

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE) Supreme Court No.
OF CALIFORNIA,) S210545
)
Plaintiff and Appellant,) Court of Appeal No:
) B231411
v.)
) Superior Court (Los
KHRISTINE EROSHEVICH, et al.,) Angeles) No. BA353907
)
Defendants and Respondents.)
_____)

SUPREME COURT
FILED

MAY 20 2013

Frank A. McGuire Clerk

Deputy

ANSWER TO PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE) Supreme Court No.
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Defendants and Respondents.) ANSWER TO PETITION

) FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rules of Court, rule 8.500(a)(2),
Respondent Howard K. Stern hereby provides the following Answer
to Appellant's Petition for Review of the March 28, 2013 published
decision of the Court of Appeal, Second Appellate District, Division
Five.

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INTRODUCTION

The prosecution charged Respondent Howard K. Stern and two physicians with a laundry list of offenses relating to medication prescribed to the actress Anna Nicole Smith. (14CT 2725, 2734-2738.)¹ A jury acquitted Mr. Stern of all the charges it considered against him save two counts of conspiracy which alleged that he had conspired to commit the target offenses of obtaining medication prescribed for Ms. Smith through fraud or the use of false names. (22CT 5172-5180.) Unlike the charged substantive offenses, these two conspiracy counts required the prosecution to prove that Mr. Stern lacked a good faith belief in the legality of his actions. (*See, e.g., People v. Marsh* (1962) 58 Cal.2d 732, 743; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 779.) Although the prosecution had every opportunity to prove this element of the conspiracy charges over the course of a three-month trial, it could not do so.

¹ Citations to "CT" denote the Clerk's Transcript on Appeal, and citations to "RT" denote the Reporter's Transcript on Appeal. These citations are preceded by the transcript volume number and followed by the page reference. All statutory references are to the Penal Code unless otherwise specified or evident by context.

In light of the prosecution's deficient proof, Mr. Stern moved for a new trial and invited the trial court to dismiss the conspiracy charges against him. (23CT 5201-5225.) The court determined that Mr. Stern had a good faith belief physicians could legally write prescriptions to Ms. Smith, a well-known figure, in names other than her own in order to protect her privacy. (48RT 15328.) Indeed, the evidence showed that Mr. Stern's belief was shared by Ms. Smith's long-time doctor and pharmacist, by numerous other doctors, hospitals, and pharmacists who provided health care for Ms. Smith under alternate names for privacy reasons, and even by the prosecution's own expert witness. (See 48RT 15328.) Finding the two conspiracy verdicts contrary to the evidence, the court granted the new trial motion and then dismissed these charges against Mr. Stern. (48RT 15329.)

The appellate court concluded that substantial evidence supported the conspiracy convictions and reversed the trial court's grant of a new trial and dismissal order. (Opinion 2, 25-30.) Recognizing that the trial court had not reached additional grounds raised in the new trial motion and the request for dismissal, the

appellate court remanded for the trial court to exercise one of four options: (1) deny Mr. Stern's new trial motion; (2) deny the new trial motion, but dismiss the case pursuant to Penal Code section 1385 other than on evidentiary insufficiency grounds; (3) grant the new trial motion after reweighing the evidence as a so-called 13th juror; or (4) dismiss the charges other than on legal insufficiency grounds. (Opinion 30-31.) The appellate court added, however, that if the trial court grants the new trial motion or dismisses the case, double jeopardy precludes the prosecution from retrying Mr. Stern. (Opinion 31-33.)

Appellant has filed a petition for review asking this court to evaluate that portion of the appellate court's March 28, 2013 opinion which holds that if the trial court grants Mr. Stern's motion for a new trial upon remand, double jeopardy bars retrial. However, Appellant fails to satisfy the criteria for review; it does not suggest that review is necessary to "secure uniformity of decision," and it comes up with no reason why this case presents "an important question of law." (Cal. Rules of Court, Rule 8.500(b)(1).) Rather, unhappy with the outcome of the appellate

court's double jeopardy analysis, Appellant spends the entirety of its petition arguing the merits of its claim. Because this court should not expend its scarce resources considering an issue unlikely to recur much, if ever, in the future, it should deny Appellant's petition for review. In the alternative, if the court takes issue with the appellate court's double jeopardy analysis, it should simply order the appellate court's opinion depublished pursuant to California Rules of Court, rule 8.1125(c).

In the event this court decides to grant Appellant's petition for review, Mr. Stern requests that it also grant review on the considerably more significant issue raised by the appellate court's decision relating to the sufficiency of the evidence necessary to prove a defendant's part in a conspiracy. Specifically, what constitutes substantial evidence that a defendant lacked a good faith belief in the legality of his actions for purposes of a conspiracy conviction? Review is appropriate on this issue given the frequency with which conspiracies are charged in California's courts.

ARGUMENT

I. THIS COURT SHOULD DENY APPELLANT'S PETITION FOR REVIEW BECAUSE IT DOES NOT PRESENT A RECURRING ISSUE OF WIDESPREAD IMPORTANCE.

Rule 8.500(b)(1) of the California Rules of Court provides that this court may order review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Indeed, "this court limits its review to issues of statewide importance." (*Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 432, n.3.) Appellant's petition fails to raise any ground satisfying the criteria for review.

In its petition, Appellant just reiterates the merits of the argument it repeatedly made to the appellate court that principles of double jeopardy do not preclude Mr. Stern from being retried. (Petition for Review ("PFR") 2-11, 17-29.) In doing so, Appellant essentially requests this court to grant review in order to correct the appellate court's holding barring a retrial. But whether the appellate court was correct in its application of the double jeopardy clause does not make this case an appropriate vehicle for review.

This court's function is not merely to rectify mistakes of particular lower courts. Reviewing a case which presents no issue of widespread importance only to ensure that the appellate court arrived at the right decision would amount to a vast waste of this court's scarce judicial resources.

The double jeopardy issue presented here in particular has very little chance of recurring. In its petition, Appellant details the extremely complicated procedural history of this case. (PFR 6-8, 11-16.) It is that complicated history which makes it highly unlikely that the issue Appellant complains about will recur with any frequency, if ever again. Specifically, the same double jeopardy question would only arise in the rare circumstance where (1) the trial court granted the defendant's new trial motion by mistakenly applying the substantial evidence standard instead of reweighing the evidence as a 13th juror, (2) the trial court left undecided at least one ground from the defendant's motion for new trial, *and* (3) the appellate court determined that the trial court erroneously found insufficient evidence in the record to support the defendant's convictions. At the same time, the trial court must *not*

have properly dismissed the case under Penal Code section 1385 or have any plans to do so upon remand.

Appellant makes little to no effort to explain how the double jeopardy issue has any application beyond this case. In fact, the only suggestion Appellant makes in this regard is when it claims that the appellate court's remedy prohibiting a retrial "allows trial courts to guarantee an acquittal and evade meaningful review, while rendering motions for new trial pursuant to section 1181 meaningless." (PFR 10; *see also* PFR 28 ["the Court of Appeal has created a new procedural scenario in which trial courts can guarantee an acquittal and evade meaningful judicial review."].) But the United States Supreme Court answered this very same concern in *Evans v. Michigan* (2013) ___ U.S. ___, 133 S.Ct. 1069, rejecting the premise that its double jeopardy ruling would "make it easier for courts to insulate from review acquittals that are granted as a form of nullification" because "[w]e presume . . . that courts exercise their duties in good faith." (*Id.* at p. 1079.) Moreover, in alleging that the appellate court's double jeopardy ruling will encourage rogue courts to circumvent the law, Appellant ignores the

fact that trial courts already have the power to "guarantee an acquittal and evade meaningful review" simply by granting a pre-verdict motion to acquit pursuant to Penal Code section 1118.1. (See Pen. Code § 1118.2 ["A judgment of acquittal entered pursuant to the provisions of Section . . . 1118.1 shall not be appealable and is a bar to any other prosecution for the same offense."]; *Evans v. Michigan, supra*, 133 S.Ct. at p. 1074.)²

² In addition to its failure to raise an issue of significant importance worthy of this court's review, Appellant incorrectly asserts that the appellate court's double jeopardy ruling is inconsistent with the cases Appellant cites in its petition. However, not one of those cases addresses the situation where, like here, the trial court both granted the defendant's new trial motion and dismissed the jury verdicts based on legally insufficient evidence -- let alone where the appellate court then reversed the trial court's orders, held that the trial court had applied an erroneous legal standard in granting a new trial, and remanded for a consideration of grounds from defendant's new trial motion previously left undecided. Most of Appellant's cases involve a trial court's dismissal based on legally insufficient evidence, but not also the grant of a new trial. (See, e.g., PFR 5-6, 9, 18-21, 24-25, relying on *United States v. Wilson* (1975) 420 U.S. 332; *People v. Craney* (2002) 96 Cal.App.4th 431; *People v. Salgado* (2001) 88 Cal.App.4th 5; *United States v. Sharif* (9th Cir. 1987) 817 F.2d 1375.) Others involve a new trial grant, but not a dismissal based upon legally insufficient evidence. (See, e.g., PFR 4, 9-10, 27, relying on *United States v. Smith* (1947) 331 U.S. 469; *Porter v. Superior Court* (2009) 47 Cal.4th 125.) And still others involve different procedural scenarios altogether. (See, e.g., PFR 4-5, relying on *United States v. Alvarez-Moreno* (9th Cir. 2011) 657 F.3d 896.)

Appellant no doubt disagrees with the Court of Appeal's decision that principles of double jeopardy preclude the prosecution from retrying Mr. Stern, but that disagreement does not make this case appropriate for review. Because Appellant's petition fails to present a recurring issue of widespread importance, this court should deny review. Alternatively, to the extent this court agrees that the appellate court's double jeopardy analysis "is legally flawed" (PFR 28), it should simply order the appellate court's opinion depublished pursuant to California Rules of Court, rule 8.1125(c).

II. IF THIS COURT GRANTS APPELLANT'S PETITION FOR REVIEW, IT SHOULD ALSO GRANT REVIEW ON THE QUESTION OF WHAT CONSTITUTES SUBSTANTIAL EVIDENCE THAT A DEFENDANT LACKED A GOOD FAITH BELIEF IN THE LEGALITY OF HIS ACTIONS FOR PURPOSES OF A CONSPIRACY CONVICTION.

If this court decides to grant Appellant's petition for review, Mr. Stern requests that it also grant review on the significantly more important issue of what constitutes substantial evidence that a defendant lacked a good faith belief in the legality of his actions for purposes of a conspiracy conviction. (*See* Cal. Rules of Court, rule 8.500(a)(2) ["A party may file an answer responding to the issues raised in the petition. In the answer, the party may ask the court to address additional issues if it grants review."].)

Count one of the information alleged that Mr. Stern had engaged in a conspiracy between September 11, 2006 and February 8, 2007, while count three alleged that he had engaged in a conspiracy between June 5, 2004 and September 10, 2006. (14CT 2725, 2735.) Both of these charges alleged, among other target crimes, that Mr. Stern conspired to obtain a controlled substance by fraud, deceit, or misrepresentation in violation of Health and Safety Code section 11173, subdivision (a), and that he conspired to obtain

a controlled substance by giving a false name or address in violation of Health and Safety Code section 11174. (14CT 2725, 2735.)

In order to prove that Mr. Stern conspired to commit the section 11173, subdivision (a), and section 11174 target offenses associated with counts one and three, the prosecution introduced evidence that he helped obtain a series of prescription medications for Ms. Smith using names other than Anna Nicole Smith. The jury subsequently found Mr. Stern not guilty of seven of the nine charged crimes it considered against him, but returned guilty verdicts in counts one and three, finding for each count that Mr. Stern conspired to obtain a controlled substance by fraud and by giving a false name. (22CT 5172-5180.)

After the jury's verdicts, counsel for Mr. Stern simultaneously filed a Penal Code section 1181 motion for new trial and an invitation to the trial court to exercise its discretion to dismiss the counts one and three conspiracy charges pursuant to Penal Code section 1385. (23CT 5201-5225.) Both the motion and the invitation alleged that the jury's guilty verdicts on the conspiracy

charges were contrary to the law or evidence because the prosecution had failed to present substantial evidence that Mr. Stern "did not have a good faith belief it was legal for Dr. Khristine Eroshevich to prescribe medications intended for Anna Nicole [Smith] in his name where both the doctor and patient knew the intended recipient was the actual patient, and the purpose was to protect patient privacy." (23CT 5203; *see also* 23CT 5215, 5281-5284, 5288-5291.)

During a subsequent hearing on the new trial motion/ invitation to dismiss, the court initially observed that the jury's verdicts -- only six convictions out of a total of 23 charges -- constituted "a stunning repudiation" of the People's "extremely complex criminal prosecution." (48RT 15303.) The court also expressed its concerns about the validity of Mr. Stern's conspiracy convictions given the dearth of evidence that Mr. Stern had a specific intent to violate the two target crimes of each conspiracy. (48RT 15307.)

Thereafter, defense counsel reiterated his position that the evidence failed to show Mr. Stern intended to break the law in

helping to obtain prescription drugs for Ms. Smith, but in fact showed Mr. Stern had a good faith belief that his actions were legal. (48RT 15307-15310.) Counsel cited the court's earlier statement that the prosecution had failed to present any evidence a lay person knows it is illegal to write a prescription in another name for reasons of privacy. (48RT 15308; *see* 42RT 12171.)

When the court asked the prosecutor to recount the evidence that Mr. Stern had an intent to defraud, the prosecutor claimed that evidence suggested Mr. Stern prevented the authorities from tracking prescriptions going to Ms. Smith. (48RT 15320.) The court replied that there was no evidence Mr. Stern knew the authorities traced prescriptions. (48RT 15320-15321.)

With regard to the counts one and three conspiracy offenses, the court believed that the prosecution had at best arbitrarily charged these conspiracies. (48RT 15327.) More importantly, the court determined that the evidence did not support Mr. Stern's convictions on either of the charged conspiracies:

Both offenses, these target offenses, required evidence that Howard Stern intended to deceive or defraud another person, and another person would, of course, include a government agency or pharmacy. It

is argued by the prosecutor that there was ample evidence of a pattern of deception and misrepresentation through the use of multiple false names. Several facts were alleged in the pleadings, and again today, that Howard Stern was a primary contact for doctors regarding Anna Nicole Smith's medical care. Eroshevich issued prescriptions under multiple names.

To me the heart of the issue is, and I really think -- I thought on this and I must tell you I don't think there is any evidence in the record at all that Howard Stern lacked a good faith belief that the practice of obtaining prescription medicines for Anna Nicole Smith in names other than Anna Nicole Smith could be against the law. He is not a doctor. He obtained medicines in names other than Anna Nicole Smith to protect her privacy. There is ample evidence in the record that this was done by most doctors, even hospitals who encountered and dealt with Anna Nicole Smith.

(48RT 15328.)

Therefore, finding insufficient evidence that Mr. Stern had a specific intent to violate either of the target crimes alleged under section 11173, subdivision (a), and section 11174, the court granted Mr. Stern's motion for new trial. (48RT 15329.) The court then went a step further and dismissed the conspiracy charges under Penal Code section 1385 in furtherance of justice because the evidence showing Mr. Stern specifically intended to join a conspiracy was so lacking. (48RT 15329.)

The appellate court concluded that substantial evidence supported Mr. Stern's conspiracy convictions. (Opinion 25-28.) Despite the trial court's finding that the prosecution had failed to introduce any evidence Mr. Stern lacked a good faith belief in the legality of obtaining prescription medicine for Ms. Smith in names other than her own to protect her privacy, the appellate court decided that

[Mr. Stern's] knowledge and involvement [in obtaining medicines for Ms. Smith] was such the jury could reasonably conclude Mr. Stern, a lawyer, knowingly participated in the ongoing illegal practice of securing illegal prescriptions. The prescriptions were secured unsupervised by treating physicians or pharmacists and without medical documentation. The controlled substances were procured for Ms. Marshall with the fraudulent use of multiple names other than her own. The jury could reasonably have concluded that a lawyer would know such ongoing and unrelenting fraudulent activity was unlawful.

(Opinion 27-28.) Accordingly, the appellate court reversed the trial court's grant of a new trial and dismissal of the conspiracy charges.

(Opinion 28-30.) Review is appropriate in light of the appellate court's determination that substantial evidence permitted the jury to find Mr. Stern lacked a good faith belief in the legality of his actions for purposes of the conspiracy charges.

"A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense" (*People v. Jurado* (2006) 38 Cal.4th 72, 120, citation omitted; *see also* Pen. Code § 182, subd. (a)(1).) However,

"[t]he association of persons with an honest intent is not conspiracy, and one of the tests on a conspiracy trial is, did the accused act in ignorance without criminal intent? In other words, did they honestly entertain a belief that they were not committing an unlawful act?" [Citation.]"

(*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1663, citation omitted.) Indeed, a defendant's good faith belief "that his actions were legal . . . negate[s] the specific intent to violate the law required for a conspiracy conviction." (*People v. Urziceanu, supra*, 132 Cal.App.4th at p. 779; *accord People v. Marsh, supra*, 58 Cal.2d at p. 742-744.) The prosecution carries the burden of showing that the defendant did *not* have a good faith belief in the legality of his actions. (*People v. Marsh, supra*, 58 Cal.2d at p. 743; *People v. Urziceanu, supra*, 132 Cal.App.4th at p. 777; *People v. Bowman* (1958) 156 Cal.App.2d 784, 797.)

In this case, the evidence showed that medical professional after medical professional used pseudonyms in prescribing medicines to Ms. Smith to protect her privacy. (11RT 2580-2581, 2585; 12RT 2757, 2845, 2848, 2875; 14RT 3310, 3410; 15RT 3642, 3644, 3646, 3648; 16RT 4035, 4062, 4142; 17RT 4233-4234; 21RT 5416-5417; 36RT 10237; *accord* Peo. Exh. 127 at 6, 12, 21, 24, 32, 34-35.) Absolutely no evidence or witness suggested anyone ever told Mr. Stern that this practice, repeated over time by different doctors, hospitals, and pharmacies, was improper. Mr. Stern therefore had every reason to believe that the procedure of using other names to protect Ms. Smith's privacy was perfectly legal, and the prosecution failed to introduce any evidence that he held a contrary belief. Absent evidence that Mr. Stern actually intended to violate the law by obtaining the prescription medications Ms. Smith needed to treat her undisputed medical conditions, he could not be convicted of conspiracy. (*People v. Marsh, supra*, 58 Cal.2d at p. 743; *People v. Meneses, supra*, 165 Cal.App.4th at p. 1663; *People v. Urziceanu, supra*, 132 Cal.App.4th at p. 779.)

In finding substantial evidence to support the conspiracy convictions, the appellate court suggested the jury could infer that Mr. Stern knew obtaining medicines for Ms. Smith by using pseudonyms was illegal merely based on his involvement in helping to get her prescriptions over time. (Opinion 27-28.) The appellate court's reasoning is circular at best. Simply helping to obtain medication for Ms. Smith by using pseudonyms -- even over an extended period of time -- did not show that Mr. Stern knew it was illegal to do so. Nothing in the evidence indicated that Mr. Stern lacked a good faith belief in the legality of his actions, and the appellate court failed to point to any such evidence in the record.

The appellate court also seemed to imply that the jury could infer Mr. Stern lacked this good faith belief just because of his status as a lawyer. (Opinion 27-28.) But it is hardly common knowledge, even for lawyers, that prescribing medication under a pseudonym to protect a patient's privacy violates the law. (*See* 42RT 12171 [trial court observing: "Everybody knows that it's illegal to rob a bank. I'm not sure a lay person, *even a lawyer*, knows that it's illegal to write a prescription for a celebrity in the

name Michelle Chase. That's what I'm saying. So where is the evidence of that?"] (emphasis supplied.) In fact, virtually every hospital, prescribing doctor, and pharmacist involved in Ms. Smith's care used false names in prescribing her medicine. Even the prosecution itself introduced expert testimony that protecting Ms. Smith's privacy constituted a valid medical reason for hospitals to treat her under an assumed name. (40RT 11442-11443.) Thus, as the trial court found, there was no

evidence in the record at all that Howard Stern lacked a good faith belief that the practice of obtaining prescription medicines for Anna Nicole Smith in names other than Anna Nicole Smith could be against the law. *He is not a doctor.* He obtained medicines in names other than Anna Nicole Smith to protect her privacy. There is ample evidence in the record that this was done by most doctors, even hospitals who encountered and dealt with Anna Nicole Smith.


(48RT 15328, emphasis supplied.) Consequently, if this court grants Appellant's petition for review, it should also review the appellate court's conclusion that substantial evidence supported the finding that Mr. Stern lacked a good faith belief in the legality of his actions for purposes of his conspiracy convictions.

CONCLUSION

For the foregoing reasons, Respondent Howard Stern respectfully requests this court to deny Appellant's Petition for Review.

DATED: May 15, 2013

Respectfully submitted,

By 
Peter Gold
Attorney for Appellant
Howard K. Stern

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d), I certify that this Answer to Petition for Review contains 3,711 words.


Peter Gold

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 5758 Geary Blvd., #160, San Francisco, California, 94121. I am not a party to this action.

On May 16, 2013, I served the within

ANSWER TO PETITION FOR REVIEW

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

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Court of Appeal
Second District, Division Five
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Howard K. Stern
3838 Dixie Canyon Ave.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 16, 2013.

Peter Gold

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LIU, J.

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May 30, 2013

Chief Justice Tani Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
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**SUPREME COURT
FILED**

JUN - 3 2013

Frank A. McGuire Clerk

Deputy

Re: *People v. Khristine Eroshevich, et al.*
California Supreme Court No. S210545
Court of Appeal No. B231411
Superior Court No. BA353907

Dear Presiding Justice Cantil-Sakauye and Associate Justices:

I was appointed by the Court of Appeal to represent Respondent Howard K. Stern in the above-entitled case. On May 8, 2013, Appellant filed a petition for review with this court. Mr. Stern filed an answer to that petition on May 20, 2013. In his answer, Mr. Stern contended that this court should deny Appellant's petition and order the appellate court's opinion depublished if it has any concerns with the appellate court's double jeopardy analysis. (*See Answer at 4, 9.*)

On May 28, 2013, Appellant filed with the court a request for an order depublishing the appellate court's opinion. Pursuant to California Rules of Court, rule 8.1125(b), and consistent with his answer to Appellant's petition for review, Mr. Stern supports Appellant's request that this court order depublication of the appellate court's opinion.

Respectfully submitted,



Peter Gold
Attorney for Respondent
Howard K. Stern

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 5758 Geary Blvd., #160, San Francisco, California, 94121. I am not a party to this action.

On May 30, 2013, I served the within

RESPONSE TO APPELLANT'S REQUEST FOR DEPUBLICATION

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

Serena Murillo
Deputy District Attorney
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(Counsel for Kristine Eroshevich)

Clerk of the Court
Court of Appeal
Second District, Division Five
300 S. Spring St., Room 2217
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 30, 2013.

Peter Gold