB 64.) But appellant fails to properly assert and argue the claim. Instead, she offers a conclusory statement that, except for failing to realize that it was available, defense counsel had no rational strategic purpose for failing to lodge an objection based on a theory of judicial estoppel. (AOB 64.)

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonable competence *and* that he was thereby prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Mayfield* (1997) 14 Cal.4th 668, 783-784.) With respect to the first prong of this test, "[r]eviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581; see also *People v. Anderson* (2001) 25 Cal.4th 543, 569 ["When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation."].) With regard to the second prong, to establish prejudice, a defendant must establish a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have

been different. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Wader* (1993) 5 Cal.4th 610, 636.) Appellant fails to satisfy either prong of this test.

As discussed *ante*, California and other jurisdictions have declined to recognize the doctrine of judicial estoppel to estop the government in a criminal case. Accordingly, defense counsel cannot be deemed ineffective for electing to not pursue a novel theory, which, as discussed, rarely if ever applies in criminal cases. Additionally, defense counsel may have reasonably believed that the prosecutor had not taken two inconsistent positions at the hearing on Varner's motion for a new trial and at the hearing regarding the prosecutor's motion to withdraw and set aside appellant's plea, thereby obviating the need for an objection.

Appellant also fails to establish prejudice. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*People v. Johnson* (1988) 47 Cal.3d 576, 591.) Here, appellant simply asserts that counsel was ineffective because, except for failing to realize it was available, she had no rational strategic purpose for failing to lodge an objection based on a theory of judicial estoppel. (AOB 64.) A conclusory statement such as this does not adequately demonstrate prejudice. Thus, appellant's claim that defense counsel rendered ineffective assistance should be rejected.

III. COLLATERAL ESTOPPEL DOES NOT APPLY TO PRECLUDE REVOCATION OF THE ORIGINAL PLEA AGREEMENT

Appellant contends that principles of collateral estoppel require reversal of the trial court's order rescinding appellant's plea agreement. (AOB 68, 71.) This contention must also fail.

A. Background

According to appellant's November 6, 2008, statement, she had not worn gloves on the night of Mariedth's murder. (1 CT 171.) According to

her July 7, 2009, statement, she again denied having worn gloves on the night of Mariedth's murder. (1 CT 444,447.) However, appellant admitted that she had moved the gloves from the back seat of the vehicle to the floor area behind the driver's side seat. (1 CT 447.) At Varner's trial, appellant testified that there was a pair of white gloves in Mariedth's vehicle, but appellant claimed that she had not worn them; instead, she acknowledged only that she had moved them. (2 RT 317, 326-327, 343, 392-393, 395-396.)

On March 30, 2010, defense counsel for Varner filed a motion for a new trial based on, among other things, the prosecutor's use of appellant's perjured testimony. (2 Aug. CT 405-416.) On April 7, 2010, the prosecutor filed written opposition to the motion in which she noted appellant's admission that she had been untruthful about the pants she had worn on the evening of Mariedth's death. (2 Aug. RT 418-424.) However, the prosecutor argued that the untruthful statement regarding the pants she had worn was not material to any issue in the case. (2 Aug. RT 421-422.)

On April 22, 2010, the prosecutor filed a Request for Findings Pursuant to the Negotiated Plea Agreement. (1 CT 98-99.) On April 23, 2010, the trial court held a hearing to consider whether it was appropriate for it to make findings with respect to the plea agreement. (1 CT 112; see also 2 RT 400-407.) On June 4, 2010, the prosecutor filed a Petition for Withdrawal of the Negotiated Plea Agreement wherein she requested that the trial court find that appellant had not fulfilled her obligation under the plea agreement. (1 CT 117-119.) On June 7, 2010, the prosecutor filed an additional Petition for Withdrawal of the Negotiated Plea Agreement and attached a transcript from the November 2008 interview of appellant. (1 CT 121-172.) At no time did defense counsel file written opposition to the prosecutor's motions.

On August 27, 2010, the court held a hearing to consider whether appellant's plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the conclusion of the hearing, the court concluded that appellant had "materially breached the agreement by giving false testimony during the Scott Varner case . . . ." (2 RT 425; see also 1 CT 176, 178.) Accordingly, the court ordered that the plea be vacated and set aside. (1 CT 176, 178; see also 2 RT 408, 425.)

B. Appellant Has Forfeited Her Current Claim

As an initial matter, appellant has also forfeited her claim that the prosecutor should have been collaterally estopped from petitioning the trial court to vacate and set aside appellant's plea agreement. (AOB 66-67.) A "right may be lost not only by waiver but also by forfeiture, that is, the failure to assert the right in timely fashion." (*People v. Barnum, supra*, 29 Cal.4th at p. 1224.) "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (In re S.B., supra, 32 Cal.4th at p. 1293.)

"The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court." (*Boyle v. CertainTeed Corp., supra,* 137 Cal.App.4th at p. 649; see also *In re S.B., supra*, 32 Cal.4th at p. 1293.) "It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial." (*Children's Hosp. and Medical Center v. Bonta, supra,* 97 Cal.App.4th at p. 776.) As one Court of Appeal explained:

> Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant. "'In the

> hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them.'" [Citation.]

(*North Coast Business Park v. Nielsen Construction Co., supra,* 17 Cal.App.4th at pp. 28-29.)

Therefore, as a general rule, "'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton, supra,* 34 Cal.4th at p. 198.)

Despite the prosecutor filing a request for findings pursuant to the plea agreement and two petitions for withdrawal of the plea agreement, defense counsel did not respond to any of the motions to argue that the prosecutor was collaterally estopped from rescinding the plea agreement.

On August 27, 2010, the court held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the hearing, the prosecutor argued that appellant had repeatedly stated that she had not worn gloves, but her DNA was present on the inside of the white gloves, a fact that the prosecutor deemed a material misrepresentation. (2 RT 411-412.) Defense counsel argued that appellant's statement that she had not worn gloves was truthful because "she never wavered in any way about not wearing the gloves." (2 RT 413.) She also argued that, even if appellant had been untruthful about wearing the gloves, the statement did not constitute a material misrepresentation. (2 RT 415-416, 419.) At no point did defense counsel argue that the prosecutor should have been estopped, under a theory of collateral estoppel, from seeking to have appellant's plea vacated and set aside.

Thus, appellant's claim that the doctrine of collateral estoppel should have been applied to preclude the prosecution from pursuing rescission of the original plea agreement (AOB 66, 71) has been forfeited. Appellant, however, also contends, in the alternative, that defense counsel rendered ineffective assistance by failing to raise the collateral estoppel doctrine below as a bar to the prosecutor's petition for vacating and setting aside the plea agreement. Accordingly, although the issue was forfeited below, respondent will proceed to the merits of the claim.

C. Relevant Law

Collateral estoppel ordinarily bars the relitigation of an issue decided at a previous proceeding when the following threshold requirements are satisfied:

> 1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding.

(*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)

"Nonetheless, because collateral estoppel is ultimately subject to considerations of public policy, the doctrine's application is not automatic." (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 669.)

As the California Supreme Court explained in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, "the public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy." (*Id.* at p. 343.)

Ordinarily, the existence of waiver and estoppel are questions of fact and, as a consequence, the trial court's determination is binding on the appellate court if it is supported by substantial evidence. (*People v. Collins*, *supra*, 45 Cal.App.4th at p. 865.)

D. Analysis

Assuming arguendo that appellant had not forfeited the claim by failing to raise it below, the facts of the instant case do not support the conclusion that the trial court's ruling rescinding the plea agreement should be reversed on principles of collateral estoppel.

Appellant has failed to establish that the issue to be precluded is identical to that decided in the prior proceeding, a threshold requirement of collateral estoppel. (See *People v. Garcia*, *supra*, 39 Cal.4th at p. 1077.) The issue in the prior proceeding—the hearing regarding Varner's motion for a new trial as framed by defense counsel for Varner—was whether the prosecutor used "perjured testimony" at Varner's trial. (2 Aug. CT 409-410.) In response to Varner's defense counsel's allegation, the prosecutor took the position that appellant had "admitted to lying in court about the pants she was wearing the night of the murder." (2 Aug. CT 421.) However, the prosecutor argued that the untruthful statement regarding the pants appellant had worn was not material to any issue in the case. (2 Aug. RT 421-422.)

On August 27, 2010, the court held a hearing to consider whether appellant's plea agreement should be invalidated, which is the same issue appellant now claims was precluded in the lower court. (1 CT 176; see also 2 RT 408-426; AOB 66, 71.) At the hearing, the issue—as framed by the court—was "whether or not [appellant]'s plea will be set aside based on her testimony in the Scott Varner case." (2 RT 408.)

Contrary to appellant's contention, the issue she claims should have been precluded is not identical to the one decided in the prior proceeding.

In the prior proceeding, the issue was whether the prosecutor had used perjured testimony in Varner's trial while the issue in the hearing addressing the prosecutor's petition for withdrawal of the negotiated plea agreement was whether appellant had "violated any term of th[e] agreement." (1 CT 82-83.) Additionally, Varner's new trial motion focused on the prosecution's conduct in purportedly offering appellant's perjured testimony at Varner's trial while the petition for withdrawal of the negotiated plea agreement focused on appellant's conduct under the terms and conditions of the plea agreement. Because appellant has failed to establish that the issue to be precluded is identical to that decided in the prior proceeding, her claim should be rejected.

IV. THE TRIAL COURT'S RULING REVOKING THE ORIGINAL PLEA AGREEMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant argues that the trial court's ruling revoking the original plea agreement is not supported by substantial evidence. (AOB 72, 79-83.) In particular, she contends that the trial court's finding that she falsely denied participating in the homicide was not supported by substantial evidence. (AOB 79-80, 83.) Appellant's argument lacks merit.

A. Background

On November 7, 2008, appellant and the district attorney entered into a written plea agreement wherein appellant agreed to "testify fully and truthfully at all stages and proceedings" in the case against Varner in exchange for pleading guilty to second degree murder and being sentenced to an indeterminate term of 15 years to life in prison. (1 CT 78-85.) By entering into the agreement, appellant represented that her November 6, 2008, statement was "true, correct, and complete" and that a "material misrepresentation will be grounds for revoking this agreement and reinstating all charges contained in the Information, including enhancements." (1 CT 79.) The only requirements of appellant were that

she answer truthfully all questions asked of her by the court, the prosecution or the defense in the case against Varner and fully cooperate in the continuing investigation as requested by representatives of the district attorney's office or Redding Police Department. (1 CT 79.) The agreement also set forth a procedure for determining whether a violation had occurred that contemplated the prosecutor petitioning the trial court for a hearing on the matter. (1 CT 82.) The agreement required the prosecutor to prove by a preponderance of the evidence that appellant had violated the terms of the agreement. (1 CT 82.)

On April 22, 2010, the prosecutor filed a Request for Findings Pursuant to the Negotiated Plea Agreement. (1 CT 98-99.) On April 23, 2010, the trial court held a hearing to consider whether it was appropriate for it to make such findings with respect to the plea agreement. (1 CT 112; see also 2 RT 400-407.) During that hearing, the prosecutor expressed her initial opinion that appellant had fulfilled her obligations under the agreement and that she had made "no material misrepresentation that affected [the Varner] trial and she was consistent with the prior statement she had given to the [prosecutor]." (2 RT 401.) However, the prosecutor also requested that the court grant her additional time to review appellant's trial testimony and her previous statements to determine whether there were inconsistencies prior to filing a motion to have the plea vacated and set aside. (2 RT 403.) Without ruling on the matter, the court asserted its preliminary finding that appellant had testified untruthfully about several matters but also expressed doubt about whether that untruthful testimony rose to the level of a material misrepresentation. (2 RT 402-403.) The court cited as one example appellant's testimony that she had never worn the gloves, despite the DNA evidence from inside of the gloves that linked her to them. (2 RT 404.) Other examples of appellant's untruthfulness included: appellant's various conflicting statements to law enforcement

officials; appellant's "confessed dishonesty" on the witness stand regarding which pants she wore on the night of the murder; appellant's inconsistent statements regarding the duration of her and Mariedth's acquaintance; and appellant's evasive and inconsistent statements regarding her prior drug use. (2 RT 404-405.) The court also noted its general impressions regarding appellant having appeared evasive, inconsistent, and non-credible. (2 RT 405-406.)

On June 4, 2010, the prosecutor filed a Petition for Withdrawal of the Negotiated Plea Agreement wherein she requested that the trial court find that appellant had not fulfilled her obligation under the plea agreement. (1 CT 117-119.) In the motion, the prosecutor argued that in her November 6, 2008, statement, appellant had acknowledged that she had moved a pair of gloves, but she had claimed that she did not wear gloves on the night of Mariedth's murder. (1 CT 117-118.) Appellant also testified at Varner's trial that she had touched, but not worn, a pair of white gloves that was found in Mariedth's vehicle after her death. (1 CT 117.)

The prosecutor also asserted that the DNA analysis of the white gloves had not been completed until after November 6, 2008. (1 CT 118.)

On June 7, 2010, the prosecutor filed an additional Petition for Withdrawal of the Negotiated Plea Agreement and attached a transcript from the November 2008 interview of appellant. (1 CT 121-172.) The prosecutor directed the court's attention to appellant's statement that she had not worn gloves on the night of Mariedth's murder. (1 CT 171.)

On August 27, 2010, the court held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the hearing, the prosecutor argued that appellant had repeatedly stated that she had not worn gloves, but her DNA was present on the inside of the white gloves, a fact that the prosecutor deemed a material misrepresentation. (2 RT 411-412.) This point was important because, if

appellant had worn gloves, she could have participated in the beating and fatal attack on Mariedtdh without sustaining injuries to her hands, which would have indicated that her participation was greater than that to which she had previously admitted. (2 RT 412.) Defense counsel argued that appellant's statement that she had not worn gloves was truthful because "she never wavered in any way about not wearing the gloves." (2 RT 413.) She also argued that, even if appellant had been untruthful about wearing the gloves, the statement did not constitute a material misrepresentation. (2 RT 415-416, 419.)

In addition to the DNA evidence, the court deemed important the fact that appellant had lied about which pants she had worn at the time of the murder important. (2 RT 422-423.) After hearing argument from defense counsel and the prosecutor, the court asserted as follows:

> . . . This . . . agreement was about [appellant] being honest about her own role in this crime, and . . . I'm convinced absolutely that she was not honest, and the DNA evidence found on the inside of the glove is more or less the lynchpin. It is the key critical piece of evidence that demonstrates that she wasn't honest, because as I . . . sat thinking about it during trial and realizing that this slow and torturous death of the victim run out over some lengthy period of time, minutes, obviously, that was an event in which there were multiple activities, potentially, by Mr. Varner and [appellant], some of which was strangulation, and it would have been opportune for [appellant] to have used those gloves to assist in the strangulation or assault on Miss Mariedth, and she didn't want to admit that, because it's apparent what that would have suggested. That would have subjected her to the greater risk of being found out about being an actual participant in the killing.
>
> [¶] . . . [¶]
>
> It was about her being honest about her own role, start to finish, and I think it's the DNA evidence and . . . again, I know this may not be part of your consideration, but it certainly is a part of the trial process and part of the agreement, her other admitted lies and those that I found just as the trier of fact on this issue

> cause me to believe that she did not live up to the plea agreement, that there were material misrepresentations during her testimony and which she is not entitled [to] the benefit of that bargain.

(2 RT 423-424.)

Accordingly, the court ordered that the plea be vacated and set aside. (1 CT 176, 178; see also 2 RT 408, 425.)

B. Relevant Law

A trial court's ruling to vacate and set aside a plea agreement based on breach by the defendant must be supported by substantial evidence. (*United States v. Simmons* (4th Cir.1976) 537 F.2d 1260, 1262 ["There would be manifest impropriety in permitting the government, without satisfying a judge that the evidence proves that a defendant broke his promise, to escape from the obligation the government undertook in the plea bargain."]; *Neeld v. State* (Fla. Dist. Ct. App. 2008) 977 So.2d 740, 745 ["the circuit court cannot declare that the defendant violated the terms of his plea agreement in the absence of competent, substantial evidence to support that finding."] *Neeld v. State* (Fla. Dist. Ct. App. 2008) 977 So.2d 740, 745; *State v. Roberson* (2003)118 Wash.App. 151, 74 P.3d 1208 [an evidentiary hearing is required to establish breach of plea agreement].)

Under the substantial evidence rule, the appellate court does not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319-320; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Rather, the appellate court

> "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . . If the circumstances reasonably justify the trial court's findings, an appellate court cannot reverse merely because the circumstances might also be reasonably reconciled with a contrary finding."

(*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.)

C. Analysis

1. The trial court's ruling vacating and setting aside the plea agreement is supported by substantial evidence

The trial court's ruling vacating and setting aside appellant's plea is supported by substantial evidence. In her November 6, 2008, statement, appellant claimed that she had not worn gloves on the night of Mariedth's murder. (1 CT 171.) This and other statements she made during the interview formed the basis of the plea agreement with the district attorney. (1 CT 79.) According to her statements, appellant's only involvement in Mariedth's murder was helping Varner remove Mariedth's body from the vehicle after he had suffocated her. (1 CT 125, 156-157.) During her interview on July 7, 2009, appellant again denied having worn gloves on the evening of Mariedth's murder. (2 Aug. CT 447.) However, she stated that she had moved some gloves from the back seat of Mariedth's vehicle to the floor area behind the driver's seat. (2 Aug. CT 447.) At Varner's trial, appellant's testimony with regard to the gloves largely mirrored her previous two statements. (2 RT 317, 326-327, 343, 392-393, 395-396.) Testing of the exterior of one of the white gloves revealed that appellant was the primary female contributor. (2 Aug. RT 448, 456.) Appellant could not be excluded as a possible contributor to the primary female DNA profile extracted from the interior of the white glove. (2 Aug. RT 448, 451, 456.) A mixture of male and female DNA was detected on the exterior of the other white glove, and appellant could not be excluded as a possible source of the primary female profile. (2 Aug. RT 451, 456.) The DNA from the interior of the white glove matched appellant's profile. (2 Aug. RT 451-452, 456-457.) The prosecutor asserted that the DNA analysis of

the white gloves had not been completed until after November 6, 2008. (1 CT 118.)

The plea agreement set forth a procedure for determining whether a violation had occurred that entailed the prosecutor petitioning the trial court for a hearing on the matter. (1 CT 82.) Under the agreement, the prosecutor was required to prove by a preponderance of the evidence that appellant had violated the terms of the agreement. (1 CT 82.) At that hearing, the court relied not only upon the DNA evidence found on the inside of the white gloves but on additional untruthful statements made by appellant. (2 RT 422-424.) Specifically, the court asserted as follows:

> . . . [O]f all of the lies that I heard, that is the most startling, the most critical, because it was . . . that pair of gloves found in the car that had evidently been worn by [appellant] that suggested a greater role in the actual killing of Miss Mariedth than she was willing to admit, and that's what . . . was breathtaking to me when I heard this evidence coming out, and hearing that [appellant], despite her denials of ever having worn the gloves, was found to have actually been untrue in that, because her DNA was found inside the gloves.
>
> [¶] . . . [¶]
>
> Well, . . . inside was the critical part. The DNA on the outside, that's one thing. That could have been -- who knows how a transfer could have occurred or what it was that caused her DNA to be on the outside of a pair of gloves found in the vicinity where she is inside a car.
>
> The critical part to me was the finding that her DNA was on the inside, suggesting rather distinctly that she had been wearing those gloves at a certain point.
>
> The other thing that I thought was important was at a point during the trial [appellant] was caught lying and admitted lying about the pants that she was wearing at the time the killing occurred.
>
> Now, I understand that there was . . . no DNA evidence or any other evidence found on the pants that she actually was

wearing to show that she was involved, . . . or that she had the victim's blood or any other kind of DNA on the actual pants she was wearing, but she was lying about which pants she actually did have on, and it wasn't even a mistake. She admitted . . . she was lying, which suggested a pattern of trying to avoid the possibility of being caught with other damaging evidence that would have made the point that she was more deeply involved in the killing of Miss Mariedth than she was willing to admit.

And let's face it, this is not about whether Mr. Varner, for his own independent role, was responsible for all for all of the crimes he committed, because he clearly was. This . . . agreement was about [appellant] being honest about her own role in this crime, and . . . I'm convinced absolutely that she was not honest, and the DNA evidence found on the inside of the glove is more or less the lynchpin. It is the key critical piece of evidence that demonstrates that she wasn't honest, because as I . . . sat thinking about it during trial and realizing that this slow and torturous death of the victim run out over some lengthy period of time, minutes, obviously, that was an event in which there were multiple activities, potentially, by Mr. Varner and [appellant], some of which was strangulation, and it would have been opportune for [appellant] to have used those gloves to assist in the strangulation or assault on Miss Mariedth, and she didn't want to admit that, because it's apparent what that would have suggested. That would have subjected her to the greater risk of being found out about being an actual participant in the killing.

And when you compound that with the other lies[6] that I believe she told during her testimony, I think that all of it suggests that she was not truthful, and her . . . dishonesty was a

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[6] Presumably, the "other lies" to which the court was referring included those it had enumerated at the April 23, 2010, hearing and included the following: appellant's various conflicting statements to law enforcement officials; appellant's "confessed dishonesty" on the witness stand regarding which pants she wore on the night of the murder; and appellant's evasive and inconsistent statements regarding her prior drug use. (2 RT 404-405.) The court also noted its general impressions regarding appellant having appeared evasive, inconsistent, and non-credible. (2 RT 405-406.)

> material breach of the agreement, . . . however you characterized the effect of those lies on the trial, and again, I think we're in agreement that it isn't about whether Mr. Varner got convicted. That's not the standard of this agreement.
>
> It was about her being honest about her own role, start to finish, and I think it's the DNA evidence and . . . again, I know this may not be part of your consideration, but it certainly is a part of the trial process and part of the agreement, her other admitted lies and those that I found just as the trier of fact on this issue cause me to believe that she did not live up to the plea agreement, that there were material misrepresentations during her testimony and . . . she is not entitled [to] the benefit of that bargain.

(2 RT 422-424.)

Substantial evidence supports the court's finding that appellant breached the terms and conditions of the plea agreement, and her untruthful statement about not having worn the gloves is but one fact supporting the court's ruling. As noted *ante*, the court also cited the fact that appellant had been untruthful about which pants she had worn on the evening of Mariedth's murder. (2 RT 422.) This is important because it is reasonable to infer, as the trial court apparently did, that the untruthful statement about the pants appellant had been wearing was made in an effort to minimize her culpability and conceal the extent of her involvement in the murder. Indeed, as the trial court asserted in this regard, "She admitted . . . she was lying, which suggested a pattern of trying to avoid the possibility of being caught with other damaging evidence that would have made the point that she was more deeply involved in the killing of Miss Mariedth than she was willing to admit." (2 RT 422-423.) Given the DNA evidence and evidence of the "other lies" (2 RT 423), the circumstances reasonably justified the trial court's findings, which should not be reversed merely because the circumstances might also be reasonably reconciled with a contrary finding. (See *People v. Quesada*, *supra*, 230 Cal.App.3d at p. 533.)

Appellant also argues that she was consistent in denying that she had worn gloves on the night of Mariedth's murder and that she was truthful about matters that inculpated her in other circumstances surrounding Mariedth's murder to support her argument that the trial court's ruling is not supported by substantial evidence. (AOB 80-81.) That appellant was consistent in denying that she had worn the gloves is of little import, because, as the trial court noted, "The consistency of the story may suggest something, but telling the lie more than once doesn't make it true the more times you tell it. It just may be that you're a consistent liar." (2 RT 419.)

Appellant also contends that "[p]ublished cases upholding rulings vacating plea agreements have generally relied upon far more solid evidence than that proferred by the prosecution in this case." (AOB 82.) However, this observation does not adequately describe the test for what constitutes substantial evidence. In support of her argument, appellant cites to *People v. Collins, supra,* 45 Cal.App.4th 849. As discussed *ante* in Argument I, in *Collins*, the defendant provided an initial statement in which he implicated Christopher Johnson in the murder of Drew Martin and, while denying any participation in the attack, acknowledged his presence at the scene of the crime. (*Id.* at pp. 855-856.) He subsequently entered into a plea agreement wherein he agreed to cooperate with law enforcement officials, including providing truthful and complete statements and testimony regarding the actions of all persons involved in the murder. (*Id.* at p. 857.) As specified in the agreement, the defendant testified as a witness for the prosecution at Johnson's preliminary hearing, testimony that was consistent with the statement he had provided previously. (*Ibid.*)

After the defendant had been committed to the California Youth Authority, his cousin told an investigator from the district attorney's office that the defendant had been untruthful in his previous statements and that he had kicked Martin in the groin during the attack. (*Id.* at p. 858.) The

defendant provided a series of additional statements in which he admitted greater involvement in Martin's murder. (*Id.* at pp. 858-860.) The prosecutor chose not to use the defendant as a witness and moved to have the defendant's plea set aside (*Id.* at p. 860.) The court granted the prosecution's motion and set aside the plea on the basis that the defendant had materially breached the agreement by testifying untruthfully at Johnson's preliminary hearing. (*Ibid.*)

In the instant case, the evidence of appellant's breach of the plea agreement is much stronger than the testimonial evidence in *Collins*. Here, in addition to her testimony that she had been untruthful in a previous statement to law enforcement and while testifying (see 1 RT 217-218; 2 RT 391), the DNA evidence plainly refuted appellant's contention that she merely moved the gloves from the seat to the floorboard of Mariedth's vehicle. (1 CT 171, 444, 447; 2 RT 317, 326-327, 343, 392-393, 395-396.) In addressing this point, the trial court reasoned that ". . . it would have been opportune for Miss Peterson to have used those gloves to assist in the strangulation or assault on Miss Mariedth," a fact that appellant would attempt to conceal because "it's apparent what that would have suggested. That would have subjected her to the greater risk of being found out about being an actual participant in the killing." (2 RT 423.) And as discussed *ante*, the trial court relied on "other lies" (2 RT 423) in formulating its conclusion that "she did not live up to the plea agreement, that there were material misrepresentations during her testimony and . . . she is not entitled [to] the benefit of that bargain." (2 RT 424.)

Under the substantial evidence rule, the appellate court does not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 319-320; *People v. Johnson*, *supra*, 26 Cal.3d at p. 578.) Here, under this standard, the trial court made an informed ruling that appellant had violated

the terms and conditions of her plea agreement. The ruling is thus supported by substantial evidence.

2. The trial court's ruling that appellant's untruthful statements were material is supported by substantial evidence

Appellant also claims that, assuming that she was untruthful when she denied wearing the gloves at any time, the untruthful statement did not constitute a sufficient material misrepresentation to warrant vacating the plea agreement. (AOB 84.) Appellant's claim is unavailing.

At the August 27, 2010, hearing to consider whether the plea agreement should be invalidated, the prosecutor argued that appellant had repeatedly stated that she had not worn gloves, but her DNA was detected on the inside of the white gloves, a fact that the prosecutor deemed a material misrepresentation. (1 CT 176; see also 2 RT 408, 411-412.) The untruthful statement, she argued, was material because appellant may have participated in the attack on Mariedth while wearing the gloves, which would have explained why she did not have injuries on her hands. (2 RT 412.) Defense counsel argued that appellant's statement that she had not worn gloves was truthful because "she never wavered in any way about not wearing the gloves." (2 RT 413.) She also argued that, even if appellant had been untruthful about wearing the gloves, the statement did not constitute a material misrepresentation. (2 RT 415-416, 419.) The trial court concluded that appellant had "materially breached the agreement by giving false testimony during the Scott Varner case[.]" (2 RT 425.) As to the materiality of the untruthful statements, the court reasoned that ". . . it would have been opportune for [appellant] to have used those gloves to assist in the strangulation or assault on Miss Mariedth[.]" (2 RT 423.) The court further noted that appellant did not admit to wearing the gloves

because "[t]hat would have subjected her to the greater risk of being found out about being an actual participant in the killing." (2 RT 423.)

In the instant case, the trial court noted that appellant "was not honest even to the extent of testifying untruthfully about her role in the killing; I thought there was evidence that pointed toward her as being more deeply involved."[7] (2 RT 403.) In its decision to vacate and set aside appellant's plea (quoted above), the trial court explained the materiality of appellant's untruthful statements in detail. (See 2 RT 422-424.)

Again, as noted *ante*, the court did not limit its consideration of the materiality of appellant's untruthful statements to the DNA evidence linking her to the gloves. In the hearing held on April 23, 2010, the court identified other untruthful statements made by appellant that went to her credibility. Indeed, the trial court took note of appellant's various conflicting statements to law enforcement officials; appellant's "confessed dishonesty" on the witness stand regarding which pants she wore on the night of the murder; appellant's inconsistent statements regarding the duration of her and Mariedth's acquaintance; and appellant's evasive and inconsistent statements regarding her prior drug use. (2 RT 404-405.) "Evidence affecting the credibility of a witness usually tends to strengthen the case of a party to an action or to weaken the defense of his adversary, and therefore such evidence is material." (*People v. Metzler* (1913) 21 Cal.App. 80, 82.)

The multiple misrepresentations enumerated by the trial court not only affected appellant's credibility, but some of the statements were relevant to her role in the murder, which is certainly material. Specifically, the court

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[7] The court made this statement at the April 23, 2010, hearing that was held prior to the court's ruling on the motion to vacate and set aside appellant's plea agreement. (2 RT 400, 403.)

reasoned that the presence of appellant's DNA on the interior of the gloves "suggested a greater role in the actual killing of Miss Mariedth than she was willing to admit[.]" (2 RT 422.) The court also noted its general impressions regarding appellant having appeared evasive, inconsistent, and non-credible. (2 RT 405-406.) All of these factors supported the court's ruling that appellant had breached the plea agreement and that her untruthful statement about the gloves constituted a material misrepresentation.

Appellant cites to *People v. Brunner*, *supra*, 32 Cal.App.3d 908 and *United States v. Vogt* (8th Cir. 1990) 901 F.2d 100 as examples of when a prosecutor reaps the benefit of an agreement but subsequently seeks to have the agreement set aside. (AOB 84-86.) But neither case addresses what constitutes a material misrepresentation.

Appellant's reliance on *Brunner* is misplaced. As discussed *ante*, in *Brunner*, the defendant was granted immunity based on her testimony regarding the murder of Gary Hinman. (*People v. Brunner*, *supra*, 32 Cal.App.3d at pp. 910-911.) The defendant testified at the trial of Robert Beausoleil for the Hinman murder to the effect that she, Beausoleil, and another woman had held Hinman captive for three days, beaten him, stabbed him, and smothered him. (*Id.* at p. 911.) She also testified that Charles Manson, who was armed with a knife, had been present at the home where Hinman was held captive. (*Ibid.*) Beausoleil was convicted of Hinman's murder. (*Ibid.*) Subsequently, Beausoleil filed a motion for a new trial and submitted an affidavit by the defendant in which she disavowed her entire testimony at his trial. (*Ibid.*) The following year, the defendant testified at Manson's trial, and she denied participation in Hinman's murder and also denied any knowledge of Manson's participation. (*Ibid.*) Later that same year, a grand jury indicted the defendant for Hinman's murder, and she moved to dismiss the indictment

on the basis that she had been promised immunity from prosecution in exchange for her testimony regarding the murder. (*Id.* at pp. 910-912.) The trial court granted the defendant's motion and permanently restrained the district attorney from prosecuting her for Hinman's murder. (*Id.* at p. 910.)

As the *Brunner* court noted, "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." (*People v. Brunner*, *supra*, 32 Cal.App.3d at p. 916.) In the instant case, the express purpose of the plea agreement was "to ensure that the trier of fact in [the Varner prosecution] will be allowed to hear the testimony of [appellant]." (1 CT 79.) The plea agreement was conditioned only on appellant testifying "fully and truthfully" at all proceedings against Varner, not on achieving any particular result. (1 CT 78-80.) In ruling to vacate and set aside the plea agreement, the trial court found that appellant had not performed as required under the terms of the plea agreement because she had provided untruthful testimony. (2 RT 422-424.) The court further suggested that the untruthful testimony was material because it was made in an effort to conceal greater involvement in Mariedth's murder than that to which appellant had previously admitted. (2 RT 422-423.)

Appellant further argues that her "alleged credibility problems" were immaterial because the jury convicted Varner. (AOB 86.) Defense counsel advanced the same argument during the hearing on the motion to vacate and set aside appellant's plea agreement. (See 2 RT 414-416.) This argument, however, overlooks the possibility that the jury found that appellant had materially misrepresented certain facts when she testified but convicted Varner because of other overwhelming evidence of his guilt. Addressing itself to this contention, the trial court asserted as follows:

> I think the problem is that Mr. Varner was clearly guilty in his own right as an actual killer, but [appellant] had the obligation to tell the truth about her own role, because she also may have been an actual killer, not someone who was . . . cowering in the back seat who was, essentially, by her testimony, a bystander to all of this.

(2 RT 416.)

Additionally, because of appellant's untruthful testimony, the prosecutor had to remind the jury that there was other evidence of Varner's guilt. As she stated in her closing argument:

> To the extent that [appellant's] testimony is required to convict Mr. Varner, exclude it. The People's key witness in this case was Mr. Varner's interview that day, the DNA, the physical evidence, the videos. We could prove it without [appellant].

(4 Aug. RT 903.)

Appellant also claims that the trial court's actions undermine its ruling as to the materiality of appellant's untruthful statements. (AOB 87.) In support of her arguments, she cites to the court's denial of Varner's motion for a new trial as evidence that "appellant's alleged lies did not affect the judgment." (AOB 87.) One of the arguments defense counsel for Varner raised his motion for a new trial was that the prosecutor relied on appellant's perjured testimony in the Varner prosecution. (2 Aug. CT 405, 409-410.) The court concluded that the prosecutor had not knowingly offered or presented perjured testimony, a finding that is not at odds with a finding that appellant materially breached the plea agreement. Indeed, as the court noted during the April 23, 2010, hearing, "[M]y impression during the trial was that [appellant] was not honest even to the extent of testifying truthfully about her role in the killing; I thought there was evidence that pointed toward her as being more deeply involved." (2 RT 403.) Nonetheless, as the court concluded, "[T]hat did not absolve [Varner] one

iota in my estimation; it just meant there may have been two actual killers." (2 RT 403-404.)

Under the deferential substantial evidence rule, the appellate court

> "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . . If the circumstances reasonably justify the trial court's findings, an appellate court cannot reverse merely because the circumstances might also be reasonably reconciled with a contrary finding."

(*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 533.) Here, the circumstances reasonably justified the trial court's ruling, thus the ruling is supported by substantial evidence.

V. THE ORDER VACATING THE ORIGINAL PLEA AGREEMENT NEED NOT HAVE BEEN VACATED BECAUSE OF JUDICIAL DISQUALIFICATION

Appellant contends that, because of judicial disqualification, Judge Gallagher should not have presided over and ruled upon the hearing regarding the prosecution's motion to vacate and set aside the plea agreement. (AOB 88.) Her claim lacks merit.

A. Background

On August 27, 2010, Judge Gallagher held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the conclusion of the hearing, he ruled that appellant had "materially breached the agreement by giving false testimony during the Scott Varner case . . . ." (2 RT 425; see also 1 CT 176, 178.) Accordingly, Judge Gallagher ordered that the plea be vacated and set aside. (1 CT 176, 178; see also 2 RT 408, 425.)

On April 5, 2011, Michael Borges, defense counsel for appellant, filed a Statement of Disqualification of the Honorable William D. Gallagher pursuant to Code of Civil Procedure section 170.3. (1 CT 186-189.) Mr.

Borges attached a declaration signed by him and another signed by Amy M. Babbits, appellant's former defense counsel. (1 CT 186-192.) In the declaration, Mr. Borges asserted, upon information and belief, that Judge Gallagher had: formed the conclusion that appellant had sworn falsely during the trial; formed the opinion that appellant may have been "an actual killer of Janette [sic] Mariedth"; concluded that appellant had committed perjury before him; and concluded that appellant had violated her plea agreement with the district attorney. (1 CT 191.) Based on these factors, Mr. Borges asserted that Judge Gallagher was actually biased against appellant. (1 CT 191.)

On April 6, 2011, pursuant to Code of Civil Procedure section 170.3, subdivision (c)(1), Judge Gallagher consented to the disqualification. (1 CT 241.) On April 12, 2011, the matter was reassigned to Judge Bradley L. Boeckman. (1 CT 242-243.)

On May 4, 2011, defense counsel filed a motion to vacate the August 27, 2010, ruling by Judge Gallagher, which had vacated and set aside appellant's guilty plea. (1 CT 245-253.) On May 10, 2011, the prosecutor filed a response to defense counsel's motion to vacate Judge Gallaher's August 27, 2010, ruling. (1 CT 252-253.) On May 12, 2011, Mr. Borges filed a response to the prosecutor's response. (1 CT 268-271.) On May 16, 2011, Judge Boeckman heard arguments from defense counsel and the prosecutor on the motion to vacate appellant's plea and continued the hearing until June 6, 2011. (2 CT 308; see also 2 RT 428-440.) On June 6, 2011, Judge Boeckman heard further arguments from counsel but subsequently denied defense counsel's motion. (2 CT 309; 2 RT 441-456.)

B. Relevant Law

"If the grounds for disqualification are first learned of or arise after the judge has made one or more rulings . . . the rulings [the judge] has made up to that time shall not be set aside by the judge who replaces the

disqualified judge" unless there is "good cause." (Code Civ. Proc., § 170.3, subd. (b)(4).) In ascertaining when the disqualification becomes controlling for the purposes of the statute, courts must look to when the disqualification arose rather than when it became apparent. (*Giometti v. Etienne* (1934) 219 Cal. 687, 689; *Tatum v. Southern Pac. Co.* (1967) 250 Cal. App.2d 40, 43.) To this end, appellant argues that the ruling on the motion to vacate and set aside appellant's plea is void because the bias arose prior to the judge's determination of the motion. (AOB 88, 96-100.) This analysis, however, proves unpersuasive.

C. Analysis

As an initial matter, the very issue about which appellant now complains on appeal was a matter for which she specifically bargained under the terms of the plea agreement. By entering into the plea agreement, appellant agreed to have the judge who presided over the case (Judge Gallagher) preside over the hearing to consider whether a violation of the agreement had in fact occurred. (1 CT 82.) The cases to which appellant cites, including of *Evans v. Superior Court of Los Angeles County* (1930) 107 Cal.App. 372 and *Chastain v. Superior Court of Sacramento County* (1936) 14 Cal.App.2d 97 are easily distinguishable because in neither case did such an agreement exist.

Addressing himself to this fact, Judge Boeckman asserted as follows:

> . . . I can tell you right now my tentative view is that it just doesn't make sense to me that you can have a plea bargain agreement which has a condition subsequent which must be met in order to maintain validity, and part of the written and agreed to condition subsequent is that the trial judge determine whether or not the defendant met her end of the bargain, I . . . don't know how it could go any way other than the way it went in this case.

(2 CT 433.)

Based on the agreement, Judge Gallagher was explicitly called upon to determine whether appellant had violated any term of the agreement, including the requirement that she testify truthfully. (1 CT 82.) If the position appellant urges were adopted, it would lead to absurd results. As Judge Boeckman noted, when, under the terms of a plea agreement, the same judge who received testimony from a witness presided over a hearing at which the truthfulness of the witness's testimony is challenged, the judge would always subject to disqualification for bias against the witness if he concluded that the witness had testified untruthfully.

Furthermore, there is no indication of bias toward appellant on the part of Judge Gallagher during the hearing to consider the propriety of him ruling on the motion to vacate and set aside appellant's plea agreement or at the hearing at which he made his ruling. Although appellant testified extensively at Varner's trial, on none of these occasions did Judge Gallagher indicate that he had any opinion that appellant had been untruthful. He made a determination that appellant had made material misrepresentations only after assessing her credibility at trial. There is neither evidence nor any reason to suspect that he did otherwise.

At the April 23, 2010, hearing to consider the propriety of him making findings as to whether appellant had testified untruthfully, Judge Gallagher shared his general impressions that appellant had been untruthful. (2 RT 402-406.) However, he made clear, "I'm not making a ruling at this point because it's not right for me to do that." (2 RT 403.) Instead, Judge Gallagher's goal was to give defense counsel and the prosecutor some "material to work with in going back through the transcripts, so [they] can read these passages . . . and satisfy [their] own judgment about whether or not there was a lack of honesty in some of these areas." (2 RT 404.) Additionally, even at the August 27, 2010, hearing at which he ultimately made the ruling to set aside and vacate appellant's plea agreement, Judge

Gallagher gave defense counsel an opportunity to offer evidence that he may not have considered up to that point. (2 RT 424.) Specifically, Judge Gallagher stated:

> Now if there is a side of this that [defense counsel] want[s] me to consider, I'm more than willing to do it, and . . . believe me, . . . I can set all this aside just as easily as I said it a moment ago in this kind of stream-of-consciousness discussion we're having here.
>
> So if there's a good explanation for why that DNA found on the inside of the gloves and you want to present it at this hearing to support your opposition to the People's motion, then now is the time to put it on and . . . believe me, I'm easily persuaded about that.

(2 RT 424-425.)

Such preliminary comments, all of which occurred prior to his ruling, hardly evince a bias toward appellant. Additionally, "a judge's remarks or opinions do not demonstrate bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (*Liteky v. United States* (1994) 510 U.S. 540, 541.) Addressing himself to the issue of Judge Gallagher's preliminary impressions, Judge Boeckman reasoned:

> . . . [T]here is a . . . time when somebody is hearing evidence and so forth, a judge, and that judge is going to make a determination, at least a tentative one, that, hey, what I heard was not credible and it's on [a] material issue, and that's based on all the issues that a finder of fact can determine credibility.
>
> And, so, saying, well, that trial judge has made that decision before he made the ruling and, therefore, it's inappropriate for him to make the ruling is getting the cart before the horse. It just makes no sense to me.

(2 RT 433-434.)

At a subsequent hearing, Judge Boeckman expressed his belief that Judge Gallagher had not been biased prior to his disqualification and stated as follows:

> And there's it [sic] absolutely no reason that this Court, based on the totality of these transcripts, for me to think that Judge Gallagher was being disingenuous or that he had unwittingly already made up his mind . . . and that he was biased. It is inevitable that a judge who is likely going to be called upon to decide if the witness who has a pending plea is truthful, that that judge is going to make some preliminary observations and some tentative impressions about which he'll want to learn more or she'll want to learn more at a later formal hearing if there is a formal hearing.
>
> . . . I believe his mind was open, and I do not believe that he was disqualified from hearing the issues on August 27.

(2 RT 448.)

Even if it were the case that the bias formed before Judge Gallagher had made his decision, the ruling still must stand. Although it is true "the statute does not say that the judge is disqualified to decide erroneously but that he shall not decide at all" (*Tatum v. Southern Pac. Co.*, *supra*, 250 Cal.App.2d at p. 43), this does not mean that the judgment must be voided. In 1934, the Supreme Court noted that judgments made by a disqualified judge are void (*Giometti v. Etienne*, *supra*, 219 Cal. at p. 689), but more recent cases illustrate that such judgments are "at most voidable." (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 939; see also *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 424 [same] and *In Re Christian J.* (1984) 155 Cal.App.3d 276, 280 [same].) Given the length of appellant's trial testimony and the potential length of her testifying again, and the clear lack of a bias-driven ruling noted above, the trial court's ruling should not be voided.

VI. THE TRIAL COURT APPLIED THE CORRECT STANDARD OF MATERIALITY

Appellant argues that the trial court applied the incorrect standard of materiality in deciding whether to vacate appellant's plea agreement. (AOB 101, 103, 105.) Appellant's claim lacks merit.

A. Background

On August 27, 2010, the court held a hearing to consider whether the plea agreement should be invalidated. (1 CT 176; see also 2 RT 408-426.) At the hearing, the prosecutor argued that appellant had repeatedly stated that she had not worn gloves, but her DNA was detected on the inside of the white gloves, a fact that the prosecutor deemed a material misrepresentation. (2 RT 411-412.) This point was important because, if appellant had worn gloves, she could have participated in the beating and fatal attack on Mariedtdh without sustaining injuries to her hands, which would have indicated that her participation was greater than that to which she had previously admitted. (2 RT 412.) Defense counsel argued that appellant's statement that she had not worn gloves was truthful because "she never wavered in any way about not wearing the gloves." (2 RT 413.) She also argued that, even if appellant had been untruthful about wearing the gloves, the statement did not constitute a material misrepresentation because "the jury was able to weigh all of the evidence and come up with a conviction." (2 RT 415-416, 419.) In response, the court stated:

> If that was the standard . . . wouldn't that make this agreement essentially an illusion rather agreement? Because, by that logistic [sic], she could get up and say virtually anything, and as long as the jury convicted Mr. Varner she couldn't be held . . . responsible, because nothing she said was material. That . . . can't be the basis of this plea bargain.

(2 RT 416.)

B. Analysis

As an initial matter, appellant claims that the trial court applied the incorrect standard of materiality in determining whether the false testimony was material. (AOB 102-103.) In support of her argument, she cites a standard of materiality that measures whether it is reasonably probable that the false evidence could have affected the verdict and cites *In re Malone* (1996) 12 Cal.4th 935, 965, *In re Sassounian* (1995) 9 Cal.4th 535, 546, and *In re Wright* (1978) 78 Cal.App.3d 788, 814. But the aforementioned cases discuss materiality in the context of relief in habeas corpus proceedings, not the vacation of plea agreements. Respondent's search has uncovered no case directly on point that defines the standard of materiality to be applied in the rescission of a plea agreement based on a material misrepresentation. However, respondent submits that materiality is only relevant insofar as the plea agreement specified that a material misrepresentation would be grounds for revoking the agreement and reinstating the charges. (1 CT 79.) In the instant case, as appellant notes, the trial court did not explicitly state the standard of materiality upon which it relied in vacating and setting aside her plea agreement. (AOB 102-103.) Nonetheless, "a trial court is presumed to have applied the law correctly in the absence of a clear indication to the contrary . . . ." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944.)

Additionally, "[f]alse testimony that affects the credibility of a witness is material . . . ." (*People v. Rubio* (2004) 121 Cal.App.4th 927, 935.) Here, in assessing appellant's testimony, the court found it "self-serving to the extreme." (2 RT 419.) This finding demonstrates the court's understanding that appellant's credibility was compromised by her false statements. The court also found that appellant's "dishonesty was a material breach of the agreement, . . . however you characterize the effect of those lies on the trial . . . ." (2 RT 424.) The court's statement reflects

its understanding that appellant's untruthful statements were material under any standard. Based on the foregoing, it is reasonable to infer that the court applied the appropriate standard of materiality, but even if it did not, any error was harmless.

C. Any Error Was Harmless

Even assuming error, the alleged error was harmless under any applicable standard. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 [constitutional error must be harmless beyond reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243 [state law is harmless unless reasonably probable result more favorable to defendant would have been reached in absence of error].)

As noted *ante*, the trial court concluded that appellant's "dishonesty was a material breach of the agreement, . . . however you characterize the effect of those lies on the trial . . . ." (2 RT 424.) Its statement strongly suggests that, under any standard, the court would have found that appellant had breached the terms and conditions of her plea agreement and that the breach was material. Because appellant has failed to demonstrate any prejudice, her claim should be rejected.

VII. Rescission of the Plea Agreement Did Not Violate Due Process

Appellant contends that the rescission of the plea agreement violated her right to Due Process under the United States Constitution for the following reasons: appellant was denied an impartial adjudicator and the judge relied upon his recollection and notes in lieu of an evidentiary record. (AOB 105-108.) Appellant's contentions are without merit.

A. Appellant Was Not Denied An Impartial Adjudicator

As set forth in Argument V of this brief, appellant was not denied an impartial judge. Thus, her due process rights were not implicated, and her argument is without merit.

1. Relevant law

"A fair trial in a fair tribunal is a basic requirement of due process." (*In re Murchison* (1955) 349 U.S. 133, 136.) "The Supreme Court has long established that the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge." (*Larson v. Palmateer* (9th Cir. 2008) 515 F.3d 1057, 1067.) The United States Supreme Court has also explained that "most matters relating to judicial disqualification [do] not rise to a constitutional level." (*FTC v. Cement Institute* (1948) 333 U.S. 683, 702.)

In reviewing claims of judicial bias, the United States Supreme Court has explained that

> judicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion. See [*U.S. v.*] *Grinnell* [(1996) 384 U.S. 563,] 583, 86 S.Ct. [1698,] 1710. Apart from surrounding comments or accompanying opinion, they cannot possibly show reliance on an extrajudicial source; and, absent such reliance, they require recusal only when they evidence such deep-seated favoritism or antagonism as would make fair judgment impossible. Second, opinions formed by the judge on the basis of facts introduced or events occurring during current or prior proceedings are not grounds for a recusal motion unless they display a similar degree of favoritism or antagonism.

(*Liteky v. United States, supra,* 510 U.S. at p. 541.)

B. Analysis

As respondent demonstrated in Argument V of this brief, the preliminary comments made by Judge Gallagher prior to his ruling on the motion to vacate and set aside appellant's plea do not demonstrate any bias

toward appellant. Additionally, "a judge's remarks or opinions do not demonstrate bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (*Liteky v. United States*, *supra*, 510 U.S. at p. 541.) In reviewing the motion to vacate Judge Gallagher's ruling vacating and setting aside appellant's plea, Judge Boeckman determined that it was appropriate, and not reflective of any bias on his part, for Judge Gallagher to begin to formulate an impression of appellant's credibility and whether she had made any material misrepresentations prior to issuing his ruling. (2 RT 433-434, 436-437, 443-448, 453.) Judge Gallagher began to form an opinion as to whether appellant had violated the terms of the plea agreement, but he did so on the basis of evidence adduced at trial, which is not adequate grounds for a recusal motion unless his actions displayed a degree of favoritism or antagonism. (See *Liteky v. United States, supra,* 510 U.S. at p. 541.) Because Judge Gallagher had no bias toward appellant at the time he made the ruling to vacate and set aside her plea, she was not denied her right to due process and her claim to the contrary should be rejected.

C. The Court Appropriately Relied Upon Its Notes And Recollection

Appellant claims that Judge Gallagher's heavy reliance on his recollection of testimony and notes in the hearing addressing the prosecutor's motion to vacate and set aside appellant's plea violated her right to due process. (AOB 107.) This contention is meritless.

At the April 23, 2010, hearing to consider the propriety of him making findings as to whether appellant had testified untruthfully, Judge Gallagher shared his general impressions that appellant had been untruthful in her testimony. (2 RT 402-406.) However, he made clear, "I'm not making a ruling at this point because it's not right for me to do that." (2 RT 403.) Instead, Judge Gallagher indicated that some of his comments were

"just off the top of [his] head, and [he would] have to go back and check [his] records . . . ." (2 RT 404.) He also acknowledged that he had not yet completed a review of his notes from the Varner trial. (2 RT 404.) At the conclusion of the hearing, Judge Gallagher scheduled an additional hearing and remarked that he would have had an opportunity to complete his review of his notes by then. (2 RT 406.) Judge Gallagher's goal in sharing his initial impressions about appellant's credibility was to give defense counsel and the prosecutor some "material to work with in going back through the transcripts, so [they] can read these passages . . . and satisfy [their] own judgment about whether or not there was a lack of honesty in some of these areas." (2 RT 404.)

Additionally, even at the August 27, 2010, hearing at which he ultimately made the ruling to set aside and vacate appellant's plea agreement, Judge Gallagher gave defense counsel an opportunity to offer evidence that he may not have considered up to that point. (2 RT 424.) Specifically, Judge Gallagher stated:

> Now if there is a side of this that [defense counsel] want[s] me to consider, I'm more than willing to do it, and . . . believe me, . . . I can set all this aside just as easily as I said it a moment ago in this kind of stream-of-consciousness discussion we're having here.
>
> So if there's a good explanation for why that DNA found on the inside of the gloves and you want me to present it at this hearing to support your opposition to the People's motion, then now is the time to put it on and . . . believe me, I'm easily persuaded about that.

(2 RT 424-425.)

Judge Gallagher's reliance on his notes and recollection of appellant's untruthful testimony and credibility was entirely appropriate. (See *Smith v. United States* (9th Cir. 1958) 259 F.2d 125, 126 [upon trial of inadequate representation, the court could properly rely upon its own recollection of

what transpired at the trial.]) Indeed, it is difficult to imagine what else the judge could have relied upon to inform his decision-making process.

The hearings on the motion to vacate and set aside appellant's plea agreement provided the required procedural safeguards. "[O]ne requisite safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea bargaining agreement." (*United States v. Calabrese* (10th Cir. 1981) 645 F.2d 1379, 1390.) The record demonstrates that Judge Gallagher provided appellant a judicial determination based on adequate evidence of her breach of the plea agreement. Contrary to appellant's contention (AOB 107), he did not merely rely upon his recollection of testimony and notes. Instead, he held two hearings at which defense counsel and the prosecutor argued their respective positions, which comported with appellant's right to due process. Therefore, the court acted within its authority in relying upon, among other things, its recollection and notes.

Appellant cites to *Hurles v. Ryan* (9th Cir. 2011) 650 F.3d 1301, 1312 to support her argument that her due process rights were violated by the judge's reliance on his memory and notes. (AOB 107.) However, appellant's reliance on *Hurles* is misplaced. In *Hurles*, the Ninth Circuit Court of Appeals concluded that the defendant had not been provided an opportunity to challenge the judge's "own claimed memory and understanding of events which had taken place years prior." (*Hurles*, at p. 1312.) Here, by contrast, Judge Gallagher presided over Varner's trial, which had occurred only months before the hearing on the motion to vacate and set aside appellant's plea agreement. Additionally, as noted *ante*, the prosecutor filed three motions related to the issue of appellant's plea agreement being vacated and set aside, none of which was answered by appellant. (1 CT 98-99, 117-119, 121-172.) And as also noted *ante*, Judge Gallagher held two hearings regarding the issue of whether appellant's plea

agreement should have been vacated and set aside. (See 2 RT 400-425.) Only after these procedural safeguards had been met did Judge Gallagher rule that appellant had violated the terms and conditions of her plea agreement.

D. The Motions At Issue In This Appeal Did Not Violate Substantive Due Process

Appellant contends that, to the extent that they violated state law rules and standards, the rulings at issue in Arguments I through VI of this brief violate the federal constitution's guarantee of Substantive Due Process. (AOB 108.) As demonstrated *ante* in response to appellant's first six claims, the court's ruling did not constitute substantive due process violations.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: May 10, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a
Times New Roman font and contains 27,250 words.

Dated: May 10, 2012

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 27,250 words.

Dated: May 10, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Peterson**
No.: **C068893**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 11, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 11, 2012, at Sacramento, California.

_____
Declarant

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