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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE, HARBOR JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GRANT WILLIAM ROBICHEAUX CERISSA LAURA RILEY, Defendants	Case No.: 18HF1291 PEOPLE'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE **FILED UNDER SEAL**

INTRODUCTION

"Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system." (*People v. Hill* (1998) 17 Cal.4th 800, 847.)

"The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor." (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 734.)

Public prosecutors carry with them grave responsibilities – responsibilities not only to crime victims and the public, but equally grave responsibilities to the accused and to the criminal justice system. A prosecutor's integrity, steadfastness, and objectivity are often the only bulwarks ensuring that criminal charges are properly pursued. And, even more importantly, these vital qualities are often the only safeguard ensuring criminal charges are appropriately withdrawn.

After an exhaustive, three-month evidentiary review concluded that insufficient evidence exists to prove the charges in this case beyond a reasonable doubt, the People hereby comply with their legal and ethical duty by submitting this brief and attached documents in support of their motion to dismiss pursuant to Penal Code Section 1385(a). This motion is not brought lightly – the People are acutely aware of the gravity of this request and the pain it may cause the alleged victims. But the People must be guided solely by the evidence and the law as it exists in this case. And, the law and the evidence direct the People toward one inescapable conclusion – that the evidence in this case falls short of the level needed to meet the People's constitutionally-required burden of proof of each and every element of the crimes beyond a reasonable doubt.

Prior to conducting the de novo review, the prevailing narrative surrounding this case cast the two defendants as serial sexual assault predators, hunting for unsuspecting women to surreptitiously drug and, ultimately, to rape. The evidence that was uncovered by the de novo review in this case, however, refutes this version of events. What the evidence actually reveals is that defendants engaged in a swinger lifestyle and openly pursued scores of women for consensual sexual encounters. In fact, the victims' own statements to law enforcement contradict the previously held, fallacious narrative. For example:

- Jane Doe #1 told investigators that she specifically communicated to Robicheaux that she was enjoying having sexual intercourse with him during the incident. She later told officials with the Orange County District Attorney's Office that she did not consider herself a victim until convinced otherwise by an OCDA investigator;

- In two separate interviews, Jane Doe #2 told investigators she considered her sexual encounter with defendants to be consensual;

- Jane Doe #3 told investigators she was aware of what was happening during her entire sexual encounter and, in fact, refused specific sexual acts both verbally and physically. The defendants immediately complied with her refusals. Jane Doe #3 initially stated to NBPD that she came forward out of concern regarding possible STD's and due to the possible existence of videos/photos of her sexual activities with the defendants;

- Jane Doe #4 specifically told responding Newport Beach Police officers that the defendants were not trying to rape or "take advantage" of her. Further investigation revealed she had a history of manufacturing events and a documented instance of giving false information;

- Jane Doe #5 stated that she considered her sexual encounter with defendants to be consensual until she saw press coverage of this case. She has since filed a lawsuit and refused any further cooperation with the prosecution;

- Jane Doe #6 reported that she voluntarily returned to defendants' residence and, when she communicated to them that she did not want to engage in any sexual activity, she was told, "you don't have to do anything you don't want to do." She then ran into the bathroom and no sexual activity occurred;

- Jane Doe #7 admitted to investigators that she was aware of and "knew what was going on" during her sexual encounter with Robicheaux. She said she even giggled during the encounter. She never told Robicheaux she did not want to have sex, yet she was able to communicate with him during the encounter and told him that she did not want to take off

her one-piece bathing suit because "I'm fat, I'm fat, I really don't want to show my stomach."

- Jane Doe #8 (uncharged) told investigators that she engaged in consensual sexual activity with defendants on previous occasions and consensually orally copulated Robicheaux with the expectation of engaging in consensual sexual intercourse with him the night of her incident. After voluntarily snorting approximately 15 – 16 lines of cocaine that she knew was laced with ketamine, she awoke to a nude Robicheaux spooning her yet she refused any sexual assault exam that may have found evidence of intercourse or other sexual activity. She could not say whether sexual intercourse did or did not occur.

Furthermore, the drugs seized from Robicheaux's residence simply corroborate the defendants' own drug use – including the use of GHB – and their practice of offering drugs to individuals with whom they partied. There is insufficient evidence that the defendants unwittingly plied any of the victims with drugs with the intent to sexually assault them and, for at least four of the seven charged victims, there is no evidence of any drug involvement whatsoever, apart from alcohol.

As to the firearms, Robicheaux kept them unloaded in a locked gun safe deep inside his closet and away from any drugs (the drugs were found locked in an entirely separate safe). The seized firearms may be legally purchased and possessed in the state of Louisiana – the state from which Robicheaux relocated to California. No evidence exists as to where he obtained the firearms or whether he knew or should have known that two of the rifles possessed features illegal in California – knowledge that is required to convict him of possession of an assault weapon.[1]

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[1] Importantly, the People are seeking a Dismissal without prejudice and are currently conducting investigation relating to the purchase of the firearms in question to ascertain whether the People can prove the knowledge element, *to wit,* that the defendant *knew or reasonably should have known* that the firearms had characteristics that

With such serious evidentiary problems, this Court may rightfully wonder why the People filed criminal charges in the first place. The de novo review team discovered that the investigation in this case succumbed to a "tunnel vision" mentality that apparently sought evidence to support a pre-determined conclusion. In accord with this mindset, critical information was excluded from the synopses of investigative reports[2], suggestive interviewing techniques were employed, contrary evidence to what was listed in the investigative reports was downplayed or disregarded, and assumptive and conclusory decision-making infected crucial aspects of this investigation. Because the severity of these issues was not apparent to the previously-assigned prosecutors, the People filed charges with a less than clear understanding of what the evidence actually contained.

With this motion, the People seek to remedy that mistake. The People sincerely hope that this Court recognizes – *because it is the unassailable truth* – that this motion is based solely on an objective analysis of the evidence and the applicable laws. To that end, the People have attached police reports, interview transcripts, and audio recordings of those same interviews, and a PowerPoint analysis for this Court's review. ***The People submit that in order to obtain a true understanding of the alleged victims' statements, it is imperative that the Court listen to the included audio recordings in their entirety*** (something that was not accomplished by the previously assigned prosecutors prior to this de novo review). Much, if not all, of the nuance and

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made them assault weapons and thus, whether these charges could be sustained and possibly reinitiated in the future. The People recognize pursuant to *In re Jorge M.* (2000) 23 Cal.4th 866, 887, that the firearm charges could also potentially be proven based on a negligence standard and will consider that in regards to the information gleaned in the investigation relating to the firearm purchases.

[2] Evidence that appears to have been exculpatory to the defendants was frequently not contained in the investigative synopses of the lead investigator, however, each synopsis contained a notation such as, "for further information see the audio recording of the interview", or this "report is not verbatim … [and] is not meant to take the place of the actual recording… For complete details, please refer to the audio recording." Importantly, the DDAs assigned to this case prior to the de novo review team did not review the recordings/transcripts.

witness demeanor is lost by skimming a dry transcript or reading a report summary. In addition, many critical details are only contained in the recordings as the police reports and investigative summaries frequently omit substantial amounts of vital information. And, it is often not until the final portions of some of these interviews that the most significant details are disclosed.

Finally, it is important to note the People are seeking a ***dismissal without prejudice***. The People are not seeking to forever close off potential prosecution of these defendants if new evidence is discovered which alters the legal analysis. Rather, the People are simply asserting that the evidence in its current state is insufficient to meet the required burden of proof. After reviewing the evidence for itself, the People are confident that this Court will agree.

I. PENAL CODE SECTION 1385(A)

Penal Code Section 1385(a) states in relevant part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." When a prosecutor informs the court that he or she can no longer fulfill his or her duty to prove criminal charges to a factfinder beyond a reasonable doubt, it is necessarily "in furtherance of justice" to dismiss the case. In the absence of clear prosecutorial corruption, it cannot be otherwise.

This case presents a unique situation not specifically addressed by current case law, for it is a rare circumstance indeed where a court does not grant a prosecution motion to dismiss based on insufficient evidence.[3] The People, however, understand that this case's tortured history gives

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[3] *People v. Hatch* (2000), 22 Cal. 4th 260, is one of the few cases discussing a Penal Code Section 1385(a) dismissal. *Hatch*, however, is a *habeas corpus* petition specifically dealing with a defense motion to dismiss under Section 1385(a) after a hung jury and in which the prosecution filed additional charges. Notably, the Court was deciding the issue in a circumstance where the People *opposed* dismissal and the dismissal would function as the *equivalent of an acquittal.* That circumstance is in diametric opposition to the circumstances in this case. Here, the People are the ones seeking a dismissal and – critically – it is a dismissal sought *without prejudice.*

the Court pause in granting the People's request. But, in discussing the motivations that would constitute an improper dismissal under Section 1385(a), the California Supreme Court listed circumstances that have no application here: dismissing a case to accommodate judicial convenience or court congestion, dismissing a case or sentencing allegation simply due to a defendant's guilty plea, or a dismissal guided by a judge's personal antipathy toward the law. (*People v. Romero* (1996) 13 Cal. 4th 497, 531).)

In fact, the *Romero* Court said that "...the reason for dismissal [in furtherance of justice] must be 'that which would motivate a reasonable judge'" (*Id.* at 530 (citations omitted).) And, while the Court acknowledged that the phrase "'in furtherance of justice' requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People", it described the People's interest as being "the fair prosecution of crimes properly alleged." (*Id.*(emphasis added).) Those words are critically important – the *fair* prosecution of crimes *properly* alleged.

The case of *People v. Polk* is, in some ways, instructive when considering this issue. The *Polk* case involved three defendants, all faced with murder charges in the same trial. Prior to the trial, the prosecutor was aware of a potential alibi for defendant Matthews but it was unclear as to the accuracy of that alibi. During the trial, and after the prosecution had already rested and one of the co-defendants had testified, the prosecution moved to dismiss the murder charges against Matthews in the presence of the jurors. That motion was granted under 1385 by the trial

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In addition, the single case that the People are aware of where a trial court denied a People's motion to dismiss for insufficient evidence under Penal Code Section 1385(a) is *People v. Angelo Buono* (the Hillside Strangler case). In that case, however, the Los Angeles County District Attorney's office moved for dismissal based on the inconsistencies in statements of their star witness, convicted murderer Kenneth Bianchi. The trial court, found, however, that at least a dozen pieces of evidence corroborated Bianchi's testimony at an earlier hearing incriminating his cousin and ordered the case to proceed. Again, that case is diametrically opposed to the circumstances here. As will be discussed below, the victims' own statements to police in the instant case, actually disprove the charges.

court and the dismissal was affirmed in the *Polk* decision. In so doing, the Appellate Court stated that dismissal under 1385 was proper holding "[a]lthough the proof of Matthew's innocence is not conclusive, the *evidence is sufficient to raise a reasonable doubt* as to his complicity in the murder. It was therefore proper for the district attorney to move for a dismissal." (*People v. Polk* (1964) 61 Cal.2d 217, 229 (emphasis added).) The case at Bar in some ways, is similar in that the initial review of the case suggested, not only that charges could be proved but indeed, that charges could be added by virtue of the Amended Complaint. Much as the motion to dismiss arose during the course of the trial in the *Polk* case when the prosecution believed an issue of reasonable doubt was raised, here the de novo review has yielded a conclusion that these charges similarly cannot be proven beyond a reasonable doubt and spawned this motion.

Thus, the People have informed this Court that they do not have sufficient evidence to pursue criminal charges in this case and are seeking a dismissal without prejudice. In other words, the People are telling this Court that, due to the current state of the evidence, the crimes in this case are not properly alleged and further prosecution would not be fair. By continuing the prosecution based on the known state of the evidence, the People – and this Court – would need to utterly disregard the defendants' constitutional and due process rights. Such an outcome cannot possibly be what the words "in furtherance of justice" contemplate.

While CALCRIM 1190 states that "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone", and CALCRIM 301 states (in part) that "[t]he testimony of only one witness can prove any fact", those instructions are not a license to disregard the evidence and the People's burden of proof. Prosecuting a case at all costs based on alleged sexual assault victims' demands without regard to the evidence, the legal elements of the charges, or the required burden of proof offends any notion of what "in furtherance of justice" means. Under such a standard, a prosecutor would literally be forced to file charges on nearly every sexual assault report that crossed his or her desk. Again, such an outcome would be nonsensical. In any event, contrary to stated contentions of the Marsy's Law attorneys, in conducting this de novo review, the People have taken the vast majority accounts the victims

gave to investigators as the truth. Importantly, it is the specific details included in those statements which exclude any possibility of proving the charges beyond a reasonable doubt.

The words of CALCRIM 220 are self-evident to every criminal law practitioner in California: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt." (CALCRIM 220.) These two short sentences perfectly crystallize the People's ultimate duty – to prove each and every element of a criminal charge beyond a reasonable doubt. When a prosecutor, in their best professional judgment, cannot fulfill this duty, the words "in furtherance of justice" must mandate a dismissal. To move forward in the absence of a good-faith ability to discharge this duty is not just to the defendants, not just to the criminal justice system and, is not even just to the alleged victims. The People here ask nothing more than what is routinely granted on a daily basis by courts trusting in the prosecution's objective judgment and good faith.

II. CASE HISTORY

As this Court noted on the record at the February 7, 2020 hearing on the People's motion to dismiss, mixing politics and prosecution results in a "toxic cocktail." The People wholeheartedly agree. Being career prosecutors – and taking that responsibility with the utmost seriousness - we completely excluded the politics from our de novo evaluation[4]. We were never pressured to, hurried toward, or expected to reach any predetermined outcome. In fact, our assignment was precisely the opposite: to review the totality of the evidence, to take as much time as needed, and to provide our unbiased conclusion. We were left alone to conduct our review as needed. The review pointed us unequivocally in one direction – that insufficient evidence exists to prove the charges in this case beyond a reasonable doubt. Once we reached this conclusion, we knew that we could not ethically proceed with prosecution and we also knew that our personal ethical duties as lawyers and prosecutors required us to refuse any directive by OCDA management to continue prosecuting this case. The situation in which we found

[4] The de novo review team consisted of Senior DDA Karyn Stokke and Senior DDA Richard Zimmer.

ourselves was, to say the least, the most nerve-wracking of our careers. *Yet, we both were prepared to refuse any directive to proceed despite the serious potential consequences to us for doing so*. Following our in-depth presentation for executive management, however, our fears were put to rest. The entire executive management team was equally distraught, realized the grave evidentiary problems with the case, and knew that the interests of justice dictated that we must move to dismiss this case.

To the extent possible, this brief will be devoid of discussions relating to the political whirlwind surrounding this case. Yet, the People believe it is important for this Court to appreciate the case's complicated history so that it can better place the People's current motion in its proper context and understand why the People now are moving to dismiss this case after arguing its merits for over a year.

The Newport Beach Police Department received its first report involving Robicheaux and Riley on April 12, 2016. Doe #3 (as designated in the Amended Complaint) arrived at NBPD and informed the assigned patrol officer that she was reporting an incident involving the defendants, not because she believed a crime was committed, but because she was concerned about contracting a sexually transmitted disease and potentially being filmed during her sexual encounter. She then described partying with the defendants and engaging in sexual activity with them. She specifically described being aware of what was happening to her and physically and verbally declining certain sex acts – a refusal with which the defendants immediately complied. She likewise submitted to a sexual assault exam and again told the examiner about specific sex acts she refused and that the defendants complied with her refusal. A week after her initial interview with NBPD, she told the assigned NBPD detective that she did not wish to move forward. She then failed to show for a scheduled appointment with the detective and, over the next several months refused all efforts to obtain her cooperation in the investigation. At the conclusion of their investigation, NBPD closed this case and did not even deem it worthy of submission to the OCDA's office for review.

NBPD's next encounter with the defendants occurred on October 2, 2016. Officers responded to Robicheaux's residence after a neighbor called 911 and reported a woman

screaming. Upon arriving at the scene, officers spoke with Doe #4 (as designated in the Amended Complaint) who, among other statements, described only an assault and further told NBPD that she did not think anyone was trying to rape or "take advantage" of her. Everyone at the residence was intoxicated and no other witnesses provided any statements that suggested a sexual assault had occurred. Doe #4 did not submit to a SART exam and said she wanted to speak to an attorney before giving any further statements. Again, following the conclusion of their investigation, NBPD cleared this case and did not submit it to the OCDA's office for review.

NBPD's third report involving the defendants occurred on July 3, 2017. Doe #8 (an uncharged alleged victim represented by Matt Murphy and by whom she was deemed to be "Jane Doe #8") reported to NBPD that she was raped and possibly drugged by Robicheaux. She informed NBPD officers that she engaged in consensual sexual intercourse with both defendants on a prior occasion and had intended to once again engage in consensual sexual intercourse with defendants the night of this incident. To assist in accomplishing this goal, she had consensually orally copulated Robicheaux to arouse him prior to having intercourse with him but he could not maintain an erection. She further stated that during the course of her encounter with the defendants that evening, she voluntarily snorted fifteen to sixteen lines of cocaine she knew were laced with ketamine (a drug which can produce a trance-like, anesthetic sensation). She later woke up with a shirt on and with a naked Robicheaux spooning her. She was unable to tell officers whether any intercourse occurred but informed them that Robicheaux had a "micro dick" and so she would not feel it if he had engaged in intercourse with her. She refused a sexual assault exam, refused to allow officers to take her pants as evidence, and refused all blood and urine tests. She then failed to respond to numerous efforts by NBPD to contact her. Once again, following the conclusion of this investigation, NBPD closed this case and did not deem it sufficient to submit it to the OCDA's office for review.

Meanwhile, in March 2017, the DNA recovered from Doe #3's sexual assault exam resulted in a "cold hit" in the CODIS system returning to Doe #3's boyfriend. As is the procedure with all cold hits in Orange County, the Orange County District Attorney's ("OCDA")

office was notified and the cold hit was assigned to an OCDA sexual assault investigator and line prosecutor. The assigned OCDA investigator requested the police reports relating to the cold hit, and it is here that she first became aware of Grant Robicheaux and Cerissa Riley. It was at this point that this case spun off in a very different – and perilous – direction.

For reasons still unknown, but which are currently the subject of an internal investigation, the assigned OCDA investigator (who subsequently took over for NBPD and assumed the role of lead investigator on the case) apparently developed a cognitive bias in favor of prosecution. This bias seemingly colored numerous aspects of her investigation and, ultimately, led to a narrative which is unsupported by a review of the evidence, but which painted these defendants as serial predators who unwittingly drugged and raped scores of unsuspecting women. Regrettably, this agenda-driven mentality and overzealous investigation appears to have influenced the thinking, not only of the initially-assigned prosecutors to this case, but also infected the executive suite of the OCDA's office. The current posture of this case is unfortunately the result of a "perfect storm" of occurrences. Some of the circumstances that have given rise to this present situation are illustrated by the following examples. The lead OCDA investigator was able to supplant NBPD as the lead investigative agency on the case and her subsequent reports were almost exclusively relied upon by the prosecutor responsible for filing the Amended Complaint in her filing determinations. The lead investigator arguably used overtly suggestive interviewing techniques to garner evidence and her reports failed to specifically mention critical information that could only be learned from listening to the recorded interviews of the alleged victims. In addition, the investigative reports failed to mention that, according to the statement of at least one alleged victim, the lead investigator persuaded her to identify herself as a victim, when the woman had previously not considered herself as such. Furthermore, the lead investigator engaged in an on-going "whisper campaign" with both attorneys and investigative bureau supervisory staff, for example by intimating that evidence, such as digital images existed, when in fact, they did not. This tactic appears to have seemingly garnered high-level support for prosecution of this case. Further, it appears the lead investigator ultimately exaggerated the existence of evidence to the former District Attorney and his Chief of Staff, which at least in

part, led to the much-publicized misconceptions about the quantum of evidence in this case. These and other issues, which will be discussed *infra*, seem to have pervaded the OCDA Office's thinking for nearly two years until they were finally uncovered once the de novo review team had the first true opportunity to complete a comprehensive review of all the evidence in this case.

Beginning in September/October of 2017, the OCDA investigator and the initially assigned prosecutor met with NBPD detectives and provided NBPD with a "to-do" list, one item of which was to draft a search warrant. The de novo review team has subsequently learned that NBPD, however, believed they needed to wait and complete the requested follow-up investigation before considering whether enough evidence existed to apply for a search warrant. Before long, NBPD has stated that they began to have significant concerns about the OCDA lead investigator's behavior in this case.

NBPD noticed that the assigned OCDA investigator was "very involved" in the case from the beginning and specifically categorized their interaction with her as "not normal." Shortly after their first meeting with the investigator and line prosecutor, a second meeting was held. According to NBPD, this meeting was markedly different from the professional tenor of the first meeting. The tone of this second meeting accused NBPD of "messing this up" and there were demands made as to why NBPD had not yet obtained a search warrant. This aggressive attitude surprised NBPD detectives as they had only recently begun work on the requested follow up investigation. Around this time, NBPD received a search warrant drafted by the OCDA investigator, which shocked the detectives because they understood NBPD was tasked with the drafting of any search warrant. NBPD, however, still believed that the additional investigation needed to be completed before a determination could be made as to whether enough evidence for a search warrant existed.

NBPD reviewed the warrant provided by the OCDA investigator and was immediately uncomfortable with what the warrant contained. The OCDA investigator based the warrant on

three NBPD reports[5] (Doe #3, Doe #4, and Doe #8). While NBPD noticed that she had accurately described what was in the police reports, detectives felt the lead OCDA investigator was "hyper aggressive" in her justification for the warrant. NBPD detectives were uneasy with the OCDA investigator's aggressive conclusion that the defendants drugged women and video recorded sexual assaults. Detectives believed that her conclusions made significant assumptions based upon what they knew was contained in the police reports. Furthermore, NBPD noticed that much of the "expertise" cited by the OCDA investigator was standard, template language that did not necessarily have specific application to the facts of this case.

Due to these issues, NBPD refused to swear to the language in the OCDA investigator's warrant and re-drafted it to be more in line with the actual evidence in the case. NBPD re-worked much of the justification for the warrant and omitted or re-drafted, what they believed to be, the assumptive and conclusory language included by the OCDA investigator. As the case investigation progressed, NBPD continued to notice that the OCDA investigator was "so aggressive" about the case and wanted to "take charge" of the investigation.

After service of the search warrant and recovery of digital evidence in January 2018, NBPD began their review of this evidence at the Regional Computer Forensics Lab ("RCFL"). Their review began in March 2018 and, due to the volume of data, the review lasted until September 2018. During this time frame, the OCDA investigator had the ability to review any items of evidentiary value that NBPD bookmarked. The review, however, ultimately did not locate any video or photo evidence that corroborated the three complainant's claims – a circumstance of which the OCDA investigator was made aware by NBPD.

On September 11, 2018, the OCDA filed initial criminal charges for the incidents involving current Jane Does #3 and #4, as well as drug and firearms charges. On September 17, 2018, the OCDA held a press conference seeking additional victims. After this initial press conference, the OCDA's office received approximately one hundred leads. Around this time, the

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[5] Each of these reports had been previously closed by NBPD and not deemed to possess sufficient evidence of criminal activity to justify submission to OCDA for filing review.

OCDA informed NBPD that the DA's office was taking over the investigation and only permitted NBPD to investigate approximately fifteen leads that according to NBPD, were not viable on their face. After exhausting those fifteen leads, NBPD was shut out of the investigation altogether and the OCDA investigator assumed the role of lead investigator.

At this point, the integrity of the investigation arguably began to suffer. As this Court will learn in its own review of the evidence, the OCDA investigator deployed what could be termed to be, overly suggestive questioning techniques[6]. Perhaps most glaringly, synopses of interviews of the alleged victims conducted by the lead investigator failed to mention critical information from her investigative reports that did not support her case theory.[7] This same lead investigator also told the former District Attorney and his Chief of Staff that "thousands of videos" – including videos of unconscious women being sexually assaulted existed. Some examples of the information missing from the investigative reports of the lead investigator include[8]: a) failing to mention numerous exculpatory facts regarding Jane Doe #2's alleged sexual assault; b) omitting highly relevant information from Jane Doe #7's report including her level of awareness and specific, exculpatory details she provided regarding the sexual encounter; and c) omitting significant clarifying details provided by Jane Doe #6 that could have significantly influenced a filing decision.

Unfortunately, it was based upon this less than transparent investigation and the attendant investigative reports that the line prosecutors relied upon in determining whether to move

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[6] The People encourage the Court to listen to Jane Doe #2's April 17, 2019 interview to get an idea of the highly suggestive, answer-feeding methods used by this investigator.

[7] As mentioned *supra,* evidence that appears to be favorable to the defendants was frequently not contained in the investigative synopses of the lead investigator, however, these synopses did contain a notation such as, "for further information see the audio recording of the interview", or this "report is not verbatim … [and] is not meant to take the place of the actual recording… For complete details, please refer to the audio recording." Importantly, the DDA's assigned to this case prior to the de novo review team did not review the recordings/transcripts.

[8] Such examples will be discussed in more detail *infra.*

forward with this prosecution. After Senior Deputy District Attorney Jennifer Walker was assigned to the case, she only had nine days to review nearly one hundred leads and make her filing decisions prior to the defendants' arraignment on October 17, 2018. Due to these time constraints, her review was necessarily abbreviated. Regrettably, the information DDA Walker relied upon to file the critical additional charges in this case was the imperfect information provided to her in the form of investigative synopses, primarily authored by the OCDA lead investigator. At that time, DDA Walker was unaware and frankly could not reasonably have been expected to have uncovered the problematic issues that would arise in the future.

In the summer of 2019, concerns surfaced regarding the evidentiary basis upon which this case was filed. It was then that the OCDA re-assigned the case to a Senior Deputy District Attorney with significant experience prosecuting sexual assault cases for review. That Senior DDA began her review of portions of the case and expressed her concern that the case contained significant proof problems. Due to non-work related issues, that prosecutor had to be removed from her review of the case. The OCDA's office then re-assigned the case to Senior Deputy District Attorneys Richard Zimmer and Karyn Stokke (the "de novo review team") and asked them to conduct a comprehensive, top-to-bottom review of every piece of evidence in the case. Their specific directive was to objectively evaluate the case and to provide an honest and unbiased review of the evidence.

After approximately ninety-days of combing through hundreds of hours of recordings, tens of thousands of text and chat messages (spanning a period of 4 years), and thousands of pages of documents, the de novo review team uncovered, what can only be termed as, profoundly disturbing issues in both the evidence (previously unknown to the assigned DDAs) and the case investigation. The evidence, discussed below, paints a portrait entirely different from the predatory narrative surrounding this case. But, more disconcertingly, the de novo team discovered that this narrative was primarily borne from misstatements, as well as investigative synopses, which appear to have "cherry-picked facts" and included context-free statements which in hind-sight, did not provide DDA Walker with a true and accurate picture of the evidence, but upon which she almost wholly relied to make her filing decisions as set forth in the

Amended Complaint. As a result of its exhaustive review, the de novo team found that the OCDA investigator:

a) failed to mention key, exculpatory details in her investigative reports;

b) engaged in conclusory, and suggestive interviewing techniques;

c) provided an unsolicited search warrant to NBPD (the lead investigative agency at that time) – a warrant that NBPD believed to have overstated the evidentiary conclusions and to which NBPD detectives refused to swear;

d) usurped NBPD as the lead investigator;

e) during meetings with the de novo team, aggressively attempted to get them "on board" with prosecution by downplaying or omitting material, exculpatory facts, deflecting questions about evidentiary problems, making statements about victims found to be unsupported by the evidence, and making conclusory assertions without any evidentiary basis;

f) admitted to the de novo team's investigator that each victim's case was problematic and, when unable to pinpoint specific evidence supporting her case theory, exclaimed, "so you're saying it's ok to rape intoxicated women?"

g) told the de novo review team that NBPD was negligent and conducted a poor investigation yet the de novo team uncovered a recorded phone call between NBPD and the investigator where the investigator praises NBPD detectives and proposes forming a task force – a recording specifically left out of the discovery initially provided to the de novo team by the lead investigator;

h) made statements to management implying that she had specific photos or videos of unconscious women being sexually assaulted – a review of these photos and videos by the de novo team discovered they show precisely the opposite;

i) persuaded women to identify as victims, where they did not initially believe themselves to be one.

According to the famous axiom, justice delayed is justice denied. In the instant case, seasoned prosecutors relied upon the reports and statements provided to them by an OCDA investigator, in whom they had placed their trust. While it is true that the effort to uncover the deficiencies in the investigation, certainly involved a significant delay, the People submit that in this case, despite that delay, a denial of the People's motion to dismiss is what would provide the ultimate denial of justice. While the delay in bringing this motion may be characterized as long overdue, some of the apparent haste with which this motion has proceeded immediately following the de novo review was a result of the People's desire to seek an immediate redress for that delay. It is the People's ardent hope that the materials we have provided to this Court will provide a sufficient basis for this Court to understand why this case proceeded forward for so long and why the People are now seeking to dismiss this case after a comprehensive, objective review of all the evidence. Below, the People detail the complete state of the evidence in this case for the Court's review.

III. THE EVIDENCE CODE SECTION 1108 FALLACY

Much has already been made in regards to statements regarding the relative strength of this case based solely on the sheer number of alleged victims and thus, it is important to address this issue at a relatively early stage in this brief. Prosecutors with experience in handling sexual assault cases are extremely familiar with Evidence Code Section 1108 ("1108") and the potential power of such evidence. At first blush, based upon a simple viewing of the Amended

Complaint, combined with the much publicized knowledge regarding the myriad of leads received by the OCDA as a result of the much ballyhooed press conference, it is not surprising that many of the questions surrounding the People's Motion to Dismiss may stem from the sheer number of charged and uncharged alleged victims in this case. In fact, in his Preliminary Response to the Prosecution's Motion to Dismiss, Mr. Murphy alluded to 1108 evidence and the 100 women who contacted the OCDA and further discussed the specter of "at least eight and possibly as many as eighteen, different women accusing the defendant of sexual assault." In his response, Mr. Murphy went on to erroneously state that "as this Court is well aware, an 1108 witness is an uncharged victim of sexual abuse by a charged defendant." However, 1108 evidence goes beyond that limited usage and it is important for this Court to be assured that the People have examined all possible uses of 1108 evidence. Interestingly, in so doing, the People found this to be a rare instance where the 1108 evidence of additional alleged victims, rather than acting to bolster subsequent claims, in many important respects, actually tends to undermine the claims of other alleged victims.

CALCRIM 1191A and 1191B are instructive as to the two potential uses of 1108 evidence in trial. CALCRIM 1191A pertains to the most common usage of 1108 evidence and does pertain to "uncharged" victims of sexual offenses. Such 1108 evidence need only be proven by a preponderance of the evidence, however, such evidence is "not sufficient by itself to prove that the defendant is guilty ... The People must still prove each [charge and allegation] beyond a reasonable doubt." (*See* CALCRIM 1191A.) Similarly, CALCRIM 1191B involves 1108 evidence, however, this usage involves "charged" victims and provides a scenario in which the 1108 evidence can be used as a form of cross-corroboration amongst charged victims. CALCRIM 1191B states: "If the People have proved beyond a reasonable doubt that the defendant committed one or more of these crimes, you may, but are not required to, conclude from the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] the other sex offense[s] in this case. If you find the defendant committed one or more of the crimes, that conclusion is only one factor to consider along with all the other evidence. It is not

sufficient by itself to prove that the defendant is guilty of another crime. The People must still prove [each charge and allegation] beyond a reasonable doubt." (*See* CALCRIM 1191B.)

As this Court is well-aware, such "propensity" evidence is rare within the law. The use of such evidence in instances of sexual assault cases that are often commonly classified as "he said/she said" type cases can be extremely powerful but can **only** be used when **each and every element of the charges can be proven beyond a reasonable doubt**. Such evidence is of no import when an individual charge is lacking in proof as to any element. The People submit that the instant case at Bar, is such a case. Based on the evidence (or lack thereof) with respect to each individual alleged victim (which will be examined in detail *infra* and in the accompanying PowerPoint presentation), none of the allegations set forth in the Amended Complaint relating to the alleged charged victims can be proven beyond a reasonable doubt and none of the allegations can stand on their own.

Further, a careful examination of the investigative reports, as well as the full recorded statements of the alleged charged victims, illustrates that under these particular facts, the 1108 evidence taken from the statements of the additional charged victims, weighs against the statements of other charged victims and thereby, actually weakens each successive charge. For example, Jane Doe #4 used a significant amount of alcohol during her encounter with the defendants, but apparently felt that she may have been unknowingly drugged by the defendants. There is no specific evidence that Jane Doe #4 could point to in her statement as to why she had that belief, other than the fact that she felt more intoxicated than she thought she should have been based on the amount of drinks she consumed. This speculative supposition is belied by the statements of the vast amount of alleged victims who nearly all describe being offered various drugs by one or both of the defendants. In all instances, the alleged victims voluntarily ingested the drugs and in most instances, one or both of the defendants ingested the same drugs. This evidence undermines the pervasive narrative associated with this case, wherein it has been widely publicized that the defendants stalked and unwittingly drugged women to a point of incapacitation and sexually assaulted them.

Similarly, as this Court will learn during its own review of the evidence, several of the alleged victims, at best, were somewhat unclear as to the issue of consent and **none** made a clear expression of a lack of consent, such that the defendants **would not** have reasonably believed their encounters with the alleged victims were consensual. Further, a complete review of the statements of the alleged charged victims relating to consent are illustrative of yet another instance where their usage as 1108 evidence undermines any inference regarding possible claims of lack of consent by subsequent charged victims. Clearly, a lack of consent is a major element in relation to each alleged victim. An analysis of the statements of alleged victims, such as Jane Doe #3, Jane Doe #6 and Jane Doe #7, serves to illustrate how the People's consideration of 1108 evidence relative to the issue of consent, results in the inescapable conclusion that a lack of consent cannot be proven beyond a reasonable doubt. Again, **none** of the victims made a clear expression negating consent which wasn't complied with, yet there are numerous instances where **consent was not given and the defendants complied.**

For example, Jane Doe #3 told NBPD investigators that while she was on her hands and knees, defendant Robicheaux attempted to switch from vaginal sex to anal sex. At that point, Jane Doe #3 told defendant Robicheaux that she did not want to engage in anal sex and he complied and returned to having vaginal sex with Jane Doe #3, to which she did not object. Similarly, Jane Doe #6 described a scenario where, after drinking in a bar and voluntarily ingesting cocaine with defendant Riley, she voluntarily accompanied them to their residence, at which point she sat on the bed with the two defendants. While on the bed, defendant Riley was naked and defendant Robicheaux began to gently attempt to remove Jane Doe #3's shirt. At that point, Jane Doe #3 told the defendants she did not want to engage in sexual activity and was told "you don't have to do anything you don't want to do" and the **defendants complied and no sexual activity occurred.**

In addition, Jane Doe #7 found herself in the defendants' bedroom on the 4th of July and in her statement, described witnessing 3 or 4 naked women on the defendants' bed. Jane Doe #7 further described watching as defendant Robicheaux went up to each of the naked women while masturbating his penis and essentially asked each woman to engage in sexual acts. Each woman

in turn, refused and the **defendant complied** and proceeded to engage in intercourse with defendant Riley. Subsequently, Jane Doe #7 was invited back to the defendants' house and after witnessing defendant Robicheaux engaged in consensual sexual activity in his bedroom with yet another woman, Jane Doe #7 proceeded to lie down on defendant Robicheaux's bed in her bathing suit. Defendant Robicheaux later approached Jane Doe #7 while he was naked, began to massage her thighs and masturbate his penis (exactly as she had witnessed on the 4th of July) and then engage in intercourse with Jane Doe #7. It is noteworthy that in the recorded interview with the lead investigator, Jane Doe #7 indicated that there were two instances of intercourse with defendant Robicheaux. Importantly, Jane Doe #7 seemingly indicates that she did not express a lack of consent during the first instance of intercourse but states that defendant Robicheaux **almost immediately complied with her request** and stopped the sex after a "half a second" during the second instance when she said "dude no".[9]

Those examples are representative of instances in this case, in light of the demonstrably irresolute statements regarding consent by the alleged victims, where 1108 evidence of statements by several alleged charged victims undercuts the statements of the other alleged charged victims. This becomes even more problematic from a proof standpoint when one considers the applicable law in this case that **mandates acquittal** if the defendants reasonably believed the alleged victims were capable of or actually consented to the sexual activity with regards to all the rape allegations and **even if that belief was wrong**, in relation to rape by intoxication.

Further, in considering the potential 1108 evidence pertaining to any uncharged alleged victims in this case, and specifically in regards to Jane Doe #8, the People submit that such evidence does not even rise to the preponderance standard required for such usage. In fact, the People are confident that after conducting its own thorough review of the evidence, this Court will agree with our assessment that it strains imagination to find a scenario where 1108 evidence

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[9] *See* Transcript of Interview of Jane Doe #7 by Jennifer Kearns at pages 26 – 27. Note that this statement is not present in the investigative report by the lead investigator.

relating to Jane Doe #8 would ever be used by a seasoned prosecutor and in the unlikely event that such evidence were to be used, such use would be extremely detrimental to the prosecution's case, as well as subject Jane Doe #8 to unnecessary humiliation.

While much has been made of the potential bolstering effect of 1108 evidence based on the volume of alleged victims and what most assuredly, will continue to be raised in opposition of the People's Motion to Dismiss, such reliance in the instant case is misplaced. Despite the potential power of 1108 evidence, a prosecutor must first assess each and every element of each and every charged count pertaining to each alleged victim on its own and apply that prosecutor's ethical obligation to only proceed if such an assessment yields a belief that every element can be proven beyond a reasonable doubt. An unprovable charge cannot be corroborated by another unprovable charge – all that is left is a mountain built upon reasonable doubt. And, following this Court's review of all of the available evidence, the People are confident this Court will agree that is unfortunately, exactly what has been built here.

IV. SUMMARY OF THE EVIDENCE

The evidence outlined below is a detailed summary, but a summary nonetheless. The People invite – and, in fact, strongly encourage – this Court to review for itself the included reports, PowerPoint analysis, transcripts, and, in particular, the full audio recordings of relevant interviews. The People firmly believe this Court should see for itself the fatal evidentiary problems present in this case. The sexual assault charges will be explored first, followed by a discussion of the drug and firearms charges.

A. SEXUAL ASSAULT CHARGES

APPLICABLE LAW

Included in the evidentiary binder submitted with this brief are the relevant jury instructions for each of the charged offenses. The instructions and law listed here are the

portions most relevant to the evidentiary analysis.[10] The People cannot emphasize enough that a victim telling investigators that she did not consent to, or did not want to have sexual intercourse is *not sufficient by itself to legally prove a rape*. The disclosure of non-consent is only the first prong of the analysis. The second prong necessarily views the incident from the defendant's perspective. And, the People must prove *beyond a reasonable doubt* that, from the defendant's perspective, he could not have reasonably believed the victim consented or, in the case of a rape by intoxication, that she was capable of consent. The People must therefore prove a negative – *to wit,* that a defendant did *not* reasonably believe the victim consented or was capable of consenting. Furthermore, in the case of a rape by intoxication, the law states that *even if a defendant's belief is wrong*, he is still acquitted as long as his belief was reasonable. In essence, if a defendant claims he believed the victim consented and explains his reasons why, the People must prove beyond a reasonable doubt that he is lying. The law states:

CALCRIM 1000 (PC 261(a)(2) – Rape by Force, Fear, or Threats)

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual intercourse with a woman;
2. He and the woman were not married to each other at the time of the intercourse;
3. The woman did not consent to the intercourse;
4. The defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.

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[10] Other similar charges in the complaint are Penal Section 220(a) and Penal Code Section 209(b). Each of these sections requires proof of an intent to sexually assault the alleged victim. As the jury instructions for those charges necessarily refer back to CALCRIM 1000 or CALCRIM 1002, the People only included the full text of those two jury instructions. In addition, the charge of Penal Code Section 288a(i) (Oral Copulation by Intoxication/Anesthetizing Substance) includes the same lack of consent and reasonable belief by the defendant language as the instructions listed here. If needed, the full text of the jury instructions for all charges may be found in the included evidentiary binder.

The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty (CALCRIM 1000) (emphasis added).

CALCRIM 1002 (PC 261(a)(3) – Rape of Intoxicated Woman)

1. The defendant had sexual intercourse with a woman;
2. He and the woman were not married to each other at the time of the intercourse;
3. The effect of an intoxicating substance prevented the woman from resisting; AND
4. The defendant knew or reasonably should have known that the effect of an intoxicating substance prevented the woman from resisting.

The defendant is not guilty of this crime if he actually and reasonably believed that the woman was capable of consenting to sexual intercourse, *even if that belief was wrong*. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty (CALCRIM 1002) (emphasis added).

Furthermore, it is a common misunderstanding that if a woman is intoxicated and her judgment somewhat inhibited, sexual intercourse with her is necessarily rape. This belief is dead wrong. In fact, California courts have specifically held that a much higher level of impairment is required:

> In deciding whether the level of the victim's intoxication deprived the victim of legal capacity, the jury shall consider all the circumstances, including the victim's age and maturity. (Cf. *People v. Young* (1987) 190 Cal. App. 3d 248, 257 [235 Cal. Rptr. 361].) ***It is not enough that the victim was intoxicated to some degree, or that the intoxication***

> ***reduced the victim's sexual inhibitions***. "Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind." (*People v. Peery, supra*, 26 Cal. App.. at p. 145; accord, People v. Griffin, supra, 117 Cal. At p. 585.) ***Instead, the level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment concerning that issue***. (*People v. Giardino* (2000) 82 Cal.App.4th 454, 466-67) (emphasis added)

This law – law that is often counter-intuitive to the public and alleged victims – must guide the People's analysis. Regardless of what the public or alleged victims perceive the law to be or would like the law to be, the People must base their prosecutorial decisions on what the law (and evidence) actually is.

THE DEFENDANTS' LIFESTYLE

Robicheaux and Riley began a romantic relationship in 2014 and quickly embraced a "swinger" lifestyle that included group sex with other women. [11] Over a four-year period beginning in 2014 and culminating in the filing of this case, they actively sought out women to participate in consensual threesomes and foursomes. To that end, they contacted women in public, on various dating applications, and on social media to recruit them for consensual group sex. The couple were avid travelers and hardcore partiers deeply involved, not only in the Newport Beach party and swinger scene, but the music festival and rave scene with all of the sexual and drug activity those environments entail. As a part of this chosen lifestyle, the two frequently used cocaine, ecstasy, and GHB while openly offering these drugs to other people. In describing their lifestyle, defendants' friend, Anessa Dea, told investigators that "[B]asically the

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[11] This description of Robicheaux and Riley's lifestyle is based upon an exhaustive review of their communications over a four-year period between themselves and others, interviews with witnesses, and the entirety of the digital evidence.

lifestyle in Orange County is like a big party scene. Everyone just likes to have a good time. They all hook up with each other. It's a normal thing for that group."[12] And, as a woman who occasionally participated in the defendants' threesomes, Dea said, "I do know that they would hook up with a lot of girls, but I mean it was definitely under the girls' consent. . . [E]very time I saw, [the girls] knew exactly what they were doing. I mean, I've been part of their threesomes a few times . . . and they have never done anything bad or harmful to me personally."

Familiar with the defendants' drug use – including their use of GHB – Dea noted, "Yeah, yeah but I mean seriously, there's just so many people in Orange County that just do [GHB], just to get themselves drunk." She likewise described an incident where she witnessed Robicheaux openly offer GHB to two women at his residence and explain to them its effects:

> "Umm, so yeah, I do remember we were all hanging out, having a good time. The girls seemed fine, you know, and I do remember I think they did, both girls did take the G [GHB] umm, they knew what they were taking uh, they, Grant, even explained to them or what like, you know, what it does and not sure if the girls had ever taken it before."

According to Dea, it was normal for the defendants to use drugs, including GHB, and to share their drugs with other people. But, she emphasized that all of the group sex and drug use that she witnessed was open, consensual, and with eager participants: "And then [the other people] know they're doing it. It's not like it's hidden. It's not like it's put in their drinks." Importantly, Dea emphatically denied that she ever witnessed either defendant putting drugs in anybody's drink, "No. No way, no."

Critically, Dea's first-hand observations of the defendants' behavior is strongly corroborated by the digital evidence in this case. Their communications are replete with discussions about obtaining controlled substances (primarily ecstasy or "Molly") for personal use. In addition, where the defendants mention drug use involving other people, it is always in

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[12] The transcript and audio recording of Anessa Dea's interview are included in the People's evidentiary binder.

the context of voluntary use by the participants. Nowhere in over four years of digital data is there a single mention of the defendants surreptitiously drugging women, of engaging in or enjoying sexual activity with unconscious or severely impaired women, or of any predatory-type desire or behavior.

The defendants' background is crucial in this case because the context of most of the incidents that follow – including the defendants' mindset and perception during these events – was deeply influenced by their experiences in this lifestyle. Robicheaux and Riley actively engaged in group sex with many women and openly used drugs with them – often during consensual sexual encounters. GHB was never used, as its reputation implies, as a "date rape" drug by these defendants. Rather, any drug use was open, notorious, and a joint enterprise between the defendants and the third participant.

THE ALLEGED SEXUAL ASSAULTS

1. Jane Doe #1[13] – Charge: PC 261(a)(2) (Forcible Rape) – Defendant: Grant Robicheaux

Doe #1 contacted the OCDA's office on September 19, 2018 after reading about this case on CNN and was interviewed that same day by the lead OCDA investigator. According to Doe #1, she was a UCLA law student in June/July of 2009 when she met Robicheaux at a bar in Hermosa Beach and began casually dating him. In Doe #1's contemporaneous email and chat discussions reviewed by the de novo team, Doe #1 acknowledged that Robicheaux just wanted to "hook up" and that she thought it would be "fun to have a fling here and there." In these exchanges, Doe #1 told her friends that, "I loooove being single . . . so I can sleep with married men." More context for Jane Doe #1's involvement with defendant Robicheaux is illustrated by a comment by one of Doe #1's friends who told Doe #1 that Robicheaux needed to be a "Mr. Right Now Sorta guy."

Jane Doe #1 and Robicheaux had several dates prior to the alleged sexual assault and on their third date, she returned to his residence only to be confronted with, what she termed, "sexually

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[13] The alleged victims are specifically referred to here in accordance with their denotation in the Amended Complaint.

aggressive" behavior by Robicheaux. His behavior, combined with Doe #1's observation of a "stripper pole" in his residence made her uncomfortable and she left. Despite her trepidations over this behavior, Doe #1 agreed to a fourth date with Robicheaux on Labor Day weekend in 2009. Her concerns were significant enough that she brought a male friend to accompany her on the date. She (and her friend) met Robicheaux at a bar and had one or two alcoholic drinks. Doe #1 told the OCDA investigator that she was definitely not intoxicated nor at a point where she could not legally consent. For reasons not explored by the OCDA investigator, Doe #1 decided to leave her male friend at the bar and accompany Robicheaux back to his residence.

Once at the residence – and despite his prior behavior – Doe #1 voluntarily went with Robicheaux to his bedroom and engaged in consensual sexual activity on his bed. Robicheaux laid on top of her while she consensually kissed him and allowed him to digitally penetrate her vagina. Doe #1 said that, during the sexual activity, the room was dark and she was unsure if Robicheaux could see her face.

She told the investigator that, at this point, she "made efforts" to tell Robicheaux that she was not interested in having sexual intercourse. When asked to clarify what she meant by "efforts", Doe #1 stated that she told Robicheaux, "I'm not sure I want to," "I don't know if I'm ready to have sex," or "I don't know if I'm ready to have sex with you." She said that she thinks that she conveyed a more forceful "no" but could not tell the investigator how that more forceful "no" was conveyed.

Per Doe #1, Robicheaux told her that she was "being unclear" and "I don't know what you want." After the intercourse began, Doe #1 said that Robicheaux told her "there's no point in saying 'no' anymore." According to Doe #1, "I didn't do anything, I didn't push him off, I didn't scream, I just sort of laid there." At this point, however, Doe #1's reaction took a very different turn as she recounted to the OCDA investigator: *"I told him I was enjoying it. I thought if I told him I enjoyed it, he would finish faster and I could get out of there."*

Once the intercourse finished, Doe 1 stated that Robicheaux told her, *"I'm glad we're adults and can consent to this kind of thing."* While later that evening Doe #1 contacted her male friend and sister and told them she was upset about what had occurred, she decided not to

report the incident to law enforcement or to submit to a sexual assault exam. The next day, Robicheaux texted her and invited her to a party. Doe #1 declined the invitation and told him she was uncomfortable with what happened the night before. Doe #1 said that Robicheaux *appeared genuinely shocked and surprised* that she was uncomfortable with their sexual encounter.

Notably, during a phone call on February 4, 2020, Doe #1 told a room full of prosecutors and other OCDA staff that *she initially did not feel like a victim* and her participation in this case was a *direct result of reassurances by the lead OCDA investigator promising her that the case was a "slam dunk."* She said that if someone had explained everything to her in the very beginning, *she would not have participated.*[14]

Proof Issues

Despite Doe #1's current contention that she did not consent to intercourse with Robicheaux, Doe #1's case clearly cannot be proven beyond a reasonable doubt when the incident is viewed – as it must be – through Robicheaux's eyes. Here, Robicheaux displayed what Doe #1 believed to be "sexually aggressive" behavior on their third date and yet Doe #1 agreed to see him again. Not only that, but she agreed to return to his residence and engage in consensual, penetrative sexual activity. Regardless of Doe #1's internal concerns about Robicheaux, her actions conveyed to him that she was comfortable being sexual with him and not intimidated by his previous behavior.

While Doe #1 did say that she told Robicheaux that she "[didn't] know" if she was ready to have sex with him, she cannot say for certain how – or even whether – she conveyed a more forceful 'no.' She told the lead OCDA investigator she only "thinks" she conveyed it. And, while she does say that Robicheaux told her that "there's no point in saying 'no' anymore", her

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[14] Throughout this prosecution, Doe #1 has run the gamut from cooperative to uncooperative. Only a few months ago, she informed the OCDA's office that she was going to propose to Robicheaux's civil attorneys that she would pull out of the criminal case if they agreed not to depose her or her friends.

next course of action destroys any hope of meeting the People's burden of proof: *She specifically communicated to Robicheaux that she was enjoying the intercourse with him and wanted him to believe she was enjoying it.*

It then strains all credulity to argue that Robicheaux did not actually and reasonably believe Doe #1 consented when she told him she was enjoying the intercourse *with the intent that Robicheaux actually believe her.* In fact, the conclusion that Robicheaux believed Doe #1 consented is further corroborated by his exchange with Doe #1 the following day. Per Doe #1, Robicheaux appeared *genuinely* shocked and surprised when she explained she was uncomfortable with the prior night's events. With these two pieces of devastating evidence, to claim that Robicheaux did not reasonably believe Doe #1 consented is utterly specious.

Further, Robicheaux was never duplicitous with Doe #1 about his ultimate intentions. Her email and chat discussions among her friends demonstrate she was well aware that Robicheaux was primarily interested in a sexual interaction. Finally, Doe #1's admissions on the February 4, 2020 phone call are incredibly telling. She specifically said – to seven OCDA witnesses - *that she did not feel like a victim* until reassured by the lead OCDA investigator that her case was a "slam dunk." Such an admission, combined with her previous statements, makes meeting the People's burden impossible.

2. <u>Jane Doe #2 – Charge: PC 261(a)(3) – Defendants: Grant Robicheaux & Cerissa Riley</u>

Doe #2 contacted the OCDA's office on September 19, 2018 after reading an ABC News Article on her news feed. She provided two separate statements to different OCDA investigators – one on October 4, 2018, to assisting OCDA investigators and one on April 17, 2019, to the lead OCDA investigator[15].

[15] The second statement to the lead OCDA investigator was taken as a result of that lead investigator expressly stating that she was not happy with the results of the first interview.

October 8, 2018 Statement

Doe #2 met Riley on Tinder (a dating application) in March 2015. According to Doe #2, Riley's Tinder profile made it clear that she and Robicheaux were looking for friends to join them at the CRSSD Music Festival in March 2015. Because she was only twenty years old, Doe expressed concern to Riley that she was underage. Riley told her not to worry and explained that Robicheaux could get her into the nightclub they were planning to attend. Doe #2 then agreed to meet the defendants at their hotel room. When she arrived, all three of them dressed to go out for the evening.

Robicheaux, Riley, and Doe #2 left the hotel room and went to Fluxx Nightclub in San Diego. Robicheaux had a contact at the club and he got Doe #2 into the club despite her age. Doe #2 consumed alcohol with the defendants at the club and was introduced to an individual named Edmund Fisher, whom the defendants met at the music festival. In her discussion with the OCDA assisting investigators, Doe #2 explained that, while she was consuming alcohol that night, she was not an experienced drinker. At some point in the evening, Doe #2 went to the bathroom with Riley, came back to the table, and found a drink ready for her. She said after she had this second drink she did not remember anything about the evening.

At this point, Doe #2 said she woke up in the hotel room in the middle of the night for about ten-to-fifteen seconds. She could not remember if her clothes were on or off and told investigators, "I *think* they [the defendants] were both touching me" but it was "such a blur, *I honestly couldn't tell you what they were doing.*" She could not say where or on what part of her body, if any, the defendants were touching her. She felt unable to move and passed back out. When she woke up in the morning, Robicheaux was having sex with her. But, she said that Robicheaux *asked* her, "do you want to go again?" Doe #2 believed that she must have said or done something to indicate that she consented to having sex, but was unable to remember specific details. She also told investigators that *she was alert enough to know what was going on.*

OCDA investigators then specifically asked Doe #2, "*was it consensual at that point?*" Doe #2 responded affirmatively and said, "*I just kind of chalked it up to a night of drinking and*

that's what happens after a few hours of drinking." Doe #2 then said that, after the morning sex, she rinsed off and all three of them (Doe #2, Robicheaux, and Riley) went to breakfast and the two defendants then dropped her off at work. When they dropped her off, Doe #2 took down Riley's phone number. She told investigators that she did not notice any video recording or photographing. After she found out about the initial charges, she texted Edmund Fisher who told her that the defendants sounded like experienced swingers. He told Doe #2 that the defendants told him that she answered an ad on a dating website, so Fisher figured Doe #2 was "into it."

Second Statement – April 17, 2019

Due to the lead OCDA investigator's unhappiness with Doe #2's October 2018 interview, she re-interviewed Doe #2 on April 17, 2019. During this interview, Doe #2 again stated with regard to Robicheaux that she thought she met him on Tinder. She told the lead OCDA investigator that she had one to three alcoholic drinks but could not remember if it was one drink or three. Doe #2 reiterated that she and Riley went to the bathroom at Fluxx Nightclub but that she could not remember anything about the evening after returning from the bathroom. She then explained that the next thing she remembered was waking up in the morning in the hotel room.

When the interview broached the topic of morning sexual intercourse with Robicheaux, Doe #2 stated, *"I just said okay, I went with it."* When Doe #2 was asked if she woke up to Robicheaux having sex with her, Doe #2 responded, *"I don't think so. It's almost like he waited for me to be cognizant before he did."* She said that Robicheaux may have looked at her and *"raised his eyebrows to say, ok?" and Doe #2 said, "ok."* After highly suggestive, leading, and repetitive questioning by the lead investigator, Doe #2 stated – in direct contradiction of her first statement – that she believed Robicheaux had sex with her in the middle of the night as well but never claimed it was non-consensual. Finally she told the lead OCDA investigator that she could

not say whether something was put in her drink or *whether it was just the way she reacted to the alcohol.*[16]

Proof Issues

The proof issues with Doe #2's case are even worse than those with Doe #1. Not only must the People prove that an intoxicating substance rendered Doe #2 incapable of consent, but the People must also prove that Robicheaux and Riley did not reasonably believe that Doe #2 was capable of consent. And, *even if the defendants were wrong about Doe #2*, if they actually and reasonably believed she was capable of consent, the law mandates an acquittal.

Here, Doe #2's own statements prove devastating to any prosecution of these charges. In her first statement, Doe #2 has no memory of what occurred in the middle of the night with the exception of general, unidentifiable "touching." Then, she states in two separate interviews that *the morning sex with Robicheaux was consensual.* The People need to prove that Doe #2 was so intoxicated that she was not capable of consent and yet Doe #2 specifically says – twice – *that she knew what was going on* and that she *actually consented to the intercourse.* And, she described Robicheaux as *waiting until she was cognizant and aware before having sex with her.* In fact, Doe #2, in her first statement to investigators, said that Robicheaux *asked* her "do you want to go again?" Robicheaux is therefore waiting for her to be "cognizant" and then *asking permission* to have sex with her – the very definition of obtaining appropriate consent. Finally, no evidence exists of surreptitious drugging or of drug use whatsoever. As an admittedly inexperienced drinker, Doe #2 specifically said that her physical condition was just as likely to have been the way her body reacted to the alcohol she consumed. As this Court can see, Doe #2's own statement actually disproves the charged crime.

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[16] Amazingly, none of these exculpatory details were in the lead OCDA investigator's report of Doe #2's interview. Furthermore, as this Court will notice in the audio recording, the investigator was engaging in highly suggestive questioning to the point of almost feeding Doe #2 the answers. In spite of this, Doe #2 maintained that she consented to, and was aware of, the intercourse.

3. Jane Doe #3 – Charges: PC 209(b), PC 261(a)(3), 288a(i) – Defendants: Grant Robicheaux & Cerissa Riley

Doe #3 reported her incident to NBPD on April 12, 2016, two days after it occurred. She told officers that she met Robicheaux on April 3, 2016, at the China Palace and exchanged phone numbers with him. Later that week, Robicheaux invited her out on a boat for Sunday April 10, 2016. She met both Robicheaux and Riley on the boat in Newport Beach and she consumed four alcoholic drinks with no food (empty stomach). She told officers that, after these drinks, she felt "really, really drunk" as if she had ten drinks. The boat docked at Woody's Wharf and Doe #3 watched Riley pour some liquid from a contact lens solution bottle into a cap and drink it. This liquid was *not* provided to Doe #3. Doe #3 then said that she consumed more drinks at Woody's Wharf and that Riley served the drinks to everyone.

Doe #3 voluntarily accompanied Robicheaux and Riley to Robicheaux's house. She walked arm-in-arm with them into the house because she was unable to walk straight. She laid down near the fireplace to sober up and said that defendants "carried" her to the bedroom. She did not describe what she meant by "carry." On the bed, Riley showed Doe #3 two drugs – a white powder (likely cocaine) and a small orange pill (likely ecstasy).[17] Riley ingested the drugs first and then offered them to Doe #3. Doe #3 *voluntarily took both drugs*. Doe #3 said that after a couple of minutes "everything was intense" and she laid down on her stomach on the bed. Riley took off Doe #3's shirt and bra. Doe #3 told defendants that she was on her period and that she was "really shy." Doe #3 specifically told officers that, *at this point she "knows what's happening" and it "just kept going."*

Robicheaux then took off Doe #3's pants and underwear and inserted his penis into her vagina. Doe #3 said she did not say anything or try to get Robicheaux to stop. She said she did not say anything because "*maybe I didn't know what to say.*" She said that she believed Riley was filming the encounter because she saw Riley on her phone. Per Doe #3, Robicheaux switched off between having sex with Doe #3 and having sex with Riley. She said that Riley

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[17] Doe #3's toxicology results showed the presence of cocaine and MDMA metabolite.

orally copulated her. Doe #3 specifically said that she was *on her hands and knees* with Robicheaux having sex with her from behind. He then attempted to have anal sex with Doe #3.

Doe #3 then said she told Robicheaux that she'd never had anal sex before, did not want to do it, and physically pushed him away from her anus. Robicheaux complied with Doe #3's request and resumed having vaginal intercourse with her and Doe #3 did not protest. Doe #3 said she was aware Robicheaux was not using a condom and that he ejaculated outside of her body. After the sex was finished, Robicheaux offered Doe #3 more drugs – a gray powder – on a key and she voluntarily ingested it. She told police that she believed the gray powder was heroin (no evidence it was or was not) and that she did not feel paralyzed until *after* she ingested this powder, which was *after the sexual encounter*. She then fell asleep and woke up around midnight to her boyfriend calling her. She spoke with her boyfriend on the phone for about 40 minutes but did not complain about what just happened. Doe #3 took an Uber home and Robicheaux texted her the next day saying *how much fun he had and that he hoped they could get together again during the week.* Doe #3 did not reply to this text message.

Doe #3 told the officer that she decided to report to the police because she wanted to get tested for STD's since Robicheaux did not use a condom and that she was concerned about possible video and what drugs they gave her. She said that she never told the defendants "no" because she felt they might be mad at her if she did not want to engage in sex acts. When officers asked her if she believed defendants committed a crime, she responded, "*I never said 'no', that's the thing.*"

During her sexual assault exam, she repeated that she told Robicheaux "no" regarding anal sex and he complied with her request. She then falsely told the sexual assault examiner that she had not engaged in consensual sexual intercourse with anyone else in the past five days. A DNA hit from this exam and further investigation later revealed that she had, in fact, had sex with her boyfriend immediately before leaving to meet defendants.

A week after her initial interview with NBPD, Doe #3 told NBPD Detective Gamble that she wanted to "move on and forget about things" and "I don't want to move forward." She

agreed to meet Gamble for a photo lineup but never showed up. She likewise refused to respond to numerous attempts by NBPD to contact her about the case.

Proof Issues

Here again, the elements of the charged offenses are affirmatively disapproved by Doe #3's own statement. As this Court is well aware, kidnapping requires movement of a substantial distance *without the victim's consent.*[18] Doe #3 said that she voluntarily accompanied the defendants to Robicheaux's residence and was aware that she was doing so. Obviously, this statement negates the gravamen of the kidnapping charge.

Second, Doe #3 admits that she was aware and cognizant during the sexual encounter – that she "knows what's happening" and "it just kept going." When asked why she did not tell them to stop, she did not say that she was too intoxicated or unable to do so, she told detectives that, "maybe I didn't know what to say." Furthermore, Doe #3 admits she was holding herself up on her hands and knees during at least some of the sexual activity. Each of these statements demonstrates an active awareness, mental capacity, and physical ability during the encounter.

But the *most telling evidence* regarding this incident is Doe #3's outright admission that, when Robicheaux attempted to have anal intercourse with her, *she told him she did not want to do it, she physically pushed him away, and he immediately complied with her direction.* Yet, when Robicheaux resumed vaginal intercourse with Doe #3, she made no effort to stop him. To argue that Doe #3 is not capable of consent where she affirmatively refused certain sexual activity and then did not protest when other sexual activity was pursued, is a nonstarter. Moreover, to claim that Robicheaux and Riley did not reasonably believe Doe #3 capable of consent where Doe #3 is forcefully expressing her non-consent to certain acts yet acquiesces to

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[18] The People recognize the decision in *People v. Daniels* (176 Cal.App. 4th 304) which essentially extends the special situation of kidnapping a small child to include the asportation of an incapacitated person, however, the People submit there is insufficient evidence of incapacitation of Doe #3 to support that use of kidnapping.

others is nonsensical. And, if Doe #3 herself admits she was aware and cognizant during the incident, it is beyond unreasonable to argue that the defendants believed the opposite.

While drug use (cocaine and ecstasy) was involved in this incident (corroborated by Doe #3's toxicology results), it was knowing and voluntary on the part of Doe #3 and the defendants. In fact, Riley is under the influence *of the same drugs* Doe #3 ingested. There is simply no evidence of any surreptitious drugging by the defendants. Finally, Doe #3 was less than truthful when speaking to the sexual assault examiner, repeatedly refused cooperation with this investigation, and has suffered a moral turpitude conviction for domestic violence/vandalism (as well as being a suspect in other, non-filed domestic violence cases). All of these circumstances render these charges unprovable.

4. **Jane Doe #4- Charges: PC 209(b), PC 220(a) – Defendants: Grant Robicheaux & Cerissa Riley**

Doe #4's incident was reported to NBPD when Robicheaux's neighbors called police after hearing a woman screaming. When NBPD arrived on scene, Doe #4 displayed the objective symptoms of alcohol intoxication. She informed officers that she and her friend, Brittany Hammond, were at a bar where they met Riley and began hanging out with her. Doe #4 then told officers that she "blacked out" at the bar and did not remember anything that happened. She said the next thing she remembered is waking up on the floor with a male on top of her.

Doe #4 specifically told police that, when she woke up, she was wearing her shirt and underwear – she was not naked. She expressly told police that *she did not think that the male was trying to rape her or "take advantage" of her.* Rather, she said that when she woke up, the male was hitting her in the face and another unknown person was kicking her in the side of the head. Doe #4 told police that Hammond was sleeping on the ground next to her. Doe #4 said she was able to get the male off of her and that she and Hammond ran to a bathroom and locked the door. In their report, officers did not mention any observable injuries on Doe #4 despite her statements of being punched and kicked repeatedly by a grown man. Furthermore, she refused to tell police whether she wanted prosecution and said she wanted to speak with an attorney first.

Brittany Hammond (also displaying objective symptoms of alcohol intoxication) was interviewed by patrol officers and said that she and Doe #4 were invited back to the residence by a "brunette girl" and "brunette guy". She said when they arrived at the house, she (Hammond) went into the second story bathroom with a "brunette female". She said she heard people knocking on the bathroom door to come out and then heard a female voice screaming. She was unsure of what happened but noticed that Doe #4 was upset and then the police arrived.

Defendant Robicheaux was also interviewed by officers and he stated that he went out drinking with Riley earlier in the evening. He said he arrived back at the house and did not know if anyone else was inside his house besides his girlfriend. Robicheaux stated that he awoke to a female screaming at the foot of his bed and that it was common for unknown people he met at bars to sleep at his house so they would not have to drive. He told officers that he approached the screaming female with his arms out and that he videotaped the incident on his cell phone.[19] He refused to show the cell phone to officers and officers did not collect the phone from him. He denied ever assaulting Doe #4.

Officers interviewed Riley who said that Doe #4 and her friend Brittany must have been Robicheaux's friends. Riley said she remembered leaving the bar and coming back to Robicheaux's residence but does not know why Doe #4 and Hammond came with them. She said she then "blacked out" for two to three hours and that both Doe #4 and Hammond were "crazy." Per police, Riley displayed the objective symptoms of alcohol intoxication. Doe #4 did not submit to a sexual assault examination and NBPD cleared the case as a non-crime.

Doe #4's Statement to NBPD Detective Gamble

Nearly two years after this first statement – and after involvement of the OCDA's office – Doe #4 was re-interviewed by NBPD Detective Gamble. This statement differed markedly from her statement made the night of the incident. Doe #4 stated that she went to Sharkeez with Hammond and that a male approached her at Sharkeez. Doe #4 said she had no idea how she

[19] The forensic search of the defendants' cell phones revealed no such video.

left the bar or got to Robicheaux's house. She told Gamble that she blacked out and claimed that she had never blacked out from alcohol before. *This claim is verifiably false*. On July 31, 2016, two-and-a-half months *before* the incident at Robicheaux's residence, Doe #4 was arrested on a PC 647(f) charge *and the arresting officer witnessed her pass out on the booking floor in the jail with a blood alcohol level of 0.25%. Doe #4 was subsequently transported to a hospital where she received medical attention due to her level of intoxication.*

In Doe #4's second statement, she now told Gamble that when she woke up at Robicheaux's house, she did *not* have her top on (in direct contradiction of her first statement) and that a male was trying to "force himself" on her. When asked to describe what he was doing, she said "make out with me, "touch me to take my clothes off" (again, contrary to her first statement). She did not indicate that any actual sexual activity took place (no penetration, oral copulation, touching of genitals/breasts). Doe #4 said that she started screaming and hitting the male and he began punching and kicking her. She said the male was kicking her over and over again and his girlfriend told him to let Doe #4 go.

She told Gamble that she had bruises and scratches all over her arms and legs and that Hammond took pictures of her injuries as soon as she got home. Again, officers did not note any injuries on her at the scene and she did not provide these photos to law enforcement.[20] She

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[20] Doe #4 provided only two photos to law enforcement (to the OCDA's office) which only happened after this case was filed. These photos (included in the attached PowerPoint) were taken almost a month after this incident and show Doe #4 and Hammond getting ready in the bathroom. There appears to be a faint mark of some kind on her arm. Following the first hearing on the People's Motion to Dismiss, the OCDA was contacted by Doe #4's Marsy's Law attorney (Mike Fell) who stated he believed Doe #4 would now be able to provide OCDA with the photos of her injuries. Mr. Fell stated that Doe #4 had deleted the photos from her phone and then sent the phone to family members in Guatemala, however, Mr. Fell asked OCDA if we would be willing to perform a forensic examination on the phone to try to retrieve the photos. OCDA agreed and arrangements were made to have Doe #4 retrieve the phone from Guatemala. Subsequently, OCDA has been advised by Mr. Fell that Doe #4 now has the phone in her possession, however, despite requests to obtain the phone to perform a forensic examination by OCDA attorneys

again reiterated that she had never blacked out from alcohol before (even as of the time of the August 15, 2018 interview with Gamble) which, is, of course, verifiably false. No sexual assault exam was completed.

Brittany Hammond Interview

NBPD Detective Gamble interviewed Brittany Hammond on August 13, 2018. Hammond told Gamble that both defendants were mutual friends with another one of Hammond's friends. Per Hammond, Robicheaux and Riley said they were going back to their house to hang out and *that she and Doe #4 both agreed to go back to their house with them.* She remembered going back to the house and continuing to drink alcohol. Hammond stated that she had a poor memory of the evening because she tends to "black out a lot" when she drinks alcohol. She said she spoke with Doe #4 the following morning about the incident and that Doe #4 expressed some concern that she was "drugged" and that "they" were trying to do sexual things to her but did not remember what the sexual acts were.

Hammond told Detective Gamble that Doe #4 had a *"pattern" of getting drunk and thinking people were trying to do sexual things to her*. She also said that Doe #4 *tended to get drunk and "make things up."* She said that she and Doe#4 used to live together but had a falling out and Hammond moved out before their lease was up.

Proof Issues

The proof issues with Doe #4's case are likewise insurmountable. Again, Doe #4 is the named victim in a kidnapping for sex offense charge yet both she and her companion that evening, Brittany Hammond, told officers that both she and Doe #4 *voluntarily returned* to Robicheaux's residence. This admission alone refutes the kidnapping allegation. Yet it gets worse. Doe #4 – at the scene of the incident – tells responding patrol officers that *she did not*

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and an OCDA investigator, Mr. Fell has now stated that he will not consider turning the phone over to OCDA until *after* this court makes a decision on the Motion to Dismiss.

believe the male was trying to rape her or "take advantage" of her. Here, we have the alleged victim herself telling law enforcement contemporaneously with the incident *she did not believe she was being sexually assaulted.*

Her next statement to law enforcement is nearly two years later and completely inconsistent with her statement the night of the incident. Yet even in this statement, she does not describe any sexual activity or attempted sexual activity apart from "making out" and "touch[ing] me to take my clothes off." And, in this second statement, she makes the claim that she was involuntarily drugged and, as support, claims (twice) that she has never blacked out from alcohol. But this claim is verifiably false – only two-and-a-half months before the incident with the defendants, Laguna Beach Police Department officers witnessed her pass out from alcohol intoxication on the jailhouse floor. Her credibility is further destroyed by Hammond's disclosures that Doe #4 has *a pattern of getting drunk and making things up, including people trying to do sexual things to her*. Such a devastating statement combined with Doe #4's admissions at the scene of the incident and her verifiably false claims to NBPD detectives, drives a stake into the heart of the credibility of her latter statement to NBPD.

In addition, Doe #4 claimed that she had Hammond take pictures of her injuries the day after they occurred. Yet these pictures were never provided to law enforcement and still have not been received by any law enforcement agency to this day. The two photographs submitted to the OCDA's office by Marsy's law counsel were taken almost a month after the incident and shows nothing more than a faint mark on Doe #4's arm. Finally, both Robicheaux and Riley are named as defendants with respect to Doe #4's charges. Doe #4, however, could not identify Riley in a photo lineup and none of her statements remotely implicate Riley in any kidnapping or sexual assault. Again, all of these factors make Doe #4's case cannot be proven beyond a reasonable doubt.

5. <u>Jane Doe #5 – Charge: PC 261(a)(3) – Defendants: Grant Robicheaux & Cerissa Riley</u>

Doe #5 reported her incident to the Orange County District Attorney on September 20, 2018 after receiving a text message referencing an article about the defendants. She was

interviewed by the lead OCDA investigator on September 27, 2018. Doe #5 said that she went to Robicheaux's house after going to a Halloween party and a bar. She was casually dating Robicheaux's friend, Jonathan Sanchez. She had run into Sanchez at the Halloween party, went to a bar with him, and then accompanied him to Robicheaux's residence. At Robicheaux's house, she had a couple of drinks and started to feel a bit "fuzzy." She told the lead investigator that the drink she had tasted "salty." Doe #5 said she questioned defendants, saying "I said GHB, they admitted that GHB was in everyone's drinks." She said that defendants told her that they were drinking it as well. Doe #5 said she then voluntarily ingested the drink containing the GHB, stating, "I felt like, okay, this is what people do, it's a party."

Doe #5 said she was sitting on a sofa and dozed off. She then remembered being in Robicheaux's bed. She said she remembered being naked with Robicheaux having sex with her while he was on top of her and that he was behind her while she was on her stomach. Doe #5 said that Riley was touching Doe #5's breasts, legs, stomach, and vagina. Robicheaux apparently started getting "rough" and Riley said, "that's enough Grant, stop." During this time, Doe #5 said that Jonathan Sanchez knocked on the bedroom door while Doe #5 was in the bedroom. She said that Robicheaux stepped out of the bedroom to talk to Sanchez, then came back into the bedroom and closed and locked the door. Doe #5 said that she got up in the middle of the night, used the restroom in Robicheaux's bedroom, saw cocaine on the counter and thought about using it to wake up but she went back to bed instead. In the morning she grabbed a pair of sweatpants and a t-shirt from Robicheaux's closet because she had gone in the hot tub earlier in the night in her bra and underwear. Doe #5 stated she then got a ride home, took a shower, and crawled into bed embarrassed and ashamed and wondering what she had done. She told investigators that she did not yell, scream, try to get away, or call police. She saw Sanchez a week later who told her that Robicheaux wanted his t-shirt and sweatpants back – she had dinner with Sanchez where she gave him Robicheaux's clothes.

Proof Issues

Notably, Doe #5 has informed the OCDA's office that she is refusing any further cooperation and *will no longer be participating in the criminal case*. Aside from that unique challenge, Doe #5's case is replete with proof problems. The overwhelming evidence is that the press coverage of this case significantly influenced Doe #5.

First, she specifically told investigators that she never thought about reporting the incident to the police at the time because it was *"only after the press release" did she "feel she didn't do this to herself."* She went on to say that after she saw the press release, *she did not remember how everything started and "had to lay down and figure out what happened"* – two years after the event. Furthermore, she told the lead OCDA investigator *that her participation in the sexual encounter may have been voluntary* because she "knew people were drinking that night and not making the best decisions." Here, the alleged victim in a rape case is admitting that she may have voluntarily participated in the sexual activity. When these charges are based almost exclusively on the victim's statements and memory, such a statement is fatal to overcoming the People's burden of proof.

And, while it appears GHB was involved in this incident, everyone at the event – including the defendants themselves – was consuming GHB and although Doe #5 may not initially have known GHB was present in the drink when she took her first sip, she was told of its presence immediately upon noticing the salty taste and thereafter, voluntarily ingested the drink. Again, simply consuming or being under the influence of a controlled substance is not sufficient to prove a rape. Doe #5's judgment must have been so severely impaired that she could no longer exercise reasonable judgment *concerning that issue* (sexual activity). Moreover, defendants must have known of, and taken advantage of, this severe impairment. It is apparent from an analysis of her statement that Doe #5 was not severely impaired.

Doe #5's account reveals a high level of awareness during the incident – she is fully aware of the sexual activity taking place and knows that her date, Johnathan Sanchez, arrives at the bedroom and that Robicheaux leaves to speak with him. Yet, she never calls out or makes any effort to tell him to come into the bedroom when she supposedly is not interested in the

sexual encounter with defendants. In addition, she wakes up in the middle of the night, thinks about doing cocaine, and then returns to the very same bed where this supposed unwanted sexual activity just took place.

In fact, her statement is again undermined by her text conversations with friends after she saw the press release that *"they make you think it was consensual"* and *"you're told it was consensual."* Clearly, until the press release, *based on her own statements*, Doe #5 believed this to be a consensual sexual encounter with the defendants. If she believed it to be consensual at the time and for years afterward (until the press release) and the defendants themselves conveyed to her in some way that they believed it was consensual, to then argue that the defendants did not have a reasonable belief in Doe #5's capability of consent, when her behavior and admissions say otherwise, is nonsensical.

Notably, Doe #5 filed a civil lawsuit against the defendants *the same day* the amended criminal complaint naming her as a victim was filed and only three weeks after speaking with the OCDA's office about the incident. While such a civil filing obviously isn't fatal to her credibility, it would provide significant fodder for potential defense cross-examination.

6. <u>Jane Doe #6 – Charges: PC 209(b), PC 220(a) – Defendants: Grant Robicheaux & Cerissa Riley</u>

Jane Doe #6 reported her incident to the Orange County District Attorney's office on September 24, 2018 after learning about the case from news reports on SnapChat. The lead OCDA investigator interviewed her the same day. According to Doe #6, she met Robicheaux on the dating app Bumble in April 2017. Bumble is a dating app where the woman is required to initiate the first contact with the man. Doe #6 then met both Robicheaux and Riley at Nobu where the waitress served them all martinis. They took an Uber to another bar and, at the bar, both defendants were handing out the drinks. Doe #6 went to the bathroom with Riley and, in the bathroom, Riley offered Doe #6 cocaine. Doe #6 accepted Riley's offer and willingly ingested the cocaine. Doe #6 then *voluntarily* went back to Robicheaux's residence.

Doe #6 reported that she sat on the corner of Robicheaux's bed with Riley and witnessed Robicheaux snorting lines of cocaine off of Riley's naked body. Riley started to kiss Doe #6's neck and tried to take Doe #6's shirt off. Robicheaux "casually" pulled Doe #6's shirt to the side and tried to take her bra off. Doe #6 specifically told the investigator that Robicheaux was "not rough" about it. Doe #6 said she began to cry and told them, "This is not what I want – I'm really scared." Riley comforted Doe #6 and told her, *"It's ok, you don't have to do anything you don't want to do."* Riley then told Robicheaux to "back off", *which he did.* Doe #6 then asked for water and saw Robicheaux put some type of powder in the water. Despite seeing him put something in the water, Doe #6 willingly drank the water. She asked Robicheaux what was in the water and he told her it was PCP and that the street name for PCP was "water."

Doe #6 told the lead OCDA investigator that, after she drank the "water", she could not stand. But, she then said that she was able to stand up, walk to the bathroom and, in the process, grab her shirt. As she walked to the bathroom, she was in her bra and pants – she was never naked or topless that night. Doe #6 said she locked herself in the bathroom and then heard Robicheaux yelling at Riley. Doe #6 said she fell asleep, woke up at 6:45am and took an Uber home.

Doe #6 said that she normally does not drink alcohol and that any amount of alcohol has a lot of influence over her. She said she never thought to call police, was extremely embarrassed, and asked herself why she would *willingly* go home with defendants.

Proof Issues

Notably, Doe #6 *was not sexually assaulted in any manner*. In a text exchange with a friend, the friend wrote, "Were you sexually assaulted?" and Doe #6 responded, "No, I wasn't roofied, I remember the entire night." She further admitted to another friend that she believed that the defendants were swingers and that they wanted to participate in a threesome with her. She told the friend that she was uncomfortable with what was happening so went to the bathroom and locked the door.

Here again, the alleged victim's own statements prove fatal to the People's case. Doe #6 specifically tells the defendants, "This is not what I want – I'm really scared" and Riley immediately tells her, "*It's ok, you don't have to do anything you don't want to do.*" Robicheaux immediately stops as well. This exchange alone is sufficient to disprove any intent on the defendants' part to sexually assault Doe #6 either forcibly or by intoxication.

Critically, *nothing further sexually occurs*. No violence, no force – in fact, no sexual activity whatsoever or attempts at it occur after Doe #6 says she does not want to participate. Doe #6 says "no" and both defendants respect her wishes. It is legally impossible for an assault with an intent to commit a sex crime to occur when no sex crime was even attempted and an alleged victim's wishes are respected. An uncomfortable situation does not amount to a crime.

Doe #6 then self-corroborated these events to her friend by telling the friend that she was *not* sexually assaulted and *not* "roofied." As to the kidnapping charge, Doe #6, in her audio interview, specifically says she went back to the defendants' house *willingly and on her own volition*, which affirmatively disproves the kidnapping allegation. In any event, the kidnapping charge must involve a kidnapping with the intent to commit a sex crime. If no sex crime occurs or is even attempted – and, as here, the alleged victim's wishes are respected –proving any intent to commit a target sex crime is a fool's errand.

Finally, Doe #6 was never involuntarily drugged – she willingly used cocaine with Riley and willingly drank the water Robicheaux provided after seeing him put powder in it. There is no evidence of GHB use – and, in fact, Doe #6 specifically negates that possibility when she tells her friend, "I wasn't roofied."

Again, arguing in these circumstances that Doe #6 was kidnapped with the intent to sexually assault her and then further arguing that she was assaulted with the intent to commit a sex offense is the height of folly. Nothing about this encounter even remotely supports the charged offenses.

7. **Jane Doe #7 – Charge: PC 261(a)(3) – Defendants: Grant Robicheaux & Cerissa Riley**

Jane Doe #7 reported her incident to the Orange County District Attorney's office on September 25, 2018 after a friend sent her a news story about the case. The lead OCDA investigator interviewed Doe #7 that same day. Doe #7 said she met both defendants on July 4, 2017, on the Newport Beach boardwalk. She became separated from her friend and found her at Robicheaux's residence. Doe #7 walked into Robicheaux's bedroom and found three or four naked girls on his bed. According to Doe #7, she thought, "I was like, oh my gosh, I just walked into an orgy." "I was already drunk so I just sat in the corner and drank vodka. I had like seven drinks before that and I was 100% intoxicated."

Doe #7 observed Robicheaux masturbating and attempting to have sex with each woman. *Each woman said "no" and Robicheaux complied with the women's wishes every time.* Robicheaux then had consensual sex with Riley in front of everyone. He opened his safe, took out $200, and threw it at Doe #7. Per Doe #7, "there were drugs everywhere" but she did not do any. Riley asked her if she wanted to do ecstasy and Doe #7 declined. Prior to leaving Doe #7 and Riley consensually kissed each other and exchanged phone numbers. The following week, Riley texted Doe #7 and invited her to go to a boat party.

Doe #7 told the lead investigator, "I was like, okay, I'll give it another shot." At the boat party, everyone was drinking heavily including Doe #7. Doe #7 explained that she was extremely intoxicated and that *the amount of alcohol she drank matched her intoxication level.* After the boat party, Doe #7 went back to Robicheaux's residence. She walked into his room and saw him having sex with a girl only described by Doe #7 as "Tinder Girl" on his bed. After Robicheaux and "Tinder Girl" finished, they went downstairs. Doe #7 then laid down on Robicheaux's bed while wearing a one-piece bathing suit. Robicheaux returned to the room completely naked, caressed Doe #7's legs, and started masturbating (much as she had witnessed days before when the naked girls on Robicheaux's bed refused to have sex with them and he complied). He then propped up her hips, pulled her bathing suit to the side and according to Doe #7, "stuck it right in" her vagina.

Doe #7 said that when Robicheaux penetrated her, *"I giggled, but I don't think I said no."* When asked if she was too intoxicated to give consent, Doe #7 specifically told investigators that *"I was able to speak – I knew what was going on."* Doe #7 said that Robicheaux asked her to take her bathing suit off during the sexual activity. She said that she responded, "I'm fat, I'm fat" and "I really don't want to show my stomach." When investigators asked her if she ever told Robicheaux "no", Doe #7 replied, *"I don't think so. I said I don't want to take off my top, but I wasn't forceful."* She was also aware that Robicheaux did not ejaculate. In addition, as stated *supra*, Jane Doe #7 indicated in her statement to the lead investigator that there were two instances where defendant Robicheaux engaged in sexual intercourse with Jane Doe #7 (once from the back and once from the front). While Doe #7 did not express any lack of consent during the first instance, she did indicate that on the second instance, Robicheaux complied almost immediately when she said, "dude no" and stopped having intercourse with her in approximately "half a second".

After the incident, Doe #7 went downstairs and Robicheaux and "Tinder Girl" were making fun of her and saying that she was annoying on the boat. Robicheaux then told her she was "the worst fuck of my life" and Doe #7 responded, "that's because I wasn't trying to fuck you." She left the residence, slammed the door, and never saw them again.

Proof Issues

Again, this final named victim's behavior and statements to investigators create copious amounts of reasonable doubt. Here, Doe #7, a few days prior to her claimed assault, voluntarily witnesses an attempted orgy by Robicheaux. Critically, *Robicheaux complies each and every time one of the women refuse sex with him.* This piece of evidence is vitally important – this is clear, independent proof that when Robicheaux knows a woman does not want to engage in sexual activity with him, he respects their wishes. Following her witnessing of this "orgy", Doe #7 then consensually "makes out" with Riley and exchanges phone numbers with her.

This evidence is highly relevant because both defendants now know that Doe #7 is aware of their swinger lifestyle, is sexually interested in at least one of them, and had agreed to

exchange phone numbers for future contact. Again, this behavior goes directly to the defendants' reasonable belief in Doe #7's willingness to engage in sexual activity with them.

After all of this, Doe #7 agrees to see them again *and* agrees to go back to their house again. Despite knowing what she observed last time, she gets intoxicated and again sees Robicheaux having sex with another girl. Instead of leaving or going downstairs, Doe #7 lies down in the same bed that Robicheaux had just used for sexual intercourse with "Tinder Girl" and the very same bed in which she had witnessed the "orgy". Furthermore – a fact that strikes right at the heart of the charge's "capable of consent" element - Doe #7 is *fully aware and cognizant of what is going on.* In fact, she specifically tells investigators that "*I was able to speak – I knew what was going on.*"

She then notices Robicheaux naked, caressing her legs, and masturbating. Doe #7, however, does not pull away or say "no" regarding Robicheaux's overtures. Again, this behavior by Doe #7 must be factored into Robicheaux's state of mind. First, if Doe #7 herself says she was cognizant and able to speak, it then must follow that it was reasonable for Robicheaux to believe the same thing. Second, he is nude and making sexual overtures to her and she is not protesting. Then, when he begins having intercourse with her, she *giggles* and does not protest the sex. In fact, rather than saying "no" to the sex, she begins commenting on her body shape and saying she does not want to take her bathing suit off. Furthermore, there is a point during the encounter when she does tell him to stop – *and he complies within half a second.* All of this behavior reveals that Doe #7 was aware, cognizant, and able to communicate her wishes to Robicheaux and when she did communicate a lack of consent, Robicheaux complied. These factors – along with the evidence previously mentioned – negate any possibility of proving Doe #7's charge beyond a reasonable doubt. And again, there is no evidence of *any* drug use and Doe #7 says that her intoxication level matched her alcohol consumption.

8. Jane Doe #8 (Uncharged)

Jane Doe #8 was interviewed by NBPD Officer Centeno on July 3, 2017 after contacting the Newport Beach Police Department. Doe #8 stated that she met Robicheaux at 3-Thirty-3 on June 30, 2017, but was not interested because she was with another guy. On July 1, 2017, she saw Robicheaux and Riley at an unknown bar and told them she was bisexual. *She then engaged in consensual sexual activity with Robicheaux and Riley at Robicheaux's home.* On July 2, 2017, Doe #8 went to a concert at the Dunes with Robicheaux and fifteen to twenty other people. She snorted five to six lines of cocaine at the Dunes and witnessed Robicheaux snorting three to four lines of cocaine. She then rode with Robicheaux in an Uber back to his residence where she witnessed fifteen other people at the home doing lines of "blow" and "K" (cocaine and Ketamine). Doe #8 snorted an additional ten lines of cocaine at Robicheaux's home and Robicheaux also snorted several more lines. *Doe #8 admitted to Officer Centeno that she knew the cocaine was laced with Ketamine before she snorted it.*

Doe #8 then agreed to engage in consensual sexual intercourse with Robicheaux on his couch and performed oral copulation on him. Robicheaux, however, could not get erect so they did not engage in sexual intercourse. She then told Officer Centeno that she went upstairs at 11:45pm to go to sleep but blacked out. Doe #8 then changed her story and said that she stayed on the couch to read a book, was given a drink (Vodka and Canada Dry) by Riley, and blacked out.

Doe #8 awoke on July 3, 2017 with a shirt on and Robicheaux completely naked, spooning her. She saw Riley and an unidentified female making out on the bed. Doe #8 told NBPD that she believed she was drugged simply because she did not know what occurred. No other evidence was proffered to support this conclusion. She first told investigators that she confronted the two females about drugging her but later changed her story and said she did not confront the two females about drugging her. She said she then got dressed, left Robicheaux's home, and called NBPD to report she was raped and possibly drugged. NBPD set up a sexual assault exam for her, but once she was at the exam site, *she refused to participate in the exam.* She also refused blood and urine tests. Finally, she failed to return phone calls and failed to

respond to a letter mailed to her home. NBPD cleared the case as a non-crime and did not submit it to the OCDA's office.

Proof Issues

The People would never call Jane Doe #8 as an EC 1108 witness due to the fatal evidentiary issues here. Doe #8 freely admits that she *consensually* engaged in prior sexual activity with both defendants, was *planning on engaging in sexual intercourse* with Robicheaux that same night, and *consensually* orally copulated him in order to get him aroused *so they could have sex*. All of the sexual activity she remembered and described was *consensual by her own admission.*

In addition, all drug use by her – fifteen to sixteen lines of cocaine laced with ketamine and alcohol consumption was entirely knowing and voluntary. No evidence exists of any surreptitious drugging outside of Doe #8's claim that she blacked out (to which sixteen lines of cocaine laced with ketamine would likely contribute). Furthermore, aside from the consensual sexual activity, she cannot say if any other sexual activity even occurred, nor that she was unable to consent to any sexual activity by virtue of any drug usage, whether voluntary or otherwise. In addition, she refused a sexual assault exam, blood and urine tests, and refused to provide any evidence that could tend to prove whether certain unwanted sexual activity occurred. Finally, she refused any further cooperation with the police. Given the extremely lacking state of this evidence, the inability to prove any criminal charges beyond a reasonable doubt is self-evident.

THE LACK OF OTHER CORROBORATING EVIDENCE

Aside from the proof issues regarding each victim themselves, this case contains a distinct lack of corroboration for any of the victims' claims. When this case was initially filed, much was made about "thousands" of videos and photographs of the defendants sexually assaulting scores of unconscious women. This narrative – which, in some circles continues to this day – is unequivocally false. While there *are* videos depicting various people engaged in consensual sexual activity, there is not a single video or photo of the defendants sexually

assaulting *anyone*, much less one of the alleged victims in this case. The de novo team paid particular attention to the videos that the lead OCDA investigator claimed showed defendants sexually assaulting unconscious women. Unequivocally, despite the investigator's claims, all of the flagged videos displayed women who appear to be aware, conscious, and knowingly engaged in sexual activity.

Furthermore, not one of the thousands of photos reviewed by the de novo team depict any unconscious or inebriated woman nude or engaging in any sexual activity. Again, there are a few photos (included in the attached PowerPoint presentation) that show passed out women. None of them are nude, most of them appear to be either Riley or Robicheaux's sister, and none of them depict the alleged victims. In fact, the photos appear to be nothing more than recreational photos one might take at a party when someone has passed out on the floor or sofa.

As for text messages and other digital data between the defendants, not a single message in over four years of conversations discusses the defendants engaging in non-consensual sex, tricking women into sex, drugging women without their knowledge, sex with drugged women, or any plan to find women to drug. Such messages simply do not exist. On the contrary, the defendants' communications routinely mention consensual threesomes, consensual, open drug use, and open recruitment of others interested in the swinger lifestyle. Furthermore, other social media and dating application records all show Robicheaux and Riley openly looking for a third, voluntary partner. Riley's messages to other individuals, including her friends, never mention anything about Robicheaux being interested in non-consensual sex, drugging women, or sexual assault.

Out of the tens of thousands of messages and other communications contained in the digital data, there are a total of three (included in the PowerPoint presentation) that even mention potential drugged sex. Two of them are large group chat discussions where individuals *other than the defendants* joke about drugging a woman. Robicheaux does not respond to or acknowledge these messages and they have nothing to do with the victims in this case. The third message is an exchange between Robicheaux and Riley and mention that they know of two girls that "we don't have to get wasted to have fun with." Again, there is no context to this message,

it does not refer to any of the victims, and could simply be an acknowledgement of the reality that alcohol consumption is often a prelude to sexual activity.

B. DRUG AND FIREARMS CHARGES

Drug Charges

The possession for sale charges in this case were unfortunately erroneously filed. While a search of Robicheaux's residence uncovered a multitude of controlled substances, none of them were possessed for the purposes of sale. Because the defendants often provided controlled substances to others (but did not sell), it appears the initial prosecutors filed the drug charges under the mistaken belief that possession for sale charges encompassed possession with the intent to furnish. Such a belief, while not uncommon, is wrong.

After researching the law on this issue, the People concluded that a possession for sale charge must be exactly that – the controlled substances must be possessed *with the intent to sell them, not the intent to furnish them.* CALCRIM 2302 summarizes this state of the law where it specifically defines the term "selling": "Selling for the purposes of this instruction means exchanging [a controlled substance] for money, services, or anything of value." (CALCRIM 2302).

The jury instruction's language specifically omits any mention of giving away or otherwise furnishing controlled substances as behaviors that fall under the definition of "selling." The common confusion with this definition appears to come from Health and Safety Code Sections 11352 and 11379 (actual controlled substance sales) that *do* permit a conviction for furnishing or giving away controlled substances regardless of any exchange of value. But, the possession for sale charge does *not* encompass those behaviors.

In any event, no evidence exists whatsoever that either Robicheaux or Riley were involved in drug sales. None of their communications mention sales, nothing in the digital evidence supports such a conclusion, and no indicia of sales was discovered during the service of the search warrant. The People have researched the viability of furnishing charges but

determined that the one case where the type of controlled substance was reasonably provable (due to specific, identifiable toxicology results) is now unfortunately beyond the statute of limitations. At most, therefore, the evidence recovered during the search warrant service supports a simple possession charge. Similarly, those charges are misdemeanors with a one-year statute of limitation. Given the fact that the search warrant was served in January 2018, the statute of limitations for simple possession has expired.

Firearms Charges

As to the two firearms charges (possession of an assault weapon), NBPD recovered two rifles from Robicheaux's residence that meet the California definition of an assault rifle, namely a telescoping stock, a changeable magazine, and a pistol grip. These guns, however, are legal to possess in Louisiana.

Robicheaux is a Louisiana native and lived there prior to relocating to California. One of the elements required to prove possession of an assault weapon is that, "The *defendant knew or reasonably should have known* that it had characteristics that made it an assault weapon." (CALCRIM 2560) (emphasis added). Here, the People do not have any evidence as to where Robicheaux obtained the rifles. For example, he may have purchased them legally in Louisiana and brought them to California without having a reasonable knowledge that they were illegal here. Without that proof, the People cannot meet that necessary element of the firearms charges.[21] Furthermore, all the guns were unloaded and found in a secured, locked gun safe in Robicheaux's closet separate from any drugs. The defendants were clearly not using the guns to defend a drug supply or a drug sales business.

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[21] It is worth noting again that, as mentioned *supra,* the People are seeking a Dismissal without prejudice and are currently conducting an investigation relating to the purchase of the firearms in question to ascertain whether these charges could be sustained and possibly reinitiated in the future.

CONCLUSION

As this Court has aptly stated, the case of *The People v. Grant Robicheaux and Cerissa Riley* is indeed a "toxic cocktail." But, its true toxicity stems not from the political hurricane surrounding it but, in large part, from the poisonous results of investigative impropriety. Although this prosecution was initiated and continued by line prosecutors acting in good faith, its evidentiary underpinnings have been found to be rotten and would have immediately collapsed under the harsh scrutiny of a jury trial (if not a preliminary hearing). Nothing in the evidence has changed since the charges were filed. Rather, this de novo review, for the first time, allowed prosecutors to digest the totality of the evidence, and in so doing, critical weaknesses in the case, which had heretofore been camouflaged, have now been brought to light. The legal and ethical duty of any prosecutor must be to remedy a mistake of this magnitude as quickly and effectively as possible. As quoted at the beginning of this brief, "The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but *in the integrity of the prosecutor*."

The exhaustive de novo review of this case was truly conducted with integrity and with no mandate from upper OCDA management, other than to leave no stone unturned and provide our honest assessment of this case. The unfortunate result of that review was the burning conclusion that, in light of our ethical duties as prosecutors, justice dictated a motion to dismiss these charges. The People fully grasp the gravity of such a motion, especially in light of the vast amount of publicity and other events surrounding this case. Although this sentiment would likely be greeted by many in the public as less than sincere, in this case, it actually takes more courage to face the public scorn and outcries that accompany this motion to dismiss, than to have ignored our ethical duty and simply pressed forward with the trial. The choice of a prosecutor to do the right thing, while perhaps cliché, is often difficult, but always what our ethical obligation and the service of justice demand. Our system of justice rests the responsibility and discretion for determining whether charges are sought or withdrawn with the prosecutor. Clearly, 1385(a) allows for this Court to act within our system as a "check and balance" in regards to that prosecutorial discretion, however, the People sincerely hope that after conducting its review, this

Court now sees that the People bring this motion based solely on our ethical duties and borne only of our sincere belief that the charges cannot be proven beyond a reasonable doubt and thus, a dismissal is indeed, in the furtherance of justice. For this, and the above reasons, the People respectfully ask this Court grant their motion to dismiss.

Respectfully submitted,

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