Filed 5/5/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT NOEL, Defendant and Appellant.	A099250 (S.F. Super. Ct. No. 18181302)
THE PEOPLE, Plaintiff and Appellant, v. MARJORIE F. KNOLLER, Defendant and Respondent.	A099366, A099499 (S.F. Super. Ct. No. 18181301)
In re ROBERT E. NOEL, on Habeas Corpus.	A109260 (S.F. Super. Ct. No. 18181302)

Marjorie F. Knoller and Robert Noel (collectively, defendants) owned two Presa Canario dogs, Bane and Hera (collectively, the Presas),[1] while living in an apartment building in San Francisco. The Presas mauled to death Diane Whipple, a neighbor living in an apartment down the hallway from the apartment of defendants. A grand jury

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV.

[1] All further references to Bane or Hera, individually, are to their name or to "the Presa."

returned an indictment charging defendants with one count of negligent homicide in violation of Penal Code section 192, subdivision (b)[2] and with owning a mischievous animal that caused the death of a human being in violation of section 399, subdivision (a). In addition, the indictment charged Knoller with second degree murder in violation of section 187.

Defendants pled not guilty and were tried before a jury. At the conclusion of the trial, the jury found defendants guilty on all counts. Defendants moved for a new trial; the trial court denied the motion as to all of the counts against Noel. The court denied Knoller's motion as to the negligent homicide and owning a mischievous animal counts, but granted the motion for a new trial for the second degree murder conviction. The court found that it could not "say as a matter of law that [Knoller] subjectively knew . . . that her conduct was such that a human being was likely to die." In addition, the court noted that it was troubled because Noel, whom the court deemed "more culpable," was not similarly charged. The court denied the new trial motions for both defendants as to the lesser offenses of involuntary manslaughter and ownership of a mischievous animal causing death, finding that those verdicts were supported by "overwhelming" evidence. The People and both defendants appealed and we granted the subsequent motion to consolidate all three appeals.

Defendants separately argue the trial court admitted prejudicial evidence of their association with the Aryan Brotherhood; they were deprived of their constitutional right to counsel during the prosecutor's closing argument; and the court violated their rights by sentencing them to aggravated terms on factual findings not resolved by a jury (*Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*)). In addition, Noel argues insufficient evidence supported the verdicts, section 399 precluded any prosecution of him under an involuntary manslaughter theory, and the court committed prejudicial error in failing to define "owner" in the context of section 399. Knoller contends that admitting letters written by Noel violated her right to confrontation. Moreover, she

[2] All further unspecified code sections refer to the Penal Code.

maintains the court violated her constitutional right to present a defense when it refused to permit her to testify about Noel's statements made to her regarding a bite Noel suffered from Bane. We are unpersuaded by defendants' arguments and conclude that either there was no error or such error was harmless.

The People appealed from the order granting Knoller a new trial on the second degree murder conviction. They contend that the lower court used a legally incorrect definition of implied malice, improperly reassessed Knoller's credibility on the key issue of subjective knowledge, and incorrectly considered the relative culpability of defendants. We agree and therefore reverse.

BACKGROUND

I. *Summary Introduction*

Diane Whipple (Whipple) lived with her domestic partner, Sharon Smith (Smith), on the sixth floor in the same San Francisco apartment building as defendants. Defendants, who were both attorneys, lived and operated their law practice out of their sixth floor, one and one-half bedroom, apartment, which was down the hallway from Whipple and Smith. Defendants brought to their apartment a female Presa Canario named Hera in the spring of 2000. In the fall of that year, defendants brought a male Presa Canario named Bane to their home. The following winter, on January 26, 2001, at about 4:00 p.m., Knoller had taken Bane out of defendants' apartment and was returning to her apartment while Whipple was returning home with groceries. Whipple had unlocked her door, but never made it into her apartment before the Presas attacked her, killing her. What actually occurred is not clear from the record, but the record clearly establishes that Bane killed Whipple and Hera joined in the attack. The Presas had ripped off all of Whipple's clothing. The hallway carpet was soaked in blood, and streaks of blood covered the walls. Groceries and pieces of Whipple's clothing littered the hallway. Whipple had 77 discrete areas of injury, which covered her body "from head to toe." She died of multiple traumatic injuries and extensive blunt force trauma resulting in a loss of one-third of her blood.

II. *Indictment and Venue Change*

On March 23 and 27, 2001, Knoller testified before the grand jury. She denied that either Bane or Hera ever gave her reason to believe that they posed a danger to any person. She denied ever seeing Bane or Hera bite, lunge, or act aggressively towards any person. She asserted that she had never lost control of Bane prior to Whipple's death, and had never seen her husband lose control of Bane.

On March 27, 2001, the San Francisco grand jury returned an indictment charging Knoller in count 1 with murder (§ 187), in count 2 with involuntary manslaughter (§ 192, subd. (b)), and in count 3 with ownership of a mischievous animal causing death (§ 399). The indictment charged Noel with involuntary manslaughter and ownership of a mischievous animal causing death. Defendants pled not guilty to all of the charges.

On September 14 and October 12, 2001, the trial court granted defendants' motion for change of venue and ordered the trial to be held in Los Angeles County. On January 15, 2002, the court denied defendants' severance motion. On February 15, 2002, the court swore a Los Angeles jury to try the case.

III. *Prosecution's Witnesses and Evidence at Trial*

A. *Bane and Hera's Early Life: June 1998 – April 2000*

Janet Coumbs (Coumbs), a woman who lived in Northern California, began visiting Paul "Cornfed" Schneider (Paul or Schneider) in January 1998. Schneider, an inmate serving a life sentence at Pelican Bay State Prison and a member of the Aryan Brotherhood prison gang, asked Coumbs to purchase, raise, and breed Presa Canario dogs. Coumbs testified that she was unaware of Schneider's prison gang affiliations; he told her that she should raise the dogs and he would draw them. Schneider sent her pictures and Coumbs testified that she considered him to be a good artist.

In June 1998, Coumbs, with the assistance of another of Schneider's contacts, Brenda Storey (Storey), purchased two Presa Canario dogs. Schneider named the male Bane and the female Isis. At the time of purchase, Bane was three months old. In January, Coumbs purchased two additional female dogs, Hera and Fury. Hera was about

five months old at the time of purchase. The dogs were kept behind a chain-link fence. In May 1999, Isis gave birth to ten puppies; only four survived.

Coumbs testified that she did not have any problems with Bane and loved him as a family member. She loved Bane and never feared him, but Hera and Fury were aggressive. Hera killed her sheep and her daughter's cat. Also, Hera would run to the fence, try to get out, and bite the fencing. Coumbs admitted finding a dead sheep in Bane's area, but since Fury and Bane were tangled up with their chains next to the sheep, she did not know which dog had actually killed the sheep. She also acknowledged that she had a doghouse for Bane, but he ate it.

Coumbs sent letters to Schneider regarding the dogs and pictures of them. Schneider became mad when he saw pictures of Bane with her cats. He told her, "Don't make wusses out of the dogs." He told her that these were guard dogs and that she should not allow them around people because he did not want them socialized.

Defendants met Schneider in January 1999, in connection with a lawsuit they had filed on behalf of a correctional officer at Pelican Bay State Prison. In October 1999, defendants filed a lawsuit against Coumbs on behalf of Storey to obtain custody of the Presa Canario dogs. During the course of the lawsuit, defendants called Coumbs several times. Coumbs told Knoller on several occasions that she was having trouble with the dogs and that they were killing her sheep. Knoller responded, "Well, then you want to get rid of these dogs anyway." Coumbs recalled specifically telling Knoller that Hera had killed her sheep and her cat.

In October 1999, Coumbs called Devan Hawkes (Hawkes), who works in the special service unit for the California Department of Corrections, and told him that she thought Schneider was involved in a dog breeding business. Hawkes investigated Schneider and Schneider's cell mate, Dale Bretches (Dale or Bretches). Hawkes concluded, based on their tattoos, correspondence, and interviews, that Schneider and Bretches were members of the Aryan Brotherhood and involved in establishing a business to purchase, raise, and breed dogs. He believed that they used others to carry out the plan, including defendants.

Coumbs finally decided not to fight the lawsuit and agreed to give defendants the dogs. Knoller contacted a veterinarian to examine the dogs. On March 26, 2000, Dr. Donald D. Martin (Martin), a veterinarian for 49 years, examined and gave vaccines to the Presa Canario dogs at Knoller's request. When Martin arrived at Coumbs's place, he saw "eight dogs, massive, massive dogs. I mean huge dogs, and I thought to myself oh, this could be a serious kind of a situation. The first thing I thought about was, you know, they are big, I mean very large . . . ." He observed that they "were really reacting quite violently." He also concluded that they had received no training. He testified that Bane was "an alpha type of dog. And what I mean by that is in a pack, he would be the king. No question he was—he was—he would be the top dog in the whole works. He just had that attitude. . . ." He said that Hera was different. She was "more of a fear biter type of dog." He said that, under the right circumstance, she could be really good, but she could become aggressive.

Martin testified that when he returned home after examining the Presa Canario dogs, he was worried that Knoller "was not aware" of or was a "little naïve" about the dogs. He therefore decided to write her a letter. He testified that he believed these dogs "had a potential of being very serious." He said that in his 49 years of veterinary practice he had never written a letter quite like the one he wrote to Knoller, but he "just felt so convinced that the potential was so great that I wanted to—to let Marjorie Knoller know in case she wasn't aware of the seriousness of it."

Martin's letter to Knoller set forth his bill of $180 and included the following admonishment: ". . . I would be professionally amiss if I did not mention the following, so that you can be prepared. These dogs are huge, probably weighing in the neighborhood of 100 pounds each. They have had no training or discipline of any sort. They were a problem to even get to, let alone to vaccinate. You mentioned having a professional hauler gather them up and taking them . . . . Usually this would be done in crates, but I doubt one could get them into anything short of a live stock trailer, and if let loose they would have a battle.

"To add to this, these animals would be a liability in any household, reminding me of the recent attack in Tehama County to a boy by large dogs. He lost his arm and disfigured his face. The historic romance of the warrior dog, the personal guard dog, the gaming dog, etc. may sound good but hardly fits into life today. [¶] In any event you'll do as you wish but at least I have given you my opinions."

Knoller responded by letter dated March 29, 2000. She sent him a check for the amount of $180. She thanked him for the information and said that she would "pass the information to my client."

On April 1, 2000, Knoller, Noel, and a professional dog handler, James O'Brien, took custody of the Presa Canario dogs from Coumbs. At the time, Bane was one year and eleven months old; Hera was one year and nine months old. Coumbs estimated Bane's weight at 150 pounds and Hera's weight at 130 pounds. On his hind legs, Bane stood over five feet tall.

At this time, on April 1, Coumbs told both defendants that she was worried about the dogs. She said that she believed that Hera and Fury should be shot before they left her property because they were not going to bond with someone else and "because of the way that they act towards other people and towards animals and things." She was also worried about Bane and Isis because they had bonded with Coumbs and her family.

B. ***Defendants Bring Hera and Bane to Their Apartment***

Bane, Isis, and the four puppies were transported to La Puente, in Southern California; Hera and Fury were transported to Peninsula Pet Resort in San Carlos. On April 30, 2000, defendants brought Hera to their apartment to live with them because Hera had a heart murmur. In September 2000, defendants received a report that Bane was sickly and in "bad shape." They retrieved the dog and brought him to live with Hera and them in the apartment. They purchased muzzles for both dogs.

C. ***Defendants' Relationships with Inmates Schneider and Bretches and Materials Found in Defendants' Apartment and the Inmates' Cell***

Once defendants brought the Presas to their apartment, they sent frequent letters to Schneider and his cell mate, Bretches. A 1999 and 2000 calendar discovered in the

prison cell of Schneider and Bretches chronicled over 100 letters sent to and received from defendants between March and December 2000.

In a letter to Schneider dated September 26, 2000, Knoller discussed names for the breeding operation. The letter stated in pertinent part: "I liked the discussion in your letter of the 19th wherein you mentioned the combining of the kennels. I am partial, as is Robert, to Dog-O-War, or as you had mentioned in naming the pups—'Wardog'. The potential problem with 'Warhouse' is that many people, including Robert and myself, initially read it as 'Warhorse', a montegreen waiting to happen-as in the line from the Old Creedence song—'There's a bathroom on the right', instead of 'There's a bad moon on the rise', people will constantly be making the same mistake Robert and I did and refer to [it] as 'Warhorse'. What about something not in English—as in GuerraHund Kennels or GuerraHunde Kennels, the Spanish word for war-Guerra, and the German word for dog-Hund (masculine), hunde (feminine). The feminine foe dog in German goes along with the feminine for war in Spanish, but I think it looks better with the male version of the word dog in German. Just a thought."

Noel wrote Bretches a letter dated August 5, 2000. He indicated that he called a number for a kennel. He detailed the prices and ages of the puppies available for sale at this kennel.

Inmates Schneider and Bretches drafted a 36-page handwritten set of notes detailing a website for a Presa Canario breeding business under the name of "Dog-O-War." The document contained a hand-drawn picture of Bane with the title, "Wardog, Bane," "Bringer of Death: Ruin: Destruction." Copies of portions of this document were located in defendants' residence.

Found in defendants' apartment was a spiked dog collar. Also found in defendants' apartment were 39 copies of a three-paged, typed document entitled, "Dog-O-War, Presas." The document had a logo at the top, a description of the breeding operation, and contact information. The picture between the line "Dog-O-War" and the line "Presas" was a dog with its mouth open and teeth bared. The document explains: ". . . We breed top quality Presa Canarios from the top lines in the United States and

Spain. [¶] The Presa Canario is properly called Perro de Presa Canario—[Dog of prey of the Canary Islands,] it is a gripping dog indigenous to the Canary Islands . . . . [¶] Presas were always used and bred for combat and guard. They were used extensively for fighting in the Islands until the 1940 Spanish decreed outlawing this practice. Presas continued to be fought; tho [*sic*] not with the blessing of the authorities and without the large crowds that had traditionally attended their matches."

The document continued: "Today the Presa Canario is thriving and enjoying success as one of, if not the top protection dog in the world. . . . [¶] That Presa, Red-Star Turco, beat out 35 of the best protection dogs on the nation from all over and from all breeds [Shepard, Rots, Dobie, Malinois, Schnauzer, Pitbull [*sic*], etc. . .] Scoring an unheard of 399 out of 400 points! Turco is the grandsire of our dog, Bane."

The document makes the following admonishment: "Most Presas are naturally very dog aggressive, and proper socialization at an early age is a must." It notes that "Dog-O-War Presas are lovingly raised by families, and they LOVE CHILDREN. They are extremely naturally protective of their home, family, and each other, and are generally very dog aggressive. . . ."

Bretches ordered several books on guard dogs, including *Gladiator Dogs*, *Dogs, The Eyewitness Handbook*, and *Manstopper! Training a K-9 Guardian*. Bretches mailed the *Manstopper* book and other dog literature to defendants.

Based upon these and other documents,[3] Hawkes, a special agent for the Department of Corrections assigned to gang intelligence operations, concluded that defendants were actively involved in the dog breeding business formed by Schneider and Bretches. Hawkes said that he therefore believed defendants were "associates" of the Aryan Brotherhood.

---

[3] Hawkes also relied on letters from Noel to Schneider discussing such things as Noel's approval of Schneider's stabbing his attorney, Noel's promise that he would not intervene if Schneider attempted to escape from prison, and Noel's disclosure of the locations of Schneider's enemies in the prison system.

Defendants also wrote the inmates about their daily interactions with the Presas. On January 11, 2001, just a few weeks before Whipple was killed, Noel wrote to Schneider about an encounter between the dogs and Whipple. He wrote in pertinent part: "This morning's was an interesting walk—getting used to the 'jail break' approach the kids have, break from the door like horses out of the starting gate, stand next to the elevator shifting from one leg to the other to the other etc., the ferocity of the panting directly proportional to how badly the mutt feels he or she needs to go at that point, elevator comes—hopefully with no one in, otherwise they will knock 'em down rushing in. . . . [¶] This morning was one of those days—we get the elevator after one of our neighbors had been dicking around with it—about a 5 minute wait for the kids. We get on, the panting is now anxious. As we reach the 1st floor I see someone standing by the door through the small view hole and tell them to step back. Just at that point the kids hit the door with their snouts, the door blows open and they are nose to nose with the little sheltie collie and obnoxious little white piece of shit that one of our neighbors on 4 has. B'ster and H are into defend mode and I get them back in and we ride back up to 6, send the elevator back down so the dog walker can get the other mutts out of the lobby and home. As soon as the door opens at 6, one of our newer female neighbors, a timorous little mousy blond[e], who weighs less than Hera is met by the dynamic duo exiting and all most [*sic*] has a coronary—the mutts show only passing interest as she gets in and goes down."[4]

Later in the letter, Noel discusses legal action that can join Noel, Knoller, and Schneider together as a "family." He writes: "On the adoption—I believe that Marjorie and I do have an appreciation for what it means to you. My letters since the one of the 31st go into more of my feelings on the matter. We will have talked about this I think in considerable detail when we are together. It is the one form of legal action which can join the 3 of us in a binding family unit—if it were permitted to be accomplished through

[4] Noel testified at the grand jury that the "timorous little mousy blond[e]" was Whipple.

a second marriage that would have been the medium—but we have become a family and Marjorie and I are prepared to go as far as possible to formalize that arrangement."

D. *Bane and Hera: April 30, 2000 – January 25, 2001*

As already noted, defendants brought Hera to live with them in their apartment in San Francisco at the end of April 2000. Defendants brought Bane to their home in September 2000. During the period of May 2000 until the dogs killed Whipple in January 2001, there were numerous incidents where the dogs ran uncontrolled in the hallway of the apartment building, where people observed both or one of the defendants losing control of their dogs, and where the Presas exhibited aggression towards other dogs and people.[5]

1. *Running Free*

Esther Birkmaier (Birkmaier) lived in the same apartment building as the defendants and on the same floor. Her apartment was on the sixth floor, directly across from Whipple and Smith's apartment. In October, Birkmaier encountered Hera, unattended and off leash, in the sixth floor hallway. Knoller was down the hallway locking the door to the apartment. Birkmaier was waiting for the elevator when Hera approached at a fast trot and sniffed her pant leg. "[F]rozen with fear," Birkmaier stood perfectly still.

Noel wrote to the inmates about the dogs running freely in the hallway. On October 3, Noel wrote a letter addressed to "Dale and Paul." He states in pertinent part: "When I got back from S.F. General, I was greeted at the door by Marjorie, Hera and Bane . . . . As I started to come in the door, H and B began competing for my attention, getting more excited with each move by the other. Marjorie, who was holding each by the harness suddenly shot passed me and disappeared down the hall, being propelled

---

[5] The trial court admitted evidence of these incidents against both defendants, even if only one was present, under the theory the jury could infer, due to their close relationship, that they communicated these incidents to each other. The court, however, limited the admissibility of verbal statements made by one or the other defendant during the incidents to only the one making the statement.

forward in the wake of a two Presa team. She let go to keep her footing and the two ran to the end of the hall, turned in unison, each with a look of 'We're so fucking cute!!' "

In a letter similarly addressed and mailed on October 10, Noel again proudly described his dogs running freely down the hallway. He writes in pertinent part: "When I got back from the hospital this a.m. I was met at the apt. door by B and H. Each acted as if they had not seen me for years instead of the 4 hours it took to go to and return. When I opened the door 2 Presa faces were immediately pressed into the gap side by side. Before I could get my body in the doorway to block them, they pushed forward into the hall and took off side by side down the hall toward the elevator in a celebratory stampede!! 240 lbs. of Presa wall to wall moving at top speed!!! Up against the wall at the end of the hall, bouncing off, turning and running back the other way bouncing off me and heading to the wall at the other end. Turning again, running back, M snagging H, B taking off up the stairs to the roof door and down and back into the apt."

In January 2001, seven to ten days prior to Whipple's death, Henry Putek, Jr., encountered one of the Presas unattended on the sixth floor. Putek had just emerged from the elevator and was standing at the door to his apartment when the door to defendants' apartment opened and a Presa charged down the hallway, running fast. Putek froze and made no eye contact; the dog, which Putek believed to be Bane, stopped right at his feet. It was unleashed and unattended. Putek did not move for about 15 seconds; at that time, Noel exited his apartment with the second Presa. Both dogs went with Noel into the elevator. Putek recalled that on at least two or three prior occasions, he had heard one or more dogs running up and down the sixth floor hallway.

2. *Difficulty Controlling the Dogs*

During the period that defendants had the Presas in their apartment until Whipple's death in January 2001, there were many incidents evincing defendants' struggle or inability to control the Presas.

Knoller acknowledged her concerns about controlling the dogs in her letter to "Paul"[6] dated October 8. Knoller writes: " 'Hera Happenings'—Other [than] the bonehead move on Thursday about the food, she is having a good time with Banester. We do take them out separately for walks most of the time as we trained the Pupness to walk off lead most of the time and she is a pain in the butt when you keep her on lead for her whole walk. I take Pupness and Robert takes Banester. Although I have a decent amount of upper body strength, if he really wanted to go after another dog I don't have the body weight or leverage straddling him as Robert does. Even one handed, he is eleven inches (11") taller than I am and at least a good 135 lbs. heavier than I am. Makes a big difference! But as I said before, I had walked him when Robert was not here and I walk him when we go out together, he is excellent on lead."

A neighbor testified that he had seen defendants with one or both of the Presas on about six occasions. He testified that the Presas "were pulling at the leash and [defendants] holding the leashes were at the beck and call, at the will of the dogs." The witness further elaborated: "The dogs were always pulling on the leash and they were leading the walk rather than the people in control of the situation and possibly tugging at the leash and directing where they would go to." Defendants did not seem to be trying to correct or rein in the dogs.

In October or November, Mary Willard saw Noel walking one of the Presas. Noel had a bandaged arm. The Presa became excited and started running. The dog pulled Noel to his knees and then to the ground, dragging him across the street. Noel managed to regain his footing. He appeared angry and upset with the dog.

In November 2000 through January 2001, Diana Curtiss (Curtiss), a resident of the apartment building where defendants resided, noticed that Knoller was walking Bane and Hera more frequently by herself.[7] On three or four occasions, Curtiss saw Knoller on the

---

[6] Paul is handwritten above the typed, Mr. Schneider, which has a line through the typed name.

[7] Curtiss observed instances of aggressive behavior by the Presas. (See discussion, *post*.)

street, alone, with both the Presas. The Presas pulled her in different directions, as she struggled to maintain control.

In January 2001, a couple who lived in the apartment next door to defendants, were backing out of their garage when they heard a commotion. Defendants were loudly yelling the names, Bane and Hera, and defendants appeared very agitated while running past the neighbors' vehicle, attempting to gain control of the Presas.

On January 24, two days before Whipple's death, Rhea Wertman-Tallent (Wertman-Tallent) was walking to her office when she saw defendants with Bane and Hera. The Presas were barking at another dog and straining at their leashes. Bane reared up on his hind legs and lunged as Noel struggled to hold the leash.

3. *Warnings and Defendants' Own Comments Regarding the Presas' Aggression*

In July, less than two months after Hera had come to live with defendants in their apartment, Kelie Ann Harris (Harris) and her husband were walking two Labrador puppies when they encountered defendants with Hera. The puppies were off leash and approached Hera with playful interest. Knoller admonished Harris, "Please leash your dogs. You don't know how serious this is. This dog has been abused. He will kill your dogs." Harris called her dogs and continued down the trail without incident.

A month or two later, in August or September, Cathy Brooks was walking her terrier when she encountered Knoller and Hera. Brooks talked to Knoller about Presa Canario dogs, and Knoller told her that Presa Canario dogs were bred especially to be a guard or attack dog. When Brooks asked whether Hera was friendly, Knoller responded that she was "questionable," sometimes good with people and dogs and sometimes not. Brooks asked permission to pet Hera, offering her hand. Hera sniffed and then squared her chest in an aggressive stance with hackles raised. Brooks slowly backed away, commenting that the dog did not seem to like her very much. Knoller rolled her eyes and shrugged her shoulders.

Gaines, who had problems with Bane and Hera twice before, spotted Noel with Bane nearby.[8] She kept the dogs she was walking away from the Presas by making sure there were cars between Bane and the dogs she was walking. Gaines yelled to Noel that he should put a muzzle on the dog because she "anticipated that the dog would get loose at some point." Noel called her a "bitch" and told her the dog she was walking was the problem. After a short interchange from a distance, she left with the dog.

Two to three weeks before Whipple's death, Mario Montepeque, who trains dogs as a hobby, encountered defendants in the park with Hera. Hera approached and put her chin on Montepeque's dog, which signified domination. Montepeque pulled Hera off and told Noel that he needed to train the dog. Noel responded that he was not planning to train the dog or to neuter him because he was going to breed him. Montepeque also offered to help train the Presas and gave Noel a business card. Defendants did not respond. Noel told him that his dog had been in a fight and had "bit off" his finger. Montepeque told him that he needed to place a choke collar on the dogs.

In January, Abraham Taylor (Taylor) met Noel, who was with Bane, in the elevator of Noel's apartment building.[9] Taylor had prevented Hera from attacking a dog he was walking. Noel told him that when defendants, Bane, and Hera go out together, Hera "had become more and more aggressive or more and more protective while they were out."

4. *Aggressive Incidents Involving Bane and Hera*

Shortly after Hera's arrival in April 2000, David Moser (Moser), a resident in the same apartment building, encountered Knoller and Noel with Hera in the doorway to the elevator. Moser moved to slip by them into the elevator; Hera bit him on his rear end. Moser jumped and exclaimed in a shocked tone of voice, "Your dog just bit me." Noel looked and replied, "Um, interesting," and then defendants left the elevator. Moser felt that "[it] was a disturbing reaction . . . ." Neither defendant apologized or reprimanded

---

[8] Gaines observed instances of aggressive behavior by the Presas. (See discussion, *post*.)

[9] The incident involving Hera and the dog Taylor was walking is detailed below.

the dog. Defendants and Hera entered the elevator and left Moser in the lobby. The bite left a red welt on Moser's rear end.[10] Moser told his wife about the incident but did not report it because his "gut instinct said you don't want to have anything whatever to do with these people." Further, his wife and he were moving from the building and Moser "figured" he would never see defendants and their dog again.

In August or September of 2000, Stephen and Aimee West, who lived in the same apartment building as defendants, had two negative encounters with the Presas. As noted earlier, defendants brought Bane to their home in September 2000. On one occasion, the Wests were at the park with their dog, a Burmese Mountain dog. Noel was also at the park with Hera. They saw another dog jump on Hera, and Hera turned and latched onto that dog's snout. Aimee threw her key at Hera, startling the dog and causing her to release her grip. On another occasion, Stephen was walking his dog when he encountered Noel and Bane. The Presa became aggressive with the other dog. Stephen grabbed his dog, fell backwards, and Bane lunged forward, barking and snarling. Noel was able to pull Bane back, preventing any contact between Bane and Stephen or his dog.

During that same month, September, Jill Cowan Davis (Davis), another resident of the apartment building, encountered Noel and Knoller with one of the Presas in the lobby of the building. Davis was eight months pregnant at the time. As she passed within two feet of the dog, the Presa suddenly growled and lunged towards her stomach with its

---

[10] When asked about the incident with Moser at the grand jury, Noel referred to Moser as "Moran." Noel testified that he saw Hera bark at Moser in the lobby. He said that Moser was running out of the elevator and bumped into Marjorie; after bumping into her, Hera barked at Moser. Noel testified that Moser "hit his right buttocks on the door handle that protrudes from the elevator and yelled[,] 'She bit me,' which is an impossibility. [Knoller] was between him and Hera, his butt cheek was facing away from her and on top of that, I had Hera restrained by the harness." Noel testified that he responded, "[b]ullshit," to the remark by Moser that he had been bitten. He elaborated that if Moser had "stood still," he "would have probably pounded him for running into" Knoller. He said that he would have hit him more than once. When asked why, he replied: "Why not? He was an asshole."

mouth open and teeth bared. The dog snapped at her. Davis stepped back and Noel jerked the dog by the leash and commanded it to "[c]ome on." He did not apologize.[11]

On September 10, 2000, Noel suffered a severe injury to his finger while breaking up a dog fight between Bane and another dog. Knoller was present and witnessed the incident. Noel was hospitalized for four days and had two steel pins placed in his hand. Noel told a number of people that Bane had bitten him when he broke up a dog fight. Further, Noel wrote Bretches that he laughed when reading the following section from *Manstopper*: "Started reading Manstopper last night—got as far as p. 20. Found the notation about 'Robert' by the passage on losing a finger and having it swallowed. M asked why I was laughing so hard and all I could do was show her the page. She thought it a stitch as well!! Can't wait to see what other comments are in the book!! Guys, thanks, with all sincerity—I really appreciate the thoughts and good wishes—and good humor—it is a big help. Still working on the breaking sticks though. [¶] Well, going to run and rest the paw. Please watch your backs." Knoller admitted that Noel had read this portion of *Manstopper* to her and she thought it was funny.

On September 11, Neil R. Bardack and his dog had an encounter with Knoller and one of the Presas. Bardack was walking his Sheltie, who was 12 years old, weighed 35 pounds, and had one leg amputated. Bardack encountered Knoller walking one of the Presas on leash. The Presa lunged forward, pulling Knoller to the ground, and latched onto the Sheltie's back. The Presa had a "death grip on [the Sheltie's] back." Bardack yelled at Knoller, who was on the ground, to gain control of her dog. Bardack saw that she could not control her dog so he grabbed the Presa by the head, causing it to release his dog, which scampered away. Knoller appeared "shaken" and "contrite." The following day, Bardack took his dog to the veterinarian for treatment of a puncture wound.

---

[11] On cross-examination by Noel's attorney, Davis admitted that defendants attempted to keep the Presas away from her and her baby on one occasion. She testified that there was an occasion in the garage of the building when defendants saw her coming with her baby carrier and defendants cleared a space to let her go ahead.

In October 2000, Curtiss was walking her 16-year-old German Shepherd mix and her 10-year-old toy poodle. When she opened the door to the elevator, she discovered Noel and Hera inside. Hera lunged forward "growling ferociously" and tried to attack Curtiss's dogs. Noel pulled Hera back into the elevator. A few weeks later, Hera saw Curtiss and her dogs and Hera went "kind of wild" when she growled, snarled, and lunged at them. Again, Noel restrained the animal, but Curtiss noted that, on both occasions, Noel physically struggled to get Hera under control. Noel neither reprimanded Hera nor did he apologize to Curtiss.

Some time in the late fall, Ron Bosia, a dog walker, was in the park with a standard poodle when he encountered defendants and Hera. Bosia and defendants decided to let the dogs play together off leash. The poodle approached Hera from behind and sniffed and pawed her. Hera turned and latched onto the poodle behind the ear and shook her head violently. Noel grabbed Hera but was unsuccessful in getting her to release the poodle. Knoller stood idly by and did not attempt to intervene. Bosia grabbed Hera in a headlock and applied pressure to her jaw muscles, causing her to release. Bosia took the poodle to a pet hospital because the poodle was bleeding and Hera had "pulled a layer of skin back" from the poodle.

Lynn Gaines, a dog walker, was walking two small dogs some time in November when she encountered Noel and Knoller with Bane and Hera. The Presas began barking and lunging towards the dogs Gaines was walking. On another occasion, Gaines was walking a dog when she came upon Noel and Bane. Bane barked and lunged at the dog she was walking.

Derek Brown (Brown) and his wife, Violetta Pristel (Pristel), resided in the same apartment building as defendant and they had several encounters with the Presas between October or November 2000 and January 2001. On one occasion, Brown and Pristel ran into Noel and both of the Presas in the lobby. The Presas began barking and lunging at the couple, baring their teeth and "basically going berserk." When asked to explain what he meant by "lunge," Brown elaborated: "Basically, you know, leaping and then being jerked back by the leash. I just remember, you know, very large head with teeth bared

and a very aggressive, you know, barking and, you know, legs working trying to get at us." Brown tried to put himself between the Presas and his wife and the couple retreated to the far end of the lobby. Noel did not verbally or physically correct the dogs or apologize. Brown was not with his wife when he encountered the Presas three or four more times and he asserted that "every time, they went berserk and tried to get at me."

Pristel recalled at least five encounters with Noel and the Presas when she was alone. On some, although not all, of those occasions, the Presas reared up, barked, and lunged at her. When asked to explain what she meant by "lunge," she clarified: "The dogs would go on leashes and they would be on their hind legs and they would raise up their front legs." Pristel also recalled that about one week before Whipple's death, which was about a week before she left for Australia, she was waiting for the elevator in the lobby of the apartment building when she encountered Knoller with both of the Presas. The Presas reared up on their hind legs, barked, and lunged at her. Knoller "seemed to be struggling to hold [the Presas]." Pristel stepped back quickly and the elevator door closed. Knoller did not apologize to Pristel about the incident. Pristel, after consulting her husband, decided to complain to the building manager. However, she left for a vacation in Australia before lodging a complaint and never had the opportunity to make a complaint prior to Whipple's death.

Skip and Andrea Cooley (the Cooleys), lived next door to defendants. The Cooleys complained about noise emanating from defendants' apartment coming from the Presas. After an exchange of letters, Skip and Noel orally agreed that they were neighbors and would try to act "in a mature way." In December, the Cooleys were waiting for the elevator on the sixth floor. Skip opened the elevator door when one of the Presas that had been in the elevator with Noel and the other Presa "sprung" at him with bared teeth and "in attack mode." The Presa came within approximately one foot or one and one-half feet from his face. Skip threw himself back and slammed the door shut. Noel apologized from inside of the elevator and directed the Cooleys to move to the end of the hallway. The Cooleys immediately retreated as instructed. Noel left the elevator

with the Presas. One of the Presas was clamoring to get at the Cooleys and "it took all of [Noel's] might" to pull them away from the Cooleys and down the hall.

In December, John O'Connell was walking his six-year-old son to school when he encountered Noel with two Presas. As O'Connell and his son approached, one of the Presas suddenly lunged at the boy and came less than one foot, "maybe less than six inches," from the boy. The dog's teeth were bared; he was barking and growling. The dog was "definitely . . . in an attack mode" and came within six inches of his son's face. Noel yelled at the Presa and yanked it away. The boy "just freaked" and jumped back. The boy was "totally shocked and terrified." O'Connell wanted to get his son away as soon as possible, so they hurried off without speaking to Noel.

In December 2000 or January 2001, Jane Lu (Lu) was delivering mail when she noticed Knoller opening her car door and a Presa, without its leash, jumped out of the vehicle. As Lu continued delivering mail, she heard a low, guttural snarling sound from behind her. When she turned, she saw the Presa approaching. She screamed and reached for her mace. The Presa continued to snarl. Knoller called to the Presa, and it returned to her. Knoller told Lu that her "dog is fine."

Another postal carrier had problems with both of the Presas in January 2001. John Watanabe was delivering mail when he heard a "very loud snarling sound," and he "looked up immediately" and spotted "these two huge dogs" coming towards him. He placed his cart between the dogs and himself and he moved the cart from right to left, depending upon the dogs' movement. The Presas were unleashed and "in a "snarling frenzy" and Watanabe was "terrified for [his] life." Suddenly, "as if somebody had pulled a plug[,]" the Presas stopped and returned to defendants, who were standing down the block.

Also in January, Taylor, a dog walker, encountered defendants on the street with Bane and Hera.[12] Taylor was walking a Belgian Shepherd. The Presas began pulling on their leashes. Hera pulled the leash from Knoller's hands and "charged" Taylor and the

[12] This incident was the one that prompted Noel to explain to Taylor when he ran into him in the elevator that Hera was becoming more protective.

shepherd. Hera tried to bite the dog Taylor was walking, but Taylor was able to grab Hera's harness and the back of her neck and force her to the ground. Knoller came and took the leash and pulled Hera away. He did not observe Knoller physically or verbally correct Hera.

One to two weeks later, Jason Edelman (Edelman), another resident of the apartment building in which defendants lived, had an encounter with one of the Presas and observed one of the Presas jump on the chest of an elderly woman who was in the lobby of the apartment building. In the first incident, Knoller was in the lobby of the apartment building with one of the Presas and the dog jumped on Edelman's chest. Although the dog did not snap or bite at him or growl or bark, Edelman did not believe that the Presa's behavior was "friendly." Edelman pushed the Presa off. Knoller did not pull the dog back or apologize to Edelman. During the second incident, when one of the Presas was with Knoller in the lobby, the Presa jumped on an elderly woman, who was in her late 70s or early 80s. The woman screamed, and nearly lost her balance. After a few seconds, Knoller pulled the dog away. Knoller did not command the Presa or apologize to the woman for the dog's conduct.

5. *Whipple's Prior Encounters with the Presas*

Whipple and Smith encountered the Presas in the apartment building as often as once a week. Whipple, according to Smith, referred to Bane and Hera as "those dogs" and she referred to defendants as "those people." In early December, Whipple called Smith at work and in a "very panicked voice" said, "That dog just bit me." Whipple said she was "okay" and did not need stitches. When Smith arrived home that evening, Whipple told her that she came upon Noel in the lobby with one of the Presas; the dog lunged at her and bit her in the hand. Smith looked at Whipple's hand and saw two or three deep, red indentations in the webbing area of her hand. Whipple did not seek medical treatment for the bite injury.

In the following weeks, Whipple and Smith discussed the dogs several times. Smith observed that Whipple "was very scared of those dogs, terrified," and made every attempt to avoid them. When leaving her apartment, Whipple would first check the

hallway to determine if the dogs were there. She became anxious waiting for the elevator, fearful that the dogs might be inside. She frequently scolded Smith for opening the elevator door without first attempting to discern whether the elevator was occupied. When Whipple encountered the dogs in the lobby of the building, she would back up to the wall and stand behind Smith. According to Smith, Whipple did "everything she could to get as far away as possible from the dogs."

Whipple and Smith did not complain to the building management about the dogs, but did try to avoid them. Smith did not discuss their concerns with defendants because she "wanted nothing to do with them."

E. ***Bane and Hera Kill Whipple on January 26, 2001***

On January 26, 2001, Whipple called Smith at work around noon and told her that she planned to arrive home early, grocery shop, cook dinner, and see a movie. She asked Smith to leave work early if possible.

At approximately 4:00 p.m., neighbor Birkmaier was at home in the apartment directly across the hall from the apartment of Whipple and Smith. Birkmaier heard dogs barking in the hallway. She heard a woman's "panic-stricken" voice saying, "help me, help me." Birkmaier looked through the peephole in her front door. She saw a body, later identified as Whipple, lying face down on the floor just over the threshold to Whipple's apartment. Whipple's apartment door was open and her body was lying partially inside and partially outside the apartment. A dark object, looking like a dog to Birkmaier, was on top of the body. The object on the floor was still and did not move. Birkmaier did not see anyone else in the hallway, nor did she hear any other human voices. The barking, which sounded like it was coming from two dogs, continued.

Not daring to open her door, Birkmaier decided to call 911. While on the phone, Birkmaier heard a voice yelling, "no, no, no," and "get off." Birkmaier estimated that two minutes lapsed between the time she first heard the dogs until she heard this latter voice.

Birkmaier again approached her door when a banging against her door started. She could hear barking and growling just directly outside her door and a voice from

further away yelling, "get off, get off, no, no, stop, stop." She chained her door and again looked through the peephole. Whipple's body was gone and groceries were strewn about the hallway. Birkmaier called 911 a second time and stood by her window, watching for the police to arrive.

At approximately 4:12 p.m., six minutes after the 911 dispatch, Officers Leslie Forrestal (Forrestal) and Sidney Laws (Laws) arrived at the apartment building to execute a "well-being check." The officers spoke briefly to a man in the lobby, and Forrestal took the elevator while Laws took the stairs to the sixth floor. When Laws reached the landing just below the sixth floor, she saw a dog on the sixth floor running by, unattended, in the direction of defendants' apartment. She yelled to Forrestal, who had just arrived in the elevator, to look out.

As Forrestal stepped out of the elevator, she spotted Whipple's body lying face down in the hallway. Whipple's clothing had been completely removed and her entire body was "riddled with wounds." Forrestal saw that Whipple was bleeding profusely, and attempting to crawl towards her apartment. Forrestal knelt down next to her and told her to lie still; an ambulance was on the way. Whipple's body relaxed.

Forrestal and Laws stood guard over Whipple with their weapons drawn for approximately two to four minutes until the SWAT team arrived and secured the scene. Knoller emerged from her apartment, and Forrestal asked her where the dogs were. Knoller responded that they were inside her apartment.

Officer Alec Cardenas (Cardenas), a trained emergency medical technician (EMT) and assigned to the SWAT team, administered first aid to Whipple. Whipple had a large wound to her neck, which was bleeding profusely. She was alive but had lost a lot of blood. Cardenas put his fingers directly on the wound, but it was too massive, and he was unable to halt the bleeding. He was monitoring Whipple's pulse and breathing, which stopped as paramedics arrived. The paramedics administered CPR, reviving her, and transported Whipple to the hospital. Shortly thereafter, Whipple died.

Personnel responding to the scene described it as "horrific" and "devastating." The hallway carpet was soaked in blood, and streaks of blood covered the walls.

Groceries and pieces of Whipple's clothing, which were completely "shredded" and "ripped to pieces," littered the hallway. Whipple's door remained open with the keys in the lock.

F. *Whipple's Injuries and the Cause of Death*

On January 27, the coroner's office performed an autopsy on Whipple's body. The autopsy concluded that Whipple died of multiple traumatic injuries and extensive blunt force trauma resulting in a loss of one-third of her blood. Chief Medical Examiner for the City and County of San Francisco, Boyd Stephens (Stephens), identified a total of 77 discrete areas of injury that covered Whipple's body "from head to toe."

The most significant injuries were to Whipple's neck. She suffered three deep lacerations, which penetrated into the tissue and muscle, damaging her external jugular vein and her carotid artery and crushing her larynx. Such injuries were typical of a predatory animal that mauls the neck of its prey to cut off the air supply. Whipple also suffered several other deep, penetrating wounds to her head and face, including a large laceration to the back of her head, penetrating injuries around her mouth, lacerations to her forehead and left temple and two large, through-and-through lacerations to her ears.

Whipple also sustained a large laceration to her right shoulder, a large pattern injury on her inside left thigh, a large contusion on her interior right buttock and upper thigh area, a large contusion to her right breast, a large, penetrating laceration to her elbow, and a large laceration to her biceps. She had numerous other pattern injuries, abrasions and lacerations, on every part of her body, including both legs, her upper torso, front and back, and both arms.

Stephens opined that dog bites caused the vast majority of Whipple's injuries. Whipple was in excellent health and tested negative for drugs. She was not menstruating at the time of the attack. Although earlier medical attention would have increased Whipple's chances of survival, Stephens did not believe that it would have ultimately resulted in saving her life because he believed she had lost one-third or more of her volume of blood at the scene. Crime scene investigator Gregory Mar compared plaster molds of Bane's and Hera's teeth to the injuries suffered by Whipple. The injuries to

Whipple's neck were consistent with Bane's teeth. As to the remainder of the injuries, he could not tell whether Bane or Hera had caused them.

G. *Knoller's Condition After the Attack*

Forrestal, Cardenas, and Paula Gamick, an EMT, examined Knoller at the scene. Knoller had blood on her face and in her hair. Her sweatshirt and sweatpants were stained with blood, and the sleeve of her sweatshirt had a two to three-inch tear. Knoller had a one-inch gash to her right thumb and a small cut to her right index finger. Gamick also noted a bruise developing around her right eye. Cardenas did not note any injuries to Knoller's torso or legs. Knoller did not complain of any other injuries, nor did she appear to be in shock. Knoller's blood pressure and pulse were normal. She told Gamick that she was an EMT and had "seen this sort of thing before."[13] She never asked anyone about Whipple or Whipple's welfare.

Stephens examined photographs of Knoller following the attack. He opined that Knoller's injury to her thumb could have been caused by a dog bite, although it lacked the typical features of a bite. The injury could also have been caused by Bane's leash, which was made of a rigid nylon capable of cutting the skin. He believed that the blood transfer on Knoller's clothing could have resulted from lying on top of Whipple or from handling Bane. He stressed that Knoller's injuries were minor especially as compared to Whipple: Knoller had three injuries while Whipple had 77.

H. *Removing Hera and Bane*

Deputy Animal Control Officer Andrea Runge (Runge) spoke to Knoller about Hera and Bane. Knoller identified the Presas as hers. Knoller was "oddly calm, almost cold." Runge asked Knoller to sign over custody of the dogs for euthanasia. She agreed to sign over Bane, but refused to sign over Hera. Runge asked Knoller to assist her with the animals, but she refused, stating that she was "unable to handle the dogs."

Animal Control Officer Michael Scott (Scott) located Bane in the bathroom of defendants' apartment. Bane was "massive," and paced back and forth in the small room.

---

[13] Knoller testified that she never was a licensed EMT.

Bane was wearing a harness and a leash; he was covered in blood. Scott opened the door slightly and shot Bane with three tranquilizer darts, but the darts malfunctioned and had no effect. Scott and Runge carefully slipped two "come-along" poles over Bane's head and led him from the apartment without incident. During this whole procedure two police officers were behind Scott and Runge; one had a machine gun and the other had a pistol drawn. Bane weighed approximately 140 pounds. They were able to get Bane out of the apartment building without incident. Bane did not display any aggression towards Scott. Subsequently, Bane was euthanized.

Scott located Hera in the master bedroom of defendants' apartment. She was barking and growling and crashing against the door. Hera had some blood on her chest near her right shoulder. She was not wearing a harness. When Scott entered, Hera backed away, growling. Scott and a second officer secured Hera with the "come-along" poles and removed her from the building. Hera weighed approximately 100 pounds.

I. *Noel Informs Schneider About the Deaths of Whipple and Bane and Defendants' Fight to Keep Hera Alive*

Following Whipple's death, Noel wrote a letter to Schneider. The redacted letter admitted into evidence read: "There is no way to ease in to [*sic*] this—Bane is dead, as is one of our neighbors. Marjorie, while bruised, cut and battered is alive and more or less o.k. I am certain that you have seen the news of the killing on either Channel 2 or 4 T.V. news or picked it up on one of the radio stations. One report indicated that a decision would probably be made to put down Hera—that will not happen and we will not permit it."

In this same letter to Schneider, Noel also reports about Hera: "We have a meeting with the assistant director of Animal Control on Sunday at 1:00 p.m. to discuss Hera. The A.D., opined that Hera should be put down as she 'is very dangerous'. What B.S. They move on Hera and they will have the fight of their lives on their hands. Neighbors be damned—Hera did nothing and has not acted in a dangerous manner toward anyone. If they don't like living in the same building with her, they can move. If [a neighbor and his wife] have a problem, they can find some place to park other than our

driveway." He also observed: "Because of the injuries inflicted, there was no way to avoid going alone [*sic*] with the decision to put [Bane] down." He comments that "[a]s far as [redacted] my feelings about [P]resas—they are unchanged. Monday is coming and we are both looking forward to the hearing. Think of us and we of you at 8:45 a.m."

J. *Defendants' Account of Attack to the Media*

Following the incident, there was much press coverage. On February 8, 2001, both defendants appeared on television on *Good Morning America*. On the show, Noel stated that Whipple was in her apartment and "[a]ll she had to do was close her door." Noel stated that neither dog had ever exhibited any signs of aggression toward people. When told that people in the neighborhood had nicknamed the dogs "Killer Dog, Beast, [and] Dog of Death[,]" Knoller responded: "Total fabrication. I, I know that a lot of people like their 15 minutes of fame, and come forward with outrageous stories. [¶] . . . [Hera] never had any problem with people at all." When asked what happened prior to the attack, Knoller responded that she had taken Bane to the roof of the building and was returning with Bane to her apartment when she noticed Whipple down the hallway with two packages on the floor behind her. Whipple had opened her apartment door and was watching Knoller walking with Bane. Knoller related that Bane was watching Whipple, but not making "any aggressive moves." She declared that Bane was becoming "really really interested. So I wasn't sure whether he had smelled something in the bags that he had wanted to check out, you know, I didn't know, I didn't know what were in the grocery bags, or if there was something about Ms. Whipple herself that was attracting him."

Knoller further explained her version of what happened: "I—when, when he became more and more interested, he pulled me basically off my feet, but he didn't attack her. What he did was unusual behavior, he'd never done it before. He jumped up and put both paws on each side of her as she was standing by the wall near her apartment door, and then he jumped down. [¶] And I'm on my knees, I grab him, I get up and I push Ms. Whipple into her open apartment hallway, and we both—you know, I tripped—we both fall down. I'm now on top of her. Bane is—I'm—he's still on my left-hand

lead. I restrained Bane with my right hand and I started pulling him out of the apartment and she hadn't been injured at this point obviously, you know, she probably was somewhat frightened by what was happening.

"And I'm, I'm pulling—on my knees, I'm pulling Bane out into the hallway and I had told Ms. Whipple just to stay down, don't move. And as I'm pulling him out and moving myself out of her apartment, she starts to move towards me. At this point she's still uninjured. He had, you know, he, he seemed to be just really interested in her. [¶] If you have a dog, there's a difference between an aggressive nature and just definite interest. He was trying to get at, get at her, but it didn't seem to me as if it was an aggressive move."

The interviewer pointed out that at some point Bane obviously became aggressive, and she wanted to know what had happened. Knoller responded: "Okay, what happened was, is that [Whipple] came out into the hallway, which I didn't understand, I thought she was just going to slam her door shut. And when she does that, Bane starts to get interested in her again and go for her, and I get on top of her again and tell her, 'Don't move, I think he's trying to protect me.' [¶] And I then start to pull him off her again, and as that's happening, she starts to move and he goes for her. [¶] Again, I get on top of her and I say, 'Don't move. He's trying to protect me,' and she, as I'm pulling him off her again, she does move again, and I'm not sure if it was the second or third time that it––that I—that was happening with her, but she did strike me with her, her fist, and in my right eye, and that's when it changed from overly, overly interested in her to he started wanting to bite her."

The interviewer asked Knoller whether she thought that she bore any responsibility for the attack. Knoller responded: "Responsibility? No." She further elaborated: "Not at all." The interviewer asked whether she had any responsibility for bringing the dogs into the building, being unable to control them, and being unable to stop them from attacking Whipple. Knoller responded that she would not say she could not control them and she would not "say that it was an attack, and I did everything that was humanly possible to avoid the incident. [¶] Ms. Whipple had ample opportunity to,

to move into her apartment. It took me over a minute to—it took me over a minute restraining him from my apartment down to the time that he jumped up and put paws on either side of her. [¶] She was in her apartment. She could have just slammed the door shut. I would've. . . ." She repeated that she had been protecting Whipple and that if she had just stayed under her Bane would not have bitten her. Knoller commented: ". . . I don't have any puncture wounds, but I was protecting Ms. Whipple. As long as she was underneath me, the dog would not bite down . . . ." She reiterated: "As long as she was underneath me and had my scent around her, [Bane] would not bite down. He was trying to get to her every time that she would move out from underneath me."

IV. *Defendants' Motions Pursuant to Section 1118.1*

At the close of the prosecution's evidence at trial, counsel for Noel moved pursuant to section 1118.1 for acquittal on both counts based on insufficient evidence. Counsel for Knoller made a similar motion on her behalf with regard to all three of the charges against her. With regard to the second degree murder charge against Knoller, her counsel argued, among other things, that there was no evidence of implied malice.

After argument, the court denied the motions as to both defendants on all of the counts and set forth its reasons: ". . . The standard before the Court right now is whether or not the evidence is insufficient to sustain a conviction for the offense or offense on appeal. I think it's quite clear that the evidence is, at the very least, contradicted. I think an appellate court could very easily find, if a jury found on the state of the record as it is right now that all of the elements or all three of the crimes charged are met, they could very well find that each of the defendants was an owner of the dog, they could very well find that each of the defendants did, indeed, satisfy the standards for involuntary manslaughter. And with respect to Ms. Knoller, I believe that the Court of Appeal[] could find that the jury had ample evidence to convict the defendant of second-degree murder."

V. *Noel's Defense*

A. *Positive Encounters With Bane and Hera*

The dog handler, O'Brien, testified that he transported eight dogs, including Bane and Hera, from Coumbs's property on April 1, 2000. The dogs were chained when he arrived; they barked and lunged aggressively. Once removed from the chains, they became submissive and manageable. He was able to transport the animals without problem.

Dr. Stephanie Flowers, a veterinarian, testified about her treatment of Hera on April 29, 2000. Knoller had taken Hera for a check-up. At that time, Hera weighed only 69 pounds; normal weight for a female dog of her breed was 100 pounds. Flowers removed a foxtail from Hera's ear and did not have to sedate Hera even though the procedure is painful. She told Knoller she was impressed with Hera's behavior during the examination. She acknowledged that a dog's territorial aggressiveness can increase as a dog bonds with its owner and may be different when not at home. She agreed that a dog that lunges, growls, and snarls at people, when unprovoked, is evidence that the dog could potentially be harmful or dangerous to human life.

Another veterinarian, Dr. Sheila Segurson, testified about her examination of Hera on April 30, 2000, for a heart murmur. She described the dog as quiet and shy and somewhat fearful. Hera exhibited no signs of aggression during the exam. Hera returned for a second visit a few months later, and she weighed 95 pounds then. Segurson stated that, if a dog lunges and snarls, this is "very aggressive" behavior and "definitely" a warning sign. If a dog lunged after people repeatedly with teeth bared, Segurson opined that "those are signs that I need to do something with my dog."

Bane was diagnosed with a cranial rupture in his left knee in November 2000 and underwent surgery on December 6, 2000. During the exams, Bane did not exhibit any aggression. However, Dr. Paula James, the veterinarian who saw Bane on November 5, put a muzzle on Bane. She put a muzzle on Bane because Noel responded "no" when asked whether the dog was good with people. Also, the operating veterinarian, Dr.

Andrew Sams, agreed that Bane's behavior at the office was not indicative of his behavior at home.

In addition, defendants boarded Bane and Hera at a kennel on January 15, 16, 20, and 21, 2001. The Presas did not show aggression towards the owners of the kennel or their 21-year-old son or the other dogs in the kennel. However, the owner explained that a kennel is "neutral territory" where dogs are not inclined to defend anything.

Seven witnesses who owned or worked in business establishments in defendants' neighborhood testified that they had interacted frequently with defendants' Presas and had never seen them exhibit aggression towards people. Some of the witnesses had petted the Presas and fed them scraps. The witnesses admitted that they did not know the Presas' behavior in the apartment building and had never seen them in or near defendants' building or inside their own residence.

With regard to the Presas' behavior at the apartment building, a friend of defendants, Bonnie Seats, testified that she saw defendants with Hera on the front step of the apartment building. Seats and her 26-year-old niece petted Hera without any problems. Defendants' client, Kim Boyd (Boyd), went to defendants' apartment on three occasions in the fall and winter of 2000. The dogs barked when she knocked and they had to be pulled away to let her enter. However, once inside, the Presas allowed her to pet them and obeyed Knoller's commands. Boyd rode in the elevator with Noel and Hera one time and Hera met a tenant in the lobby and did not respond to the tenant. Another client, Darrel Sichel, also visited defendants' apartment on three occasions. While inside, Sichel interacted with the Presas and they were friendly.

In July, defendants brought Hera to the home of Boyd. Boyd, her friend, and her friend's seven-year-old daughter, played with Hera at the apartment. Hera seemed to enjoy the attention and displayed no signs of aggression. Defendants took Hera to visit another friend, Hesche Stark, in October 2000. Hera was calm during the visit.

In December or January, Jean Wright encountered Noel walking Bane. She petted Bane, who was very friendly, wagging his tail.

B. ***January 26, 2001***

David Kuenzi was a witness for Noel and he testified about what he heard and experienced on January 26, 2001. He came to visit a friend at defendants' apartment building at about 3:50 p.m. His friend's apartment was on the third floor. He heard a young woman scream loudly and "in agony." He reported that the "voice was wild . . . [and] she was screaming for her life." Concerned, Kuenzi went up the stairs to investigate what he presumed was a domestic violence situation. As he approached, he could hear a dog barking. The screaming continued for some time, but it later turned to a quiet whimper.

Afraid to go up to the sixth floor, Kuenzi decided to go back down to the lobby and call 911 on his cellular phone. He called and then ran back upstairs; he noticed that the screaming had stopped but the barking continued. He heard for the first time a woman's voice saying, "stop, please stop." This sound, unlike the first screaming, was "resigned." Kuenzi admitted that the situation "was really truly terrifying," and he decided not to "barge in on it." He decided to wait in the lobby and direct the police. He estimated that the entire encounter lasted about 10 minutes and the dog barked throughout the entire period.

VI. *Knoller's Defense*

A. *Knoller's Testimony*

1. *The Origins of the Relationships Between Knoller, Noel, and Schneider*

Knoller testified on her own behalf. She stated that Noel and she started practicing law together in May 1988, and they married on April 4, 1989. She took the State Bar in January 1992 and discovered that she had passed in March of that year. As soon as she was admitted to practice law, around June 1992, their law practice became Noel and Knoller. She admitted developing a personal relationship with Schneider beyond an attorney/client relationship and referring to the relationship between her husband, herself, and Schneider as "the triad."

Knoller admitted that Hera had become a focal point of her relationship with Schneider, and that Noel and she wrote several letters to Schneider about Bane and Hera

and the transportation of the Presas from Coumbs's property. Knoller knew that Schneider was a member of the Aryan Brotherhood but stated that she was not an associate of the group. She admitted that the dogs became central to Noel's and her relationship to Schneider when Hera came to their home. She denied any involvement in the Dog-O-War breeding operation.

Knoller also initially denied that she took any part in naming the breeding business Dog-O-War. When confronted with her letter that she had written to Schneider dated September 26, 2000, where she stated that she, similarly to Noel, was partial to "Dog-O-War," she admitted giving advice about the name.

2. *Knoller's First Exposure and Research on Presa Canario Dogs*

Knoller testified that she first saw Hera at Coumbs's place on March 31, 2000. She had researched Presa Canario dogs before Hera and Bane came to their home. Noel had downloaded information from a website on Presa Canario dogs and Knoller discovered that this breed is the national dog for the Canary Islands. She said they are members of the Mastiff family and that the Presa Canario dog was both a herder and a guard dog "so you have got a nice combination in terms of temperament as far as I am concerned." Specifically, she testified about downloaded information from a website of a kennel named "Show Stoppers." She stated that the information from that website indicated that Presa Canario dogs are good pets "in terms of being, you know, loyal, being protective, being good with kids, being a good family pet, that they are—they have a Mastiff temperament, that they are just basically a good dog to have around for a family."

Knoller proceeded to explain the reasons why she believed a Mastiff is more "sensitive" and "gentle" than a Collie: "In other words, like if I were yelling at a Collie or if I raise my voice to a Collie, it wouldn't be the same thing. If I raised my voice to a Mastiff, the Mastiff would kind of look at me like what did I do wrong, where a Collie would be I don't care if you are yelling at me—or at least that's my impression with whoever is dealing with—with a Collie as opposed to dealing with another kind of dog."

Knoller further testified about the data she gleaned from the downloaded information and her impressions from that data. She explained that Presa Canario dogs were "protective, they were loyal to their owners, somewhat wary of strangers, that they had a history just like an English Mastiff does of being, you know, a war dog, of being a fighting dog in terms of their past history so that, you know, that any dog that has something of a fighting history to it, that it may be dog aggressive. . . . [Y]ou have to be aware of the fact that they may be dog aggressive. [¶] But that doesn't—that generally doesn't translate over to people. If your dog is a people aggressive dog, you will learn about that, but in terms of a fighting dog, you know that you have to be aware that because of that background, they would necessarily probably be more dog aggressive if that was their nature. Not all dogs that have 'fighting history' are aggressive with other dogs. It just depends on your socialization and the personality of the dog."

Knoller could not remember reading anything else about Presa Canario dogs prior to retrieving the dogs from Coumbs's property. The official website was sponsored by a major breeder in the Canary Islands. She did not do any further research because she had never intended to own a Presa Canario dog. In her role as the attorney in the lawsuit against Coumbs, her responsibility was simply "to organize the transport of the dogs" from Coumbs's property.

3. *Other Literature on Presa Canario Dogs Read by Knoller*

Once Hera and Bane came to live with Knoller and Noel, the inmates sent them literature on Presa Canario dogs. She was aware that inmates Schneider and Bretches had sent Noel a copy of a book called *Manstopper* and a newsletter from Show Stopper Kennels named *Gripper*. On cross-examination, she denied reading that Presa Canario dogs were used "to go after" pit bulls. However, she testified before the grand jury that the *Gripper* newsletter stated that Presa Canario dogs were being used by police in Mississippi to aid the K-9 corps to "go after pit bulls." She admitted on cross-examination that Bane's picture was on the cover of the *Manstopper* book. In addition to the name Bane on the cover, the book proclaims the following: "El Supremo Bane,"

"The Tiger," and "The Warrior." She stated that the pictures and the notation "The Warrior" did not have any significance to her.

On cross-examination, she also admitted that she had been "informed" that there were 39 copies of the document, "Dog-O-War Presas" found in her apartment, but she claimed not to recall receiving the copies. She admitted that the picture of the dog was "aggressive-looking" and the dog had its mouth open and it looked like it was barking.

4. *The Socialization or Training of Hera and Bane by Knoller and Noel*

Knoller did not consult a professional trainer with respect to either Bane or Hera. She elaborated that she did not "think they had any personality problems that would necessitate a personal trainer or a behaviorist to deal with them." She denied any intent to train either dog as a guard dog or that Schneider requested that.

Noel started the training of Hera and had the primary responsibilities for her the first two weeks Hera was with them. However, Knoller took over because Hera had "bonded really strongly" with her. Knoller walked Hera one to three times daily and taught her several basic commands, such as, "come," "sit," "wait," "no," and "paw." She trained her to "respond immediately" to her voice commands. She testified that Hera "never" pulled her "off her feet" and dragged her when she walked her.

Knoller testified that Bane was primarily Noel's responsibility and they wanted Bane to bond with him. Bane responded to the same commands as Hera. When Noel was unable to walk Bane—such as after he was hospitalized after being bitten by Bane—she walked Bane. She stated that she "never" walked both of the Presas together and acknowledged that she could not control both of them at the same time. She testified that other people's accounts that they saw her outside the apartment with both of the Presas were not correct. When she walked Bane by herself, Bane was "really calm" and a "cooperative dog on lead." She testified that she never walked Bane without his leash and harness. She adamantly testified: "Bane was always on a leash in my presence, always."

Knoller admitted that she wrote Schneider a letter in October 2000 stating that she had insufficient body strength to restrain Bane. She said that she was trying to convey

the following message in her letter to Schneider: "I intended to convey that Bane had some dog aggression issues and that, in that context, I don't believe or I wouldn't know whether or not I would be able to control him." By January 26, 2001, Knoller declared she was more confident because Bane had been with her longer and was physically recovering from surgery. However, she ultimately admitted under cross-examination that Bane was more "powerful" than she was.

5. *Warnings and Incidents of Aggression by the Presas*

Prior to taking the Presas home, Knoller testified that she had not received any warnings about their propensity for violence. Knoller testified that Coumbs had mentioned experiencing problems with one of the other Presas, but she never mentioned any problems with Bane and Hera. Knoller asserted that all of Coumbs's statements that she had told Knoller that Hera had killed animals and was a danger were "lies." As for the letter from veterinarian Martin, she admitted receiving and reading it. She discounted this information, however, because she had "no context" for the comments.

Knoller also denied ever seeing Bane or Hera bite, lunge, or act aggressively towards any person. She did acknowledge that Hera would bark at a person who crowded Knoller. She also admitted that Hera had become loose and "charged" Taylor's dog, but she asserted it was because she, herself, was "careless and inattentive." She denied that Hera "attacked" the other dog. Knoller maintained that witnesses Bardack, Pristel, Edelman, Lu, Harris, Moser, Davis, Wertman-Tallent, and Cooley had given "false" accounts about the incidents involving Bane, Hera, or both of the Presas. She said that she never told anyone that Hera was not good with people or that Hera had been abused in the past and would kill the other person's dogs. She asserted that the testimony by Moser that he had been bitten by their Presa was false and she admitted calling him an "idiot" when she testified in front of the grand jury.

Other than the one incident with Hera and Taylor's dog, Knoller testified that there was no other incident before Whipple's death where she had lost control of the dogs. When confronted with Noel's letter that stated the dogs pulled her to the ground and broke loose running freely down the hallway when he returned from the hospital, she said

that she did not believe that incident ever occurred. When asked why Noel would lie about the incident, she maintained that "[h]e might have been expressing—or exaggerating an incident." She said that she did not believe that it was "a possibility" that Hera could pull her off her feet.

Knoller testified about the incident on September 10, shortly after Bane's arrival, when Bane bit Noel's finger. She explained that she was walking Hera and Noel was walking with Bane. Bane had been playing with a Belgian Malinois. They were departing when the Belgian Malinois came rushing towards Noel and Bane. Bane then latched onto the other dog and Noel tried to get Bane to release. Knoller began to pull on Bane's hind leg, and Bane released. She then noticed that Noel had a severe injury to his right index finger. She asserted that she discovered Bane was the one that had injured Noel's hand only when they were in the hospital emergency area prior to Noel's having surgery. She admitted that Noel had to wear a splint on his arm and had two steel pins placed in his hand for eight to ten weeks.

6. *Knoller's Knowledge Regarding Bane's Capability to Kill a Person*

Knoller denied having any knowledge that Bane could ever kill a person. The final question asked her in direct examination by her attorney was whether she ever claimed not to be responsible for the attack suffered by Whipple. Knoller responded: "I said in an interview that I wasn't responsible but it wasn't for the—it wasn't in regard to what Bane had done, it was in regard to knowing whether he would do that or not. And I had no idea that he would ever do anything like that to anybody. How can you anticipate something like that? It's a totally bizarre event. I mean how could you anticipate that a dog that you know that is gentle and loving and affectionate would do something so horrible and brutal and disgusting and gruesome to anybody? How could you imagine that happening?"

During cross-examination, when asked whether Knoller knew that Bane and Hera were physically capable of mauling or killing a person, she responded that "any dog at any given time can do something like that." She maintained that "in a certain context a Chihuahua could be just as dangerous to a child or a small infant as the larger dog could

be, and a larger dog would be more detrimental to an adult." In her grand jury testimony she said she could not say how serious a bite from Hera could be, and she explained that a bite from a Chihuahua could be serious. She did admit that the "damage" inflicted by a larger dog is "always more dangerous" but she did not consider the Presas to be very large dogs.

7. *The Presas' Attack of Whipple on January 26*

Knoller testified that she had taken Bane out earlier, about 11:00 a.m., on January 26, 2001. The "habit" was that Noel would take Bane for a walk somewhere between 3:00 and 5:00 p.m., and generally closer to 4:00 p.m. She said that Bane could usually wait until past 4:00 p.m. to go to the bathroom. However on the 26th, Bane was "having severe problems with his elimination needs[,]" and she took him to the roof again at approximately a little after 3:45 p.m. She put a leash on him. They were on the roof about 10 to 15 minutes. She did not muzzle him, but admitted Noel and she had muzzles for both of the Presas in the apartment.

Knoller returned by coming down the stairwell with Bane and disposing of the waste in the trash chute in the hallway of the sixth floor. She noticed Whipple standing by her open doorway at the other end of the hall. Whipple's grocery bags were next to her on the floor. Knoller opened her apartment door and Bane and she entered. She opened the door with her right hand and held Bane's leash with her left hand. Hera, who was inside the apartment, stuck her head into the hallway and "woofed." Bane then backed out of the apartment and moved towards Whipple.

Knoller testified that Bane and she engaged in a prolonged tug of war in the hallway, which lasted over one minute. Bane pulled her down the hallway a few feet at a time, stopping when Knoller ordered him to "come" and then resuming again. Knoller testified that she was exerting "[a]s much force as I could possibly muster. I was using all my strength in my body to get him to respond to my command and come back with me to the apartment."

According to Knoller, Whipple remained in the open doorway to her apartment watching Knoller struggle with Bane, who was moving slowly in Whipple's direction.

Bane pulled Knoller off her feet, dragging her down the hallway to Whipple. The leash was still in her hand. Hera followed, barking. Bane jumped up, putting his paws on both sides of Whipple. Knoller tugged him back down. While Knoller was trying to restrain Bane, Whipple exclaimed, "Your dog jumped me."

Knoller pulled Bane back with her left hand while using her right hand to push Whipple into her apartment. Whipple fell face first into her apartment and Knoller fell on top of her. Knoller warned Whipple: "Stay down. Don't move." Knoller crawled out of the apartment on her knees, pulling Bane with her. Hera continued to bark.

Whipple did not shut her apartment door but came back into the hallway; Bane lunged at her. Knoller again threw her body on top of Whipple and told her, "Stay down. Don't move." Bane seemed to calm down when Knoller placed her body between Whipple and him, but resumed the attack when Knoller moved away. At some point, Whipple flailed her arms while Knoller was on top of her, striking Knoller in the eye.[14] Bane then bit Whipple in the neck. Knoller immediately threw herself back on top of Whipple and said, "Please stay down. Don't move. He's trying to protect me." Bane ignored Knoller's commands to stop and to get off and increased his attack on Whipple.

Knoller attempted to maneuver Whipple towards the elevator, and the two women were "shimmying down the hallway." Knoller was yelling and banging with her foot against a neighbor's door.[15] Bane continued to circle and bite Whipple's body. Knoller testified: "I hit him in the face to get him away from her. I put my hands in his mouth to get him away from her. I was pushing him and beating him and he wasn't feeling it. None of that anger was being redirected at me, it was all being directed at her, and it was getting worse and worse." Knoller asserted that Bane had bitten her several times—on

---

[14] On cross-examination, Knoller was asked about Whipple's hitting her strong enough to give Knoller a black eye when Whipple was being bitten by Bane and, according to Knoller's own testimony, when Whipple was lying face down, which would have required Whipple to have hit Knoller backwards. Knoller responded that they were moving and Whipple was flailing. While flailing, Whipple struck Knoller in the eye.

[15] While testifying before the grand jury, she did not state that she banged or kicked any neighbors' doors.

her arm, shoulder, back, and chest—without breaking her skin. She testified that "for some reason," he did not "complete the bite" on her.

Knoller finally was able to pull Bane off Whipple, but Whipple was in "grave" condition and bleeding profusely. Knoller pulled Bane down the hallway and into her apartment and Hera followed. Knoller estimated that the attack lasted from 10 to 20 minutes. She did not believe that Hera participated in the attack. After securing the Presas in her apartment, she returned to the hallway "as fast" as she could. She intended to render first aid to Whipple, but she left Whipple alone in the hallway, bleeding. She did not ever call 911. Knoller could not recall whether she had told the officers that she had gone back to look for her keys.

With regard to the injuries she suffered in her struggle to protect Whipple from Bane, Knoller testified that she had a gash to her thumb from placing her hand inside Bane's mouth. She had "mottling" on her legs from being dragged down the hallway, various bruises, and a black eye. She had bruises on her arm and shoulders from the bites from Bane. When asked whether she received treatment, she said that she went to the hospital two days later on the 28th of January. The only treatment she received for her injuries was a tetanus shot.

Knoller admitted that many of the details she provided in her trial testimony were not told to the officers responding to the scene. She did not tell Officer Forrestal that Bane and she engaged in a one-minute struggle while Whipple watched or that Whipple had inadvertently hit Knoller in her eye, causing Bane to attack. She admitted speaking with Noel about the incident, but denied that the two of them fabricated a story.

Knoller's trial testimony also differed somewhat from her testimony in front of the grand jury. Before the grand jury, Knoller stated that, after Bane placed his paws on Whipple, he put his head in Whipple's "crotch" and began sniffing. Whipple remained standing there and said, "Your dog just jumped me." At that point, Knoller said she did not like what her dog was doing, so she pushed Whipple into her apartment and they both tripped and fell. When asked what it appeared that Bane wanted to do, Knoller said that he was agitated and was acting "as if there was something he was smelling that was

getting him excited." When asked to be more specific, Knoller answered: "My terminology, unfortunately, if I—like a bitch in heat, like he was smelling something that was stimulating to him." When asked to explain further, she stated: "There's something about when a male—any male dog is around the scent of a female dog who's coming into estrus where he starts to act differently. He—becomes somewhat agitated. [¶] In other words, if you're walking a male dog on the street and they are sniffing, their demeanor changes if they scent, or if they smell, the female that's coming into heat or that is in heat. Their body language changes. They start to really sniff and become interested in the scent. It's a change in their demeanor."

At trial, Knoller stated that she did not forget her testimony before the grand jury, but she had "come to know that [it] is not an accurate statement on my part." When asked what she meant, she responded that her "interpretation of [Bane's] behavior is inaccurate."

Knoller maintained that she cared about her neighbors' welfare and that she never blamed Whipple for her own death. She did admit that after the attack she fought to keep Hera alive. She claimed that after the attack she was "a basket case." She was having difficulty doing anything. She spoke to the media because she was angry about "some of the things that had been said" and she "felt that people should hear or try to hear what my perception was of what had happened."

B. ***Experts' Testimony Regarding Knoller's Injuries***

Dr. David Barcay, a doctor in internal and emergency medicine, examined photographs of Knoller's injuries. He opined that the bruises, abrasions, and lacerations on her body were consistent with dog bites. He identified bruises on Whipple's body that resembled those on Knoller's body. He did acknowledge that Whipple had dog bites over her entire body while Knoller only sustained one significant injury to her thumb. He also admitted that Bane's leash could have caused the cut to Knoller's thumb. Barcay was asked about the written comments of the physician who treated Knoller when she went to the hospital on January 28, two days after Whipple was killed. The treating doctor wrote that Knoller had complained about dog bites. The physician wrote that

Knoller had an "altercation with dog" and then concluded: "No bites, just lacerations." Barcay stated that his opinion was still that Knoller's injuries were consistent with dog bites.

Peter Barnett, a criminalist, examined the clothing Knoller was wearing when the Presas attacked Whipple. He located three tears to the clothing, including a large rip on the right sleeve, a small tear on the right leg, and a tear on the back of the left leg. He also identified several dark blood stains, which he described as "primary transfer" stains, meaning that Knoller's sweatshirt came in direct contact with a bleeding injury or a large accumulation of blood. Barnett acknowledged that the scene was "incredibly bloody" and that any significant source of blood could account for the stains, including blood on the carpet or on the dog.

VII. *Rebuttal*

A. *Knoller's Account Told Shortly After the Presas' Attack on Whipple*

Officer Forrestal testified that Knoller spoke to her shortly after the Presas had attacked Whipple. Knoller had said that she had just returned from taking the "dogs" out for a walk. Knoller was at her open apartment door when she saw Whipple return home with a bag of groceries. Bane ran down the hall towards Whipple and attacked her. Knoller followed and attempted to intercede, but was unsuccessful. Knoller told her that every time Whipple attempted to get to her apartment, Bane renewed his attack. Hera did not initiate the attack but was pulling at Whipple's clothing. Knoller made no inquiry about Whipple's condition during the interview with the officer. Initially, Knoller appeared dazed and confused but by the end of the interview, which lasted about 15 minutes, Knoller was no longer disoriented.

B. *Testimony Regarding Knoller's Account in Light of Her Injuries*

Randall Lockwood worked for the Humane Society and had studied canine dog behavior, particularly dog attacks, since 1972. He reviewed the grand jury testimony, portions of the trial testimony, the medical examiner's report, and the police report. Lockwood explained that dogs have different types of bites, depending upon whether their intent is to play, to warn, to hurt, or to kill. He noted that Whipple suffered very

severe, deep puncture wounds while Knoller suffered less severe, "inhibited" bites. Based on these difference, he believed that Knoller "was not in very close proximity" to the attack. He explained that a person intervening in a vicious attack is likely to suffer serious injury because the dog, in the heat of the moment, is not able to differentiate or exercise bite inhibition. Thus, the injury to Noel's finger when interfering in a dog fight involving Bane was an example of such aggression being redirected at an owner during an attack. However, the bites Knoller suffered did not break the skin, suggesting that she was at least a few feet away and that Bane gave her inhibited bites to keep her from intervening.

Lockwood was asked about testimony given by Knoller to the grand jury. When describing Bane's behavior towards her during the attack, Knoller testified: "They were hard bites but they didn't break the skin because of the simple fact that Bane knew it was me. In other words, Bane—as long as Ms. Whipple was underneath me and not moving and I was on top of her, even though Bane bit, he wouldn't—once he tasted me, he wouldn't bite down." Lockwood considered Knoller's description to be inconsistent with reasonable dog behavior during a full blown attack. He explained that the decision to bite is made quickly but taste is a slow process. The decision about what type of bite to give is made by the time the dog first initiates the bite.

Lockwood commented that the unique aspect of this situation was that a person was killed while the owner of the dog attacking was present. He explained: "What is unique in this situation is in the more than 300 fatal dog attacks that I've seen, we have not had a case of a healthy adult young woman who has been killed by a dog when the owner is present. Usually the presence of the owner has been sufficient to prevent the attack." He concluded that Knoller did not restrain Bane. He concluded: "I don't see the restraint. The fatality took place. There was an attempt at restraint but if the dog [were] restrained, there wouldn't have been a fatality."

Lockwood also considered the evidence presented by defendants of the Presas' good behavior. He stated that good behavior did not negate or undermine evidence of dogs' bad behavior in terms of evaluating the dogs' potential for aggression. "[I]f a dog

licks ten children in the face and then bites the finger of the 11th, those prior acts are irrelevant in terms of telling me what standard of care I need to exercise in supervising that dog." Dogs have different behavior in different circumstances. Guard dogs will attempt to assess the wishes of their owners and then act accordingly.

With regard to the Presas, Lockwood concluded: "The pattern of the incidents, that seemed to me, just looking at the time line, to be of increasing frequency, indicated the dogs were clearly bonded to the owners, clearly protective of them, but also clearly increasing their instances of challenging those who they interpreted to be a risk or needing to be threatened." He explained, "That's what these dogs were bred to be, very protective and territorial." He cautioned: "You don't have to train a dog to fight. You have to train them not to, very often. Particularly a dog coming from this kind of bloodline." The Presas' earlier acts of aggression sent "a message that greater work . . . needs to be done in disciplining the dogs, controlling the dogs, getting the dogs to sit quietly on command, all the other things that one might do to inhibit that behavior if it was seen as undesirable."

VIII. *Verdict and Motion for New Trial*

On March 21, 2002, after just over two days of deliberation, the jury found defendants guilty on all counts.

Defendants filed motions for a new trial. They argued, among other things, insufficient evidence to support the convictions and the prejudicial admission of evidence concerning the Aryan Brotherhood. On June 17, 2002, the trial court granted Knoller's motion for a new trial pursuant to section 1181 on the second degree murder conviction and denied the new trial motion as to the remaining counts for both defendants.

When explaining its reasons for granting Knoller's motion on the second degree murder conviction, the court stated that the "key here" is implied malice. The court explained: "We are also going to start with the fact that as a judge, it's my responsibility to review all of the evidence, to weigh the credibility of the various witnesses, to determine whether as a matter of law there is sufficient evidence to support the conviction of second degree murder. In that regard, the Court makes a couple of

preliminary observations as it relates to second degree murder. And I am looking at the implied malice feature, which I determine to be knowledge, reasonable knowledge with one exception and the exception is the witness Wertman-Tallent. The Court found every witness that testified on behalf of the People on this issue was credible, believable and in large part corroborated. . . ." The court noted that "for all practical purposes [it was] discounting the good dog witnesses in this case . . . . What we are talking about is who the bad dog witnesses were and what they said."

The court elaborated: "The law requires that there be a subjective understanding on the part of the person that on the day in question—and I do not read that as being January 26th, 2001 because by this time, with all of the information that had come out dealing with the dogs, the defendants were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad. [¶] Is the 'something bad' death? That is the ultimate question in the case. There is no question but that the something bad was going to be that somebody was going to be badly hurt. I defy either defendant to stand up and tell me they had no idea that those dogs were going to hurt somebody one day. But can they stand up and say that they knew subjectively—not objectively and that's an important distinction—that these dogs were going to stand up and kill somebody?

"Look at what happened in the hallway on January 26th. In fact, we will never know what happened in the hallway. The only witness that testified to what happened there is the witness Knoller. With very few exceptions, the Court—Ms. Knoller, I did not believe you. I did not believe a lot of what you said as to what happened. I believe a lot of things that happened in the hallway did happen somewhat along the lines that you said but there is more there and frankly, we are never going to know. Nobody is ever going to know what happened, why after all of these circumstances that we had in a confined place where there had been lots of confined places before, the lobby of the building but not the hallway, the dog all of a sudden went and attacked a defenseless woman trying to get her groceries into her apartment."

The court proceeded to explain that it believed that defendants' behavior after Whipple's death was a principal reason why people disliked them so much and partially responsible for the murder charges being brought against them. The court noted the various theories propounded by defendants where they had blamed Whipple for her own death, such as the following: it was Whipple's perfume; the suggestion that Whipple used steroids; Whipple came back out of her apartment; and "Whipple was acting macho." The court also noted that Knoller's statement that Whipple hit her in the eye while the dog was killing Whipple was "incredible" and one of the "most unbelievable aspects of the story given by Ms. Knoller . . . ." The court also commented on Knoller's remarks on the television show *Good Morning America* where she dismissed the evidence of 34 people who had come forward to announce they had a bad experience with the Presas as people just interested in their "15 minutes of fame."

The court stated that the entire history of these defendants is their absolute refusal to accept "what was going on in their house with those two dogs. They brushed off everything, they thumbed their nose at everything." It then pointed out that the sole case the court could find involving a second degree murder case involving a dog was a Kansas case (*State v. Davidson* (Kan. 1999) 987 P.2d 335). The court noted that the facts in the Kansas case were "very close to what's going on here except in that case, the dogs were actually trained to attack. In the case that we have in front of us, there really is no evidence that these dogs were trained to attack by the defendants or by anybody who had them before. They were not taken care of properly and did not demonstrate any meaningful socialization although they became very close to the defendants in this case." Moreover, *Davidson* was a Kansas case and all of the California cases involved involuntary manslaughter.

The court therefore concluded: "I am guided by a variety of principles. One of them is that public emotion, public outcry, feeling, passion, sympathy do not play a role in the application of the law. The other is that I am required to review all of the evidence and determine independently rather than as a jury what the evidence showed. I have laid out most of the evidence as it harms the defendants in this case. Their conduct from the

time that they got the dogs to the time—to the weeks after Diane Whipple's death was despicable.

"There was one time on the stand, Ms. Knoller, when I truly believed what you said. You broke down in the middle of a totally scripted answer and you actually, instead of crying, you actually got mad and you said you had no idea that this dog could do what he did and pounded the table. I believed you. That was the only time, but I did believe you." The court then set forth the definition of second degree murder under the Penal Code as being one who "subjectively knows, based on everything, that the conduct that he or she is about to engage in has a high probability of death to another human being."

The court continued: "What we have in this case as it relates to Ms. Knoller is the decision to take the dog outside, into the hallway, up to the roof, go to the bathroom, bring it back down and put it in the apartment. There was no question but that taking the dog out into the hallway by that very act exposed other people in the apartment, whether they are residents there or guests, invitees to what might happen with the dog. When you take everything as a totality, the question is whether or not as a subjective matter and as a matter of law Ms. Knoller knew that there was a high probability that day, or on the day before on the day after,—I reject totally the argument of the defendants that she had to know when she walked out the door—she was going to kill somebody that morning. The Court finds that the evidence does not support it." The court concluded it had "no choice, . . . taking the Legislature's scheme, the evidence that was received, as despicable as it is, but to determine not that she is acquitted of second degree murder but to find that on the state of the evidence, I cannot say as a matter of law that she subjectively knew on January 26th that her conduct was such that a human being was likely to die."

The court noted that it had another consideration. "The Court also notes a great troubling feature of this case that Mr. Noel was never charged as Ms. Knoller was. In the Court's view, given the evidence, Mr. Noel is more culpable than she. Mr. Noel personally knew that she could not control those dogs. He could not control those dogs. Mr. Noel was substantially haughtier than she was. In brushing off all of the incidents that happened out in the street, Mr. Noel knew as a theological certainty that that dog,

which had recently been operated on, was taking medication that had given it diarrhea, was going to go out into the hallway or out into the street possibly, at the hands of Ms. Knoller. He . . . left her there to do that.

"To argue that he is not responsible because he wasn't there is to argue that by setting a bomb off in a locker and then getting on an airplane and going to New York City, you are not responsible for the damages caused by the bomb. And yet Mr. Noel was not charged. Equality of sentencing and the equal administration of justice is an important feature in any criminal court. That played a role as well."

IX. *Appeals and Sentencing*

On June 17, 2002, the trial court sentenced Noel to the upper term of four years in state prison for the involuntary manslaughter conviction. On June 18, 2002, Noel filed a notice of appeal.

On July 3, 2002, the People filed a notice of appeal from the court's order granting Knoller a new trial on her second degree murder conviction.

On July 15, 2002, the trial court found that it retained jurisdiction to sentence Knoller on the remaining counts, and sentenced her to the upper term of four years to state prison for the involuntary manslaughter conviction. That same day Knoller filed a notice of appeal.

On December 5, 2002, we granted the People's motion to consolidate the three appeals. On December 9, 2002, Knoller filed a motion in this court to determine whether the prosecution's notice of appeal deprived the trial court of jurisdiction. On January 15, 2003, we concluded that the determination on the jurisdictional issue would be considered with the merits of the appeal.

DISCUSSION

I. *Motion Challenging Trial Court's Jurisdiction to Sentence Knoller*

On December 9, 2002, Knoller filed a motion requesting this court to determine a jurisdictional issue and we issued an order dated January 15, 2003, stating the issue would be considered with the merits of the appeal. In her motion, Knoller argues the trial court lost jurisdiction to sentence her once the People filed their notice of appeal from the

new trial order. Preliminarily, we note that Knoller has already been sentenced for her convictions for involuntary manslaughter (§ 192, subd. (b)) and keeping a mischievous dog that kills (§ 399), and she did not challenge the trial court's ruling that it had jurisdiction by filing a writ petition in this court. In addition, she has gone forward with her own appeal of these convictions. Notwithstanding the timeliness problem with this motion, we consider the merits of Knoller's argument.

Knoller challenges the trial court's jurisdiction to sentence her once the People appealed because the filing of an appeal ordinarily deprives the lower court of jurisdiction " ' "during that period to do anything in connection with the cause which may affect the judgment." ' " (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1834; Code Civ. Proc., § 916, subd. (a); see also *People v. Sonoqui* (1934) 1 Cal.2d 364, 365-366.) Knoller acknowledges there are limited exceptions to the reviewing court's assumption of exclusive jurisdiction over a cause (Code Civ. Proc., § 916, subd. (a)), but maintains that none applies here. She insists that her convictions for keeping a mischievous dog and for involuntary manslaughter are affected by the outcome of the People's appeal because, among other things, a new trial on the second degree murder charge raises the issue of the double jeopardy clause of the federal constitution. (See, e.g., *United States v. Dixon* (1993) 509 U.S. 688, 733.) Thus, Knoller maintains, if the reviewing court denies the People's appeal, the double jeopardy issue will either bar the new trial or the lower court will have to vacate the present involuntary manslaughter conviction. Conversely, if the reviewing court reverses and reinstates the murder conviction, Knoller will have to be resentenced and the court will have to vacate the involuntary manslaughter conviction to sentence her because she cannot be convicted of both murder and a lesser included offense of manslaughter (see, e.g., *People v. Kurtzman* (1988) 46 Cal.3d 322).

It is undisputed that the People can appeal from an order granting a defendant a new trial. (§ 1238, subd. (a)(3).) Further, as Knoller argues, the general rule is that the filing of a valid notice of appeal in a civil or criminal case vests jurisdiction of a cause in the appellate court until determination of the appeal and issuance of the remittitur. (Code

Civ. Proc., § 916, subd. (a); *People v. Johnson* (1992) 3 Cal.4th 1183, 1257.) However, as acknowledged by Knoller, the trial court "may proceed upon any other matter embraced in the action and not affected by the judgment or order." (Code Civ. Proc., § 916, subd. (a).) A motion for a new trial will almost always have some type of collateral affect on the judgment if the defendant is convicted of a lesser included offense, but it is well settled that a motion for new trial is a collateral matter and trial courts have retained jurisdiction to hear such motions even after an appeal from the judgment is taken. (See, e.g., *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 486.)

In addition, we have an independent basis for concluding that the trial court retained jurisdiction to sentence Knoller. After a notice of appeal has been filed, jurisdiction survives in the trial court where expressly provided by statute. (See *People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1757-1758; *Portillo v. Superior Court, supra,* 10 Cal.App.4th at pp. 1834-1835.) Section 1242 provides: "An appeal taken by the people in no case stays or affects the operation of a judgment in favor of the defendant, until judgment is reversed." The granting of Knoller's motion for new trial on the second degree murder conviction was a ruling clearly in favor of Knoller since it left only the two lesser convictions intact. The People properly appealed, and this appeal, under section 1242, did not stay operation of the judgment on the lesser counts even if these lesser accounts were affected by the appeal.

Further, if we were to embrace Knoller's argument, we would be suggesting that the People's appeal operates to negate her right to speedy sentencing under section 1191. Such an argument is contrary to the law and policy. We therefore reject Knoller's argument that the trial court was deprived of jurisdiction to enter judgment and sentence her.

II. *The People's Appeal*

The People contend that the trial court committed error by granting Knoller's motion for a new trial as to the second degree murder conviction and that the conviction must be reinstated. Specifically, they assert the trial court erroneously considered the relative culpability of Noel and Knoller; the trial court applied a legally erroneous

standard in assessing implied malice; and the trial court erroneously reassessed Knoller's credibility on the issue of subjective knowledge. We consider each of these contentions.

A. *Standard of Review*

The trial court granted Knoller's motion for a new trial on the basis that the verdict of second degree murder was "contrary to law or evidence." (§ 1181, subd. (6).) "In passing upon a motion for a new trial on the ground of insufficiency of the evidence the rule is that '[I]t is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence [citations]. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial [citation], and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried [citation]. . . . 'While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.' " (*People v. Sheran* (1957) 49 Cal.2d 101, 109.)

Although the trial court must weigh the evidence independently, it is "guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' " (*People v. Davis* (1995) 10 Cal.4th 463, 524.) "In making this determination the court must use its own judgment and cannot rely on the jury's conclusions." (*People v. Price* (1992) 4 Cal.App.4th 1272, 1275.)

"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261.) However, the exercise of that discretion must not be " 'arbitrary, vague, or

fanciful' " but is " 'to be governed by principle and regular procedure for the accomplishment of the ends of right and justice.' " (*People v. Taylor* (1993) 19 Cal.App.4th 836, 848.) A trial court abuses its discretion if its grant of a new trial disregards the jury's verdict or merely reflects the result it would have reached had a bench trial been held. (*Ibid.*) " 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' " (*People v. Sheran*, *supra*, 49 Cal.2d at p. 109.)

B. *Relying on Relative Culpability of Noel and Knoller*

When explaining its reasons for granting the motion for a new trial, the court stated that "a great troubling feature of this case" was that Noel was never charged with second degree murder and the court viewed him as "more culpable" than Knoller. Comparative culpability is not a basis for a new trial under section 1181 and therefore granting a new motion on this basis is in excess of the court's authority.[16] Since a motion

---

[16] Section 1181 provides that, once a jury renders a verdict against the defendant, the court may grant the defendant's motion for a new trial "in the following cases only: [¶] 1. When the trial has been had in his absence except in cases where the trial may lawfully proceed in his absence; [¶] 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property; [¶] 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; [¶] 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors; [¶] 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury; [¶] 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed; [¶] 7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed; [¶] 8. When new evidence is discovered material to the

for a new trial in a criminal trial may only be made on the grounds set forth in section 1181 (e.g., *People v. Sainz* (1967) 253 Cal.App.2d 496, 500), the court erred when it relied on this factor.

Knoller contends that the court based its decision on insufficiency of the evidence and the comments on comparative culpability merely reflected the court's observations. The record indicates that the court did more than simply observe this difference in the charges against each defendant when it specifically stated that this consideration "played a role" in the court's decision to grant the motion. To the extent this consideration "played a role," the court's ruling was unauthorized and beyond the scope of section 1181. However, "[a]n order granting a new trial will be affirmed on appeal without regard to the particular reason given if there is good and sufficient reason present which is within the terms of the motion." (*People v. Montgomery* (1976) 61 Cal.App.3d 718, 728 (*Montgomery*).) " 'It is not material, upon this appeal, as to the particular ground upon which the court based its order granting the new trial; for if the order should have been made upon any one of the grounds raised by defendant, it will be affirmed.' " (*Id.* at p. 729.) Accordingly, since Knoller moved for a new trial on the basis of subdivision (6) of section 1181, the issue is whether a new trial was properly granted on this basis.

C. *Granting a New Trial Pursuant to Section 1181, Subdivision (6)*

The jury convicted Knoller of second degree murder based on a theory of implied malice and the trial court granted Knoller's motion for a new trial pursuant to section 1181, subdivision (6) as to this count. The court stated that the evidence was insufficient to establish the subjective component of implied malice because Knoller did not subjectively know on January 26 "that her conduct was such that a human being was likely to die."

---

defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. . . . [¶] 9. When the right to a phonographic report has not been waived, and when it is not possible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule because of the death or disability of a reporter . . . the trial court . . . shall have power to set aside and vacate the judgment . . . and to order a new trial of the action or proceeding."

The People contend the trial court did not use the proper definition of implied malice. The prosecution, according to the People, must establish that the defendant "knows that his conduct endangers the life of another and . . . acts with conscious disregard for life." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104 (*Nieto Benitez*).) They argue that this subjective appreciation of the risk includes risk of death and a risk of serious bodily injury. (E.g., *People v. Coddington* (2000) 23 Cal.4th 529, 592, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Had the trial court considered the proper standard of implied malice, its statements that defendants "were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad" and that "the something bad was going to be that somebody was going to be badly hurt" established that sufficient evidence supported the jury's verdict on this charge as a matter of law.

Knoller responds that implied malice requires the person to be aware that his or her conduct causes a grave danger of death, and not merely serious injury, to another. No California case, according to Knoller, has ever stated that implied malice is based on a subjective appreciation of a risk of serious bodily injury.

1. *The Legal Definition of Implied Malice*

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) Involuntary manslaughter, excluding vehicular manslaughter, is "the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) "[W]ithout due caution and circumspection" (*ibid.*) requires proof of criminal negligence, which is shown by aggravated, gross, reckless conduct. (*People v. Penny* (1955) 44 Cal.2d 861, 879.)

Second degree murder is the unlawful killing of a human being *with malice aforethought*, but without the additional elements—i.e., willfulness, premeditation, and deliberation—that would support a conviction of first degree murder. (§§ 187, subd. (a), 189.) "[M]alice may be either express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied,

when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)

Knoller asserts that, under the People's definition of implied malice that includes serious bodily injury, implied malice murder would be indistinguishable from involuntary manslaughter. We disagree. The essential difference between the two crimes is that only the former requires a subjective or mental component. "[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.) Thus, implied malice may be distinguished from gross negligence by both the higher degree of the risk involved, and by the requirement that the risk be subjectively appreciated rather than merely objectively apparent. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46, fn. 4.)

"Implied malice has both a physical and mental component, the physical component being the performance of ' "an act, the natural consequences of which are dangerous to life," ' and the mental component being the requirement that the defendant ' "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." ' " (*People v. Hansen* (1994) 9 Cal.4th 300, 308; see also *People v. Cleaves* (1991) 229 Cal.App.3d 367, 378 [essential distinction between second degree murder based on implied malice and involuntary manslaughter "is the subjective versus objective criteria to evaluate the defendant's state of mind—i.e. if the defendant commits an act which endangers human life without realizing the risk involved, he is guilty of manslaughter, whereas if he realized the risk and acted in total disregard of the danger, he is guilty of murder based on implied malice"].)

Although courts have universally required a subjective component for implied malice, courts have not used a uniform definition of implied malice. As the Supreme Court has pointed out, two competing definitions of implied malice emerged in the jury instructions and courts. (*Nieto Benitez, supra,* 4 Cal.4th at pp. 103-104.) One strand of cases used the "wanton disregard" definition and held that "malice could be implied where 'the defendant for a base, antisocial motive and with wanton disregard for human

life, does an act that involves a high degree of probability that it will result in death.' " (*Ibid.*) The other strand of cases used the "conscious disregard" definition and "held that malice could be implied where the killing was proximately caused by ' "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." ' " (*Id.* at p. 104.)

These two definitions have repeatedly been held to "articulate[ ] one and the same standard." (*Nieto Benitez, supra,* 4 Cal.4th at p. 104; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1219; see also *People v. Watson, supra,* 30 Cal.3d at p. 1219.) However, in *People v. Dellinger, supra,* at page 1221, the Supreme Court held that the better practice is to use the conscious disregard definition in jury instructions, rather than the wanton disregard definition.

Knoller argues that the court properly used the "high probability of death" definition of implied malice when the court stated the question is whether Knoller "knew that there was a high probability" that as a result of her conduct "she was going to kill somebody that morning." The court ruled that it "finds that the evidence does not support it." Subsequently, the court elaborated that it had concluded that it could not say "as a matter of law that [Knoller] subjectively knew on January 26th that her conduct was such that a human being was likely to die."

Knowledge that a person is going to die or that the act has a high probability of death is not the proper subjective standard. Rather, under either the "wanton disregard" or the "conscious disregard" strand of cases, the subjective element is having a " 'base, antisocial motive and with wanton disregard for human life' " or knowing that one's " ' "conduct endangers the life of another" ' " and acting " ' "with conscious disregard for life." ' " (*Nieto Benitez, supra,* 4 Cal.4th at pp. 103-104.) The standard for the act, itself, or the physical component requires a high probability of death or having the natural consequences of which are dangerous to life. (*Ibid.*; *People v. Hansen, supra,* 9 Cal.4th at p. 308.)

The question was not whether Knoller knew her conduct was likely to result in the death of someone but whether Knoller knew her conduct endangered the life of another and acted in conscious disregard for life or in wanton disregard for life. (*Nieto Benitez, supra,* 4 Cal.4th at p. 104.) Our Supreme Court has stated that endangering the life of another means the defendant commits an act, "the natural consequences of which are dangerous to human life." (*People v. Taylor* (2004) 32 Cal.4th 863, 868.) The defendant does not have to know specifically the existence of each victim. (*Ibid.*) The subjective element can include accidental deaths if the "circumstances surrounding the act . . . evince implied malice." (*Nieto Benitez, supra,* at p. 110; see our discussion of the vehicular homicide cases, *post*.)

Knoller argues that the trial court used the correct standard and cites *People v. Dellinger, supra,* 49 Cal.3d 1212. The *Dellinger* court was concerned with the instruction of implied malice at that time, which included "wanton disregard for human life." (*Id.* at p. 1219.) The court concluded that this instruction did adequately set forth the subjective component, but added that a better practice in the future was to instruct juries "solely in the straightforward language of the 'conscious disregard for human life' definition of implied malice." (*Id.* at p. 1221.) The court held that "the 'wanton disregard for human life' definition of implied malice would be understood by a reasonable juror to independently require a finding of the defendant's subjective awareness of the life-threatening risk." (*Ibid.*) It affirmed that the high probability of death standard related to the physical component of implied malice when it stated that "[v]iewing the language of the 'wanton disregard' definition as a whole, a reasonable juror would understand that one who acts 'with a base antisocial motive and with a wanton *disregard* for human life' necessarily acts with *knowledge* of the life-threatening harm that might occur if he proceeds with 'an act with a high probability that it will result in death.' " (*Id.* at p. 1219.)

Knoller claims that serious bodily injury is not sufficient to satisfy the subjective element of implied malice. However, our Supreme Court has specified that "[i]In order to find 'wanton disregard' it must be shown that the accused was both aware of his duty

to act within the law and acted in a manner likely to cause death or serious injury despite such awareness." (*People v. Poddar* (1974) 10 Cal.3d 750, 758, fn. 11, superseded by statute on another issue; see also *People v. Coddington, supra*, 23 Cal.4th at p. 592; *People v. Conley* (1966) 64 Cal.2d 310, 322; *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205; *People v. Teixeira* (1955) 136 Cal.App.2d 136, 150 ["Thus, to constitute murder there has to be either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate that they would cause death or serious bodily injury so as to indicate an abandoned and malignant heart"].) The court in *People v. Matta* explained implied malice as follows: "[M]alice may be implied from the doing of an act in wanton and willful disregard of an unreasonable human risk, i.e., the willful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result." (*People v. Matta* (1976) 57 Cal.App.3d 472, 480.)

Knoller attempts to dismiss this long line of authority by asserting that the foregoing cases do not define implied malice but merely detail the type of evidence that is sufficient to support a conviction for implied malice murder. This argument has no merit. In *People v. Poddar, supra,* 10 Cal.3d at page 758, the Supreme Court defined implied malice in the context of a challenge to the correctness of second degree murder instructions and was not concerned with the sufficiency of the evidence. Further, even if the cases involve review of the sufficiency of the evidence, the reviewing court would not have affirmed the judgment if the evidence had to support something more than an appreciation of serious bodily injury. The legal definition of implied malice, as a subjective appreciation and conscious disregard of a likely risk of death or serious bodily injury, is unaffected by the standard of review, which simply informs the degree of deference afforded to the decision maker. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [substantial evidence inquiry considers whether rational jury could find each element of offense beyond reasonable doubt].)

Knoller equates "life-threatening risk" and conscious disregard for human life as requiring the prosecution to prove that Knoller had to know that her conduct was going to

result in the killing or the death of a person. That is not the correct standard, although it is the standard she persuaded the trial court to use. The trial court was wrong when it elevated the subjective standard to require Knoller to know on January 26, 2001, that "her conduct was such that a human being was likely to die."

The construction used by the trial court or the one urged by Knoller would have barred second degree murder convictions in many of the vehicular murder cases where implied malice was found by the jury and affirmed by the appellate courts. (See, e.g., *People v. Watson, supra*, 30 Cal.3d at p. 301 [facts that defendant acted wantonly and with conscious disregard for human life supported charge of second degree murder]; *People v. Autry* (1995) 37 Cal.App.4th 351, 359 [passengers warned defendant of dangerous driving]; *People v. Talamantes* (1992) 11 Cal.App.4th 968, 973 [cases rely on following factors in upholding drunk-driving-murder convictions: (1) a blood alcohol level above the .08 percent legal limit (2) a pre-drinking intent to drive (3) knowledge of the hazards of driving while intoxicated and (4) highly dangerous driving]; *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1349-1351; *People v. David* (1991) 230 Cal.App.3d 1109, 1115-1116 [prior convictions, near misses while driving, and exposure to mandatory educational programs showed awareness of life threatening risks of driving under the influence]; *People v. Olivas* (1985) 172 Cal.App.3d 984, 988-989 ["The criminal act underlying vehicular murder is not use of intoxicating substances in anticipation of driving, but is driving under the influence with conscious disregard for life"].) These cases do not require the defendant to know that drinking and driving is likely to result in death, but they require the driver to know that such behavior poses a "risk" or "danger" to human life and to act in disregard to that risk.

Even under the disfavored "wanton disregard" standard, the subjective element (mental component) is the awareness that the act is life-threatening or likely to result in great bodily injury. The objective test (physical component) is that the act has a high degree of probability that it will result in death or that the "performance of ' "an act [has] the natural consequences of which are dangerous to life . . . ." ' " (*Nieto Benitez, supra*, 4 Cal.4th at pp. 106-107.) This distinction is critical.

We therefore conclude that the trial court used the incorrect standard for subjective awareness when considering implied malice and we need to determine whether the evidence as a matter of law supported the legally correct standard.

2. *Evidence of Implied Malice*

As discussed *ante,* second degree murder is the unlawful killing of a human being with malice aforethought (§ 187, subd. (a)) and the prosecution had the burden of establishing both the physical and subjective elements of implied malice.[17] Knoller argues that we must affirm the lower court if there is any substantial evidence in the record that Knoller did not act with implied malice, irrespective of whether there is also evidence that could support a verdict of conviction for second degree murder. (*People v. Prudencio* (1928) 93 Cal.App. 241, 248.) That rule, however, only applies when the trial court uses the proper legal standard. Here, the trial court did not. Thus, we review the record to determine whether the evidence as a matter of law supports the jury's verdict of implied malice. If we cannot determine that the evidence supports implied malice as a matter of law, we will remand for the trial court to consider the section 1181, subdivision (6) motion, using the proper legal standard.

In the present case, the trial court left no doubt about its view of all of the evidence. The court expressly described in detail the evidence it found credible and the evidence it found incredible or insignificant. The court stated unequivocally that it believed none of Knoller's testimony, other than her one statement that she did not know that Bane (or both Presas) would do what he did. We therefore review the record accepting this one statement as true (but see our discussion, *post,* regarding the lower court's determination that this one statement was credible). Further, the trial court expressly stated that it believed the testimony of all of the prosecution's witnesses, except Wertman-Tallent, when they recounted their interactions with the Presas and defendants. We therefore dismiss the testimony of Wertman-Tallent and accept the testimony of the other witnesses as true.

---

[17] There is no dispute that the record does not support a finding of express malice.

Finally, the trial court pointed out that the witnesses' testimony about the Presas' good acts was irrelevant. We agree. Many of these witnesses had not observed the Presas in the apartment building, where they were more aggressive and territorial. Further, as Lockwood and defendants' own witnesses who were veterinarians stated, lunging and snarling at people when unprovoked represented warning signs. Lockwood testified that good behavior did not negate or undermine evidence of dogs' bad behavior in terms of evaluating the dogs' potential for aggression.

Knoller argues that her sole statement that she had no idea that the Presas "would ever do anything like that to anybody" was sufficient to establish that she did not have the requisite mental state. She maintains that her statement regarding her subjective mental state is the best evidence and that there was no other evidence of comparable weight. However, if the defendant's testimony were always the best evidence, the element would be subsumed by the defendant's mere denial. Accordingly, " '[i]mplied malice is malice inferred in law from the defendant's *conduct* rather than by proof of an actual intention to kill.' " (*People v. Whitfield* (1994) 7 Cal.4th 437, 464 (conc. & dis. opn. of Mosk, J.), italics added, superseded on another issue by section 22 [precludes evidence of voluntary intoxication to negate implied malice aforethought].) As we have already stressed, the prosecution did not have to prove that Knoller knew the Presas would kill someone, and it did not have to prove that she knew the Presas would act in the particularly horrific manner in which they acted. It very well may be true that Knoller had no idea that the Presas would rip all of the clothing from Whipple's body and bite her 77 times.[18] However, as we have emphasized, the prosecution only had to prove that Knoller knew that, by taking Bane outside of her apartment without a muzzle, she was endangering the life of another. The key to the issue is her conscious disregard for the life of another person.

---

[18] Knoller testified that she "had no idea that [Bane] would ever do anything like that to anybody. How can you anticipate something like that? It's a totally bizarre event. I mean how could you anticipate that a dog that you know that is gentle and loving and affectionate would do something so horrible and brutal and disgusting and gruesome to anybody? How could you imagine that happening?"

Knoller asserts that, even if we do not take her one statement as dispositive, the record overwhelmingly supports the conclusion that walking dogs cannot give rise to implied malice because such conduct does not have a high probability of resulting in a human being's death. She points out that she walked the Presas numerous times without ever causing another human fatality. She also claims, without any citation to the record or to any authority, that "Presa Canarios had been walked many thousands of times more [than Bane and Hera had been walked] and conservatively estimated, the forty million dogs in the United States apparently had been walked by their owners billions of times a year without causing a fatality. On the record in this case, the probability of a death resulting from walking Bane and/or Hera, as measurable before the walk on the 26th, approached zero."

Knoller argues that "in order to prove an implied malice murder under California law, the state most assuredly did have to prove beyond a reasonable doubt that on previous occasions death had resulted from acts similar to Ms. Knoller's dog walk on January 26th, 2001. Absent prior fatalities under the same or similar circumstances, it simply cannot be said that Ms. Knoller's leaving the apartment carried a high probability of death at the time she engaged in that conduct." Knoller proceeds to argue that there were no human deaths caused by Presa Canarios prior to January 26. To support this statement she cites Lockwood's testimony that there was no scientific literature on the Presa Canario. Simply because there is no scientific literature or specific statistics regarding Presa Canarios does not mean they have caused no deaths. In any event, Knoller's logic is specious and her argument is irrelevant.

Knoller attempts to bolster her argument by citing to a study by Lockwood, which she claims fixed the annual probability of a dog bite resulting in human death as one one-hundred-thousandth of one percent. Knoller fails to mention that the data from this study were never presented to the jury. During voir dire, Lockwood merely acknowledged this study as being his most recent published work. No attorney asked Lockwood to describe the information in the study or to explain its results. Moreover, not only were these data never before the jury and therefore improperly here before us, but Knoller presents the

results of this study as patently true, without any discussion of the validity or reliability of these numbers. Thus, we are provided no information about how the evidence regarding dog bites was collected, whether there was any possibility of underreporting, and what were the indexes of its reliability, if there were any. Moreover, these statistics apparently were for all breeds, including, Chihuahuas and toy Poodles, which indisputably have minimal, if any, relevance to Presa Canarios.[19] Finally, these statistics are irrelevant to predicting the likelihood of a particular event occurring in a certain context.

When considering the physical criterion of implied malice, Knoller is arguing that the act, in the abstract, has to have a high probability of death. This is incorrect. Knoller asserts that the "*possibility* that a death *might* ensue from the legal act of walking a dog without a muzzle cannot be the basis of a murder conviction . . . ." To support this assertion, she cites cases concerned with the second degree felony-murder rule. (E.g., *People v. Patterson* (1989) 49 Cal.3d 615.) She cites *People v. Patterson*, which states: "We therefore conclude—by analogy to the established definition of the term 'dangerous to life' in the context of the implied malice element of second degree murder [citation]—that, for purposes of the second degree felony-murder doctrine, an 'inherently dangerous felony' is an offense carrying 'a high probability' that death will result. A less stringent standard would inappropriately expand the scope of the second degree felony-murder rule reducing the seriousness of the act which a defendant must commit in order to be charged with murder." (*Id.* at p. 627, fn. omitted.) This rule has no application to this case.

It is only when the second degree felony-murder rule applies that the court looks to the underlying felony in the abstract to determine whether it was so inherently dangerous that malice can be ascribed to the defendant without referring to the particular facts of the case. (*Nieto Benitez, supra,* 4 Cal.4th at p. 106.) "Whether a defendant's underlying acts are inherently dangerous *in the abstract* is not dispositive in the jury's determination as to whether a defendant acted with malice." (*Id.* at p. 107.) "The very nature of implied malice, . . . invites consideration of the circumstances preceding the

---

[19] In this regard, Knoller's argument is similar to her testimony that Chihuahuas can be, in some circumstances, just as dangerous as Presa Canarios.

fatal act." (*Ibid.*) Accordingly, the physical element, which requires the act to have a high probability of death is not to be considered in the abstract, but is to be considered within the context of the defendant's knowledge and actions. In an implied malice case such as the one before us, the law asks this question: what were the circumstances preceding the fatal act?

As discussed *ante,* Knoller's argument would preclude the prosecution of second degree murder when a person is killed in a vehicle accident involving a drunk driver. Studies indicate that one drunk driving arrest occurs per 300 to 1000 drunk driving trips, which leads to the inescapable conclusion that "most incidents of drunk driving do not result in injury." (Hingson, *Drunk Driving as Second-Degree Murder in Michigan* (1995) 41 Wayne L.R. 1433, 1447, citing Hingson, *Prevention of Alcohol-Impaired Driving* (1993) 17 Alcohol Health & Res. World 28, 31.) Indeed, Justice Clark of our Supreme Court dissented against awarding punitive damages against a drunk driver because "[r]arely will the defendant have been drinking for the purpose of injuring someone, with knowledge that his drinking will injure the plaintiff, or even with knowledge that his drinking will probably injure someone. While driving intoxicated is dangerous, injury is not probable. Thousands, perhaps hundreds of thousands, of Californians each week reach home without accident despite their driving intoxicated. [¶] . . . It is rare that a person commences drinking alcohol with the intent to drive or to injure someone after becoming drunk. Rather, he typically sets out to drink without becoming intoxicated, and because alcohol distorts judgment, he overrates his capacity, and misjudges his driving ability after drinking too much." (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 907-908 (dis. opn. of Clark, J. [considering malice for punitive damages].)

Just as the statistics regarding drunk driving and fatalities are irrelevant to whether a particular driver in a specific context should be charged with second degree murder, general statistics regarding dog bites are not germane to the physical criterion for implied malice. There is no dispute that most people walk their dogs without incident. There is also no dispute that most dog bites do not result in death. However, the facts of this case

do not resemble most dog bite cases. Most dog owners do not take dogs from a breeding operation called "Dog-O-War" that is operated and funded by prison inmates. Most people do not keep a breed of dogs historically used for fighting and therefore bred to be aggressive. Most people do not keep two large Presa Canarios—one of them an unneutered male—in a small apartment in an urban area. Most people do not keep such "fighting" dogs without providing them any significant socialization or training. Most people do not routinely take two such inherently aggressive, unsocialized dogs outside without muzzles and without the ability to control them. Unquestionably, the defendants' conduct in this case was unusual for more reasons than the simple fact that most people do not have killer dogs.

Knoller does not discuss the foregoing recorded facts in any meaningful way, but rather focuses on statistics and analogies regarding the dangers of motorcycle riding and swimming pools. Such information is irrelevant to the evidence in this record and tangential to the legal issues before us. The facts in the record, not abstract statistics that are irrelevant to actual conduct, must provide the basis to establish implied malice. We therefore must examine the record to determine whether the evidence as a matter of law supports both the physical and mental components of implied malice.

The evidence regarding the breed of Presa Canarios was undisputed. The literature found in Knoller's home warned that Presa Canarios are "naturally very dog aggressive, and proper socialization at an early age is a must." The same literature made it clear that such dogs could kill and clarifies that the name for the breed is "properly called Perro de Presa Canario[,]" which means "dog of prey" of the Canary Islands. The literature announced that the dogs "were always used and bred for combat and guard." Further, the literature warned that this breed is fiercely protective to its owners. Lockwood testified that when a person has dogs that are bred to be protective and territorial, such dogs have to be *trained not to fight*.

Knoller admitted reading this literature and being aware that it stated Presa Canarios were bred to be guard dogs, had a fighting history, and had been used by police units to disable pit bulls. Although they knew that socialization of these dogs at an early

age was critical, Knoller and Noel took Bane and Hera after being informed that they had no training and were so out of control that Hera had killed sheep. Moreover, Knoller had been specifically warned by the veterinarian that had seen the dogs at Coumbs's property that "[t]hese dogs are huge" and "have had no training or discipline of any sort." He also warned that these animals would be a "liability" in any household and specifically warned her of a recent attack by large dogs where a boy lost his arm and had his face disfigured.

Although defendants knew that the literature warned about the paramount importance of socialization and that the dogs had not been socialized while in the care of Coumbs, Knoller stated that defendants sought no outside help in training the Presas. The record establishes that defendants did little training of the dogs as the witnesses uniformly declared that, after the Presas lunged at or attacked them or their dogs, defendants never reprimanded their dogs. Moreover, Montepeque, who was a professional dog trainer, specifically told defendants that they needed to train the Presas after he observed the Presas' behavior, and he provided them with his business card. It is undisputed that defendants ignored this advice and did not seek his help or the help of any other expert.

The record is equally convincing that Knoller had clear notice that she could not and often did not control the Presas. Bardack testified that one of the Presas lunged forward, pulling Knoller to the ground, and attacked his dog. He stated that Knoller "couldn't do anything with the animal." Taylor recalled Hera's breaking away from Knoller and charging his dog and him. Birkmaier recounted a time when Hera was running down the sixth floor hallway, unleashed and unattended, while Knoller locked her apartment door. Other witnesses testified that they observed Knoller struggling to keep control of the Presas. Moreover, Noel wrote to Bretches and Schneider describing incidents where the Presas bolted out of the apartment with Knoller being "propelled forward" and having to let go of the leashes to keep her footing. Knoller admitted that she lost control of Hera when the Presa attacked Taylor's dog, and she wrote to Schneider that she lacked the upper body strength to stop Bane from "going after another dog."

As in drunk driving cases, prior near misses or prior minor accidents are sufficient to place a defendant on notice. (See, e.g., *People v. Olivas*, *supra*, 172 Cal.App.3d at p. 988 [prior "fender bender" collision preceding fatal collision sufficient to put defendant on notice of danger to life]; see also *People v. David*, *supra*, 230 Cal.App.3d at pp. 1115-1116.) This record provides overwhelming evidence of prior incidents. Of particular significance is the number of incidents given the short period of time the Presas were with defendants. This was not a situation where 30 incidents occurred over a period of years. In this record the witnesses described over 30 incidents where Bane and/or Hera lunged, snapped, and growled at people or physically attacked other dogs. All of these attacks took place in a period of months.[20]

The jury heard little to support Knoller's claim that she was surprised by the dogs' behavior. Even Flowers, a veterinarian testifying as a witness for Noel, agreed that a dog that lunges, growls, and snarls at people, when unprovoked, is evidence that the dog could potentially be harmful or dangerous to human life. Segurson, another veterinarian who was a witness for Noel, stated that, if a dog lunges and snarls, this was "very aggressive" behavior and "definitely" a warning sign. If the dog lunges after people repeatedly with teeth bared, Segurson opined that "those are signs that I need to do something with my dog."

Knoller had clear notice of this aggression. She personally witnessed 11 of the incidents of aggression by Bane and Hera. She also observed the damage done by Bane's jaws when she saw that a single bite from Bane required Noel to remain in the hospital for four days and have two steel pins placed in his hand. Indeed, Knoller expressly warned others that her dog would "kill" the other person's dog and that Hera was "questionable" with people, "sometimes good and sometimes not."

Knoller's disregard of the risk to life that her dogs presented was inferable from

---

[20] Bane came to defendants' apartment in September and then had surgery in early December. The first seven to ten days after his surgery Bane had difficulty getting up and walking around the apartment. Thus, during about two weeks during this period, Bane was not physically able to lunge at and attack people or dogs.

the fact that she routinely failed to apologize when the Presas repeatedly lunged and attacked others in her presence. Not only did she fail to apologize, but she described Moser, who had complained that one of the Presas had bitten him, as an "idiot" when she testified in front of the grand jury. Her disregard of the danger was apparent on the day of the fatal attack when she took Bane outside the apartment without a muzzle despite knowing that she could not control him. Her disregard for Whipple's life was inferable from the fact that she never called 911 for help, never asked after the attack about Whipple's condition, and returned to the scene of the attack, not to assist the dying Whipple, but to find her keys.

Inferences about Knoller's mental state can also be drawn from her behavior after the killing. In her interview on television following the killing, she denied any responsibility for the attack and appeared to blame the victim by asserting that Whipple had ample opportunity to move into her apartment. Knoller suggests that evidence during or after the attack cannot be considered because the prosecutor's closing argument focused on Knoller's mental state prior to leaving the apartment with Bane. This argument merits little discussion. The prosecutor summarized all of the evidence, including the evidence related to the attack and Knoller's actions after the killing. Moreover, in a homicide case, the defendant's state of mind is to be determined from the entire factual context of the crime, including the circumstances of the killing and the defendant's acts before and after the offense. (See, e.g., *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1309.)

The evidence is ample and essentially undisputed on the single issue upon which the trial court overturned the jury's verdict. The record indicates that the trial court would not have granted the motion had it applied the proper legal standard for implied malice. This is because the court expressly found there was no question that Knoller knew that the Presas "were going to hurt somebody one day." The court also expressly found that both defendants "were fully on notice that they had a couple of wild, uncontrollable and dangerous dogs that were likely going to do something bad. . . . There

is no question but that the something bad was going to be that somebody was going to be badly hurt."[21]

Our independent examination of the record establishes that Knoller knew that Bane was a frightening and dangerous animal: huge, untrained and bred to fight. She had seen and heard of his numerous and ominous aggressive acts in the months leading up to the fatal attack. She had been warned about the dangers inherent in his lack of training. She knew first hand of the serious injuries Bane could inflict; her husband, who was closest to the dog, had nearly lost a finger to him. Her conduct before the killing repeatedly demonstrated her disregard for the obvious dangers both dogs represented. This disregard culminated in her fatal decision to take the dogs outside her apartment

---

[21] The court even noted that the facts of this case were remarkably similar to those in *State v. Davidson, supra,* 987 P.2d 335. In *State v. Davidson*, the court held that the prosecution was not required to prove that the defendant knew her dogs would attack and kill someone. (*Id*. at p. 344.) The court determined that it was sufficient for the prosecution to prove that the defendant's dogs killed the child and that the defendant could have reasonably foreseen that the dogs would attack or injure someone as a result of what she did or failed to do to. (*Ibid.*) The Kansas court found that the following evidence of the defendant's conduct contributed to the death of the child: "The State presented evidence that she selected powerful dogs with a potential for aggressive behavior and that she owned a number of these dogs in which she fostered aggressive behavior by failing to properly train the dogs. She ignored the advice from experts on how to properly train her dogs and their warnings of the dire results which could occur from improper training. She was told to socialize her dogs and chose not to do so. She ignores the evidence of the dogs getting out on numerous occasions and her failure to properly secure the gate. She ignored the aggressive behavior her dogs displayed toward her neighbors and their children. The State presented evidence that she created a profound risk and ignored foreseeable consequences that her dogs could attack or injure someone. The State is not required to prove that defendant knew her dogs would attack and kill someone. It was sufficient to prove that her dogs killed Chris and that she could have reasonably foreseen that the dogs could attack or injure someone as a result of what she did or failed to do." (*Ibid.*)

Clearly, this Kansas case is not good authority in California, but it is instructive that the trial court considered the facts of the two cases to be similar because it further indicates that the court believed the evidence established that Knoller was aware that the Presas could seriously injure a person and she acted in conscious disregard of that knowledge.

without muzzles, despite knowing she could not control them. Both the jury and the trial judge found these facts, and more, to have been established by the prosecution. As we have discussed, the single fact of Knoller's denial of knowledge that the Presas would kill, erroneously relied upon by the trial court to set aside the jury's verdict, could not be dispositive as a matter of law.

Even in the face of what appears to be ample evidence to support the jury's verdict and the trial court's own evaluation of the evidence, we feel constrained to remand to the trial court for its consideration of the new trial motion in light of the appropriate standard for implied malice and in light of its proper role as the thirteenth juror. Since we are remanding, we also consider the trial court's proper role as the thirteenth juror when ruling on a motion for a new trial.

D. *The Court's Granting a New Trial as the 13th Juror and Denying the Motion to Dismiss at the Close of the Prosecution's Case*

1. *Trial Court's Rulings on the Motions to Dismiss and for a New Trial and Its Statements on the Sufficiency of the Evidence*

Knoller moved for a new trial pursuant to section 1181, subdivision (6), but the People contend that it was unclear whether the court was acting pursuant to this section or section 1385, subdivision (a). Section 1385, subdivision (a) provides that the judge may on his or her own motion or upon the motion of the prosecuting attorney, "and in furtherance of justice," dismiss an action. Under section 1385, the court finds the evidence legally insufficient whereas the court finds that the verdict is contrary to the evidence under section 1181, subdivision (6).

Knoller dismisses this argument by stating that the trial court made it clear that it was not acquitting her of the second degree murder charge but, rather, was granting a new trial on the basis of its reweighing of the evidence and finding the evidence insufficient. Further, according to Knoller, the court was acting in response to her motion, not on its own motion or on the prosecution's motion. Thus, the court was not acting pursuant to section 1385.

The trial court's statements, however, are inconsistent. When ruling on the motion pursuant to section 1181, subdivision (6), the court stated that it was reviewing the evidence independently but then concluded "as a matter of law" that such evidence was insufficient. If the court were making its decision as a matter of law, then it should have reduced the crime to the lesser offense. (*Ibid*.) However, elsewhere, the court purports to be independently weighing the evidence rather than determining the legal sufficiency of the evidence. Any review by the trial court regarding legal insufficiency must be completed by looking at the evidence in the light most favorable to the prosecution and reducing the crime to the lesser offense (*ibid.*) or acquitting on its own motion or the prosecution's motion (§ 1385); legal insufficiency can only occur if the trial court finds no reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Hatch* (2000) 22 Cal.4th 260, 273.) In contrast, when considering a motion for new trial based on the court's role as the 13th juror, the court is under a duty to give the defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict. (*People v. Veitch* (1982) 128 Cal.App.3d 460, 467.)

We are particularly troubled by the trial court's statement that the evidence was insufficient as a matter of law in view of the court's denial of Knoller's earlier motion to dismiss pursuant to section 1118.1. Section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. . . ." When denying this motion, the court expressly stated the prosecution had presented ample evidence to support the second degree murder charge.

Given the prior ruling of the trial court that the prosecution had presented ample evidence to support the second degree murder charge, the trial court's later ruling that the evidence was insufficient as a matter of law to support implied malice was contradictory. (See *People v. Trevino* (1985) 39 Cal.3d 667, 694 (*Trevino*), overruled on other grounds

in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219.) Further, if the court actually concluded that the evidence was insufficient as a matter of law, it should have reduced the crime rather than granting a new trial.

In our independent research, we uncovered only two published cases where the trial court granted the defendant's motion for a new trial under section 1181, subdivision (6), after previously denying the defendant's motions for a judgment of acquittal under section 1118.1. (*People v. Trevino, supra,* 39 Cal.3d 667; *Montgomery, supra,* 61 Cal.App.3d 718.) In *Trevino,* the court erroneously used the same standard of review for a section 1118.1 motion and a section 1181, subdivision (6) motion while denying the earlier motion and granting the later motion. (*Trevino, supra,* 39 Cal.3d at p. 695.) When denying the section 1118.1 motion at the end of the prosecution's case, the trial court "expressed serious reservations as to the adequacy of the evidence . . . ." (*Trevino, supra,* at p. 695.)

Even so, the Supreme Court noted that the lower court's rulings were inherently contradictory. It stated that "[i]t strains logic to rule during trial that the evidence is sufficient to preclude acquittal, and rule after trial that the evidence is insufficient as a matter of law to support the conviction, all the while applying the same standard of review." (*Trevino, supra,* 39 Cal.3d at p. 696.) In light of the lower court's irreconcilable rulings on these motions, the Supreme Court independently reviewed the sufficiency of the evidence and concluded that the court should have entered a judgment of acquittal barring retrial. (*Id.* at pp. 696-698.)

In the other published case, *Montgomery, supra,* 61 Cal.App.3d at pages 722-725, the defendant had been indicted on two counts of bribery and the defendant moved to dismiss under section 1118.1, arguing that there was entrapment as a matter of law. The trial court denied the motion. (*Montgomery, supra,* at p. 722.) At the close of trial, the defendant moved for reconsideration of the section 1118.1 motion and also moved for a new trial under section 1181, subdivisions (5) and (6). (*Montgomery, supra,* at p. 722.) The trial court explained that, as to count two, it believed that it had committed error in not granting the dismissal motion pursuant to section 1118.1. (*Montgomery, supra,* at p.

725.) The court further explained that as the trial progressed, it realized that the second count was based on "admitted lies and done for the purpose of entrapping the defendant." (*Id.* at p. 726.)

On appeal, the reviewing court in *Montgomery* viewed these two rulings as consistent because it determined that entrapment had not been established as a matter of law, and therefore the section 1118.1 motion was properly denied. (*Montgomery, supra,* 61 Cal.App.3d at pp. 727-728.) It affirmed the lower court's granting of a new trial under subdivision (6) of section 1181 because the court had explained it did not believe the testimony of a critical witness. (*Montgomery, supra*, at p. 729.) The lower court had concluded that it would not " 'feel satisfied in confining a man of the testimony of [witness] Clement, a weak character, who, among other unacceptable actions, admitted that he lied to [the defendant] . . . to [trap] him; and also the testimony of [witness] Thomas, which was given to set it up, and went to the length that he did to convict a friend for the benefit of another.' " (*Ibid.*)

Unlike the two cases of *Trevino* and *Montgomery*, the trial court in the case before us declared unequivocally at the end of the prosecution's case that the facts supporting the second degree murder charge were ample. Moreover, the trial court in the present case stated that it found—with the exception of one witness—all of the prosecution's witnesses to be credible. Further, as we have discussed, *ante*, evidence supported the second degree murder verdict and therefore any ruling that the evidence was insufficient as a matter of law was error. Thus, although the trial court's statements are somewhat contradictory, the question remains whether the trial court properly granted Knoller's motion for a new trial acting as the 13th juror.

2. *Court's Acting as the 13th Juror*

When acting as the 13th juror, we defer to the trial court when it weighs all of the evidence in the record. However, we consider whether the trial court is carrying out its role properly when making a second decision on the evidence pursuant to a section 1181 motion. "The second decision on the evidence to which the defendant is entitled pursuant to section 1181 is fundamentally different from the jury's decision. The trial

court 'exercises a supervisory power over the verdict,' [citations], it is guided by 'a presumption in favor of the correctness of the verdict and proceedings supporting it,' [citation], and its reviewing function is 'strictly circumscribed by the authority granted by statute.' [Citation.] That statute, section 1181, 'clearly contemplates review will be confined to what the "evidence shows" [citation].' [Citation.] Thus, although the trial court has broad discretion in this area, that discretion is abused when the court exceeds the bounds of its supervisory capacity over the jury's function . . . ." (*People v. Moreda* (2004) 118 Cal.App.4th 507, 514; see also *People v. Davis, supra,* 10 Cal.4th at pp. 523-524.)

The trial court should not "disregard the verdict" or "decide what result it would have reached if the case had been tried without a jury, but instead . . . it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." (*People v. Robarge* (1953) 41 Cal.2d 628, 633.) "[T]he trial court does not supplant the jury as to exclusive finder of fact, but in the exercise of its supervisory capacity insures only that the jury's function has been performed justly and intelligently." (*People v. Watson* (1983) 150 Cal.App.3d 313, 319.)

The trial court explained that "public emotion, public outcry, feeling, passion, sympathy do not play a role in the application of the law." Although the court commented that it did not believe any other part of Knoller's testimony, it stated that "[t]here was one time on the stand, Ms. Knoller, when I truly believed what you said. You broke down in the middle of a totally scripted answer and you actually, instead of crying, you actually got mad and you said you had no idea that this dog could do what he did and pounded the table. I believed you. That was the only time, but I did believe you." On this single basis, the court granted the motion for a new trial.

The People contend that Knoller obviously had the greatest motive to fabricate on this one issue. In light of the trial court's own conclusions regarding Knoller's credibility, the People assert the trial court's decision to believe Knoller on this one point was arbitrary and capricious. Knoller counters that reviewing courts always "defer

to the [trial] court's resolutions of credibility and findings of fact." (E.g., *People v. Brown* (2001) 91 Cal.App.4th 623, 654.) Therefore, she maintains the trial court's determination on this issue was proper.

The trial court is constrained to weigh the evidence in its supervisory capacity, and must not usurp the role of the jury. Here, the trial court stated that it found Knoller's testimony completely unbelievable, and even a cursory review of the record fully supports that assessment. Knoller's account of the attack told to the officers responding to the 911 call differed from her version given to the media and both of these versions deviated from her testimony to the grand jury. All three versions diverged from her testimony at trial. Speaking to the media and the grand jury, she maintained that there was something about Whipple's smell that attracted Bane; she then abandoned that notion at trial. She did not, however, abandon her attempts to blame Whipple for the attack. As the trial court pointed out, Knoller's claims that Whipple, lying face down and being mauled to death by the Presas, hit Knoller in the eye and thereby caused Bane to attack, defied all credibility. In addition, Knoller testified that she tried to protect Whipple during the attack even though she had suffered no serious injuries and had abandoned Whipple without providing any assistance.

Further straining credulity, Knoller testified that all of the other witnesses had not told the truth. She categorically denied ever walking both of the Presas by herself, ever having them off-leash, and, with one exception, ever having lost control of them. She denied that the Presas ever attacked another dog. She claimed when she walked Bane by herself he was "really calm" and a "cooperative dog on lead." This contradicted the testimony of numerous witnesses who said they observed Knoller losing control of one or both of the dogs and they had seen the Presas without a leash. Knoller also initially denied participating in the naming of the dog breeding business as Dog-O-War. She later admitted her role when confronted with her own letter discussing her views regarding the name. Her credibility further eroded when she attempted to evade questions about the dangerousness of her dogs by claiming that Chihuahuas could be dangerous and that Presa Canarios were more gentle and sensitive than Collies.

The trial court, after weighing the evidence in the context of a section 1181 motion, is not to rely on the jury's conclusions; but it also cannot merely state that it believes one statement by an otherwise incredible witness without providing some explanation from the record to support that finding. Further, the court must explain the basis for dismissing all of the other evidence. This is not a situation like the one in *Montgomery* where the trial court explained that the witnesses' testimony was not credible and therefore not entitled to much weight because the prosecution's witnesses were admitted liars.

When deciding to grant a new trial after the jury's verdict of guilty, the " 'court may consider, examine, and scrutinize the testimony by the aid of those tests by which the jury are required to measure the worth and weight of the proofs adduced in substantiation of the charge, and if it thus reaches the conclusion that the jury, to reach its conclusion, must have accorded to such testimony undue weight and credit—that is to say, if it be persuaded by a just and fair consideration of the testimony that it is insufficient to establish guilt beyond a reasonable doubt, and that the jury formed an erroneous judgment on the probative power of the evidence—and, accordingly, in the exercise of the discretion committed to it as to such matters, grants a new trial, the order granting the motion must then be held to stand free from disturbance by a court of review.' " (*People v. Prudencio* (1928) 93 Cal.App. 241, 248.)

The trial court in the case before us abused its discretion in carrying out the foregoing function. Other than noting that Knoller seemed to be departing briefly from her scripted answer when she pounded the table and declared she "had no idea that this dog could do what he did" and stating this was the sole time the court believed her, the court offered no explanation as to why this one statement in the midst of such incredible testimony was believable. Further, as we discussed *ante*, Knoller's comments that she never could imagine Bane doing "something so horrible and brutal and disgusting and gruesome to anybody" does not necessarily mean, as the court inferred, that she did not

know the Presas could kill someone.[22] Moreover, as discussed extensively already, this statement has no bearing on whether she knew they could seriously injure anyone. In any event, the court did not explain how this one statement outweighed all the other evidence that it and the jury had deemed credible. The court was obligated to weigh the evidence in its supervisory role and it abuses its discretion if its grant of a new trial disregards the jury's verdict or merely reflects the result it would have reached had a bench trial been held. (*People v. Taylor, supra*, 19 Cal.App.4th at p. 848.)

Accordingly, we hold the court manifestly abused its discretion by granting a new trial based exclusively on the court's own interpretation of the credulity of one statement by an otherwise incredible witness. The trial court was not permitted to substitute its conclusion for the jury's verdict under circumstances where it could not explain how this single bit of evidence trumped the otherwise overwhelming countervailing credible

---

[22] It is actually unclear from the record before us whether the trial court was relying on Knoller's very last answer during direct or her close to the last answer during redirect.

The final question asked Knoller in direct by her attorney was whether she ever claimed not to be responsible for the attack suffered by Whipple. Knoller responded: "I said in an interview that I wasn't responsible but it wasn't for the—it wasn't in regard to what Bane had done, it was in regard to knowing whether he would do that or not. And I had no idea that he would ever do anything like that to anybody. How can you anticipate something like that? It's a totally bizarre event. I mean how could you anticipate that a dog that you know that is gentle and loving and affectionate would do something so horrible and brutal and disgusting and gruesome to anybody? How could you imagine that happening?"

At the end of Knoller's redirect testimony, her attorney asked how had her feelings changed towards Bane after the attack and Knoller responded: "I saw a pet, a dog that had been loving, docile, friendly with people turn into a crazed wild animal that I—I never—I never—I never anticipated or could imagine anything happening as what happened in that hallway. I couldn't imagine this dog turning into what he turned into. I–I–couldn't imagine him doing anything like what he did. I—I—it's still—it's in—and still incomprehensible that he—that he did what he did in that hallway. I can't—I still—I can't believe that he did what he did. How could—how could this—how could he turn into what he turned into in that hallway? How could he do that to somebody, how could–––how could he do that? I—I—I—how could he do that to somebody?"

evidence, and the court did not explain how or why it believed passion or emotion improperly governed the jurors' decision.

III. *Knoller's Appeal*

Knoller challenges her convictions on the basis that the trial court abused its discretion in admitting evidence of Knoller's association with the Aryan Brotherhood prison gang (prison gang or Aryan Brotherhood), that the court committed prejudicial error in admitting letters written by Noel as evidence against Knoller, that the trial court should have permitted her to testify regarding comments Noel made to her about Bane's biting Noel's finger, and that she was deprived of her constitutional right to counsel during the prosecution's closing rebuttal argument. We consider each of these contentions.

A. *Evidence of the Aryan Brotherhood Prison Gang*

1. *Pretrial Motion and Hearing*

During pretrial motions, defendants moved to exclude evidence they were associates of the Aryan Brotherhood, arguing such evidence was irrelevant and prejudicial. The prosecution responded that it was relevant to show defendants had a relationship with the prison inmates to raise vicious dogs and to establish defendants' state of mind. The court ruled that evidence of a "dog-raising ring" involving defendants and inmates who are members of the Aryan Brotherhood, if established in an Evidence Code section 402 hearing, was relevant to establish defendants' knowledge and state of mind as to "what they understood the dogs to be, the kind of dogs they were. If indeed as touchy as the Aryan Brotherhood may be, if the argument is and there—not the argument, there is evidence to support that the dogs were being used to support or to protect activities of people on the outside of prison involved with the Aryan Brotherhood, that will very much go to the defendants' knowledge and state of mind as it relates to the nature of the dogs and the likelihood that those dogs would be good house pets."

On January 29, 2002, Hawkes, a special agent assigned to gang intelligence operations in the California Department of Corrections, testified at the Evidence Code section 402 hearing. The parties stipulated that, for the purpose of the admissibility

question, the court would consider a transcript of Hawkes's earlier testimony given at a bail hearing on August 31, 2001. Hawkes testified that Schneider and Bretches were members of the Aryan Brotherhood and that defendants were associates of the prison gang. He also concluded that the dog breeding scheme was related to the Aryan Brotherhood and conducted to benefit it.

The court heard further argument from counsel regarding the prison gang evidence. Counsel for Knoller argued the evidence was irrelevant and it was "uncontroverted that a plan to raise dogs was discovered by the California Department of Corrections in the year 2000 and, at that time, the California Department of Corrections traced the source of the funds that were used to buy the dogs to a personal injury settlement involving an inmate." Counsel claimed that the settlement was against the California Department of Corrections and that is how Schneider received the money to purchase the dogs and, "as a direct result of the negligence, the inhumanity of the California Department of Corrections, Ms. Whipple is dead." She avowed that defendants were involved with the inmates as pro bono attorneys and transported the dogs in their capacity as attorneys. Counsel argued that defendants "did not benefit the Aryan brotherhood. They were solely trying to rescue the dogs. And their actions in no way benefited themselves monetarily. They did not receive funds from the Aryan Brotherhood. All they did was use their legal know-how to mount a civil suit so as to rescue the dogs from a situation of neglect." The only relationship that developed subsequently was a "deeply personal relationship" between defendants and Schneider.

The prosecution argued that the Presas were part of a "common scheme, a common plan, a conspiracy between key members of the Aryan Brotherhood to raise and breed and sell aggressive dogs." The prosecution asserted that the letters, many of which remained under seal, provided Hawkes with the information to determine defendants were associates of the Aryan Brotherhood, that is, "giving material aid to the Aryan Brotherhood in its enterprise." The prosecution maintained that the Aryan Brotherhood could not operate on the outside of prison without people like defendants "moving money around, giving legal aid, providing information about people on the outside . . . ."

Further, the prosecution emphasized that it was "not an accident that Presas were chosen" and it was not an accident that Bane was on the cover of the *Manstopper* book.

The prosecutor argued further: "So the fact that these inmates chose these kinds of dogs, brought other Aryan Brotherhood members and associates into their scheme to bring them into the outside world to raise money, to train them and to make them aggressive, is at the beginning of this case and it's at the end of the case." The prosecution concluded: "And all that evidence proves the fact that these almost 30 incidents were not an aberration. The defendants liked it. They enjoyed it. They wanted it. And they encouraged it. And what stands at the heart of that is the fact that these are the kind of dogs that the Aryan Brotherhood chose to raise, chose to sell, chose to market."

The court commented that the documents showed that "money from an Aryan Brotherhood member . . . was delivered to another Aryan Brotherhood member named Mr. Schneider, which was then used for the purpose of purchasing dogs. . . . The nature of the Presa Canario as a breed is highly relevant. . . ." The court pointed to evidence of a relationship between Schneider and Bretches with Coumbs to get her to raise the dogs and the conflict, which arose because Coumbs was raising the dogs "to be wooses and [Schneider] was not going to have any woosee dogs in his ownership." The court concluded that the "fact that the Aryan Brotherhood is a prison gang is . . . admissible. However, the Court finds that the characteristics of the Aryan Brotherhood as, for example, a white supremacist organization is irrelevant to the question in front of the Court or, to the extent that it is relevant, the prejudice that would flow towards the defendants way outweighs any probative value. Accordingly, while the Aryan Brotherhood may be identified as a prison gang, there is no evidence before the Court that would warrant, on the state of the current record, any further inquiry into the nature of the Aryan Brotherhood. Accordingly, any discussion about the qualities of the Aryan Brotherhood or the perceived qualities will—the motion to suppress, that is granted. The identification of the Aryan Brotherhood as a prison gang, however, may be admitted."

The court noted that the question whether the issue was "just dogs" or a "breeding program designed to benefit the Aryan Brotherhood" would be left to the jury to decide. The court continued to explain that "it will be up to the jury to determine one way or the other whether or not the Aryan Brotherhood played a role; if it did, what that role was as it relates to the defendants' knowledge of the dogs that they ultimately had physical control over and that were involved in the death of Diane Whipple on January 26th, 2001."

2. *Opening Statement*

In the opening statement by Knoller's attorney, she stated that the evidence would show that Schneider had Coumbs purchase the Presa Canarios because Schneider and Bretches wanted to draw pictures of the dogs. She asserted that Knoller went to rescue the dogs from Coumbs because they were being abused and Knoller provided this service for free as part of her legal pro bono work. She declared that Knoller "has never been a member of a white supremacist group and that she is not a member of the Aryan Brotherhood." Rather, Knoller had developed "a personal affection" for Schneider. She summed up the relationship: "[T]he only connection between Paul Schneider and the dogs was his desire to draw pictures of dogs, and the only connection that my client entertained with Mr. Schneider was one of a personal relationship that was in no way benefiting an Aryan Brotherhood organization."

3. *Evidence at Trial*

Hawkes gave his opinion at trial that Schneider and Bretches were members of the Aryan Brotherhood and that they were involved in a business to purchase, breed, and train guard dogs for the benefit of the Aryan Brotherhood, with help from people outside the prison system. He asserted that he believed defendants assisted in this activity and were associates of the Aryan Brotherhood who knowingly participated in criminal activity to aid the gang. Hawkes based his conclusions on letters between defendants and Schneider, documents found in defendants' home, and a calendar found in the inmates' cell.

In particular, Hawkes testified about a letter from Noel condoning Schneider's stabbing his attorney and a letter to Bretches where Noel identified the location of certain inmates in the prison system who were prosecution witnesses and enemies of Schneider and the Aryan Brotherhood. (See discussion of the content of the letters in pt. III, *ante*.)

One letter from Noel to Schneider appears to encourage eliminating other witnesses: The following portion of the letter was read to the jury: "POS comes onto the property, walking right up to the front door, challenges the guy to come on out because he's going to kill him. Guy had every reason to believe that the POS was packing and comes out with a .357, cranks off a round which is aimed 20 feet to the side of the POS, and tells him to get gone or the next one is up his ass or between his eyes. Guy should have been given a medal and made sheriff. Instead, the D.A. overcharges like a son of a bitch looking to put him in for a minimum of 15 years and ineligible for credit because it was charged as a 245 offense." The letter continues: "Eventually, we got a deal worked out. D.A., himself, was not an ass, just his charging deputy. Felony but a wobbler, nine months County Jail and given that he had been in four months, he was out the door after sentencing." The letter continued: "When I grew up, that kind of shit would never happen. Have the witnesses to support the threat and put [one] between his eyes. Only one side of the story to tell and it was self-defense."

During Knoller's direct examination, she denied any association with the Aryan Brotherhood. On cross-examination, she admitted she knew Schneider was a member of the Aryan Brotherhood. The prosecutor asked Knoller about the various letters Noel had sent to the inmates, and she denied any knowledge of these letters.

Knoller claimed that she first learned about Presa Canarios because she was representing Storey in her lawsuit to recover the dogs from Coumbs. Schneider had told her that he had a friend who was having a problem because she was unhappy with the care of the dogs and she wanted them transported. Knoller then researched the breed because she likes "to find out general information about what my case is going to involve sometimes even before I take it to make sure if I want to take it or not." She asserted that the information she gleaned from the website of the kennel "Show Stoppers" established

that these dogs were good as family pets, because they were loyal, protective, and good with "kids." She explained that Storey was financially responsible for transporting the dogs but, since she had "taken the case on a pro bono basis and there were funds" needed to rescue the dogs from Coumbs, Noel and she agreed that they would donate money if there was some shortfall.

Knoller also testified that she first had a legal relationship with Schneider and that it evolved into a personal relationship. She first denied that the personal relationship involved Noel, Schneider, and her or that she referred to the relationship as "the triad." She was then impeached with her grand jury testimony, where she was asked what the triad meant to her. She first told the grand jury that the triad was a boat in the harbor, but she ultimately admitted: "It's an expression that I use for Robert and myself and my son." When asked who was her son, she responded that he was Schneider.

4. *Court's Instructions*

During the cross-examination of Knoller, the court admonished the jury as follows: "Ladies and gentlemen, I want to caution the jury. The relationship, if there was one—and it's up to the jury to determine—between Ms. Knoller and Mr. Noel and Mr. Schneider or Mr. Bretches or anybody else is relevant to the extent and only to the extent that information about the dogs, if you find that there was any information, became known to either Ms. Knoller or Mr. Noel. [¶] The same thing with respect to the prison gang. You will be instructed about this at the end. I believe you've been instructed already. The prison gang itself, if you find that there is one—this is entirely up to you—is not relevant and nobody may be held accountable for anything that has to do with a prison gang, except to the extent that information about these dogs in any way that you find to be relevant was communicated to Mr. Noel and Ms. Knoller. Nobody here is on trial for being a member of a prison gang and nobody is on trial for having a relationship with a person who is in state prison, and you many not consider that for it being a bad fact or anything along those lines."

At the end of trial, the court admonished the jurors as follows about the limited use of the Aryan Brotherhood evidence: "[E]vidence regarding the Aryan Brotherhood,

Pelican State—Pelican Bay State Prison, Mr. Paul Schneider and Mr. Dale Bretches has been admitted here. You may consider such evidence in determining whether the defendants Robert Noel and Marjorie Knoller either obtained from or sent to—obtained knowledge or sent knowledge about the dogs Bane and Hera or about Presa Canario dogs generally and then only to the extent that you find such knowledge is relevant to the crimes with which each defendant has been charged.

"You may not consider any evidence that you have heard regarding the Aryan Brotherhood, Pelican Bay State Prison, Paul Schneider or Dale Bretches for any purpose whatsoever except to the extent that you find it relevant to knowledge actually obtained from or sent by the defendants Marjorie Knoller and/or Robert Noel about the dogs in this case or about Presa Canario dogs generally. If you find that the defendants did not obtain or send any information about the dogs Bane, Hera or about Presa Canario dogs from any communications with either Mr. Schneider and/or Mr. Bretches, then you are instructed to disregard in its entirety any evidence you may have heard regarding the Aryan Brotherhood, regarding Pelican Bay State Prison, regarding Paul Schneider or regarding Dale Bretches.

"Under no circumstances, regardless of which way you come down, may you consider evidence of the Aryan Brotherhood, Pelican Bay State Prison, Mr. Paul Schneider or Mr. Dale Bretches to be evidence of the character of the defendant Marjorie Knoller or Robert Noel."

5. *Inadmissible Character Evidence or Evidence Probative of Intent or Motive*

Knoller contends that evidence of the Aryan Brotherhood was inadmissible character evidence. (Evid. Code, § 1101, subd. (a).) She maintains that opinion evidence as to character is never admissible in California as part of the prosecution's case in chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 494.)

Knoller concedes that courts have permitted evidence of gang affiliation and activity when relevant to motive or intent of the defendant or witness (see, e.g., *People v. Woods* (1991) 226 Cal.App.3d 1037, 1054) or an integral factor of the crime (see, e.g., *People v. Burns* (1987) 196 Cal.App.3d 1440, 1455-1456). Such evidence, however, is

not permitted when it has only tangential relevance, because its prejudicial effect is so significant. (E.g., *People v. Cox* (1991) 53 Cal.3d 618, 660 [not admissible if tangentially relevant]; *People v. Cardenas* (1982) 31 Cal.3d 897, 903 [prejudicial effect of gang evidence outweighed limited probative value when used to establish witness bias that was established by other evidence]; *People v. Perez* (1981) 114 Cal.App.3d 470, 479 [evidence of gang membership had no relevance to any issue at trial].)

Knoller claims that defendants' relationship to the inmate could have been presented without the highly prejudicial evidence of the Aryan Brotherhood and Hawkes's testimony. She stresses that the Aryan Brotherhood evidence was not probative of the nature of the plan of the inmates to breed dogs and was presented solely to prove character as exemplified by the prosecutor's arguing that "bad people" choose "bad" or dangerous dogs. In addition, Hawkes testified that Knoller was an associate of the Aryan Brotherhood and an associate is "someone who participates in criminal activity knowingly and who aids the gang." Further, Aryan Brotherhood evidence was unnecessary, according to Knoller, because the prosecution could still have offered evidence that the inmates had hired Coumbs to raise dogs resulting in a dispute over the inmates' belief that she was raising the dogs not to be sufficiently aggressive. Further, the prosecution could have presented evidence that Knoller was the attorney for Storey and helped transfer the dogs from Coumbs's property.

Knoller maintains that the error amounts to a federal due process violation. (See *McKinney v. Rees* (1993) 993 F.2d 1378, 1382-1384.) She claims that the Aryan Brotherhood evidence "could have been viewed by the jury in only one of two ways: it directly proved Knoller evil and worthy of punishment, an impermissible inference about character; or it proved that the dogs were inherently dangerous because they were in the possession of associates of a racist and violent prison gang, also an impermissible inference concerning [defendants'] character." Further, Knoller argues that the trial court acknowledged during the hearing on the motion for a new trial that the prosecution had failed to present much of the evidence of "the connection between the Aryan

Brotherhood and the dogs and the defendants in terms of raising dogs, buying dogs, supplying money to intermediaries for dogs, transporting dogs . . . ."

Although the prosecution decided not to present all of its evidence, the Aryan Brotherhood evidence it did offer was necessary to refute Knoller's defense that her participation in the entire operation was strictly related to her legal pro bono work and her desire to rescue the dogs. Further, we review the trial court's ruling on the basis of the evidence presented to the trial court at the time the ruling was made, which was at the Evidence Code section 402 hearing. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1007 & fn. 23.)

As Knoller argues, courts have recognized that the admission of evidence of gang membership or gang activity creates a risk that the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 922, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 945.) Moreover, evidence of a defendant's criminal disposition is inadmissible to prove the defendant committed a specific criminal act. (Evid. Code, § 1101.) Even when such evidence is relevant, trial courts should carefully scrutinize such evidence before admitting it because it may have a highly inflammatory impact on the jury. (*People v. Champion, supra,* at p. 922.)

However, gang evidence is admissible if relevant to motive, knowledge, or intent, so long as its probative value is not outweighed by its prejudicial effect. (*People v. Champion, supra*, 9 Cal.4th at pp. 922-923; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 175 [evidence defendant and victims were from rival gangs was admissible to prove motive]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 [gang evidence admissible to prove intent and motive]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516-1519 [same]; see also Evid. Code, § 352.) When reviewing the trial court's ruling on the admissibility of the evidence, we apply the abuse of discretion standard. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194 [admission of gang evidence reviewed for abuse of discretion].)

The court in its ruling made it clear that evidence of the Aryan Brotherhood was only to be admitted as it related to the connection among the inmates, defendants, and the Presas. No evidence was to be admitted regarding what the Aryan Brotherhood is or its racist ideology, although counsel for Knoller violated this limitation in both her opening statement and in her examination of various witnesses. Thus, Knoller waived any objections on this basis. Not only did the court limit the admission of the evidence, it instructed the jury not to consider the Aryan Brotherhood evidence as demonstrating the bad character of the defendants and the jury is presumed to have followed such instructions. (*People v. Olguin, supra,* 31 Cal.App.4th at p. 1368.)

As even Knoller concedes, gang evidence is admissible when relevant to motive and intent. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 193.) Evidence of membership in a criminal organization has been admitted in numerous cases where there was no gang allegation and where, as here, defendants' conduct may be part of or directly related to the goals, purposes, and activities of a criminal organization. (See, e.g., *People v. Champion, supra,* 9 Cal.4th 879; *People v. Harvey* (1991) 233 Cal.App.3d 1206; *People v. Frausto* (1982) 135 Cal.App.3d 129; *People v. Dominguez* (1981) 121 Cal.App.3d 481; *People v. Perez, supra,* 114 Cal.App.3d 470; *People v. McDaniels* (1980) 107 Cal.App.3d 898; *In re Darrell T.* (1979) 90 Cal.App.3d 325; *People v. Remiro* (1979) 89 Cal.App.3d 809; *People v. Manson* (1976) 61 Cal.App.3d 102; *People v. Beyea* (1974) 38 Cal.App.3d 176.)

Knoller insists that evidence of the Aryan Brotherhood gang was unnecessary, but her attorney argued at the Evidence Code section 402 hearing that Knoller came to possess the Presas "as a result of a pro bono lawsuit. Their custodianship of the dogs came about because they were rescuing two dogs who would no longer have anything to do with any breeding plan whatsoever. . . . [A]ny personal relationship between Marjorie and this inmate, Mr. Schneider, was just that, it was a personal relationship borne of a personal love, and it had no way—it was in no way intended to benefit an Aryan Brotherhood member. . . ." Indeed, Knoller testified that her sole intent was to represent Storey on a pro bono basis and she spent money to transfer the dogs as part of her pro

bono work. Further, Knoller's attorney argued that the "rescued" dog simply "went berserk" and there was no reason for Knoller to know that the Presas were aggressive.

The Aryan Brotherhood evidence was relevant to Knoller's knowledge of the Presas' violent disposition and to her participation in the naming of the dog breeding business as Dog-O-War. The evidence also disputed her claim that Schneider never expressed an opinion to her about how he wanted the dogs to be despite the inmates' sending defendants literature such as *Manstopper*. Moreover, the gang evidence directly refuted Knoller's defense that she simply rescued two abused dogs while acting in her role as a pro bono attorney and therefore had no knowledge that they posed a danger to human life. It also provided an explanation different from the one offered by Knoller for defendants' spending their own money to transport and care for the animals. We therefore conclude the evidence was relevant to explaining the numerous letters between the inmates and defendants detailing defendants' daily experiences with the Presas.

Knoller complains that the letters and use of the information in the letters during the prosecution's closing argument and cross-examination did not have to do with dogs. However, this was not simply a dog case. This was a case where two attorneys, claiming to be doing pro bono work, became involved with inmates who had started a Dog-O-War breeding business that was funded by a settlement from a lawsuit by another inmate who was a member of the Aryan Brotherhood. Evidence of the Aryan Brotherhood was not only necessary to link defendants to the inmates but also to connect them to Storey, who was the person who hired defendants to retrieve the dogs from Coumbs's property. Storey's connection to the inmates was explained by Hawkes; he opined that she was an associate of the Aryan Brotherhood. Thus, the money for the breeding business, the players in the breeding business, defendants' connection to and participation in the naming of the breeding business, the literature highlighting the ferociousness of the dogs that was found in defendants' apartment, and the choice of breeding Presa Canarios could only be explained through the gang connection. Thus the Aryan Brotherhood evidence was necessary to connect all of the players, to establish intent and motive, and to counter the defense at trial.

We therefore reject Knoller's contention that the trial court's admission of evidence of the Aryan Brotherhood was inadmissible character evidence constituting an abuse of discretion and a violation of her federal due process rights. The trial court found that the prosecution had established an adequate foundation and the record supports this ruling. The evidence was not cumulative of any other evidence introduced on the issues of Knoller's motive and intent. Knoller's connection to the Aryan Brotherhood was directly relevant and probative as to why she, an attorney, had the Presas and why she kept them even after they had lunged at people and even after she was having problems controlling them. Further, it connected her to the literature found in her home, such as *Manstopper*.

The prejudicial effect of this evidence was not outweighed by its probative value, since such evidence was highly relevant. The court limited the evidence presented, and it was Knoller's own attorney who delved into the racist ideology of the Aryan Brotherhood. Moreover, the trial court properly instructed the jury on the limited purposes for which it was admitting this evidence. Accordingly, we conclude the trial court did not abuse its discretion in admitting evidence of the Aryan Brotherhood. Knoller's claims of federal constitutional error, "entirely dependent as they are on [her] claim of state law error, likewise must fail." (*People v. Carter* (2003) 30 Cal.4th 1166, 1196.)

6. *Harmless Error*

Even if we were to presume that the trial court abused its discretion in admitting the evidence of the Aryan Brotherhood, the alleged error was harmless under any applicable standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [constitutional error must be harmless beyond reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law is harmless unless reasonably probable result more favorable to defendant would have been reached in absence of error].) Knoller argues that the prosecutor stressed and repeated Hawkes's testimony. Further, she argues that the cross-examination of her regarding her preference for the German name for the dog

breeding business was an attempt to connect the Aryan Brotherhood to Nazis or Hitler.[23] Further, she claims Hawkes's testimony focused on Noel, not her, and this tainted her. Finally, she asserts that even the trial court admitted that the connections to the Aryan Brotherhood was "very inflammatory" and prejudicial.

Knoller also stresses that the prosecutor focused on this evidence in its closing argument by referring to the Aryan Brotherhood each time he referred to Bretches or Schneider, accentuating the prejudicial effect of this evidence. Moreover, in closing, the prosecutor emphasized the following: "What kind of dogs did Mr. Schneider and Mr. Bretches want? Take a look. This was found at their Pelican Bay State Prison cell. War Dog Assassin Bane. Rock hard Bane. Death: Ruin: Destruction. Fighting dog breed. [¶] Mr. Noel and Ms. Knoller weren't just involved in the Dog-O-War Kennels. Especially with Mr. Noel, the evidence is uncontradicted frankly that he was an associate to the Aryan Brotherhood. Devan Hawkes was uncontradicted in his testimony before you, ladies and gentlemen, an expert in prison gangs. And it wasn't just their deep involvement in this kennel which was designed to breed and raise and train aggressive dogs but you read those letters. I am not going to read them to you again, but who writes 'The smuck probably deserved to be stabbed'? That is a lawyer. Who writes 'If you try to escape, we will get out of the way so you have a clear shot'? That's a lawyer. Who discloses the location of the enemies of the Aryan Brotherhood to a member of the Aryan Brotherhood but somebody trying to help the Aryan Brotherhood? [¶] All of that evidence is offered simply, ladies and gentlemen, to show the very close nature of the relationship with these defendants and these prisoners, that was the triad evidence so you can judge her claim under oath that she had nothing to do with it and didn't know anything about the plan."

The question is whether the evidence of the Aryan Brotherhood was harmless beyond a reasonable doubt. As discussed *ante*, the evidence supporting Knoller's conviction for second degree murder was ample and strong. The literature that Knoller

---

[23] Knoller's preference actually was GuerraHund Kennels or GuerraHunde Kennels, which used both Spanish and German words.

had read and that was found in defendants' apartment affirmed that Presa Canarios are "naturally very dog aggressive, and proper socialization at an early age is a must." The literature made it clear that such dogs could kill. Knoller admitted reading this literature and being aware that it stated Presa Canarios were bred to be guard dogs, had a fighting history, and had been used by police units to disable pit bulls. Despite reading that socialization of these dogs at an early age was critical, Knoller and Noel took the Presas into their apartment after being warned by Coumbs that Hera had killed sheep and being warned by the veterinarian that had seen the dogs at Coumbs's property that "[t]hese dogs are huge" and "have had no training or discipline of any sort." He also warned that these animals would be a "liability" in any household and specifically warned her of a recent attack by large dogs where a boy lost his arm and had his face disfigured.

As discussed *ante,* the record is equally convincing that Knoller had notice that she could not control the Presas. Knoller admitted that she lacked the strength to control Bane and she personally witnessed 11 of the incidents of aggression by Bane and Hera. She also observed the damage that Bane could do when a single bite from Bane required Noel to remain in the hospital for four days and have two steel pins placed in his hand.

Finally, as set forth in our discussion of the evidence in support of implied malice in the People's appeal (see pt. II.C.2., *ante*), Knoller's complete disregard of the risk to life that the Presas presented was demonstrated repeatedly when she failed to apologize after the Presas lunged or attacked others, and when she called a witness who asserted that he had been bitten by one of the dogs an "idiot." Further, her disregard was established when she took Bane, who was sick with diarrhea, outside the apartment without a muzzle despite knowing that she could not control him. Her disregard for Whipple's life was evident in her failure to call 911, her failure to inquire at any time after the attack about Whipple's condition, and her failure to provide any assistance to the dying Whipple after she returned to the scene of the attack to find her keys.

We conclude that the evidence to support the second degree murder was overwhelming and that the introduction of the Aryan Brotherhood evidence with the limiting instruction by the court was therefore harmless beyond a reasonable doubt.

Since involuntary manslaughter is a lesser included offense of second degree murder, the evidence also overwhelmingly supported the conclusion that Knoller's act of walking the Presas without muzzles was "aggravated, culpable, gross, or reckless . . . conduct . . . [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . ." (*People v. Penny* (1955) 44 Cal.2d 861, 879.) Moreover, the evidence overwhelmingly established a keeping of the dogs "without ordinary care" (§ 399) in support of her conviction for owning a mischievous animal that caused the death of a human being.

B. *Noel's Letters Admitted as Evidence Against Knoller*

Knoller argues that the letters written by Noel violated her constitutional right to cross-examine Noel because he did not testify, preventing any cross-examination of him on the veracity of these letters. The Sixth Amendment to the United States Constitution, which applies to the states under the Fourteenth Amendment, protects a defendant's right to cross-examine all witnesses against him or her. (*Davis v. Alaska* (1974) 415 U.S. 308; *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *Richardson v. Marsh* (1987) 481 U.S. 200; *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), partially abrogated by constitutional amendment as stated in *People v. Fletcher* (1996) 13 Cal.4th 451, 465.) Knoller contends the letters were facially incriminating of her, and therefore their admission constituted *Aranda-Bruton* error (*Aranda, supra,* at pp. 530-531; *Bruton, supra,* at pp. 136-137).

1. *Trial Court's Rulings on Severance Motion*

Defendants each filed a motion to sever prior to trial. Knoller argued that a separate trial was necessary because the jury would not be able to "compartmentalize" the evidence and would use evidence admissible only against Noel also against her. Due to defendants' marriage, Knoller argued that "the jury [would] be compelled to attribute knowledge" of a prior encounter between Whipple and the Presas to Knoller and would attribute attitudes expressed by Noel to her.

In denying the motion, the court noted the preference for joint trials under section 1098. The letters Schneider sent were addressed to both Knoller and Noel. The court explained that it was aware that Noel was the principal writer of the letters and Knoller was the person in the hallway. However, they both, as a married couple, took the Presas to their home and often both accompanied the Presas on the walks. The court concluded: "This I think is a classic case for a joint trial. You have common defendants, you have common crimes, you have common events, the same victim. The Court finds that while there may be some arguably prejudice to one defendant or another regarding a particular piece of evidence, it's very small. I disagree with the argument that the prejudice is going to be large, certainly not overwhelming."

2. *The Letters*

a. *Letter Written by Knoller:* During the trial, the court granted Noel's motion to limit evidence of the letter written by Knoller to veterinarian Martin. However, outside the presence of the jury, the court elaborated that it did "not believe under the totality of the circumstances that letters written by only one person are admitted [only] against that person. The evidence in its totality clearly shows a fluid interaction between the defendants with respect to virtually everything as it relates to this case, and that's why the Court has been—has declined the offers to limit testimony to just one person."

b. *Noel's Letters Connecting Defendants to the Aryan Brotherhood:* Knoller objects to two letters admitted during Hawkes's testimony that connected defendants to the Aryan Brotherhood. Hawkes testified about a letter written by Noel to Schneider on December 27, 2000. The letter was on Noel and Knoller's joint legal letterhead and marked "Confidential Legal Mail." Before the prosecution read the letter into evidence, counsel for Knoller objected, arguing the jury should be instructed that the letter should be considered only against Noel. The court overruled the objection. Subsequently, it noted that counsel for Knoller had brought this issue up in her opening statement. Hawkes testified that Schneider had stabbed a lawyer in court and the knife used had an Aryan Brotherhood symbol on it. One portion of the letter read to the jury stated: "I don't think Marjorie's ever told you what my response, with which she agreed

immediately, was upon hearing that, every time we were told that [Schneider had stabbed his attorney], 'If he did, he must have had a damned good reason and the smuck [*sic*] probably deserved it.' "

The prosecution read further from the letter regarding the *Boyd* case. Boyd was an inmate who was killed at Pelican Bay and who was a witness in another case. The letter from Noel stated: "When someone early on in the *Boyd* case from the defense side made mention of possibly wanting to depose you, Marjorie and I both agreed that we would have no problem being in such a setting with you but that I would just want to make it clear that I was not sitting between you and the door and if you went for the door, all she or I would do was to wave good-bye and wish you good luck and God's speed."

In this letter, Noel indicated no surprise that Schneider had been carrying a weapon when he testified at the trial of a former Pelican Bay prison guard. The prosecution read: "I had no doubt that you were carrying. Neither I nor Marjorie had any fear of you for a couple of reasons. If you went for the door and your route of travel was through the spot where I was standing, I would get my ass out of the way so you had a clear shot at the door, window, et cetera."

Hawkes testified regarding a second letter written by Noel to Bretches on January 12, 2001. Again defendant's joint legal letterhead was used and was marked "Confidential Legal Mail." The letter was "[r]egarding mutts and other matters." The letter concerned two inmates who were enemies of the Aryan Brotherhood and were prosecution witnesses in a federal case against the Aryan Brotherhood. One had dropped out of the Aryan Brotherhood, and Hawkes testified that the consequence of dropping out was death. In the letter, Noel identified the location of a protected witness, which, in Hawkes's opinion, could result in great bodily harm to that witness. Noel's letter did not reference Knoller, except to say: "Hope tomorrow is a good mail day. It always is if we hear from either you or Paul and a really great day if we hear from you both."

c. *Noel's Letters Regarding the Presas:* Knoller also objects to letters that Noel wrote to the inmates regarding the Presas. At the close of the prosecution's case, the prosecutor read into the record a redacted letter from Noel to inmate Bretches, with the

salutation, "Dear Dale and Paul," dated October 3, 2000, and marked "Confidential Legal Mail." This letter expressed delight at the Presas meeting him at the door and their escape into the hallway after Knoller was forced to let go of their leashes. (See Background, pt. III.D.1., *ante*.) Counsel for Knoller stated on the record that she had no objection to the admission of this letter.

Noel wrote a similar letter sent October 10, 2000, to Bretches with the salutation, "Dear Dale and Paul," on joint legal letterhead and marked "Confidential Legal Mail." In this letter he again describes an incident where the Presas escaped into the hallway when he entered the apartment. (See Background, pt. III.D.1., *ante*.) Knoller's attorney again stated on the record that she had no objection to the admission of this letter.

On October 17, 2000, Noel wrote to Bretches about his reading *Manstopper* and laughing when he read the part about his losing a finger. (See Background, pt. III.D.4., *ante*.) Finally, in a letter written by Noel to Schneider on January 11, 2001, on joint legal letterhead and marked, "Confidential Legal Mail," Noel recounted his becoming used to the "jail break" approach the Presas had and the Presas' confrontation with two other dogs. He also reported an incident involving the Presas' exiting the elevator door and meeting Whipple, "a timorous little mousy blond[e], who weighs less than Hera[.]" He remarked that Whipple almost "has a coronary[.]" (See Background, pt. III.C., *ante*.)

3. *Waiver*

In order to preserve an *Aranda-Bruton* claim or a confrontation clause challenge, the defendant must make a specific and timely objection on that basis in the trial court. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1044; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) Knoller objected to both the letters written by Noel connecting defendants to the Aryan Brotherhood. As to the remaining letters, Knoller did not object and the People argue she has therefore waived any challenge. As to the two letters regarding the Aryan Brotherhood, the People argue Knoller never specifically raised any *Aranda-Bruton* claim.

Knoller argues she did challenge all of the letters authored by Noel in her motion to sever. Further, since the trial court referred to the *Aranda-Bruton* issues raised by

defendants' motions, this issue was preserved for appeal. We agree. Since the court ruled on the *Aranda-Burton* issue, we consider the issue preserved for appeal. In addition, we conclude the issue regarding all of the letters was sufficiently raised in Knoller's motion to sever.

Finally, we consider admitting Noel's letter expressing support for Schneider's stabbing an attorney in court because Knoller's attorney mentioned in her opening statement that Schneider was in prison for attempted murder. Knoller argues that, simply because she mentioned he was in prison for attempted murder, the door was not opened to admit evidence of a letter indicating Noel's support of the stabbing. However, Knoller's attorney also asked her questions about the content of this letter. Knoller testified that she knew Schneider stabbed an attorney but she did not write or agree with the statements in Noel's letter. Although it is a close question whether there is waiver as to this letter, we consider the issues of *Aranda-Bruton* error as to all six of the letters.

4. *Aranda-Bruton and Sixth Amendment Right to Confrontation*

As set forth earlier, the Sixth Amendment to the United States Constitution, which applies to the states under the Fourteenth Amendment, protects a defendant's right to cross-examine all witnesses against him or her. (*Davis v. Alaska*, *supra*, 415 U.S. at pp. 315-316; *Bruton*, *supra*, 391 U.S. at pp. 135-136; *Aranda*, *supra*, 63 Cal.2d at pp. 528-530.) "[T]he Clause envisions [¶] 'a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' " (*Ohio v. Roberts* (1980) 448 U.S. 56, 63-64, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-243.)

A defendant's right to cross-examination is violated when a nontestifying codefendant's confession (or declaration against penal interests) directly implicates the defendant's participation in the crime and the confession is admitted into evidence. (*Bruton*, *supra*, 391 U.S. 123.) "[A] nontestifying codefendant's extrajudicial self-

incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120.)

Knoller argues that the December 27, 2001, letter to Schneider concerning the stabbing incident referred to her and provided support for Hawkes's conclusion that she was an associate of the Aryan Brotherhood. Similarly, she argues the letter dated January 12, 2001, to the inmates concerning the whereabouts of an inmate in a federal case against the Aryan Brotherhood incriminates her. The other letters, Knoller urges, are facially incriminating because they indicate she could not control the Presas, she found an injury caused by a dog generally amusing, and she shared Noel's contempt for Whipple when he described her as a "timorous little mousy blond[e]."

The People maintain the *Aranda-Bruton* rule is limited to confessions that are both "powerfully incriminating" and "facially incriminating" of the nondeclarant defendant. (*Richardson v. Marsh, supra,* 481 U.S. at pp. 207-208.) They argue that the only potential impact of these letters on Knoller was indirect; the jury had to use inference to connect statements in these redacted letters to Knoller's state of mind regarding the Presas' dangerous propensities and her conscious indifference to the danger they posed. (See, e.g., *id.* at pp. 208-211 [no Sixth Amendment right invoked when other evidence must be associated with extrajudicial statement to implicate defendant].)[24] Further, the People argue these letters did not violate Knoller's Sixth Amendment right to confrontation because these extrajudicial statements were admitted for a nonhearsay

[24] The question whether the evidence had to be interlinked to other evidence to have an effect on the non-declarant is especially relevant when the trial court instructs the jurors to limit the effect of the admission to the declarant. Here, the trial court stated that Noel's letters were being admitted into evidence against both defendants. In addition, the trial court did not admonish the jurors that the letters were being used only as a basis for Hawkes's opinion and should not be consider for their truth. (See, e.g., *People v. Valdez* (1997) 58 Cal.App.4th 494, 510-511.)

purpose or under a firmly-rooted hearsay exception. (*Tennessee v. Street* (1985) 471 U.S. 409, 414.)

Even if we presume the court erred in admitting all of the six letters, the error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. 18.) Other evidence introduced at trial independently substantiated the content of the letters. This was especially true of the two letters reciting events where the Presas escaped from Knoller's grasp and wandered freely in the hallway. Other evidence corroborated that the Presas wandered freely on the sixth floor. Birkmaier testified that in October she encountered Hera, unattended and off leash, in the sixth floor hallway. In January 2001, seven to ten days prior to Whipple's death, Putek encountered one of the Presas unattended on the sixth floor. Moreover, Putek recalled that on at least two or three prior occasions, he had heard one or more dogs running up and down the sixth floor hallway.

In addition, the evidence that Knoller had difficulty controlling the Presas was overwhelming. In Knoller's own letter to Schneider, she admitted she could not stop Bane if he really wanted to go after another dog. A neighbor testified that he had seen defendants with one or both of the Presas on about six occasions and the Presas "were pulling at the leash and [defendants] holding the leashes were at the beck and call, at the will of the dogs." Another neighbor, Curtiss, observed Knoller with both Presas on three or four occasions; the Presas pulled Knoller in different directions, as she struggled to maintain control. Another neighbor saw defendants yelling for the Presas in the garage. Bardack and Taylor saw Hera break free of Knoller's grasp while she was walking her on the street.

As for the letters where Noel states that Knoller and he laughed when reading in *Manstopper* about his finger being bitten off, Knoller does not dispute that there was other evidence of Noel's finger being bitten by Bane. Rather, she objects to this letter because it demonstrated a disregard for human life or callousness. She also similarly complains that the letter describing Whipple as a "mousy" blonde was extremely prejudicial because it showed disregard for the victim. Knoller, however, testified that she laughed when Noel read her this reference in *Manstopper*. As to the interaction

between Whipple and the dogs, Smith testified about Whipple's fear of the animals and her being bitten by one of the dogs while Noel was present. Further, the negative comments Knoller, herself, made regarding Whipple to the media provided stronger evidence of her attitude toward the victim than Noel's description in the letter. Moreover, Knoller's grand jury testimony where she called Moser, the person who complained about being bitten by one of defendants' dogs, an "idiot," provided strong evidence of her attitude and her disregard for her neighbors.

The last two letters admitted into evidence, which Knoller claims constituted error, involved statements by Noel in support of Schneider. The first letter indicated that defendants supported Schneider's stabbing of an attorney in court and that they would not attempt to stop Schneider should he try to escape. In the second letter, Noel identified the location of a witness for the prosecution in a federal case against the Aryan Brotherhood. Although the admission of these two letters is more troubling than the others, they were not impermissibly prejudicial. These letters were not the only evidence of the Aryan Brotherhood affiliation. Knoller, herself, admitted a close personal relationship with Schneider and knowledge that he was a member of the Aryan Brotherhood. Knoller's attorney had mentioned that Schneider was in prison for attempted murder and asked Knoller about this letter in her direct examination. The fact that the knife used in that stabbing had a symbol of the Aryan Brotherhood was admissible and provided further evidence of their association with the gang. The letters do show a callous disregard for people and society. However, as discussed *ante*, the evidence evincing Knoller's disregard for the public was overwhelming when she made derisive comments about the people who had complained about the Presas, blamed Whipple for the attack, and failed to call 911 or assist the dying Whipple after the Presas had attacked her.

In sum, the evidence against Knoller was overwhelming without the letters. It was Knoller's own letters, her own testimony, her own admissions regarding her relationship with Schneider, her own comments to the media, her own admission regarding her knowledge about Presa Canarios, and the witnesses' testimony about seeing her unable to control the Presas that provided more than ample evidence to support her convictions for

second degree murder, involuntary manslaughter, and having a mischievous dog that killed someone.

C. *Not Allowing Knoller to Testify Regarding Noel's Statements to Her about Being Bitten by Bane*

While testifying, Knoller stated that Noel had described to her after the incident how he was injured. When asked what Noel said to her, the People objected. Defense counsel then asked Knoller if it was her understanding that Bane had bitten Noel on the hand, and the People again objected on the grounds of hearsay and lack of personal knowledge. The trial court sustained the objection and instructed the jury to "disregard any testimony about how the injury occurred in the absence of personal knowledge by Ms. Knoller."

Knoller argues that this statement was admissible for the nonhearsay purpose of establishing Knoller's state of mind and excluding it violated her federal due process rights. Knoller did not raise this specific ground of admissibility in the trial court and may not rely upon it for the first time on appeal. (*People v. Fauber* (1992) 2 Cal.4th 792, 854 [defendant precluded from asserting nonhearsay purpose for admission of evidence for first time on appeal]; see also Evid. Code, § 354, subd. (a).) The constitutional nature of Knoller's claim does not excuse her failure to identify the theory of admissibility in the trial court. (*Coleman v. Thompson* (1991) 501 U.S. 722, 750 [a claim that is procedurally defaulted under state law may not support a finding of federal constitutional error].)

Further, we agree with the People that Knoller has failed to establish a constitutional violation. Application of the ordinary rules of evidence does not impermissibly infringe on the accused's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*Id.* at p. 1103.) Denying Knoller the opportunity to testify about Noel's statements about how he was injured clearly did not rise to the level of depriving Knoller of a defense and therefore did not involve an alleged error of constitutional dimension.

Further, she testified that she did not discover that Bane was the one that had injured Noel's hand until she talked with Noel in the hospital emergency area prior to his having surgery.[25] Thus, according to her own testimony, Noel did not tell her what happened right after the incident.

Although Knoller has failed to preserve this objection on appeal, in order to preclude any future possible ineffective assistance claim, we consider whether excluding this testimony was harmless under *People v. Watson*, *supra*, 46 Cal.2d 818. As stated above, Knoller testified that she did not learn that Bane was the one that had caused the injury until after they went to the hospital. Thus, she did testify regarding her understanding of what had happened. Moreover, Knoller did testify that she observed Noel trying "to manipulate Bane's jaws and teeth to open, to have him open and release the Malinois." Further, the jury heard Noel's testimony before the grand jury that his hand accidentally slid into Bane's mouth as the two dogs were biting each other and his testimony that "it wasn't a situation where Bane was biting me." Accordingly, Knoller has completely failed to establish any prejudice.

D. *Deprivation of Counsel*

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel during critical stages of the proceedings. (*Herring v. New York* (1975) 422 U.S. 853, 857 (*Herring*) [trial judge's order denying counsel opportunity to make summation at close of bench trial denied defendant assistance of counsel].) Closing argument is clearly a critical stage of a criminal trial and the complete deprivation of the right to counsel at the defendant's closing argument requires reversal per se. (*Ibid.*) Knoller contends she was deprived of her constitutional right to counsel during the prosecution's closing rebuttal argument when the court ordered her attorney, Nedra Ruiz (Ruiz), not to

---

[25] Knoller was asked why she kept Bane after the dog had bitten Noel, and she responded: ". . . I did not know that Bane was the one who had injured Robert's hand. I found that out when Robert and I were talking in the hospital emergency area prior to his going up for surgery. That's when he described to me how his hand was injured, because I wasn't sure whether it had occurred by the Malinois or by Bane."

make any further objections or she would be placed in a holding cell. For the reasons set forth below we reject Knoller's claim that she is entitled to reversal per se.

1. *Closing Argument*

The prosecution and counsel for both Knoller and Noel presented their closing arguments to the jury without any significant infringement on their arguments by the trial court. However, after the prosecution had given a little more than one-third of its rebuttal closing argument, Ruiz, Knoller's attorney, objected on the basis that the prosecutor had misstated the evidence. The court admonished counsel that this was closing argument and told her that "[t]here will be no further interruptions or you will be out of the courtroom."

Subsequently, the prosecution argued: "The evidence, and it's uncontradicted, is that time and time again they were warned wear a muzzle, put a choke collar on and they said in Mr. Noel's words I can do whatever I god damn please, I can go to any park I want with the dog off-leash." Counsel for Knoller objected, stating "the dog was on leash at all times." At this point, the prosecution had made more than three-quarters of its rebuttal closing argument.

The court reprimanded Ruiz and stated the following: "Counsel, there will be no further objections. The jury will recall the evidence.

"Ladies and gentlemen, it is improper and counsel's conduct is improper by standing up in closing argument and objecting to her recollection of what the evidence was. The jury will recall what the evidence is. Arguments of counsel are not evidence and it is improper.

"And, Ms. Ruiz, please take your seat now and not get up again or the next objection will be made from the holding cell behind you.

"Ladies and gentlemen, counsel are entitled to argue what they believe the evidence is. If they are wrong, the jury will recall that. What counsel say the evidence is, is not the evidence. And it is not a proper objection to stand up in the middle of closing argument and insert your own interpretation of what the evidence is."

Neither Ruiz nor the attorney for Noel objected during the remainder of the prosecution's closing rebuttal argument.

After the trial concluded, at the hearing on the motion for a new trial, the court considered the issue that its order to Ruiz to refrain from objecting any further supported a deprivation of counsel claim. The court explained: "This is not on the record and I am putting it on the record now for this reason. The way the courtroom in Los Angeles is set up, it's a very big court, a large room, much wider than this one. The jury box is over to my right, to your collective left and the way the tables were set up, Ms. Ruiz and her client were over to my left so that when you look at the jury box, you can't see them. Your back is turned, you have to physically turn.

"During the course of [the prosecutor's] rebuttal on March 19th, where I was watching them, the Court had caught—and this was independently verified by security staff down in Los Angeles. I was caught by a substantial amount of noise coming from the defense table and I looked over and Ms. Knoller and Ms. Ruiz were engaged in a very animated discussion with a lot of waving of hands which included on the part of Ms. Knoller the 'Get up, get up, get up,' the waving of arms going up like that (indicating) and suddenly in the middle . . . . Ms. Ruiz for perhaps the second time in the trial did not make a speaking objection. She simply stood up and said 'Misstates the evidence.' It's the Court's view that was an improper objection. The evidence that she was talking about was virtually impossible to identify and it was the Court's view—and this was independently corroborated by security staff, . . . who was so concerned about the amount of noise that he got up to stand over there because he was afraid that something was going to happen. The waving of hands, the 'stand up,' it appears to this court that this was an objection inserted into the record for the purposes of interrupting the flow of the prosecution's rebuttal argument and nothing more than that. [¶] . . . [¶]

"This was a second objection which appeared to the Court more to be—more designed to interrupt the flow of the prosecution's rebuttal argument than anything else. And the Court was quite stern with Ms. Ruiz. The Court indicated that there would be no further objections. I wish I had inserted the word 'improper' in there, I didn't, but my

description to the jury afterwards of why it is not proper for counsel to stand up in the middle of an argument and dispute a rather small technical point of evidence, I certainly suggested that Ms. Ruiz remain in court and was free anytime under the obligation to insert whatever objections she deemed appropriate on behalf of her client. She was never removed. And this should be considered a compliment to Ms. Ruiz. I do not believe that she would be at all cowered into silence by any of my comments made from the bench."

2. *The Effect of the Court's Order that it Would Expel Ruiz if She Objected Again During the End of the Prosecutor's Closing Rebuttal Argument*

Even if we presume Ruiz did refrain from making any further objections during the prosecutor's rebuttal closing argument as a result of the court's oral order[26] and threat

---

[26] Although Knoller maintains that the court's order unambiguously silenced her, the record establishes that immediately after it told Ruiz not to object any further or she would be placed in the holding cell, it explained to the jury that Ruiz's conduct was "improper." It then explained to the jury the reasons it perceived her conduct as being improper. Thus, a reasonable attorney would have interpreted the court's order as indicating that Ruiz was not to make any further "improper" objections. To the extent the court's ruling was ambiguous, Ruiz had a duty to seek clarification. (See *Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, 796 ["An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling"].)

Even if we agree that the court's order did forbid Ruiz from making any further objections, Knoller is somewhat disingenuous when she asserts that this oral order by the court cowed Ruiz into foregoing her duty to her client to represent her client's interests zealously (see, e.g., *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126-127). Not only had the court's threat just minutes earlier that Ruiz would "be out of the courtroom" if she made any further interruptions had no effect on silencing Ruiz, but Ruiz had purposefully violated an earlier gag order. Prior to the trial, the court issued a gag order, which was modified on several occasions. The amended order specified, among other things, that no attorney connected to this case was to make any extrajudicial statements relating to this case for dissemination by any means of public communication, and it then set forth a few exceptions. The order specified: "This exception does not authorize comments regarding the credibility or veracity of any witness nor any comment regarding the effect the testimony would have on the charges." It expressly stated that a violation of this order was "to be treated as contempt."

Subsequently, on March 5, 2002, Ruiz appeared as a guest on the Greta Van Susteren show, which aired on national television. On this show, Ruiz volunteered her

to place her in the holding cell,[27] this did not deprive Knoller of her Sixth Amendment right to the assistance of counsel requiring reversal per se. The Constitution "entitles a criminal defendant to a fair trial, not a perfect one." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) "Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11.) It is well settled that " 'most constitutional errors can be harmless.' [Citation.] '[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' [Citation.] Indeed, we have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' [Citations.]" (*Neder v. United States* (1999) 527 U.S. 1, 8.)

Constitutional violations that defy harmless-error review contain "a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the

---

opinion that witness Smith "had been willfully false and had lied during her testimony on the stand in trial earlier that day." Following the trial, on May 17, 2002, the court held a hearing on the order to show cause regarding these statements to the media by Ruiz and other statements to the media by District Attorney Terence Hallinan. Ruiz acknowledged violating the court's order, but she explained, ". . . I felt that I had a duty to my client to speak in her behalf and so I did, and those are the reasons for—for what I did and what I said."

Thus, Knoller's argument that the court's admonishment to Ruiz not to make any more objections or she would be placed in a holding cell functioned to silence Ruiz and caused her to forego her duty to her client to represent her zealously is suspect. Ruiz had an obligation to continue to represent her client while in the court room (see *Hawk v. Superior Court*, *supra*, 42 Cal.App.3d at pp. 126-127), and her past conduct confirmed that, even outside the courtroom, she purposefully acted in contravention of a court's order when she believed such acts were in her client's best interest.

[27] Under the dissent's analysis, the trial court's initial instruction to Ruiz to stop interrupting or she would be "out of the courtroom" violated Knoller's Sixth Amendment right. Since the significant factor is that the court threatened to expel Ruiz from the courtroom, it does not matter whether the threat was simply to banish her to the hallway or to place her in a holding cell. Thus, according to the dissent, reversal was required the first time the trial court told Ruiz to be quiet or she would be out of the courtroom.

trial process itself.' [Citation.] Such errors 'infect the entire trial process,' [citation], and 'necessarily render a trial fundamentally unfair,' [citation]. Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' [Citation.]" (*Neder v. United States, supra,* 527 U.S. at pp. 8-9.)

Although Knoller does not rely on *United States v. Cronic* (1984) 466 U.S. 648 (*Cronic*), and does not cite to it except in response to the People's brief discussion of this case, the dissent interprets what it refers to as the "*Cronic* principle" as mandating reversal. We are unclear what the dissent means by the "*Cronic* principle," but the holding in *Cronic* requires us to apply the harmless error analysis to this record. The United States Supreme Court stated in *Cronic* that the defendant is not entitled to perfect assistance and is only deprived of his or her Sixth Amendment right to effective assistance when the trial process "loses its character as a confrontation between adversaries . . . ." (*Id.* at pp. 657-658, fn. omitted.) The most obvious example is "the complete denial of counsel" "at a critical stage." (*Id.* at p. 659.) The *Cronic* court does not state that a limitation on counsel "during" a critical stage constitutes structural error.

The holding in *Cronic, supra,* 466 U.S. at pages 658-662, has been reiterated by the United States Supreme Court in *Bell v. Cone* (2002) 535 U.S. 685, 696 (*Bell*). The United States Supreme Court in *Bell* explained that it "identified three situations implicating the right to counsel [in *Cronic*] that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' [Citation.] [¶] First and '[m]ost obvious' was the 'complete denial of counsel.' [Citation.] A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at 'a critical stage,' [citation], . . . [Footnote omitted.] Second, we posited that a similar presumption was warranted if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' [Citation.] Finally, we said . . . where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the

proceedings were affected." (*Bell, supra,* 535 U.S. at pp. 695-696.)

The dissent, ignoring the warning in *Cronic* that the defect "at the critical stage" must undermine the entire adversary process (*Cronic*, *supra,* 466 U.S. 657), maintains that any limitation on counsel during a critical stage results in reversal per se. The dissent relies exclusively on its interpretation of the following footnote in *Cronic*: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at p. 659, fn. 25.) According to the dissent, the court "prevented" Ruiz from assisting Knoller by ordering Ruiz not to object any further during the last portion of the prosecution's rebuttal closing argument or she would be doing it from the holding cell. The dissent is interpreting the *Cronic* footnote inconsistently with the United States Supreme Court's own discussion of its holding and is elevating the significance of this footnote far beyond what any other court has done. In a footnote, the United States Supreme Court in *Bell v. Cone* has explained the meaning of this footnote in *Cronic*. (*Bell, supra,* 535 U.S. at p. 696, fn. 3). The United States Supreme Court clarified that this footnote states that no prejudice needs to be shown when the criminal defendant "had actually or constructively been denied counsel [at a critical stage] by government action." (*Ibid.*) As discussed *ante*, the United States Supreme Court expressly stated that the holding in *Cronic* is that the state's action must result in the actual or constructive " '*complete* denial of counsel.' " (*Bell, supra,* at p. 696, italics added.)[28]

Under *Cronic* and *Bell* prejudice is presumed only under the most egregious conditions. Prejudice is presumed when the state interferes to the extent there is a complete deprivation of counsel during a critical stage of the proceeding. In addition,

---

[28] Further, we are mindful that two justices on our own Supreme Court have admonished us not to read too much into the footnotes in *Cronic*. Justice Brown stated: "As Justice Mosk previously recognized, '[t]he devil may often be in the details, but the rule of *Cronic* is not in its footnotes.' " (*In re Visciotti* (1996) 14 Cal.4th 1089A (dis. opn. of Brown, J.), quoting *In re Avena* (1996) 12 Cal.4th 694, 726-728 (dis. opn. of Mosk, J.).

error by counsel may be presumed in the rare circumstances when counsel's actions undermined the reliability of the finding of guilty, such as, when counsel repeatedly slept through the guilt phase of the trial (e.g., *Burdine v. Johnson* (5th Cir. 2001) 262 F.3d 336, 345), counsel was intoxicated during the entire trial (e.g., *State v. Keller* (1929) 57 N.D. 645 [223 N.W. 698]), or counsel had an actual conflict of interest affecting performance (*Cuyler v. Sullivan* (1980) 446 U.S. 335). In the present case, we are only concerned with the state's interference causing the actual or constructive complete deprivation of counsel.

The situation before us does not approximate any of the other cases where a court has held prejudice per se based on actual or constructive complete deprivation of counsel. Courts have concluded that there is actual or constructive complete deprivation of counsel as a result of the state's actions in the following situations: counsel for defendant was prevented from giving any closing argument (e.g., *Herring, supra*, 422 U.S. at p. 857); no counsel was appointed for an indigent defendant in a robbery prosecution (*Gideon v. Wainwright* (1963) 372 U.S. 335); the defendant was prevented from consulting counsel "about anything" during a 17-hour overnight recess (*Geders v. United States* (1976) 425 U.S. 80); the state law required the defendant to testify first or not at all, which deprived the defendant of "the 'guiding hand of counsel' " in the timing of this critical element of the defense (*Brooks v. Tennessee* (1972) 406 U.S. 605); the attorney was barred from conducting any direct examination of the client (*Ferguson v. Georgia* (1961) 365 U.S. 570); the defendant was deprived of any counsel during the supplemental instruction to the jury (*French v. Jones* (6th Cir. 2003) 332 F.3d 430); counsel was prevented from arguing an entire theory of the defense (e.g., *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739); counsel was stopped from cross-examining a particular witness (e.g., *Davis v. Alaska, supra*, 415 U.S. at pp. 317-318); the defendant had no counsel at his arraignment in a capital case (*Hamilton v. Alabama* (1961) 368 U.S. 52, 55); the defendant had no counsel when he entered a guilty plea at the preliminary hearing, and this initial plea was introduced into evidence at the defendant's trial (*White v. Maryland* (1963) 373 U.S. 59, 60); and the defendant had requested counsel but did not

receive any at the time he was convicted and sentenced (*Williams v. Kaiser* (1945) 323 U.S. 471).

The cases cited in *Cronic*, *supra*, 466 U.S. at page 659, "involve instances where something having to do with the truth-seeking process was prevented by court ruling, or where the part to be played in that process by defense counsel was *wholly* absent." (*Green v. Arn* (6th Cir. 1987) 809 F.2d 1257, 1265, italics added.) The case before us differs significantly from these rare cases that have reversed for structural error as the truth-seeking or adversarial process was not significantly frustrated. Ruiz was not precluded from giving any part of her closing argument (e.g., *Herring, supra*, 422 U.S. at p. 857), from arguing an entire theory of the defense (e.g., *Conde v. Henry, supra,* 198 F.3d at p. 739), from communicating with her client (e.g., *Geders v. United States*, *supra*, 425 U.S. 80), or from cross-examining a particular witness (e.g., *Davis v. Alaska*, *supra*, 415 U.S. at pp. 317-318).

At best, the court limited Ruiz's ability to object during the last part of the prosecution's closing rebuttal argument. The *Herring* court clarifies that the judge retains the power to control the courtroom, including limiting or interfering with the attorney's argument: "This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion." (*Herring*, *supra*, 422 U.S. at p. 862.) Here, the judge did not threaten Ruiz with being placed in the holding cell until after she had completely flouted his prior orders, including his admonition minutes earlier that if she continued to interrupt she would be out of the courtroom.

Indeed, the dissent fails to address the trial court's authority to control the courtroom, and its need to control Ruiz who had defiantly ignored its warning that further interruptions would result in her being banished from the courtroom and who had shown

a complete disregard for other court orders, even when such orders stated that a violation would result in contempt.[29] Under the rule proposed by the dissent, the trial court faced with a determined, obstreperous attorney would have two choices: (1) refrain from making the orders necessary to stop counsel from continuing to interrupt, resulting in a mockery of the trial process, or (2) threaten the attorney with removal to the holding cell after the other admonitions—including being expelled from the courtroom—had no effect, resulting in an automatic reversal of the judgment by the reviewing court. Both situations would result in the complete degradation of the trial process.

Our Supreme Court and the United States Supreme Court have never embraced the rule being proposed by the dissent. Although not exactly the issue presented here, our Supreme Court has made clear that a ruling that adversely affects the defense's closing argument does not necessarily result in prejudice per se. Our Supreme Court specified that to the extent that *In re William F.* (1974) 11 Cal.3d 249, "a case in which no argument at all was permitted[,] implies that error adversely affecting defense counsel's closing argument necessarily infringes on the defendant's constitutional right to the assistance of counsel [citation], it is unsound and is hereby disapproved." (*People v. Bonin* (1988) 46 Cal.3d 659, 695, fn. 4, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Here, defense counsel's closing argument was not affected. Only her ability to object to the last fraction of the prosecutor's rebuttal closing argument was arguably impacted.

Rather than point to any case that resulted in per se reversal under conditions similar to the situation present here, Knoller and the dissent cite to contempt cases. (See e.g., *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 695-697; *Sacher v. United States* (1952) 343 U.S. 1, 9; *Cooper v. Superior Court* (1961) 55 Cal.2d

---

[29] We note that the trial court exhibited significant patience in dealing with Knoller's counsel who had engaged in extremely disruptive behavior throughout the trial that included, but was not limited to, writhing on the floor during the trial, purposefully disobeying a prior gag order, improperly telling the jury that the victim was a lesbian by stating that charges were only brought against her client "to curry favor with the homosexual community," and disregarding the court's prior admonitions not to interrupt.

291, 298-302 ["When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4 1/2 of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand"].) These contempt decisions are concerned with courts' failures to follow lawful contempt procedures. Knoller acknowledges that these contempt cases are addressing a completely different issue. However, she insists that, although they have no relevance because of their "context or result[,]" they are germane "because of the constitutional principles on which they are expressly founded." Thus, for example, she cites the following quote from *Sacher*, "Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling." (*Sacher, supra,* at p. 9.) Knoller, however, excises the remainder of the court's statement, which explains: "Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case." (*Ibid.*) The *Sacher* decision does not suggest that any interference with the attorney's ability to press his or her claim results in reversal. Rather, the court makes it clear that the attorney's obligation is to make a record sufficient for appeal and the court retains the power to control the proceeding.

The other contempt cases cited by Knoller are similarly unavailing. The court in *Cooper* acknowledges that an attorney has a duty to make objections on his or her client's behalf, and a judge cannot absolutely foreclose that. (*Cooper, supra,* 55 Cal.2d at p. 302.) The court in *Cannon* reviewed the decision to remove a judge who had, as well as other actions, incarcerated public defenders and effectively denied the defendants the effective right to counsel because substituted counsel had insufficient time to prepare. (*Cannon, supra,* 14 Cal.3d at pp. 696-697.) Neither decision suggests that any threat of incarceration combined with a restriction on the ability to object results in prejudice per

se. Indeed, our Supreme Court has clarified that the removal of counsel *does not* automatically result in prejudice. (*People v. Jones* (2004) 33 Cal.4th 234, 243-244 [trial court has authority to remove indigent defendant's appointed attorney because of potential conflict of interest].) If removal does not result in automatic prejudice, then the threat of removal combined with the order not to make any more objections cannot result in automatic prejudice.

In any event, these contempt cases are essentially irrelevant to the issue before us. As already stressed, the complete deprivation of counsel is structural error because "the entire conduct of the trial from *beginning to end* is obviously affected by the absence of counsel for a criminal defendant . . . ." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307, italics added.) A constitutional deprivation is a structural defect "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Ibid.*, see also *People v. Bonin, supra,* 46 Cal.3d at p. 695.) We know of no case holding that limiting an attorney's role or ability to object during a portion of the closing argument results in prejudice per se.[30] Ruiz does not argue that she was foreclosed from raising a defense, from presenting an argument, or from objecting throughout the entire critical stage of closing argument. Rather, her sole complaint is that she suffered prejudice because, subsequent to her being told to stop objecting, the prosecutor improperly appealed to the jurors' passions and prejudice. Such a complaint is an issue of prejudice easily addressed by a harmless error analysis and does not approach the level of establishing that her trial was *so fundamentally unfair* that the court's actions undermined the reliability of the finding of her guilt. (See, e.g., *People v. Hill, supra,* 17 Cal.4th at pp. 844-847.)

Further, as already highlighted, this is not a situation where Ruiz was barred from

---

[30] We are aware of a Kansas decision where the court instructed counsel to stop objecting during closing argument. (*State v. Jeffrey* (Kan. 2003) 75 P.3d 284.) The reviewing court concluded that the defense counsel had made two proper objections when the court prohibited further objections. (*Id.* at p. 290.) The reviewing court applied a harmless error analysis. (*Id.* at p. 292.)

making an objection during the entire closing argument,[31] nor was she in any way barred from making a motion or presenting evidence regarding a defense. Rather, this is a situation where the court instructed her not to interrupt any further or she would be expelled and placed in the holding cell. Rather than structural error, this situation is similar to when a reviewing court considers the erroneous overruling of an objection during closing rebuttal argument or considers prosecutorial or judicial misconduct when objecting would be futile (see, e.g., *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-847). Under both of these circumstances, it is well settled that the reviewing court applies a harmless error analysis.

Here, the dissent refuses to apply harmless error in a situation where counsel objected all through trial and throughout most of the closing argument. At best, Knoller could argue that it was futile for her attorney to object during the final moments of the closing rebuttal argument, but automatically reversing the judgment on this basis, as the dissent wishes to do, contravenes our Supreme Court's precedent. Our Supreme Court has applied the harmless error analysis in a situation where the attorney did not object to the alleged prosecutorial misconduct *throughout* the trial because the judge had made it clear that such objections would be denied and ridiculed. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 821-822, 844-847 [counsel could infer from trial court's prior rulings and comments that it disfavored additional interruptions during the questioning of witnesses or during closing argument and therefore Supreme Court applied harmless error to alleged prosecutorial misconduct].) We, unlike the dissent, are not willing to create an entirely new, all-encompassing category of structural error, especially when we have before us a clear record of any alleged prosecutorial misconduct during the waning moments of closing rebuttal argument.

"[T]he harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the

---

[31] We express no opinion as to whether the complete foreclosure of objections during closing argument could result in structural error.

underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-308.) "Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of *every* criminal conviction in which the error occurs), the court must be certain that the error's presence would render *every* such trial unfair." (*Sherman v. Smith* (4th Cir. 1996) 89 F.3d 1134, 1138.)

E. *Prosecutorial or Judicial Misconduct*

The only remaining questions are whether the claims of prosecutorial misconduct and judicial misconduct under state law are preserved and, if so, do they survive a harmless error analysis. Ordinarily, defense counsel has to object to the court's conduct and request an admonishment to preserve the issue for appeal. (See, e.g., *People v. Fudge, supra,* 7 Cal.4th at pp. 1108-1109.) Similarly, counsel is obligated to object to improper statements during a closing argument to preserve the claim of prosecutorial misconduct for appellate review. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 79.) However, counsel's failure to object is excused where the record establishes that such an objection would be futile. (See, e.g., *People v. Hill, supra,* 17 Cal.4th at pp. 820-822.) The appellate court may remedy the error simply by reaching the merits of the prosecutorial and judicial misconduct claims. We therefore consider these issues as if Knoller had properly objected.

1. *Prosecutorial Misconduct*

Knoller's argument of prejudice stems from statements made by the prosecutor at the end of his rebuttal closing argument and after the judge had made his "holding cell" comment. Specifically, Knoller objects to the following argument made by the

prosecutor: "Last thing I want you to think about, please, because this is a murder case and you try to recreate Diane Whipple's time in that hallway, what is it she saw before that first bite? . . . [¶] Mr. Noel writes 'Before I could get my body in the doorway to block them, they pushed forward into the hall and took off side by side down the hall toward the elevator in a celebratory stampede.' Think of Diane. '240 pounds of Presa wall-to-wall bouncing off and heading for the wall at the end of the hall.' Exactly where Diane was standing before she was bitten by these dogs.

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

Knoller contends that the prosecutor's argument was "utterly irrelevant." She argues that the prosecutor had emphasized that the theory of liability rested on Knoller's act of leaving the apartment and therefore all of the evidence that occurred in the hallway was irrelevant. We conclude that Knoller's argument of irrelevance is entirely without merit. (See, e.g., *People v. Johnston*, *supra*, 113 Cal.App.4th at p. 1309.) Knoller's defense and Ruiz's closing argument emphasized that Knoller had a profound respect for life and that she did everything in her power to save Whipple from the dogs. Thus, the argument that Knoller abandoned Whipple in the hallway was proper rebuttal and relevant to the charge of second degree murder in establishing her disregard for human life. Further, the evidence of Whipple's severe injuries was particularly relevant to dispute Knoller's claim that she attempted to protect Whipple. Officer Forrestal testified that, when she arrived on the scene, she spotted Whipple, who was attempting to crawl

towards her apartment and who was bleeding profusely from a severe neck wound. Cardenas, an EMT who arrived at the scene and administered first aid to Whipple, testified that Whipple had a large wound to her neck, which was bleeding profusely, and she was having problems breathing.

In addition, Knoller argues that the prosecutor improperly appealed to the jurors to "consider the suffering of the victim." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057; *People v. Fields* (1983) 35 Cal.3d 329, 362, revd. on other grounds *sub. nom. Stansbury v. California* (1994) 511 U.S. 318 ; *People v. Talle* (1952) 111 Cal.App.2d 650, 676-677; *People v. Pitts* (1990) 223 Cal.App.3d 606, 701-707, superseded by statute on other grounds; *People v. Simington* (1993) 19 Cal.App.4th 1374, 1378-1379; see also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [prosecutor asked jurors to suppose crime had happened to their children].) "[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt." (*Stansbury, supra,* at p. 1057.) The prosecutor has an independent duty to avoid inflammatory argument designed only to prejudice or inflame the jury. (Cf. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1249.) A conviction cannot be based on innuendo or improper inferences drawn from inflammatory and irrelevant matters. (See, e.g., *People v. Wagner* (1975) 13 Cal.3d 612, 619.)

We disagree that the prosecutor's statements were simply an appeal to the jury to consider the suffering of the victim. Here, the prosecutor did not ask the jurors to place themselves in the position of Whipple as occurred in *People v. Fields,* but rather told them to try to recreate the scene in the hallway. We agree, however, when the prosecutor invited the jurors to "think" of Whipple, he was appealing to the jurors to view the case through the eyes of Whipple rather than to view the evidence objectively. (See, e.g., *People v. Fields, supra,* 35 Cal.3d at pp. 361-362.) Accordingly, the extent to which these remarks appealed to the jury's passion and prejudice, they were improper.

We note that most courts have held such comments not to be prejudicial. (See, e.g., *People v. Fields, supra,* 35 Cal.3d at p. 362 [no prejudice]; *People v. Stansbury, supra,* 4 Cal.4th at p. 1057 [same]; *People v. Simington, supra,* 19 Cal.App.4th at p 1379

[same].) Here, any error was harmless under *People v. Watson, supra,* 46 Cal.2d at page 818. These few comments by the prosecutor that invited the jurors to "think of Diane" do not warrant reversal and must be viewed in their context. (See *People v. Stansbury, supra,* at p. 1057.) These comments primarily focused on the evidence and the jury was instructed not to be swayed by sympathy, passion, or prejudice in reaching its verdict.

Moreover, even if the prosecutor committed misconduct under California law, that misconduct was not prejudicial because it is not reasonably probable a result more favorable to the defendant would have occurred had the prosecutor not made his remarks. (*People v. Fields, supra,* 35 Cal.3d at p. 363.) As discussed *ante,* the evidence of Knoller's guilt was overwhelming. (See discussion in pts. II.C.2. and III.A.6, *ante*.)

2. *Judicial Misconduct*

Knoller contends that the court's statements to Ruiz that she needed to remain quiet or face the holding cell as well as its reprimanding her for making an objection constituted judicial misconduct and was prejudicial under *Chapman, supra*, 46 Cal.2d at page 24. Knoller asserts that the court's unwarranted reprimand conveyed to the jury that Ruiz was not to be trusted. (*People v. Mahoney* (1927) 201 Cal. 618, 626-627; *People v. Zammora* (1944) 66 Cal.App.2d 166.) Knoller complains that the prosecutor interrupted Ruiz's closing argument based on inappropriate argument, which she characterizes as essentially an objection based on the misstatement of the evidence. The court did not castigate the prosecutor. In contrast, she was severely reprimanded for objecting on the basis of the prosecutor's misstating the evidence. Further, Knoller asserts that she had the right to object on this basis. (See *McCann v. Municipal Court* (1990) 221 Cal.App.3d 527, 539.)

A trial court commits misconduct if it *persistently* makes discourteous and disparaging remarks so as to discredit the defense or create the impression it sides with the prosecution. (*People v. Fudge, supra,* 7 Cal.4th at p. 1107.) A judge's comments are evaluated " 'on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.] 'The propriety and prejudicial effect of a particular comment are judged both

by its content and by the circumstances in which it was made.' " (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.)

Knoller cites *People v. Mahoney, supra*, 201 Cal. 618 and *People v. Zammora, supra,* 66 Cal.App.2d 166, where the reviewing courts concluded prejudicial judicial misconduct occurred. In *Zammora,* the trial judge accused counsel of repeatedly making unfounded objections, suggested the attorney look up what a leading question was, sarcastically referred to someone using ventriloquism to make counsel's statements for him, and accused counsel of being asleep. (*People v. Zammora, supra,* at p. 209.) In *Mahoney,* the court remarked, " ' "Now, that question . . . you know is not a proper question. I am willing to allow a lot for ignorance, but some questions pass the bounds, and that is one of them." ' " (*People v. Mahoney, supra,* at p. 624.) This same judge commented that counsel's objection was " ' "idiotic" ' " and had not " ' "a scintilla of sense." ' " (*Id.* at p. 625.) The trial court in *Mahoney* made 23 remarks, disparaged a defense expert witness in the jury's presence, and questioned defense witnesses in a manner that demonstrated a clear bias for the prosecution. (*Id.* at pp. 621-623.)

The facts of the decisions cited by Knoller are very different from the misconduct alleged here. The judge in the case before us did not exhibit a persistent antagonism toward defense counsel by continuously belittling her in the jury's presence. Indeed, the court was rather tolerant of Ruiz's speaking objections and her constant attempts to insert her own interpretations of the evidence. The court repeatedly warned her to stop without disparaging her skills as an attorney. Even in the court's statement that serves as the basis for the allegation of misconduct, the court was clear to inform the jury that it believed Ruiz was improperly objecting based on her recollection of evidence and it reminded the jury that arguments of counsel are not evidence. The court did not speak derisively about Ruiz or the defenses presented.

Further, the court had warned Ruiz , "[t]here will be no further interruptions or you will be out of the courtroom[,]" shortly before making the remark about the "holding cell." This stern warning apparently had no effect because Ruiz, very shortly thereafter, objected again on the same basis. The court believed the sole purpose of Ruiz's objection

was to disrupt the prosecution's rebuttal closing argument. Although the court probably should not have threatened Ruiz with the holding cell, it appears that the earlier threat to remove her had no effect.

The entire transcript does not demonstrate unfairness or undue criticism of defense counsel, but a desire to control the proceedings. (Pen. Code, § 1044; *People v. Fudge, supra,* 7 Cal.4th at p. 1108 [trial court entitled to "exercise[e] its reasonable control of the trial"].) At most, the court improperly became angry with what it perceived to be Ruiz's disruptive behavior, which had not even been stymied when the court threatened to remove her. The trial court does not commit misconduct simply by evidencing irritation with counsel or admonishing counsel in the jury's presence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) These comments fall far short of establishing misconduct or "betray[ing] a bias against defense counsel." (*People v. Wright* (1990) 52 Cal.3d 367, 411.) Accordingly, we conclude there was no judicial misconduct.

F. *Blakely Error*

Knoller contends her sentence to the aggravated term for the manslaughter conviction constituted error pursuant to *Blakely, supra,* 542 U.S. ___ [124 S.Ct. 2531]. Since we are reversing and remanding, the trial court may reinstate the second degree murder conviction and consider the proper sentence. Accordingly, any possible *Blakely* error regarding sentencing may become moot.

IV. *Noel's Appeal*

A. *Admission of Gang Evidence*

Noel argues that the admission of gang evidence violated his due process rights because the evidence, according to him, was irrelevant to any fact at issue in the case. As already discussed extensively in Knoller's appeal (see pt. III.A.5, *ante*), this evidence was relevant to disputing defendants' claim that they were simply involved in rescuing the dogs as pro bono attorneys. For the same reasons already specified in the discussion of Knoller's appeal, we reject Noel's contention that this evidence was irrelevant and that the court erred or abused its discretion in admitting it.

Further, the admission of this evidence did not result in prejudice to Noel. The evidence against him regarding involuntary manslaughter (§ 192, subd. (b)) and failure to keep "mischievous" dogs with ordinary care (§ 399) was overwhelming. Noel, himself, admitted that Knoller was unable to control the Presas and he was present during many of the 30 incidents where the Presas lunged and growled at people. Noel proudly wrote about two incidents where the Presas broke away from Knoller and ran into the hallway. Thus, his act of leaving Knoller alone with the Presas, with full knowledge of their dangerous propensities and of Knoller's inability to control them, amply supported his convictions for violating sections 192, subdivision (a), and 399.

B. *Insufficient Evidence to Support Manslaughter Conviction*

Noel maintains his actions were not a proximate or substantial cause of Whipple's death and therefore the record contains insufficient evidence to support the involuntary manslaughter conviction (§ 192, subd. (b)). Noel agrees that the prosecution presented substantial evidence that he knew the Presas were dangerous and that Bane was sick. Noel agrees that he may have been negligent in leaving Knoller alone with the Presas until 3:00 p.m., the time he planned to return home. Noel points out that he was absent past 3:00 p.m.—and at the time when Whipple was killed—only because he was delayed returning home because of a flat tire on the car he was driving. Thus, his absence during this critical period, according to Noel, was not due to a negligent act and was not the cause of Whipple's death.

This argument by Noel merits little discussion. "It is generally held that an act is criminally negligent when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm." (*People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.) "The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of the accused tended to endanger life." (*Ibid.*) "In a case of involuntary manslaughter the criminal negligence of the accused must be the proximate cause of the death." (*Ibid.*) "[A] 'cause of death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and

without which the death would not occur.' " (*People v. Cervantes* (2001) 26 Cal.4th 860, 866, citing CALJIC No. 3.40.)

Noel appears to be arguing that his intent to be home at a specific time was relevant. However, his intent is irrelevant to negligent manslaughter, which does not require specific intent. (*People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [involuntary manslaughter is an unintentional killing].) Under proximate cause liability, Noel was responsible both for those consequences he intended and for those he might reasonably have foreseen. (*People v. Cervantes, supra*, at p. 871.)

We view the evidence in the light most favorable to the guilty verdict and therefore we must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (See, e.g., *People v. Staten* (2000) 24 Cal.4th 434, 460.) The fact that Noel may have been delayed due to car problems, traffic, or other circumstance was certainly foreseeable and not a superseding cause sufficient to break the chain of causation. "The critical factor in determining the question of proximate cause is the foreseeability of an intervening act." (*People v. Schmies, supra*, 44 Cal.App.4th at p. 56; see also *People v. Autry* (1995) 37 Cal.App.4th 351, 361; see also *People v. Cervantes, supra*, 26 Cal.4th at p. 871 [intervening or superseding cause must be unforeseeable].) Thus, the jury had sufficient evidence to conclude that Noel's actions were negligent and that the flat tire was foreseeable. Accordingly, substantial evidence supported Noel's conviction for involuntary manslaughter.

C. *Section 399 Precludes Prosecution of Violating Section 192, Subdivision (b)*

Noel was charged with and convicted of owning a mischievous dog in violation of section 399 and of involuntary manslaughter in violation of section 192, subdivision (b). Prior to trial, Noel unsuccessfully demurred to the indictment, arguing the latter charge was preempted by section 399. On appeal, he contends that the statutory provisions of section 399 precludes prosecution and conviction under section 192, subdivision (b),

because section 399 is a more specific statute, which governs deaths resulting from an animal.[32]

"[T]he . . . preemption rule is applicable (1) when each element of the general statute corresponds to an element on the face of the special statute, or (2) when it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson, supra,* 30 Cal.3d at pp. 295-296.) "[W]hen the Legislature has enacted a specific statute addressing a specific matter, and has prescribed a sanction therefor, the People may not prosecute under a general statute that covers the same conduct, but which prescribes a more severe penalty, unless a legislative intent to permit such alternative prosecution clearly appears." (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250, italics omitted.)

"[I]t must be evident the Legislature intended to preclude application of the general statute to the targeted conduct." (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 922-923; see also *Watson, supra,* 30 Cal.3d at pp. 296-297.) If the prosecution has to prove a higher degree of culpability for one of the offenses, then preclusion does not apply. (*People v. Watson, supra,* at p. 297.) Section 399 requires proof only that a defendant did not use ordinary care in keeping an animal that the defendant knows may pose a risk of danger. In contrast, involuntary manslaughter requires proof of criminal negligence or proof of acts that are such a departure from the conduct of an ordinarily careful person under the same circumstances as to be contrary to a proper regard for human life or to constitute indifference to the consequences of such acts. Since a higher

---

[32] At the time of the offense, section 399 provided: "If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions that the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony."

In 2001, the statute was amended to extend liability to any person "owning or having custody or control of a mischievous animal . . . ." A separate subdivision was added penalizing the same conduct resulting in "serious bodily injury to any human being" as a wobbler.

degree of culpability is required to establish involuntary manslaughter than for a violation of section 399, preemption does not apply in the present case.

Further, section 399, both at the time it was enacted and at the time of this offense, applied only to the owner of a "mischievous" animal causing death. Involuntary manslaughter extends to any person who acts in a criminally negligent manner with respect to an animal, which causes a person's death. Thus, ownership is not necessary in the latter. (See, e.g., *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 454-460 [charge of involuntary manslaughter for allowing horse to run at large proper but not charge of violating section 399 because defendant was not legal owner].)

The Legislature may enact several statutes covering different gradations of conduct and different mental states so as to "punish less despicable conduct less severely, and punish more despicable conduct more severely." (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 32.) Accordingly, we conclude that section 399 did not preempt the prosecution of Noel for violating section 192, subdivision (b).

D. *Failing to Define Owner for Purposes of Violating Section 399*

The trial court instructed the jury on the elements of section 399—owning a mischievous animal which caused the death of a human being—pursuant to CALJIC No. 12.97.[33] Noel asserts the court had a sua sponte duty to define owner, although he never offers a definition that the court should have given.

---

[33] The court instructed as follows: "Every owner of a mischievous animal who, knowing the propensities, willfully suffers it to go at large or who keeps it without ordinary care and such animal, while so at large or while not kept with ordinary care, kills any human being who has taken all the precautions which the circumstances permitted or which a reasonable person would ordinarily take in the same situation, is guilty of the crime of negligent keeping of a mischievous animal which kills a human being, a violation of 399 of the Penal Code.

"In order to prove such a crime, each of the following elements must be proved: one, a person owned a mischievous animal, two, such person knew the propensities of such animal, three, such person willfully suffered such animal to go at large, or such person kept such an animal without ordinary care, four, such animal, while so at large or while not kept with ordinary care, killed a human being and, five, such human being had

Noel reasons that the jurors were mislead because the prosecutor argued that owner includes those persons who have custody and control, and this was an incorrect definition of owners. Noel claims that "owner" has a technically legal meaning, which he never provides, and the court was required to inform the jury of its special meaning. (*People v. Anderson* (1966) 64 Cal.2d 633, 639; *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.) Reversal is required, according to Noel, unless the state can establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24.)

Noel points out that, at the time he was charged, section 399 punished "the owner of a mischievous animal" where death resulted from negligent ownership. (Former § 399.) In contrast, section 399.5, punished "any person owning or having custody or control of a dog trained to fight, attack or kill . . . ." He explains that the different language of these two statutes indicates the Legislature's intent for the two statutes to have a different scope. Interpreting section 399 to include owner as persons who have custody and control would render, according to Noel, the language of "custody or control" in section 399.5 superfluous. Further, it would result in section 399 including those who have custody or control, which he claims is contrary to the language of the statute. This construction, he argues, violates the fundamental principles of statutory construction. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.)

In addition, Noel contends the Legislature's recent amendment to section 399 establishes the original intent in limiting section 399 to "owners." Effective September 5, 2001, the Legislature amended section 399 to mirror the language of section 399.5 and expand the scope of the statute to "any person owning or having custody or control of a mischievous animal" where death resulted from negligent ownership. (§ 399, subd. (a).)

---

taken all the precautions which the circumstances permitted or [] which a reasonable person would ordinarily take in the same situation.

"The word 'mischievous' means those propensities that may naturally pose a risk of harm or injury to others."

He claims that the legislative history makes it clear that this amendment was designed to expand the scope of the original statute.

The court's failure to define "owner," according to Noel, was prejudicial error because of the prosecutor's argument and the common definition of owner, which is a person who has "possession" and "control." He argues that the evidence on ownership was not overwhelming. According to Noel, the only evidence the jurors heard was that Noel and Knoller had taken custody of the dogs when removing them from Coumbs's property. The Presas were only later taken into defendants' homes when they became sick. He acknowledges that he registered the dogs with the animal control center, but he claims the registration form did not distinguish between owners and temporary custodians. He also concedes that he claimed defendants were the legal owners of the dogs, but he stated that the ownership was "as trustees." He claims the jurors could have found defendants were not owners, but were simply providing temporary care to sick dogs.

The court has no sua sponte duty to instruct the jury on commonly understood terms. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Webster's Third New International Dictionary (Unabridged 2002) page 1612, defines "owner" as "to possess, take possessions of . . . one that owns . . ." The Legislature has not defined the word "owner," which "supports a conclusion that no specialized legal meaning was ever intended for that term." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023.) Because "owner" is a commonly understood term, we conclude the court had no obligation to define it.

In any event, any alleged error over failing to instruct on the definition of "owner" was harmless under *Chapman, supra,* 386 U.S. at page 24. Once the Presas came to their home, defendants exercised exclusive control over them. They housed them, trained them, and sought and paid for their veterinary care. Noel purchased licenses for both dogs, designating Knoller as the "owner" and himself as "co-owner" of the dogs. When considering whether to obtain another dog, Noel told a neighbor, "It's tough enough having two. Could you imagine owning three?" Knoller testified that Hera had bonded

to her and was "my dog." Following the death of Whipple, Noel stated in a press conference that Knoller and he were the "legal owners" of the Presas "as trustees." On this record, the evidence of ownership was overwhelming, and any alleged error for failing to define "owner" was harmless beyond a reasonable doubt.

E. *Deprivation of Counsel*

Noel argues that when the trial court instructed Knoller's attorney not to object any further during the prosecutor's rebuttal closing argument, this effectively silenced his attorney and deprived him of his Sixth Amendment right to counsel during a critical stage of the trial. Even if we presume the court's comments that were directed to Knoller's attorney also had effect on Noel's attorney, we reject the argument that this deprived him of his Sixth Amendment right to counsel for all of the same reasons that we rejected Knoller's similar claim. (See pt. III.D., *ante*)

F. *Blakely Error*

With permission of this court, Noel filed a supplemental brief asserting that the trial court imposed the upper term of four years for his involuntary manslaughter conviction in violation of *Blakely, supra,* 542 U.S. at p. ___ [124 S.CT. 2531]. In *Blakely*, the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely, supra,* at p. __ [124 S.Ct. at p. 2535].) The *Blakely* court held that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra,* at p. ___ [124 S.Ct. at p. 2536].) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra,* at p. ___ [124 S.Ct. at p. 2537].)

We reject the People's contention that Noel forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See § 1170, subd. (b); Cal. Rules of Court, rules 4.409 & 4.420-4.421.) Since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors" (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after Noel was sentenced.

The People also argue that *Blakely* does not apply to California's upper term determinate sentencing scheme. As the People note, this issue is currently pending before the California Supreme Court. However, we agree with those courts that have concluded that *Blakely* does apply to the imposition of an upper term under California law. The Supreme Court expressly held that the statutory maximum is "not the maximum sentence a judge may impose after finding additional facts," but rather the sentence it may impose without making *any additional findings.* (*Blakely*, *supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2537].) Under California law, the maximum sentence a judge may impose without any additional findings is the middle term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420.)

The *Blakely* court rested its holding on *Apprendi* and, therefore, we apply the *Chapman* standard of prejudice applicable to *Apprendi* errors to the trial court's error here. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Under this test, we are required to reverse unless the error is harmless beyond a reasonable doubt. (*Chapman*,

supra, 386 U.S. at p. 24.) In this case, we can conclude beyond a reasonable doubt that a jury would have made the requisite findings of these aggravating factors had the matter been submitted to them as *Blakely* requires.

In support of sentencing Noel to the upper term, the court cited two factors in aggravation: (1) Noel demonstrated an "utter lack of remorse" for the victim and (2) Noel committed perjury numerous times before the grand jury. The court also found three mitigating factors: (1) Noel had no prior criminal record, (2) he had a full-time job at the time of the incident, and (3) Noel had performed significant pro bono work in his legal work.

We agree with the People that the evidence in support of the no remorse finding was overwhelming. Noel's letters not only showed no remorse but exhibited disdain for his neighbors and a complete lack of caring for the victim. After Whipple had been killed by the Presas, Noel wrote that he was going to fight to keep Hera alive, "[n]eighbors be damned." Further, the evidence showed that he attempted to blame the victim for what had happened, maintaining that Whipple stood in the hallway for over a minute with her apartment door open, watching as the situation developed.

Similarly, the evidence in support of the perjury is ample and convincing. The court found as a matter of fact and as a matter of law that Noel committed perjury when testifying before the grand jury. He testified before the grand jury that the Presas never lunged, never acted aggressively, and never barked at any person. He also denied that one of the Presas lunged at a pregnant woman in the hallway. The testimony by the witnesses at trial overwhelmingly contradicted this.

Although we conclude overwhelming evidence supports both aggravating factors, only one factor is necessary for the court to sentence the defendant to the upper term. Here, the court found that the aggravating circumstances "predominate" over the mitigating circumstances. In addition the court described Noel's conduct as "despicable." Significantly, the court observed that it believed the evidence showed that Noel was more culpable than Knoller. Accordingly, we conclude that, even if only one factor was determined to be valid, it is not reasonably probable that the court would

have imposed the middle or lower term for involuntary manslaughter. A remand for resentencing is not necessary.

G. *Petition for Writ of Habeas Corpus*

Noel filed in propria persona a petition for writ of habeas corpus, arguing that the Board of Prison Terms (the board) wrongfully retained him on parole without timely and proper consideration by a three-commissioner panel and without sufficient support for the board's decision. In addition, he argues the board's decision that good cause exists to retain him on parole is not supported by a preponderance of the evidence. For the same reasons this petition was denied by the superior court (*In re Robert Noel* (Super. Ct. S.F. City and County, 2005, No. 4997)), we deny his petition for relief in this court.

DISPOSITION

The order granting Knoller a new trial for second degree murder is reversed and the matter is remanded for further proceedings consistent with this opinion. In all other respects, the judgment against Knoller is affirmed. The judgment against Noel is affirmed.

_____
Lambden, J.

I concur:

_____
Ruvolo, J.

Concurring and dissenting opinion of Haerle, J.

I concur with the majority's affirmance of the involuntary manslaughter conviction of appellant Noel. I also concur in its rejection of the majority of appellant Knoller's claims, with one crucial exception: I agree that appellant was improperly denied the assistance of counsel at a critical stage in the proceedings, namely, the closing argument of the prosecution. On this basis, therefore, I respectfully dissent.

A.

To recapitulate the critical facts: During the prosecution's rebuttal closing argument, Knoller's attorney, Ruiz, objected to a statement by the prosecutor on the ground that it misstated the evidence. The court responded, "Counsel, this is closing argument. There will be no further interruptions or you will be out of the courtroom. [¶] Please continue."[34] Later in the argument, counsel objected again. The court then made the following order: "Counsel, there will be no further objections. The jury will recall the evidence. Ladies and gentlemen, it is improper and counsel's conduct is improper by standing up in closing argument and objecting to her recollection of what the evidence was. The jury will recall what the evidence is. Arguments of counsel are not evidence and it is improper." The court then reiterated its earlier order: "*And, Ms. Ruiz, please take your seat now and not get up again or the next objection will be made from the holding cell behind you.*[35] [¶] Ladies and gentlemen, counsel are entitled to argue what they believe the evidence is. If they are wrong, the jury will recall that. What counsel say the evidence is is not the evidence. And it is not a proper objection to stand up in the

[34] Appellant Knoller points out that the prosecutor had done precisely the same thing (inserted what he thought the evidence in fact was) during the defense closing argument, when the defense was discussing the testimony of a witness: "[Prosecutor: Your Honor, I'm going to interrupt. I think what I see at the top is you limiting that not for the truth of the matter and Ms. Ruiz is arguing for the truth of the matter. It's pretty obvious from the top of that." The court sustained this objection.

[35] Hereafter, for purposes of convenience, I will refer to these two orders of Judge Warren as the "gag orders and expulsion threats."

middle of closing argument and insert your own interpretation of what the evidence is. [¶] Mr. Hammer, continue." (Emphasis supplied.)

Shortly thereafter, just before the matter was submitted to the jury, the prosecutor made the following argument: "Last thing I want you to think about, please, because this is a murder case and you try to recreate Diane Whipple's time in that hallway, what is it she saw before that first bite? . . . [¶] Mr. Noel writes 'before I could get my body in the doorway to block them, they pushed forward into the hall and took off side by side down the hall toward the elevator in a celebratory stampede.' Think of Diane. '240 pounds of Presa wall-to-wall bouncing off and heading for the wall at the end of the hall.' Exactly where Diane was standing before she was bitten by these dogs. [¶] Think about the ten minutes that she was ripped to death and her clothes ripped off her and then think about this because this is how she died because of their recklessness. Every time she tried to breathe, think of a breath in. Every time she tried to breathe, her throat closed in on itself, every time. And she crawled, this young woman despite her to try to get home and she tried to breathe again and her throat closed in again. She tried to breathe again and she was alone, she was alone unable to even talk. And the dog was still running loose with her and she tried to breathe again, and her voice closing down with two holes in her larynx and she crawled and she tried to push herself up and she crawled some more to try to get home and no one was there, no one."

Knoller's counsel offered no objection to this argument.

Three months later,[36] after the court and the parties had returned to San Francisco and the court was hearing the appellants' motions for new trials, Judge Warren proffered the following explanation concerning the gag orders and expulsion threats: "*And the Court was quite stern with Ms. Ruiz.* The Court indicated that there would be no further objections. *I wish I had inserted the word 'improper' in there, I didn't*, but my description to the jury afterwards of why it is not proper for counsel to stand up in the middle of an argument and dispute a rather small technical point of evidence, I certainly

---

36 The gag orders and expulsion threats occurred on March 19, 2002; the court granted Knoller's new trial motion on June 17, 2002.

suggested that Ms. Ruiz remain in court and was free anytime under the obligation to insert whatever objections she deemed appropriate on behalf of her client. She was never removed." (Emphasis supplied.)

Knoller argues that the trial court's gag orders and expulsion threats, i.e., the two orders prohibiting her counsel from making any objections during this final phase of the prosecution's closing argument (1) effectively deprived her of her Sixth Amendment right to counsel and (2) also violated long-standing non-constitutional California precedent. I agree with both contentions.

B.

The Sixth Amendment principle applicable here was summarized succinctly in *United States v. Cronic* (1984) 466 U.S. 648, 657-662 (*Cronic*). There, the court reversed a decision of the Tenth Circuit Court of Appeals, which had reversed a conviction on the basis, inter alia, that the defendant had been denied effective assistance of counsel during the course of the trial. Although it ultimately determined that the defendant had suffered no such denial, the court took pains to carefully delineate under what circumstances what standards of prejudice apply to claims of denial of counsel; it devoted a full seven pages of its opinion to this issue. In the course of that discussion, it noted that "the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. [¶] Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." (*Id.* at pp. 658-659, fns. omitted.)

Immediately after this last sentence, the court dropped a footnote consisting of one highly pregnant, and subsequently much-quoted, sentence that effectively sums up the rule applicable here: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Cronic*, *supra*, 466 U.S. at p. 659,

fn. 25.) In support of that proposition, the Court then cited seven of its earlier precedents. (*Ibid.*)[37]

The majority explicitly concedes, as of course it must, that closing argument is a "critical stage of a criminal trial." (Maj. opn. at p. 101.) It contends, however, that Knoller's counsel was not "prevented from assisting her" because, at least as I understand their arguments: (1) it was *her* responsibility to clarify what the court meant by its gag orders and expulsion threats; (2) the "per se reversible" standard set forth in *Cronic* is, for a variety of reasons, inapplicable here; instead, either a *Chapman* or *Watson*[38] prejudice standard applies; and (3) utilizing such a standard, nothing prejudicial occurred after the gag orders and expulsion threats. I will address these arguments in that order, after which I will set forth why California precedent also mandates reversal.

C.

Relatively little need be said about the majority's first argument, relegated to a footnote, that "[t]o the extent the trial court's ruling was ambiguous, Ruiz had a *duty* to seek clarification." (Maj. opn. at pp. 104-105, fn. 26, emphasis supplied.) In support of this rather curious proposition, the majority cite some hornbook law regarding an attorney's duty to "protect the interests of his client" and not much else.

The court's gag orders and expulsion threats were not in the slightest bit "ambiguous." (Maj. opn. at p. 104, fn. 26.) The key sentence in one of them was, again:

---

[37] Although I will hereafter often refer to the principle summarized in *Cronic* as the "*Cronic* principle" or "*Cronic* rule," it is critical to understand, as I reluctantly conclude the majority does not, that the rules summarized there, including that in footnote 25 and its related text, had their respective geneses many years—and cases—before. I make this point both to emphasize the substantial and historic basis of the *Cronic* rule and also to respond to the majority's statement that Knoller "does not rely on" [it] and does not cite to it except in response to the People's brief discussion of this case." (Maj. opn. at p. 106.) What the majority omits to note is that, in their opening brief on her behalf, Knoller's counsel referenced three of the cases cited in *Cronic's* footnote 25 as well as a leading California Supreme Court case discussing *Cronic.* Thus, Knoller's counsel clearly *did* rely on what I have termed "the *Cronic* rule."

[38] *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818 (*Watson.*)

"And, Ms. Ruiz, please take your seat now and not get up again or the next objection will be made from the holding cell behind you." After that, the reporter's transcript shows a paragraph break and, from that point of time on, Judge Warren was clearly addressing only the jury. But in both the sentence just quoted and the earlier portion of his orders**,** he had made it abundantly clear to Ruiz that she was to be expelled from the courtroom and placed in a Los Angeles County jail cell as and when she made any further objection to the prosecutor's closing statement.**39**

Judge Warren himself appreciated, clearly more than the majority does today, the serious deprivation-of-counsel problem created by his gag orders and expulsion threats; it was certainly because of his belated sensitivity to what he had said and how he had said it ("the Court was quite stern with Ms. Ruiz") that, at the new trial hearing on June 17, 2002, he attempted to qualify his three-months-earlier gag orders and expulsion threats by explaining that they were only meant to apply to "improper" objections.

This belated attempted modification of the admonition was not at all what Judge Warren had told Ruiz three months earlier.

D.

As noted above, the majority's main argument is that, for a variety of reasons, the *Cronic* principle is inapplicable here. My colleagues advance a number of reasons, some of them apparently interrelated, in support of this contention. They are, albeit not in order of importance, that the *Cronic* principle is not controlling here because (1) it was articulated in a footnote in *Cronic*; (2) it has never been accorded much attention in California (3) it was superseded, or at least impliedly undermined, by *Bell v. Cone* (2002) 535 U.S. 685 (*Bell*); and (4) most importantly, it applies only to "complete" and "egregious" denials of counsel. (Maj. opn. at pp. 104-114.)

---

39 The second order of Judge Warren, the one that contained the mention of Ruiz's possible confinement in a "holding cell," still amounted to a threat of expulsion from the courtroom; I am not aware that Los Angeles County has started to emulate Russia and place holding cells inside its courtrooms.

The fact that, in *Cronic*, the United States Supreme Court opted to summarize in a footnote *seven* of its prior holdings on the subject of when and under what circumstances denial of counsel error becomes prejudicial per se seems, at least to the majority, to render the principle thus stated somehow inferior, or at least suspect. I disagree. In *In re Avena* (1996) 12 Cal.4th 694 (*Avena*), the majority of our own Supreme Court disagreed with dissenting Justice Mosk regarding the application of the principles articulated in the text of *Cronic* to the statements made in three of *Cronic's* footnotes. (Compare *Avena* at pp. 727-728 with pp. 775-778.) But both sides clearly agreed, notwithstanding Justice Mosk's slightly flippant comment about those footnotes generally (see *id.* at p. 776), that all three of the *Cronic* footnotes they were discussing were highly significant. Indeed, the *Avena* majority noted that they all contained "revealing comments." (*Id.* at p. 727.)

Secondly, *Avena* and numerous other cases make clear that our Supreme Court is fully aware of, and clearly considers the courts of this state bound by, the principles articulated in *Cronic.* (Besides *Avena*, see also *In re Visciotti* (1996) 14 Cal.4th 325, 351-353, and such even more recent cases as, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 86, and *People v. Snow* (2003) 30 Cal.4th 43, 111, 116-117, 121.)[40]

Thirdly, *Bell* does not even slightly undermine the principles articulated in *Cronic*; in fact it strongly reiterates them. In *Bell*, an 8-1 majority of the Supreme Court overruled a holding of the Sixth Circuit Court of Appeals which had granted the petitioner a writ of habeas corpus based on his claim that, at the sentencing hearing after his Tennessee state court trial, "his counsel rendered ineffective assistance." (*Bell, supra*, 535 U.S. at p. 695.) The holding of the court was simple and straightforward: the court of appeals erred in applying the *Cronic* standard to an ineffective assistance of counsel claim; such a claim is governed by *Strickland v. Washington* (1984) 466 U.S. 668, a case

---

[40] Our colleagues in the Third District appear to understand *both* that the principle we are discussing applies in California *and* that it is permissible to cite and rely upon a United States Supreme Court footnote. In *King v. Superior Court* (2003) 107 Cal.App.4th 929, 950, Justice Morrison, writing for a unanimous panel of that court, stated: "The denial of the assistance of counsel at a critical stage of the proceeding is reversible per se. (*United States v. Cronic*, *supra*, 466 U.S. at p. 659, fn. 25.)."

decided the same day as *Cronic*. (*Bell, supra,* 535 U.S. at pp. 695-698.) In so holding, the court took pains to reiterate each of the three circumstances identified in *Cronic* when a trial court's error would trigger a per se reversal error standard. (*Id.* at pp. 695-696.) One of them, it reiterated thusly: "A trial would be presumptively unfair, we said [in *Cronic*] where the accused is denied the presence of counsel at 'a critical stage' [citation], a phrase we used in *Hamilton v. Alabama,* 368 U.S. 52, 54 (1961) and *White v. Maryland,* 373 U.S. 59, 60 (1963) (*per curiam*), to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." (*Bell, supra,* 535 U.S. at pp. 695-696.)

The court then dropped a footnote specifically calling attention to footnote 25 of *Cronic*; it stated, in pertinent part: "In a footnote, we also cited other cases besides *Hamilton v. Alabama* and *White v. Maryland* where we found a Sixth Amendment error without requiring a showing of prejudice. *Each involved criminal defendants who had actually or constructively been denied counsel by government action.* See *United States v. Cronic*, 466 U.S. 648, 659, n. 25 (1984)." (*Bell, supra,* 535 U.S. at p. 696, fn. 3, emphasis supplied.) Thereafter, the court cited and summarized the facts of the other five cases—besides the two cited by it in the text-–which it had previously cited in *Cronic*'s footnote 25.

In short, if anything, *Bell* makes abundantly clear that the law succinctly summarized in footnote 25 of *Cronic* and the text to which it is attached has long been, and continues to be, the law of this nation.

But the majority's main point seems to be that the *Cronic* principle applies only to "complete" denials of counsel and such did not occur here. The problem with responding to this is that the majority nowhere articulates what, in its view, was "incomplete" about the denial of counsel not just implicit but explicit in the gag orders and expulsion threats. I can imagine the majority might mean one or both of two things: (a) Ruiz was not personally removed from the courtroom but only threatened with removal if she said anything more during the remainder of the prosecution's rebuttal, and/or (b) the gag

orders and expulsion threats occurred during only a relatively short, and concluding, portion of the trial and hence amounted to a less than complete denial.

If the majority means (a), I simply disagree. I do so on the basis of the words used, how they were used, and common sense. I believe a threat to *both* remove *and* jail a criminal defendant's only trial counsel if she objected again to the prosecutor's argument, a threat admittedly delivered in a manner "quite stern with Ms. Ruiz," constitutes a complete denial of counsel and not just, as the majority seems to contend, a "limitation on counsel." (Maj. opn. at p. 106.)

If the majority means (b), i.e., that a relatively insignificant portion of the trial was impacted by the gag orders and expulsion threats, then I disagree on the basis of the overwhelmingly weight of authority. That authority makes clear that *any* deprivation of counsel during a "critical phase of the proceedings" falls within the *Cronic* rule, *no matter how long or short the duration of the deprivation*.[41]

Some examples, in chronological order, of cases in which the reversible per se rule has been applied: *Ferguson v. Georgia* (1961) 365 U.S. 570, 593-596 (*Ferguson*) (per se reversal required when defense counsel barred from conducting direct examination of his client; one of the seven cases cited in *Cronic's* footnote 25); *Davis v. Alaska* (1974) 415 U.S. 308, 315-318 (defense counsel's cross-examination of prosecution witness cut-off after the prosecutor objects; per se reversal rule applied); *Herring v. New York* (1975) 422 U.S. 853 (*Herring*) (no summation allowed at end of bench criminal trial; another of the seven cases cited in *Cronic*'s footnote 25); *Geders v. United States* (1976) 425 U.S. 80 (*Geders*) (no consultation allowed between defendant and his lawyer overnight; another of the seven cases cited in *Cronic*'s footnote 25); *Gomez v. United States* (1989) 490 U.S. 858, 873-876 (defense counsel not permitted to conduct voir dire of jury panel;

---

[41] It is quite evident from the relevant authority in this area that the word "complete" is a conclusion that courts draw when a defendant is deprived of counsel at a critical stage. Thus, when such a deprivation occurs, courts refer to this constitutional error as a "complete" deprivation of counsel. The majority, however, appears to have imported this descriptive, conclusory term used by courts applying the *Cronic* rule into the rule itself.

rather a magistrate conducted it himself; this was a "critical stage" and hence error); *Curtis v. Duvall* (1st Cir. 1997) 124 F.3d 1, 4-5 (*Curtis*) (defense counsel absent during the court's delivery of a sua sponte supplemental jury instruction);[42] *United States v. Russell* (5th Cir. 2000) 205 F.3d 768, 771-772 (two-day absence of one defense counsel because of illness triggers reversible per se rule); *Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 581-585 (last-minute appointment of counsel by the court did not give that counsel adequate time to prepare); *Mitchell v. Mason* (6th Cir. 2003) 325 F.3d 732, 741-748 (defendant not provided counsel during pre-trial stage requires automatic reversal); *French v. Jones* (6th Cir. 2003) 332 F.3d 430, 436-439 (no counsel present during court's final deadlock-breaking instruction to the jury; per se reversal rule applied).[43]

Given the concession by the majority that the prosecution's closing argument was a "critical stage" of the trial, I respectfully submit that the only possible conclusion to be drawn from this extensive line of authority is that the gag orders and expulsion threats were**,** indeed, as "complete" as they needed to be for the per se reversal rule to apply. They were most emphatically not**,** to use the majority's highly questionable phrase, merely a "limitation on counsel." (Maj. opn. at p. 106.) They were**,** rather, an unequivocal threat that Knoller would be denied that counsel (and, to use the term the majority finds critical here, "completely" denied that counsel) if the latter objected again.[44]

---

[42] In *Curtis*, the *Cronic* rule was not applied because the error had occurred some 17 years before and, the *Curtis* court held, applying *Cronic* to the facts before it would violate a rule against retroactivity. However, in holding the *Cronic* principle specifically applicable to the facts before it, the First Circuit made a comment quite pertinent to the majority's "complete" deprivation argument: "[A]lthough this deprivation was short-lived, it occurred during a vital point in the trial and was, within its terms, total." (*Curtis, supra,* 124 F.3d at p. 5.) This is exactly correct, and I am sorry the majority does not agree with it and, indeed, does not even cite or discuss *Curtis*.

[43] These cases are, of course, in addition to the remaining four (plus *Ferguson, Herring* and *Geders*, noted above) cited in *Cronic's* footnote 25 and similarly discussed in *Bell, supra*, 535 U.S. at p. 696.)

[44] The majority attempts to justify the gag orders and expulsion threats, and also critique this dissent, by arguing that I do not "address the trial court's authority to control

E.

The third and final prong of the majority's "no prejudice here" argument is that nothing of much significance happened following the gag orders and expulsion threats. But, as I have attempted to point out in the immediately preceding section, nothing that happens after counsel is "prevented from assisting the accused during a critical stage of the proceeding" (*Cronic*, *supra*, 466 U.S. at p. 659, fn. 25) may be evaluated on a "was there or wasn't there prejudice?" basis. Prejudice is presumed, and reversal is mandated.

Even aside from that point, I suggest the majority significantly downplays what followed the gag orders and expulsion threats; in my view what followed was an "egregious" (to borrow an adjective from the majority) "imagine you're Dianne Whipple" closing argument by the prosecution.

This portion of that rebuttal closing argument is set forth at page 115 of the majority opinion and I will not repeat it here. While the majority concedes this argument was error, I believe it substantially minimizes that error's possible impact.

---

the courtroom" and noting that Knoller's counsel had engaged in "extremely disruptive behavior throughout the trial," including objecting "all through trial and throughout most of the closing argument." (Maj. opn. at pp. 109-110, fn. 29, and 113.) The answers to these contentions are quite easy: in the first place, the last one is flatly and demonstrably wrong: Knoller's counsel made absolutely no objections during the prosecution's initial closing argument. However, and as noted earlier, the prosecutor did object to a statement made by Knoller's counsel during her closing and, rather than chastising him for that objection, the court effectively sustained it. *The only two objections* Knoller's counsel made during the prosecution's closing are those specifically recited by both the majority and earlier in this opinion.

As far as Knoller's counsel's earlier behavior, and the majority's lament that the application of my views would effectively "deny the trial court's authority to control the courtroom," the answer is equally simple: as our Supreme Court has often noted, the method by which to control obnoxious and obstreperous counsel is via the contempt power and not by denying, or threatening to deny, the client that counsel's services. (See *People v. McKenzie* (1983) 34 Cal.3d 616, 632, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Price* (1991) 1 Cal.4th 324, 395.) Applying this principle here, as and when Knoller's counsel was out of line, she could have been—out of the presence of the jury or when the trial was concluded—held in contempt. It is elemental that attorney trial misconduct is remedied *by action directed at the attorney, not the client.*

As noted both above and in the majority's opinion, in the time remaining after the gag orders and expulsion threats, the prosecutor asked the jury to "recreate Dianne Whipple's time in that hallway" and "[t]hink about the ten minutes that she was ripped to death."

California law has long been clear that any such "put yourself in the place of the victim" argument is, especially in gruesome and horrible fact situations such as the current one, error. Our colleagues in Division Four of this court summarized the law in this area in *People v. Simington* (1993) 19 Cal.App.4th 1374 (*Simington*): "It is improper for the prosecutor to appeal to the passion and prejudice of the jury in closing argument during the guilt phase of trial. [Citation.] In [*People v.*] *Pensinger* [(1991) 52 Cal.3d 1210], the defendant was charged with an assortment of offenses including kidnapping and murder of a child. In closing argument, the prosecutor stated: '"Suppose instead of being Vickie Melander's kid [the victim] this had happened to one of your children."' [Citation.] The court found the prosecutor's remark to be an improper appeal to the jury's passion and prejudice. Similarly, in *People v. Jones* (1970) 7 Cal.App.3d 358, the defendant was charged with assaulting a motorcyclist. The prosecutor's remarks in argument 'to the effect that the sons of the jurors and their girl friends dare not ride motorcycles into an area where the appellant is located, because he reacts seriously,' were held to be misconduct. [Citation.] The court described the remarks as 'a crude appeal to the fears and emotions of the jurors . . . .' [Citation.] In *People v. Fields* (1983) 35 Cal.3d 329, 362, the prosecutor invited the jury to 'view the case through the eyes of the victim.' This invitation was deemed misconduct since it encouraged jurors 'to depart from their duty to view the evidence objectively . . . .' [Citation.] Here, the prosecutor asked the jurors to place themselves in the position of an innocent victim who is assaulted with a knife and sustains serious injuries. Under the foregoing authorities, we conclude that the remarks constituted an improper appeal to the passion and prejudice of the jury

and the objection, which was timely and made on the proper grounds, should have been sustained." (*Simington, supra,* 19 Cal.App.4th at pp. 1378-1379.)[45]

The majority notes, correctly, that *considered by itself*, this sort of appeal to jury passion and prejudice is usually subject to a *Watson* harmless error standard of review. But, again, this is not the usual case (1) because Ruiz could not object because of the gag orders and expulsion threats and (2) therefore, there was no ruling by the court (presumably) sustaining her objection. And what if the trial judge had spoken as sternly to the prosecutor as he had a few minutes earlier to Ruiz about his "imagine you're Dianne Whipple" argument, and instructed the jury in no uncertain terms to disregard it, what then? I readily concede that the odds the jury would have then returned a different verdict as to Knoller are long indeed. But, as I noted at the beginning of this section, *that is the very point of the per se reversible error rule*: when a defendant is denied the assistance of counsel at such a crucial point, it is simply wrong to engage in run-of-the mill harmless error analyses; what is required is reversal.

F.

Finally, the majority downplays important California precedent which, whether or not construed as deriving from constitutional sources, mandate reversal because of the gag orders and expulsion threats. The majority dismisses these cases because, it says, they are based not on constitutional principles but, rather, on the intrinsic power of a trial court to punish contempt.

I acknowledge that the holdings in cases as *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697 (*Cannon*), *Smith v. Superior Court* (1968) 68 Cal.2d 547, 558-562 (*Smith*), *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 298-302 (*Cooper*), and *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843-844, do indeed involve a court's contempt powers. But they still say what they say, much of which is

---

[45] In addition to the several earlier cases cited in *Simington*, see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318; and *People v. Kipp* (2001) 26 Cal.4th 1100, 1129-1130, holding to the same effect.

quite pertinent here. In *Cooper*, our Supreme Court was reviewing a contempt judgment imposed on a criminal defense attorney who had been told by the trial judge: "'You don't have a right to say a word when the jury is down here in the process of their deliberations.'" (*Cooper, supra,* 55 Cal.2d at p. 302.) The court annulled the contempt judgment, stating: "It scarcely seems necessary to point out that when an attorney is presenting an objection or motion in contested litigation he is engaged in a trial, and reasonable opportunity to prepare and present his motion is as fundamental as is the right to counsel. [Citation.]" (*Ibid*.)

Fourteen years later, in *Cannon*, the same court, citing *Smith*, stated that "the inhibition imposed on a defense counsel by a threat of removal 'constitutes a serious and unwarranted impairment of his client's right to counsel. It is . . . "an unreasonable interference with the individual's desire to defend himself . . . ."' [Citation.]" (*Cannon, supra,* 14 Cal.3d at p. 697.)

The fact that these California Supreme Court holdings arise in the context of contempt judgments and are devoid of explicit Sixth Amendment citations or phraseology seems utterly irrelevant to me for at least two reasons: (1) no matter what their context, the holdings are still binding on us and (2) when all is said and done, those several precedents embrace essentially the same right-to-counsel principle articulated in *Cronic* and its preceding and succeeding authority.

For all of these reasons, I would reverse appellant Knoller's conviction for involuntary manslaughter and remand the matter for a retrial of her. For the same reasons, I would not reinstate, as the majority does, the jury verdict convicting her of second degree murder.

_____

Haerle, J.

Trial Court: Superior Court of San Francisco County

Trial Judge: Hon. James L. Warren

Counsel for Appellant Knoller	Riordan & Horgan, and Dennis Patrick Riordan Donald M. Horgan Dylan Schaffer
Counsel for Appellant Noel	Clifford Gardner

By Appointment of the Court of Appeal under the First District Appellate Project Independent Case System

Counsel for Respondent	Bill Lockyer Attorney General Robert R. Anderson Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Eric D. Share Supervising Deputy Attorney General Amy Haddix Deputy Attorney General