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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SUSAN FERGUSON,

Defendant and Appellant.

A133178

(San Francisco City and County  
Super. Ct. No. 215973)

Pursuant to a negotiated disposition, Susan Ferguson entered a guilty plea to one count of first degree burglary (Pen. Code, § 459).<sup>1</sup> A stipulated term of the plea agreement was that Ferguson would be sentenced to an upper prison term of six years, but that sentencing would be continued to allow her to participate in a specified residential substance abuse program, with probation to be granted only if she successfully completed that program. Ferguson left the program within a week and absconded. The trial court imposed the agreed term of imprisonment. Ferguson challenges the sentence imposed, contending that the trial court abused its discretion when it denied her request for a continuance of the sentencing hearing and in refusing to reinstate probation. We dismiss her appeal.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

According to the presentence report, on July 28, 2010, Ferguson entered a hotel room and removed valuables, including a watch, ring, laptop computer, and various items

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<sup>1</sup> Unless otherwise noted, all further statutory references are to the Penal Code.

of clothing. Police officers observed pry marks on the door frame and fingerprints on the window.

Ferguson was charged, by complaint, with one count of first degree residential burglary (§ 459; count one) and one count of grand theft (§ 487, subd. (a); count two). It was alleged that Ferguson had four prior felony convictions and was, accordingly, ineligible for probation pursuant to section 1203, subdivision (e)(4).<sup>2</sup> The complaint also alleged that Ferguson was subject to sentence enhancements, given her prior convictions and prison terms. (§§ 667, 1170.12.)

On April 4, 2011, pursuant to a negotiated disposition, Ferguson pleaded guilty to count one. Count two was dismissed and the prior conviction allegations were stricken. At the time of her plea, the proposed disposition was explained by Ferguson’s counsel as follows: “[Ferguson] *is going to serve six years in state prison*. However, we’re going to set the sentencing off about three months to receive a progress report from Asian-American Recovery Program. She is going to be transported to that program and admitted . . . . And it is going to be required by the court that she enter and complete *that program*. . . . [¶] So long as she does do that, that she *enters and completes, satisfactorily graduates from that program*, as long as she does not pick up any other cases of any type, as long as she obeys the law, the court has agreed that upon completion of that program the court is going to sentence her as follows: [¶] . . . [¶] imposition of sentence suspended for a period of three years during which time she is placed on formal probation . . . . [¶] . . . [¶] Now, should [Ferguson] not graduate from the program, should she be expelled from that program, should she not do what she’s supposed to do at that program, should she pick up offenses from today until she’s supposed to graduate . . . *that six years that I*

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<sup>2</sup> Section 1203, subdivision (e)(4), provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.”

*mentioned in the beginning of the admonishment will be imposed by the court, and . . . I can't imagine any excuses that the court would accept at this point.*" (Italics added.)

The trial court reiterated: "I will make it real clear. You walk out the door, you get expelled for violation of program rules for inappropriate behavior with other residents, you don't have a graduation certificate in hand from [Asian American Recovery Program], I will send you to prison for six years. . . . [¶] . . . [¶] So this is not like, well, I did really well but I didn't get arrested. I am clean and sober. I didn't graduate. I left or I got expelled. To me the bed there is an available resource, and every day that you're there someone else isn't there. So if you're not going to take advantage of it, I don't have any problems in sending you to the Department of Corrections . . . ." When asked if she understood, Ferguson responded "[y]es." Accordingly, Ferguson was released, on her own recognizance, to the Asian American Recovery Program and ordered to return for sentencing on June 28, 2011.<sup>3</sup>

Ferguson left the Asian American Recovery Program within a week of her arrival. And, on April 27, 2011, her release was revoked and a bench warrant was issued. When she next appeared in court, on July 8, 2011, Ferguson represented to the court that she had since been accepted into another residential treatment program at Walden House. She brought a representative from Walden House, as well as documentation showing her purportedly "perfect conduct" there. She was remanded into custody and the matter was set for sentencing.

On July 29, 2011, despite a recommendation in the presentence report for probation, Ferguson was sentenced to a term of six years in prison. The court explained: "I am cognizant of the fact that [Ferguson] has had lifelong problems, both with mental

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<sup>3</sup> In releasing Ferguson, pending sentencing, the trial court, in effect, granted her informal probation. (*People v. Superior Court (Roam)* (1999) 69 Cal.App.4th 1220, 1230 ["Roam's release to Delancey Street more closely resembles informal probation than a release on OR. It is clear from the record that the trial court's purpose in suspending the imposition of sentence and releasing Roam post conviction was to give him a chance at rehabilitation, and not to simply let him out of custody pending sentencing, probation or appeal"].)

health issues, as well as substance abuse, but I'm not inclined to change my mind from the original disposition. [¶] Here is the reason why: When you look at [Ferguson's] criminal history, it involves first-degree burglaries in 1993, and more recently in 2002; and significantly . . . in both those instances there was an execution of sentence suspended, and [Ferguson] was afforded the opportunity through probation to seek treatment, and in both instances she was unsuccessful. [¶] In this case I was convinced to give [Ferguson] another opportunity, since I didn't doubt her lawyer's representations that she was sincere, and the fact that [Ferguson] had enrolled in in-custody treatment programs. [¶] Notwithstanding the dirty test shortly before she was scheduled to leave to go to the program, I felt that was . . . part of relapse and it's part of recovery, and so I was not going to change my mind just based upon that dirty test. [¶] However, after giving [Ferguson] the opportunity to go to Asian American Recovery Services, and seeing her stay for a very brief time, and then leaving once again, I am of the opinion that three executions suspended really, at this point, doesn't make sense, because I don't believe by her conduct that she's ready. . . . [¶] I think at this point, as far as I'm concerned, putting her on probation—and I don't like to say this, nor do I like to conclude this: It is really an exercise in futility, as far as I'm concerned.”

After the trial court had given the above explanation, Ferguson's counsel made the following request: “What I would ask the court to do is to . . . put this matter over for a week for us to get then a statement from Walden House.” The trial court responded: “I don't think I need to put it over a week. *I'm not going to change my initial inclination, because I think what is happening in a week is I would get confirmation from the treatment staff that they feel she's sincere, and that she has made a genuine effort.* [¶] As far as I'm concerned, I haven't heard anything to change my mind, and it isn't just about that we have a contract here. It is trying to balance the need to rehabilitate someone, their willingness, and, also, public safety, and so I'm going to sentence [Ferguson] pursuant to the negotiated disposition. [¶] The request to continue sentencing for a week is denied.” (Italics added.)

Ferguson filed a notice of appeal, stating that her appeal was “based on the sentence or other matters occurring after the plea” and that it also “challenges the validity of the plea or admission.” The trial court denied her request for a certificate of probable cause.

## II. DISCUSSION

Ferguson asserts that the trial court erred in (1) denying her request to continue sentencing; and (2) imposing a six-year term, rather than “reinstating probation.” Specifically, she argues that Walden House was a more appropriate treatment program for her and that “the trial court was presented with two options: (1) to reinstate appellant on probation subject to conditions; or (2) to sentence appellant to 6 years in state prison. The trial court abused its discretion in choosing the draconian second option.”

Although not originally briefed by the parties, we requested and received supplemental briefing “regarding whether [Ferguson] should be barred from raising either or both of her arguments on appeal because (1) her request for a certificate of probable cause was denied; and (2) she waived the right to appeal her sentence as part of the plea bargain. (. . . § 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 76, 85–86 [(*Panizzon*)]; *People v. Carr* (2006) 143 Cal.App.4th 786, 793–794 [(*Carr*)].)” The People, in their supplemental briefing, contend that Ferguson is barred from raising both of her contentions on appeal because she waived her right to appeal her sentence and because her request for a certificate of probable cause was denied. We begin by addressing the waiver issue.

When Ferguson’s plea was taken, she was asked: “As a condition of this plea . . . your [*sic*] waiving your right to appeal any irregularities that there may be in this sentence. Do you agree to do so?” Ferguson responded: “Yes.” This was the only discussion, on the record, of Ferguson’s appellate rights. “[I]t is well settled that a plea bargain may include a waiver of the right to appeal.” (*People v. Buttram* (2003) 30 Cal.4th 773, 791 (*Buttram*); accord, *Panizzon, supra*, 13 Cal.4th at pp. 80, 82.) A defendant may waive the right to appeal in writing or orally in court. (*Panizzon*, at p. 80.)

Generally, “[a] broad or general waiver of appeal rights ordinarily includes error occurring before but not after the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error. [Citation.]” (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.) But, in *Panizzon*, our Supreme Court held that when a defendant agrees to a plea bargain that includes a specified sentence, and that sentence is actually imposed, the defendant’s specific waiver of the right to appeal *from the sentence* will foreclose appellate review thereof. In that case, the defendant received a written advisement of his appellate rights and had agreed, in writing, to waive his right to appeal the sentence. (*Panizzon, supra*, 13 Cal.4th at pp. 82, 85–86.) The court explained: “Not only did the plea agreement in this case specify the sentence to be imposed, but by its very terms the waiver of appellate rights also specifically extended to any right to appeal such sentence. Thus, what defendant seeks here is appellate review of an integral element of the negotiated plea agreement, as opposed to a matter left open or unaddressed by the deal. . . . [B]oth the length of the sentence and the right to appeal the sentence are issues that cannot fairly be characterized as falling outside of defendant’s contemplation and knowledge when the waiver was made . . . .” (*Id.* at pp. 85–86.)

Ferguson argues that her waiver of appeal rights was invalid because it was not knowing, intelligent, and voluntary. “[A]n express waiver of the right of appeal made pursuant to a negotiated plea agreement is valid provided defendant’s waiver is knowing, intelligent and voluntary.” (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1659; accord, *Panizzon, supra*, 13 Cal.4th at p. 80.) “The voluntariness of a waiver is a question of law which we review de novo. [Citation.] To make this determination, we examine the particular facts and circumstances surrounding the case, including the defendant’s background, experience and conduct. [Citation.]” (*People v. Vargas*, at p. 1660.)

Ferguson relies on *People v. Rosso* (1994) 30 Cal.App.4th 1001 (*Rosso*). In that case, there was no written waiver and the record showed only the following oral discussion at the time of the plea agreement: “ “[The Court]: . . . Have you discussed these [constitutional] rights with your attorney? [¶] [Rosso]: Yes. [¶] The Court: Do you

understand each and every one of these rights? [¶] [Rosso]: Yes, I understand. [¶] The Court: Do you waive and give up these rights and your right to appeal? [¶] [Rosso]: Yes, I waive them.’ ” (*Id.* at p. 1006, italics omitted.) The *Rosso* court concluded there was no valid waiver, reasoning as follows: “ ‘ “[T]he valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. [Citations.]” [Citation.] It “ ‘ [i]s the intelligent relinquishment of a known right after knowledge of the facts.’ [Citation.]” The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. [Citation.] The right of appeal should not be considered waived or abandoned except where the record clearly establishes it. [Citation.]’ [Citation.]” (*Id.* at pp. 1006–1007.)

Here, like in *Rosso*, there was no written advisement of Ferguson’s appeal rights. Furthermore, the limited oral discussion did not include any advisement of the substance of Ferguson’s appellate rights. Because the record does not clearly establish that Ferguson knowingly and intelligently waived her right to appeal, we will assume that she is not barred from bringing this appeal.

In any event, Ferguson’s claims are not cognizable on appeal because her request for a certificate of probable cause was denied. “[T]o appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court with the notice of appeal . . . —the statement required by . . . section 1237.5 for issuance of a certificate of probable cause.” (Cal. Rules of Court, rule 8.304(b)(1).)<sup>4</sup> A “defendant need not [obtain a certificate of probable cause] if the notice of appeal states that the appeal is based on . . . [¶] . . . [¶]

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<sup>4</sup> Ferguson sought a certificate of probable cause to contest her guilty plea, alleging that because of her “mental state” she did not understand the consequences of her plea. The court denied the request. She does not, and cannot, challenge that ruling on appeal. Denial of a certificate of probable cause is reviewable only by timely petition for a writ of mandate. (*People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.)

[g]rounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(B); see also *Panizzon, supra*, 13 Cal.4th at pp. 74–76.)

Ferguson contends that the denial of her request for a certificate of probable cause is not fatal because her notice of appeal indicates that the appeal is based on the sentence or matters occurring after the plea. However, we look at the substance of a defendant’s appeal. “[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself,” for which a certificate of probable cause is required. (*Panizzon, supra*, 13 Cal.4th at pp. 76, 79.) Both of Ferguson’s arguments on appeal, and most obviously her second argument, boil down to a contention that the agreed-upon sentence of six years was excessive, given her willingness to attend an alternate residential treatment program. Thus, we conclude that Ferguson’s challenge to her six year sentence is actually a disguised challenge to the plea, which requires a certificate of probable cause. (See *id.* at p. 79.)

We are not persuaded to reach a contrary conclusion by Ferguson’s reliance on *Buttram, supra*, 30 Cal.4th at p. 791. In *Buttram*, our Supreme Court held that, “absent contrary provisions in the plea agreement itself,” a defendant could appeal, without obtaining a certificate of probable cause, from a six-year sentence imposed after agreeing to plead guilty in exchange for a maximum sentence of six years. (*Id.* at pp. 777–779, 790.) The plea agreement did not involve a waiver of the defendant’s right to appeal his sentence. (*Id.* at pp. 777–778.) The court reasoned: “[W]hen the parties agree to a *specified* sentence, any challenge to that sentence attacks a term, and thus the validity, of the plea itself. However, by negotiating only a *maximum* term, the parties leave to judicial discretion the proper sentencing choice within the agreed limit. Unless the agreement itself specifies otherwise, appellate issues relating to this reserved discretion are therefore outside the plea bargain and cannot constitute an attack upon its validity.” (*Id.* at p. 789, fn. omitted.)

Unlike the defendant in *Buttram*, and contrary to Ferguson’s characterization in her supplemental brief, Ferguson did not agree to a “potential maximum sentence” or a

sentence “*Id.*”<sup>5</sup> Nor was it agreed that, if she walked away from the Asian American Recovery Program, the trial court would have the discretion to either impose a six-year prison term or place Ferguson on formal probation. Rather, Ferguson explicitly agreed that, if she did not complete that specific program, she would go to prison for six years. At the time of her plea agreement, Ferguson did not insist that Walden House, rather than the Asian American Recovery Program, was the more appropriate treatment alternative. Her attempt to raise this argument now is an attempt to challenge the validity of her plea agreement.

*Carr, supra*, 143 Cal.App.4th 786, is directly on-point. In *Carr*, the defendant pleaded guilty to carjacking and was sentenced to a term of nine years in prison. The plea agreement also provided that the defendant would be released on his own recognizance and resentenced to a reduced term of 365 days if he, *inter alia*, appeared in court on the scheduled day for resentencing and did not violate any law while released. (*Id.* at p. 788.) Before the scheduled day for resentencing, the defendant was arrested and it was determined that he had violated the terms of his plea agreement. He was not resentenced to the reduced term. (*Ibid.*)

The defendant appealed, challenging the trial court’s conclusion that he violated the plea agreement. He also challenged the nine-year sentence on the ground that the trial court improperly failed to exercise its discretion to consider imposition of the reduced sentence of 365 days. (*Carr, supra*, 143 Cal.App.4th at pp. 788–789.) The reviewing court concluded that the sentencing issues were not reviewable on appeal because the

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<sup>5</sup> The other authorities relied on by Ferguson are distinguishable for similar reasons. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1091, 1099–1100, 1104 [challenge to calculation of presentence custody credits is reviewable without certificate of probable cause when plea agreement involved maximum term]; *People v. Lloyd* (1998) 17 Cal.4th 658, 666 [certificate of probable cause not required to challenge sentence when “[t]here was, in fact, no plea bargain”]; *People v. Cole* (2001) 88 Cal.App.4th 850, 869–870 [“when, as part of the plea agreement, the question of whether to impose the negotiated maximum sentence is left to the trial court’s discretion at an adversary hearing, section 1237.5 does not apply to an appellate claim that the trial court abused its discretion . . . in not striking prior convictions”].)

defendant did not obtain a certificate of probable cause. It reasoned: “Although defendant does not purport to challenge the validity of his guilty plea, he is challenging the sentence which he negotiated as part of the plea bargain. Thus, he attacks an integral part of the plea, which requires compliance with the probable cause certificate requirements of section 1237.5 . . . . [¶] Arguing this case is analogous to cases such as [*Buttram, supra,*] 30 Cal.4th [at p.] 782, involving plea agreements which provide for an agreed *maximum* term, defendant contends a certificate of probable cause is unnecessary because he agreed to a maximum sentence of nine years and a minimum sentence of 365 days as long as certain conditions were met. Defendant misstates the plea agreement and ignores the plea bargain’s two-tiered sentencing. The agreement was to sentence him to a prison term of nine years and, if he returned on a certain date and did not violate any law in the interim, he would be resentenced to 365 days in jail on weekends. As a result, *the trial court had no discretion* to resentence defendant to the lower sentence after it determined that defendant had violated [the agreement.] Thus, the trial court merely implemented the reasonable expectations of the parties.” (*Carr, supra,* at p. 794, italics added.)

As in *People v. Carr*, the plea agreement before us was conditional—a six-year term was to be imposed if Ferguson did not complete the Asian American Recovery Program. At the time her plea was taken, the court made it abundantly clear to Ferguson that if she failed to complete the Asian American Recovery Program, she would be sentenced to a term of six years in prison. Nonetheless, she chose to avoid the risk of trial, in order to foreclose the possibility of a potential sentence of up to 35 years to life.

Despite our request, Ferguson does not directly address *Carr* in her supplemental brief. However, she does repeatedly contend that the trial court retained discretion because her sentencing was delayed and the plea bargain had not yet been accepted by the trial court. She insists: “It was specifically contemplated that there would be a sentencing hearing at which the trial court would determine whether to accept the plea and what disposition it would impose.” She relies on the fact that the court stated: “Acceptance of your plea at this time is not binding *on the court*. *If the court withdraws*

*approval at the time for sentencing* you will be allowed to take back your guilty plea and enter a plea of not guilty if you wish to do so.” (Italics added.) But, this does not mean that the court did not accept the plea agreement. Section 1192.5 requires the trial court, upon approving a plea, to give this admonition.<sup>6</sup> Without withdrawing its approval of the deal, the plain terms of plea agreement did not leave the trial court with any discretion to sentence Ferguson to anything but six years in prison. Although the trial court may, at a later date, have appeared to believe otherwise, it is the terms of the agreement that govern. We decline Ferguson’s veiled invitation to distinguish *Carr*.

Even if we were to decide that the trial court retained discretion to reinstate probation, we would conclude that the trial court did not abuse its discretion in not doing so. “ ‘A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.’ [Citation.] A court abuses its discretion ‘whenever the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.] We will not interfere with the trial court’s exercise of discretion ‘when it has considered all facts bearing on the offense and the defendant to be sentenced.’ [Citation.]” (*People v. Downey* (2000) 82 Cal.App.4th 899, 909–910.)

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<sup>6</sup> Section 1192.5 provides, in relevant part: “Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, . . . the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it. [¶] Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] *If the court approves of the plea*, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.” (Italics added.)

Reinstatement of probation “requires a determination by the trial court that the interests of justice so require.” (*People v. Stuckey* (2009) 175 Cal.App.4th 898, 916.) Here, the trial court took into consideration Ferguson’s substance abuse history, the seriousness of the instant crime, and her criminal history, involving two prior first-degree burglary convictions, with execution of sentence suspended in both. The court also considered Ferguson’s failure in either instance to succeed in treatment through probation. The court considered the relevant factors in denying Ferguson’s plea for reinstatement of probation. (See Cal. Rules of Court, rules 4.410, 4.414.) In these circumstances, the trial court was not compelled to give Ferguson yet another bite at the apple. The trial court reached a reasonable conclusion that probation was futile.

We must also reject Ferguson’s contention that the trial court abused its discretion, and violated her right to due process, in denying her request for a continuance. “ ‘The trial court’s denial of a motion for continuance is reviewed for abuse of discretion.’ [Citation.] ‘There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.’ [Citations.] [¶] In reviewing the decision to deny a continuance, ‘[o]ne factor to consider is whether a continuance would be useful. [Citation.]’ [Citation.]” (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.)

Ferguson cites many cases suggesting a trial court’s discretion to deny a continuance may not be exercised in such a manner as to deprive the defendant of reasonable opportunity to prepare his defense. (See, e.g., *People v. Fontana* (1982) 139 Cal.App.3d 326, 333.) But, Ferguson fails to recognize that, at the time she requested a continuance, she had already pleaded guilty, agreed to a term of six years, and conceded that she had violated the terms of her plea agreement. Ferguson has cited no authority suggesting that a court abuses its discretion in denying a request to continue sentencing in such a case. The trial court accepted that, were a continuance granted, a representative from Walden House would confirm Ferguson as sincere and making a genuine effort in that program. However, the court clearly did not believe that

continuance would be useful. It simply viewed those facts as immaterial, given its consideration of Ferguson's criminal history and prior lack of success in treatment through probation. The trial court did not abuse its discretion in denying the continuance. Moreover, since it is also clear that the court would have made the same sentencing decision had the continuance been granted, Ferguson is unable to show prejudice.

The trial court did not abuse its discretion, or deny Ferguson her rights to due process, in denying the request for a continuance and sentencing her to a six-year prison term.<sup>7</sup>

### III. DISPOSITION

The appeal is dismissed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.

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<sup>7</sup> We need not consider Ferguson's argument regarding purported judicial bias because she forfeited the argument by waiting to raise it in her reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [arguments not raised in opening brief need not be considered].)