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Untimely ownership claim barred copyright infringement claim where gravamen of dispute was ownership and parties were in close relationship (O'Scannlain, J.)

Seven Arts Filmed Entertainment Limited v. Content Media Corporation PLC

9th Cir.; November 6, 2013; 11-56795

The court of appeals affirmed dismissal of a copyright infringement claim. The court held that an untimely ownership claim will bar a claim for copyright infringement where the gravamen of the dispute is ownership and the parties are in a close relationship.

In 2011, Seven Arts Filmed Entertainment Limited sued Paramount Pictures Corp. and Content Media Corp. PLC. for copyright infringement and related claims. According to Seven Arts, it was the proper owner of U.S. copyrights to several motion pictures. Seven Arts cited a summary judgment order obtained earlier that year from a court in Canada.

The Canadian suit dated to 2003, when Seven Arts sued Content's predecessors-in-interest (CanWest) under a document that CanWest pointed out had a Canadian forum-selection clause. While that action was pending, Seven Arts filed a second action in California federal district court in 2005, alleging copyright infringement and related claims against CanWest. Seven Arts asserted that it had exercised a right to rescind any contracts among the parties once CanWest denied their agreement in Canada.

The district court granted CanWest's motion to stay pending prosecution of the Canadian action. That resulted in the 2011 summary judgment on which Seven Arts relied in its 2011 suit, which was a near-duplicate of its 2005 action.

Paramount moved to dismiss on the ground that Seven Arts's copyright infringement claim was barred by the Copyright Act's three-year statute of limitations. The court agreed and granted dismissal.

The court of appeals affirmed, holding that the district court properly dismissed the action.

The court of appeals explained that copyright infringement claims have two basic elements: ownership of a valid copyright, and copying of elements of the work that are original. In most infringement cases, ownership is not in dispute, but rather the issue is whether the defendant's copying was lawful.

Here, the dispute was about ownership. That raised the issue, which was one of first impression in the circuit, whether a claim for copyright infringement in which ownership is the disputed issue is time-barred if a freestanding ownership claim would be barred.

Other circuits have held that where the gravamen of a copyright infringement suit is ownership, and a freestanding ownership claim would be time-barred, any infringement claims are also barred. That was a proper approach, the court reasoned. Allowing infringement claims to establish ownership where a freestanding ownership claim would be time-barred would allow plaintiffs to avoid the statute of limitations for ownership claims and lead to potentially bizarre results.

The court refused to adopt the inequitable alternate approach suggested by Seven Arts, which would allow plaintiffs who claimed ownership, but were time-barred from pursuing their ownership claim directly, to restyle their claims as "infringement" and proceed. That was not a fair approach, and the court was disinclined to create a circuit split in authority on the issue.

The court likewise rejected Seven Arts's contention that Paramount was a putative downstream, third-party licensee rather than a co-author or other party in a close relationship, such as those who transfer copyright ownership by contract. Paramount and Seven Arts's predecessors-in-interest were in a "close relationship" for pertinent purposes where Paramount had an interest in, and distribution rights to, the disputed motion pictures.

The record demonstrated that Paramount plainly and expressly repudiated Seven Arts's copyright ownership more than three years before Seven Arts brought suit. As a result, the action was barred by the Copyright Act's three-year limitations period, and the district court properly dismissed the action.

Criminal Law

Jury's verdicts did not support enhanced sentencing for crimes committed for benefit of criminal street gang (Peña, J.)

People v. Anaya

C.A. 5th; October 7, 2013, F063835

The Fifth Appellate District reversed in part judgment of conviction and vacated in part judgments of sentence. In the published portion of its opinion, the court held that the trial court erred in imposing enhanced sentencing for the defendants' crimes of witness intimidation and extortion in the absence of jury findings that the crimes were committed by the use of threats.

Adam Anaya and Eric Wolfe were charged with multiple crimes stemming from their forceful attempts to collect a criminal street gang debt. It was alleged that the majority of the defendants' crimes were committed for the benefit of

a criminal street gang, for purposes of enhance sentencing under §186.22(b). Among the crimes charged were extortion, in violation of Penal Code §519, and attempting to dissuade a witness or victim, in violation of §136.1(b)(1). As to the latter offense, the information did not allege the use of an express or implied threat of force.

With regard to the crime of extortion, the trial court instructed the jury that it could find the crime was committed by the use of either force or fear.

As to the crime of dissuading a witness or victim, the trial court did not instruct the jury that it needed to find the defendants used an express or implied threat of force.

The jury found Anaya and Wolfe guilty of both offenses, among others, and made no additional findings regarding the use of force or fear.

As to both crimes, the trial court imposed enhanced sentences pursuant to §186.22(b)(4)(C).

The court of appeal vacated the judgments of sentence as to extortion and dissuasion, holding that the jury's findings failed to support enhanced sentencing.

Section 186.22(b)(4)(C) requires a trial court to impose a term of life in prison instead of the sentence otherwise required by law for the crimes of "extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1," where such crimes are found to have been committed for the benefit of a criminal street gang.

Section 136.1(b)(1) makes it a felony or a misdemeanor to attempt to prevent or dissuade another person who has been the victim of a crime from reporting a crime to law enforcement. Subdivision (c)(1) adds to that crime the element of either force or an express or implied threat of force, which additional element makes the crime a felony. Here, the court found, the defendants were alleged to have violated §136.1(b)(1), attempting to dissuade a victim of a crime from reporting a crime to law enforcement. The amended information did not charge the defendants with using an express or implied threat of force. The instructions also did not inform the jury it must find defendants used an express or implied threat of force. Nor did the jury make a specific finding the defendants used an express or implied threat of force.

This was the same factual setting presented in *People v. Lopez* (2012) 208 Cal.App.4th 1049, the court found. There, the court found that §186.22(b)(4)(C) authorizes enhanced sentencing only where a defendant makes "threats to victims and witnesses ..." The plain meaning of §186.22(b)(4)(C), the *Lopez* court found, is that enhanced sentencing can be imposed only if the jury convicts the defendant of attempting to dissuade a witness by use of an implied or express threat of force pursuant to §136.1(c)(1). The same analysis applied here. Because the jury was not instructed to make, and did not make, a finding regarding the use of an express or implied threat of force, §186.22(b)(4)(C) did not apply. The trial court's imposition of enhanced sentencing under that subdivision was thus error.

The verdicts also failed to support enhanced sentencing for the crime of extortion, the court found. Section 519 defines fear for purposes of the crime of extortion: "Fear, such as will constitute extortion, may be induced by a threat … [t]o do an unlawful injury to the person or property of the individual threatened." Although the defendants were charged with extortion in violation of §519, the verdict form referenced §518, which defines extortion as the "obtaining of property from another, with his consent … induced by a wrongful use of force *or* fear." The jury's verdicts similarly found defendants guilty of "Extortion by Threat or Force" in violation of §518. These verdicts were insufficient, the court found, to establish that the defendants accomplished their crime by the use of fear, as defined in §519, rather than by the use of force. Because §186.22(b)(4)(C) authorizes enhanced sentencing for extortion as defined in §519 only, the verdicts here did not support such enhanced sentencing.

Environmental Law

Substantial evidence supported city's finding that revisions to general plan's housing element were within scope of EIR certified when general plan was approved (Dondero, J.)

Latinos Unidos de Napa v. City of Napa

C.A. 1st; October 10, 2013; A134959

The First Appellate District affirmed a judgment. The court held that substantial evidence supported a city's finding that revisions to the housing element of its general plan were within the scope of an environmental impact report that was certified when the general plan was approved.

Pursuant to Pub. Res. Code §21166 of the California Environmental Quality Act (CEQA), the City of Napa approved a 2009 update of the housing element of the 2020 general plan that the city had adopted in 1998. Under §21166, the city had certified a program environmental impact report (EIR) in connection with the 2020 general plan. The 2009 update revised permitted densities in specified areas and made related amendments to zoning ordinances and the 2020 general plan (the project). Pursuant to CEQA regulatory guidelines, the city found that the 2009 project was "within the scope" of the program EIR and did not require a further EIR.

Latinos Unidos de Napa (LUN), an affordable-housing advocacy group, petitioned for writ of mandate to set aside approval of the project, contending that an EIR was required. The trial court denied the petition, finding that the city properly applied §21166 in its finding that the project was within the scope of the 1998 program EIR. The trial court also found that the LUN had waived its substantial-evidence challenges by failing to brief all relevant evidence. The trial court further found that even had such challenges not been waived,

substantial evidence supported the city's findings. The LUN appealed.

The court of appeal affirmed, holding that substantial evidence supported the city's finding.

At the outset, the court rejected the contention of the LUN that the city should have used the "fair argument" standard based on §21151. Specifically, the LUN asserted that it could be fairly argued that the project was new because it might have a significant environmental impact and thus required an EIR. Rather, under *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, the deference due to the city in administrative matters required extraordinary care before its finding as to the environmental impact of changes to the project could be reversed. The court agreed with *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 that the "threshold question" as to the appropriate level of judicial scrutiny for a finding such as the city's is one of law for the appellate court. Accordingly, the court elected to evaluate the city's decision to proceed under §21166 by using the substantial evidence test.

As such, the court found that substantial evidence supported the city's decision to proceed under §21166. The entire project consisted of limited amendments to the housing and the land-use elements of the 2020 general plan and relatively minor amendments to the city's zoning ordinances. Further, the 1998 program EIR analyzed the effects of the then-existing housing element, notwithstanding the city did not change the housing element at the time that it approved the 2020 general plan. Thus, the housing element was not excluded from consideration.

In addition, the environmental impacts associated with the housing element were necessarily addressed in the land-use element, given that under §65583, the housing element consists of housing-related policies whose site-based objectives must be accounted for in the land-use element. Moreover, all of the alleged changes -- which were primarily in density -- that resulted from the project that the LUN argued would cause significant impacts were changes that the project made to the land-use element rather than to the housing element.

It was undisputed that the 2020 general plan fully revised and updated the land-use element. Accordingly, that aspect of the project was clearly a modification of the 2020 general plan that was analyzed in the 1998 program EIR. Therefore, that aspect was properly analyzed under CEQA guidelines §15162, which implements §21166. Thus, substantial evidence supported the city's decision to proceed under §21166.

Further, the LUN failed to show that the city's decision not to do an EIR was not supported by substantial evidence. The city's initial study found that the project would not create any new or more severe environmental impacts over those analyzed in the 1998 program EIR. That study indicated that incremental raises in maximum densities in limited areas of the city would not increase total potential development above what was already analyzed in the 1998 program EIR. That was largely because many city approvals had permitted less development than would have been allowed under the 2020 general plan and the city's growth rate had been less than the 1994 general-plan projections anticipated.

The 1998 program EIR analyzed the environmental impacts of land-use designations pertaining to housing density, including impacts on traffic, air quality, biological resources, population, public services, and other resources. Further, residential density was addressed in the 1998 program EIR and the changes made by the current project in narrowing density ranges did not fall outside the ranges of that earlier discussion.

Given these facts, the LUN did not satisfactorily explain how the project's impacts were so different from or more severe than the impacts identified in the 1998 program EIR that they required further review.

Family Law

Guardianship proceedings failed to comply with notice requirements of Indian Child Welfare Act of 1978 (Ruvolo, P.J.)

Guardianship of the Person of D.W.

C.A. 1st; October 10, 2013; A136982

The First Appellate District reversed a probate court order. The court held that where the probate court had notice that the minor subject of guardianship proceedings was likely of Indian heritage and nonetheless ruled on the petition for guardianship without waiting for a response from the concerned tribe, that court violated the notice and inquiry requirements of the Indian Child Welfare Act of 1978.

In February 2012, J.G. petitioned to be appointed guardian of her sister's six-year old son, D.W.

The minor's paternal grandmother, also D.W., objected, invoking the Indian Child Welfare Act of 1978 (ICWA). She argued that she was a "Native American of a Recognized Yurok Tribe," had cared for the minor for several years already, and wanted him to remain in the tribal community.

The probate court assigned to the minor's grandmother the task of notifying the Indian tribes of the pending guardianship petition and providing proof of service to the court.

At hearing in August 2012, the probate court addressed the issue of ICWA compliance. The court apparently had before it some type of document indicating the minor was not eligible for enrollment in the Yurok Tribe. The court accordingly ruled that ICWA did not apply.

The minor's grandmother objected, arguing that the Karuk Tribe, which was different from the Yurok tribe, had not been properly notified. The minor's grandmother presented a letter from the Karuk Tribe stating that the minor's request for possible membership was still being processed. The court stated

it would entertain a request for intervention from the tribe if and when such a request was made.

A month later, at hearing on J.G.'s petition for guardianship, the minor's grandmother requested "that the Karuk [T]ribe be allowed to intervene." When the court pointed out that the tribe had not taken any steps to intervene, the grandmother replied that the tribe had not yet received certain records it had requested. The court responded that the matter was closed, stating, "[t]he ship has sailed on the issue of ICWA."

The court thereafter granted J.G.'s request to be appointed the minor's permanent guardian. The minor's grandmother appealed.

While that appeal was pending, the Karuk Tribe intervened in support of the grandmother's position on appeal. The tribe's brief stated: "The lack of notice and inquiry violated ICWA and state law, resulting in the Tribe's inability to participate in the underlying action. As such, the underlying Guardianship Order must be invalidated." Appended to the brief was a declaration executed under the penalty of perjury by the enrollment officer for the tribe confirming that the minor was an "enrolled descendant member of the Karuk Tribe."

The court of appeal reversed, holding that the probate court's order of guardianship failed to comply with the requirements of ICWA.

The court found, at the outset, that the grandmother's appeal from the order of guardianship was timely. The minor's grandmother was not required to appeal the probate court's earlier order addressing ICWA compliance because, at that point, no judicial action on the underlying petition had yet been taken.

The court found the record in the present case disclosed that, from the outset of these proceedings until J.G. was appointed the minor's guardian, the grandmother consistently informed the court that the minor had Indian ancestry, and that his father was an enrolled member of the Yurok or Karuk tribes. This notification sufficed to trigger ICWA's statutory notice provisions. However, in carrying out its obligation under the ICWA to provide notice, the probate court incorrectly assigned the grandmother, the party objecting to the guardianship, the responsibility of providing notice to the possible Indian tribes.

Further, by the time of the contested hearing on J.G.'s guardianship petition, even though the Yurok Tribe had completed its investigation and found the minor was not eligible for enrollment, the grandmother had a letter from the Karuk Tribe, indicating that the minor was potentially affiliated with the tribe and that the matter was currently under investigation. Rather than waiting for the results of that investigation for at least 60 days, as required by Cal. Rules Ct., rule 7.1015(c)(9), the court proceeded with the guardianship proceeding as if the minor was not an Indian child, granted J.G.'s guardianship petition, and placed the minor in J.G.'s care.

The Karuk Tribe thereafter intervened, stated the minor was an Indian child, and requested that the guardianship order be vacated and proceedings consistent with the ICWA be conducted.

On this record, the court found, it was compelled to reverse the orders entered in this guardianship proceeding and to remand for compliance with the requirements of the ICWA and applicable state law.

Family Law

Non-minor was entitled under California Fostering Connections to Success Act to hearing to determine whether dependency court's continued exercise of jurisdiction was in her best interests (Bruiniers, J.)

In re Shannon M.

C.A. 1st; November 6, 2013; A136730

The First Appellate District reversed a dependency court order terminating jurisdiction. The court held that the California Fostering Connections to Success Act entitled a non-minor to a hearing to determine whether the continued exercise of dependency jurisdiction was in her best interests.

After years in foster care, Shannon M. was returned to her mother's home in June 2011. In September 2011, Shannon turned 18. In November, based on what it considered a successful reunification, the Alameda County Social Services Agency moved to terminate dependency jurisdiction. Shannon objected to the termination of jurisdiction and a contested hearing was set for January 2012.

In December 2011, Shannon's mother was arrested. Upon her release from custody, she fled, leaving Shannon homeless.

The January 2102 hearing date was continued while the county provided the dependency court with updates regarding Shannon's application for MediCal benefits, high school graduation, and referrals to transitional housing and other independent living services.

In June 2012, Shannon filed a written objection to the dismissal of jurisdiction and petitioned the court to maintain jurisdiction. She argued the court could terminate her dependency jurisdiction only if the county established that termination was in her best interest. Shannon argued termination of jurisdiction was not in her best interest because she was in immediate need of support services from the county, including mental health services, transportation assistance, and housing.

The court argued that Welf. & Inst. Code §364 applied, and there was no legal justification for continued jurisdiction over Shannon under that statute.

The dependency court agreed and terminated jurisdiction.

The court of appeal reversed, holding that the dependency court erred in relying on §364 to terminate dependency jurisdiction.

Section §364(c) generally governs continued supervision of dependents in home placements and requires termination of jurisdiction unless the court finds that grounds for assumption of jurisdiction exist or will likely exist absent court supervision. Shannon argued that under the recently enacted California Fostering Connections to Success Act (CFCS Act), §391, as revised by the CFCS Act, now governed the termination issue for all dependents who had turned 18 and required the dependency court to consider the best interests of a nonminor dependent in deciding whether to terminate jurisdiction. The court of appeal agreed.

The court noted that §391, as revised by the CFCS Act, has six relevant subdivisions, each of which is applicable to a specified class of nonminor dependents. Looking to each of these subdivisions, the court found that the plain language of §391 indicates that it applies to all nonminor dependents, with the exception of subdivisions (c) and (d), which are applicable to specific subsets of nonminor dependents. For nonminor dependents who do not fall within one of those subsets, §391 requires the court to hold a hearing before terminating dependency jurisdiction, requires the county to verify that it provided the nonminor dependent with certain documents and assistance, and requires the department to ensure the nonminor dependent's presence at the hearing if possible and to report on whether continued dependency jurisdiction is in the nonminor's best interests.

On the record here, the court found it unclear whether the dependency court understood its discretion under §391. Remand was accordingly necessary to permit that court to exercise its jurisdiction under that statute.

The court rejected the county's contention that the dependency court's purported reliance on §364 was harmless.

Immigration Law

Government failed to establish grounds for terminating asylum based solely upon impeachment evidence admitted after alien's refusal to testify (Marshall, J.)

Urooj v. Holder

9th Cir.; November 6, 2013; 09-70628

The court of appeals granted a petition for review of a decision of the Board of Immigration Appeals. The court held that the Department of Homeland Security failed to establish grounds for termination of asylum by a preponderance of the evidence where it relied solely upon impeachment evidence admitted after an asylum recipient refused to testify in a hearing on the agency's request to terminate.

Sumaira Urooj and Khalid Mahmood Turk were a married couple from Pakistan admitted to the U.S. on non-immigrant visas. Urooj was granted asylum on the basis of her purported detentions, arrests, and beatings for being a member of the Pakistan People's Party (PPP).

Urooj subsequently provided a sworn statement to the Department of Homeland Security (DHS) during an interview in which she admitted that her asylum application had been falsified. She was a member of a PPP student organization but was never persecuted in Pakistan as a result, and she did not fear persecution if she returned to Pakistan.

DHS served Urooj and Turk with notice of its intent to terminate their asylum status. The notices to appear charged both with being subject to removal as immigrants who had overstayed their authorized time in the United States, and aliens present on account of a prior misrepresentation of fact.

Contrary to the Local Operating Procedures (LOP) of the San Francisco Immigration Court, DHS did not give notice of its proposed witnesses or exhibits before the removal hearing. Urooj took the stand when called by DHS as a hostile witness, but on advice of counsel, who objected to the lack of proper notice under the LOP, she refused to answer questions. DHS offered as impeachment evidence Urooj's asylum application, sworn statement, and the record of oath pertaining to her asylum application. Impeachment evidence was excepted from the LOP requirements, and the immigration judge (IJ) admitted the documents offered by DHS accordingly. The IJ further drew adverse inferences from Urooj's refusal to answer each question she was asked.

The IJ terminated Urooj's and Turk's asylum and ordered both removed to Pakistan. Urooj and Turk appealed when the Board of Immigration Appeals (BIA) affirmed the IJ's decision by dismissing their appeal.

The court of appeals granted the petition, holding that DHS did not meet its burden of establishing the grounds for termination of asylum by a preponderance of the evidence.

The court of appeals observed that DHS was required to establish the grounds for termination of a grant of asylum by a preponderance of the evidence. The issue here was whether it could satisfy that burden through impeachment evidence only. The court concluded that it could not.

The court admonished that where a sole witness refused to answer questions, DHS could not meet its burden, in the absence of any substantive evidence, based only upon the adverse inference drawn from the witness's silence. That would equate to essentially no burden of proof at all.

The court emphasized that impeachment evidence alone cannot meet DHS's burden where there was no substantive evidence – and thus nothing to impeach.

Here, both the IJ and the BIA relied on impeachment evidence for proof of facts in dispute. That was error because it conflated impeachment evidence with substantive evidence and effectively relieved DHS of its burden of proof. The agency was allowed to prove the disputed facts by offering only impeachment evidence unconstrained by the procedural rules of notice.

Because the DHS failed to present a prima facie case by establishing the grounds for termination of asylum by a pre-

ponderance of the evidence, the court of appeal granted the petition for review.

Judge Bybee dissented, writing that under a BIA ruling in a prior case, silence indeed can be evidence, just not the only evidence. Here, the DHS proffered exhibits that were considered by the IJ in conjunction with Urooj's refusal to testify. The IJ did not err in granting DHS's request to terminate asylum. Judge Bybee noted, too, that in any event there was no basis to overturn the BIA's decision based on application of its own rules. In his view, the proper step would be to remand to the BIA for further proceedings.

Litigation

Party to lawsuit had right to notice and opportunity to be heard on opposing party's request for accommodation under Americans With Disabilities Act (Gilbert, P.J.)

Vesco v. Superior Court (Newcomb)

C.A. 2nd; November 6, 2013; B249447

The Second Appellate District reversed a trial court order. The court held that the plaintiff in a lawsuit had the right to notice and an opportunity to be heard on the defendant's request for accommodations under the Americans With Disabilities Act and also had a right of access to medical documents submitted by the defendant in support of that request.

While in a long-term relationship with Dawne Necomb, David Vesco bought a house. When the relationship ended, Newcomb refused to move out. She remained in sole possession of the house, living there rent-free, while Vesco paid the mortgage and other expenses. Vesco sued to recover possession of his home. Trial was set for April 22, 2013.

On April 15, 2013, Newcomb filed an ex parte motion for accommodations under the Americans With Disabilities Act (ADA) and Cal. Rules Ct, rule 1.100, requesting a continuance of trial based on her health. The trial court granted the motion and continued the trial date to June 3. Vesco was not served with a copy of the motion nor notified of it until after it had been granted.

Vesco filed an ex parte application to examine and photocopy all documents in the trial court's possession concerning Newcomb's request for ADA accommodation. The trial court denied the application.

On May 30, 2013, Newcomb made another confidential request for accommodation under the ADA. On June 12, the trial court granted the request, this time continuing the trial date to August 12, 2013.

Vesco petitioned the court of appeal for a writ of mandate ordering the trial court to allow him access to all materials it relied on to grant the trial continuance.

The court of appeal granted the writ petition, holding that Vesco had the right to notice, to view the documents submitted by Newcomb, and to be heard on her request for accommodation.

Rule 1.100 allows persons with disabilities to apply for "accommodations" to ensure they have full and equal access to the courts. In denying Vesco access to the documents filed by Newcomb, the trial court relied on Rule 1.100(c)(4), which prohibits disclosure of the applicant's identity and confidential information to persons "other than those involved in the accommodation process." The trial court apparently deemed Vesco not to be a person "involved in the accommodation process." The court of appeal disagreed. It was Vesco's trial that was being continued, the court found, and he was the person being forced to make the accommodation. As such, he was very much "involved in the accommodation process."

The court noted that when a party raises her physical condition as an issue in a case, she waives the right to claim that the relevant medical records are privileged. The reason for the waiver is self-evident, the court found. It is unfair to allow a party to raise an issue involving her medical condition while depriving an opposing party of the opportunity to challenge her claim. A challenge requires access to the medical records on which a party relies and an opportunity to be heard. Otherwise, the challenge is in name only. That rule 1.100 (c)(1) allows the application to be made ex parte does not dispense with the requirement of notice.

Vesco had the right to have his trial as soon as circumstances permit. It followed that he was entitled to challenge Newcomb's request for a continuance. He therefore had to be given notice and an opportunity to view the medical records and other material on which Newcomb relied.

Local Government

County violated its own competitive bidding ordinance when it awarded contract on basis of criteria not set forth in its request for proposals (Kline, P.J.)

Eel River Disposal and Resources Recovery Inc. v. County of Humboldt

C.A. 1st; November 5, 2013; A135744

The First Appellate District reversed a judgment. The court held that the County of Humboldt violated its own competitive bidding ordinance when it awarded a long term solid waste collection franchise on the basis of criteria other than those set forth in its published request for proposals.

The County of Humboldt solicited bids for an exclusive 10-year contract to collect and dispose of solid waste for the county's residents. The county's "request for proposals" (RFP) identified six criteria that would be considered in reviewing all bids. These were: responsiveness to the RFP; company qualifications and comparable experience; financial creditworthiness; acceptance of the RFP and franchise terms;

management plan; and service rates. Reach of these criteria was, in turn, assigned a weight ranging from five to ten percent, for each of the first five criteria, to 65 percent for the final criterion of services rates.

Multiple service providers submitted proposals. That submitted by Eel River Disposal and Resources Recovery Inc. received the highest score. Eel River proposed the lowest service rate and scored highest or tied for highest on each of the five other criteria. The proposal submitted by Tom's Trash tied with another proposal for the lowest score.

Notwithstanding these results, at the ensuing board meeting, the board awarded the franchise to Tom's Trash. The award was based on the board's findings that residents had long had and still wanted a locally-based service provider who knew customers personally and employed local residents. Tom's Trash, which had previously provided trash collection services to local residents, satisfied that criterion.

Eel River filed a petition for writ of mandate challenging the board's decision. Eel River argued board's decision violated a local ordinance mandating competitive bidding.

The trial court denied the writ petition.

The court of appeal reversed, holding that the trial court erred in construing the county ordinance as not including a "responsible bidder" requirement.

Like Publ. Res. Code §40059, the language of which it tracked, the county's ordinance used the phrase "competitive bidding" without explicitly indicating whether or not the phrase embodies a "lowest responsible bidder" requirement. The lack of such an indication rendered the ordinance ambiguous, the court found.

The court found, however, that both the ordinance and the state statute had to be construed as including such a requirement. Virtually all authorities on government procurement and public contract law define the competitive sealed bidding process employed by the county in this case as one in which "the award is made to the responsible bidder having the lowest responsive bid."

Further, the court opined, to read the RFP in this case as not including such a requirement would grossly distort its meaning and purpose. Although the RFP did not refer to the lowest responsible bidder requirement explicitly, it nonetheless strongly implied such a requirement. The RFP required the review committee to evaluate the bidders not just on the basis of "service rates," but on five other weighted criteria as well. The RFP's specification of the evaluative criteria employed to assess bidders "responsibility" or "qualifications," and comparison of bidders' scores on the basis thereof, and the provision in the RFP that "a proposal may be rejected even though it proposes the lowest monthly fee for subscribers," could only mean that the franchise was to be awarded the lowest responsible bidder.

The bidders in this case could not be required to guess at the standards by which they would be measured, the court found. They were entitled to expect that the bid that most fully satisfied the specified criteria would be awarded the franchise. Having apparently determined that all of the bidders were "responsible," it fell to the board only to determine which of those bidders submitted the lowest bid. Such determination required only a comparison of arithmetical figures and did not involve the exercise of judgment and discretion.

In making its determination based on alternate criteria, the board deviated from strict compliance with applicable bidding requirements and gave the successful bidder an unfair advantage. The RFP expressly stated that any modifications of its provisions, such as changing the evaluative criteria, had to be made "prior to the date and time fixed for submission of proposals ..." The board ignored this requirement, as well as the evaluative criteria identified in the RFP. In so doing, it not only changed the criteria after bids were unsealed, but did so by introducing a previously unknown factor that appeared to have disadvantaged all bidders except the one who received the franchise.

The court admonished that, if the board's intent, from the outset, was to award the franchise to a locally owned company, it could properly have found that "the public health, safety and well-being" were best served by doing so and avoided the competitive bidding process altogether. But the board did not take that course. Instead, it turned the evaluative criteria and process described in the RFP, and the detrimental reliance thereon of the bidders, into a charade. It was easy to see, the court suggested, how such a scenario could easily be employed to facilitate favoritism, fraud, corruption and extravagance.

The court remanded to the trial court to determine the appropriate remedy. The court noted that even though the franchise had already been awarded to Tom's Trash, it was a 10-year franchise that had not yet been fully or even substantially performed. For that reason, a grant of injunctive relief remained possible.

FULL TEXT OPINION

Ninth Circuit Court of Appeal

Cite as 13 C.D.O.S. 12250

SUMAIRA UROOJ; KHALID MAHMOOD TURK, Petitioners,

v.

ERIC H. HOLDER, JR., United States Attorney General, Respondent.

No. 09-70628
United States Court of Appeals for the Ninth Circuit
Agency Nos. A-098-144-358, A-098-144-359
On Petition for Review of a Final Order of the Board of Immigration Appeals
Argued and Submitted June 12, 2013—San Francisco, California
Filed November 6, 2013
Before: Marsha S. Berzon and Jay S. Bybee, Circuit Judges, and Consuelo B. Marshall, District Judge.*
Opinion by Judge Marshall; Dissent by Judge Bybee

* The Honorable Consuelo B. Marshall, Senior District Judge for the U.S. District Court for the Central District of California, sitting by designation.

COUNSEL

Jonathan M. Kaufman, Law Offices of Jonathan M. Kaufman, San Francisco, California, for Petitioners.

John Blakeley (argued), Tony West, Assistant Attorney General, Civil Division, Emily Radford, Assistant Director, and Patrick J. Glen, Office of Immigration Litigation, Department of Justice-Civil Division, Washington, D.C., for Respondent.

OPINION

MARSHALL, District Judge:

Petitioners Sumaira Urooj ("Urooj") and her husband, Khalid Mahmood Turk ("Turk"), seek review of the Board of Immigration Appeals' ("BIA") dismissal of their appeal from a final order of removal. The order terminated their asylum status and held them removable under § 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(B), for remaining in the United States longer than permitted. The order also held Urooj removable for misrepresenting a material fact, and declared that Urooj had filed a frivolous asylum application.

Petitioners seek review on three bases: First, the Department of Homeland Security ("DHS") failed to establish grounds for termination of asylum by a preponderance of the evidence. Second, the IJ violated Urooj's due process rights when he did not require DHS to adhere to the local operating procedures requiring advance disclosure of both witnesses and exhibits. Finally, the BIA's decision affirming the IJ's finding that Petitioners' asylum application was frivolous was not supported by substantial evidence.

Because we agree that the BIA erred in finding that DHS established grounds for termination of asylum by a preponderance of the evidence we grant the Petition for Review.

I.

Petitioners Sumaira Urooj and Khalid Mahmood Turk are a married couple from Pakistan admitted to the United States on non-immigrant visas in 2002 and 2003. Both visas expired in 2005. While in the United States, Petitioner Urooj submitted an application for asylum in 2004. Her husband, Petitioner Turk, was a derivative beneficiary of this application. In her application, Petitioner Urooj stated that while in Pakistan she was detained or arrested on at least three occasions, during which she was beaten, interrogated, tortured, and threatened on account of her membership in the Pakistan People's Party ("PPP"), and she feared similar mistreatment or worse if removed to Pakistan. Petitioner Urooj's asylum application was granted on December 23, 2004.

In August 2005, Petitioner Urooj was interviewed by DHS. DHS prepared a Record of Sworn Statement from the interview, which Urooj signed. The Statement reflects that Urooj paid an acquaintance to help prepare her application and her acquaintance told her to "memorize the story that he created for the asylum interview" and reminded her of details while serving as her interpreter during the asylum interview. It also reflects that Urooj was a member of a PPP student organization but was never persecuted, arrested, or tortured in Pakistan because of that affiliation and did not fear persecution if she returned to Pakistan.

Following the interview, Petitioners received Notices to Appear and Notices of Intent to Terminate Asylum Status. The Notices to Appear charged Petitioners with being subject to removal pursuant to § 237(a)(1)(b) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1227(a)(1)(B), as (1) immigrants who remained in the United States for a longer period than authorized and (2) aliens present in the United States in violation of law, on account of a prior misrepresentation of a material fact pursuant to section 212(a)(6)(C) of the INA, 8 U.S.C. § 1182(a)(6)(C).

DHS did not provide notice of its proposed witnesses or exhibits before the hearing on Petitioners' removability, as required by the Local Operating Procedures ("LOP") of the San Francisco, California Immigration Court.[1] At the hear-

1. Local Operating Procedure 3 provides "all pre-hearing briefs and proposed exhibits must be filed with the Immigration Court no later than fifteen (15) calendar days before the scheduled Individual Cal-

ing, DHS called Petitioner Urooj as a hostile witness and offered the following documents as evidence: (1) Petitioner Urooj's asylum application; (2) the Record of Sworn Statement; and (3) the record of oath pertaining to her asylum application.

Counsel for Petitioners objected, relying on the lack of proper notice under the LOP. Questions were propounded by DHS, but Petitioner Urooj refused to answer on advice of counsel. While Petitioner Urooj was on the stand, DHS offered the documents as impeachment evidence, which is excepted from the LOP notice requirements, and the IJ admitted them as such. The IJ also found that Petitioner Urooj did not need to be disclosed as a "proposed witness" within the meaning of the LOP because she was a party to the proceedings. The IJ drew adverse inferences from Petitioner Urooj's refusal to answer each question she was asked.

Following the removal hearing, the IJ terminated Petitioners' asylum and held that Petitioner Urooj filed a frivolous asylum application. The IJ ordered Petitioners removed to Pakistan.

Petitioners sought review of the IJ's decision to the BIA. The BIA dismissed Petitioners' appeal, affirming the IJ's decision. Petitioners timely appealed.

II.

We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review final orders of removal. *See Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1053 (9th Cir. 2006). On review from a decision to terminate asylum status, this Court reviews the BIA's factual findings for substantial evidence. *Brezilien v. Holder*, 569 F.3d 403, 411 (9th Cir. 2009). Questions of law are reviewed de novo. *Id.* Where, as here, the BIA adopts the decision of the IJ, "'we review the IJ's decision as if it were that of the BIA.'" *Abebe v. Gonzales*, 432 F.3d 1037, 1039 (9th Cir. 2005) (en banc) (quoting *Hoque v. Ashcroft*, 367 F.3d 1190, 1194 (9th Cir. 2004)).

III.

In proceedings to terminate a grant of asylum, DHS must establish the grounds for termination by a preponderance of the evidence. 8 C.F.R. § 1208.24(f). The pivotal legal question before this Panel, which we review de novo, is whether DHS can satisfy its burden through impeachment evidence only. Our conclusion is that it cannot.

Where, as here, the sole witness refuses to answer questions, DHS cannot satisfy its burden, "in the absence of any substantive evidence . . . , based solely upon the adverse inference drawn from . . . silence." *Matter of Guevara*, 20 I. & N. Dec. 238, 244 (BIA 1990). As the BIA aptly observed in *Guevara*, "if the 'burden' of proof were satisfied by a respondent's silence alone, it would be practically no burden at all." *Id.* at 244.

The IJ distinguished the evidentiary record in this case from that in *Guevara* and justified the different result by relying on the impeachment evidence offered by DHS. The IJ held that Petitioner Urooj's "refusal to testify, taken in conjunction with the documentation submitted by the DHS . . . is sufficient to demonstrate by a preponderance of the evidence that 'there was a showing of fraud in [her] application . . .'." We disagree. Impeachment evidence alone cannot satisfy DHS' burden where there was no substantive evidence and thus nothing to impeach.

It is clear both from the transcript of the proceedings and the IJ's written decision that the IJ admitted the documentary evidence proffered by DHS for impeachment purposes only.[2] Impeachment evidence is limited to "show[ing] background facts which bear directly on whether [the factfinder] ought to believe [one witness] rather than other and conflicting witnesses." *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967); *see also* Fed. R. Evid. 607, 608 (impeachment includes attacking witness credibility and character for truthfulness or untruthfulness); 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 607.03[1] (2d ed. 1997) ("[T]he technicalities surrounding impeachment tend to submerge the basic aim of all credibility rules: to admit evidence that enables the trier of fact to determine whether or not the witness is telling the truth.") Where there is no act of "telling," there is no need to determine the credibility of the witness.[3]

Rather than terminating the proceedings for lack of substantive evidence, the IJ and BIA relied on the impeachment evidence for proof of the facts in dispute. This reliance was error, as it improperly conflated impeachment evidence with substantive evidence.[4] *See, e.g.*, *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984) (emphasizing "subtle distinction between impeachment and substantive evidence"); Robert E. Jones, *et al.*, Federal Civil Trials & Evidence §

endar hearing, unless specifically permitted by the Immigration Judge assigned to the matter. Except for good cause shown, an Immigration Judge will not consider materials that are not timely submitted as in the Procedure. This procedure shall not apply to exhibits which are to be submitted for purposes of rebuttal and impeachment." Procedure 3 applies the same timeline and exceptions to submission of witness lists and provides "[a]ttorneys shall name all proposed witnesses that they intend to bring to a hearing and provide a brief offering as to each witness' testimony, the length of the witness' testimony, and whether the witness needs an interpreter and, if so, in what language."

2. The IJ overruled Petitioners' objection to the documentary evidence, holding that impeachment evidence is excepted from the advance notice requirement imposed on other categories of evidence.

3. The better course in this situation would have been to terminate the proceedings. *Duvall v. Attorney General of the United States* is instructive on this point. 436 F.3d 382 (3d Cir. 2006). In *Duvall*, as here, the government called the respondent as the sole witness. *Id.* at 384. The respondent refused, however, to answer the government's questions. *Id.* The government then sought to introduce the respondent's application for adjustment of status but the IJ ruled it inadmissible for noncompliance with the local rules. *Id.* Finding that the government had failed to satisfy its burden of proof, the IJ terminated the proceedings. *Id.*

4. We are not called upon to determine whether the IJ could have properly admitted the documentary evidence as substantive evidence, and then reached the same result, and we do not opine on that issue.

8:1954 (2013) ("Impeachment evidence proves only that the declarant lacks credibility; substantive evidence proves the facts in dispute"). The IJ found the impeachment evidence to be "probative on the issues of fraud . . . [and] give[n] full evidentiary weight." Similarly, the BIA found the impeachment evidence to "indicate that [Urooj] knew her asylum application contained false statements and that she made false claims in support of it during her asylum interview." The decisions of the IJ and the BIA in this case relieved DHS of its burden of proof, allowing it to prove the facts in dispute by offering only impeachment evidence unconstrained by the procedural rules of notice.[5]

We agree with the First Circuit that "'the United States Government should not be bailed out from the need to present an adequate prima facie case . . . We should not encourage the cutting of corners by an agency having such significant responsibilities.'" *Navia-Duran v. Immigration and Naturalization Serv.*, 568 F.2d 803, 811 (1st Cir. 1977) (quoting *Sint v. Immigration and Naturalization Serv.*, 500 F.2d 120, 124 (1st Cir. 1974)). We thus conclude that DHS did not meet its burden of establishing the grounds for termination of asylum by a preponderance of the evidence. *Cf. Duvall v. Attorney General of the United States*, 436 F.3d 382, 384 (3d Cir. 2006). We need not reach the merits of Petitioners' remaining arguments in support of review.

IV.

Accordingly the Petition for Review is **GRANTED**.

BYBEE, Circuit Judge, dissenting:

The majority holds that the Department of Homeland Security ("DHS") cannot satisfy its burden of establishing grounds for termination of a grant of asylum by a preponderance of the evidence where the sole witness refuses to answer questions and documentary evidence is offered only for impeachment. Maj. at 7. Remarkably, for support, the majority principally relies on the Board of Immigration Appeals ("BIA") decision in *Matter of Guevara*, 20 I. & N. Dec. 238 (BIA 1990). But in that case, the BIA said just the opposite: "[A]n adverse inference may indeed be drawn from a respondent's silence in deportation proceedings." *Id.* at 241 (citing U.S. Supreme Court and Ninth Circuit authority). As I explain, *infra*, the BIA qualified that rule in *Guevara*, holding that silence can be evidence; it just can't be the only evidence. *Id.* at 243–44. That qualification doesn't help Petitioner Urooj.

Because the Immigration Judge ("IJ") not only based his decision on an adverse inference drawn from Urooj's refusal to testify but also on Urooj's sworn statement admitting to concocting a false story to support her asylum application, I would deny the petition. But even if I thought that the BIA had acted inconsistently with *Guevara*, I would remand the matter pursuant to *Immigration and Naturalization Serv. v. Ventura*, 537 U.S. 12 (2002). *Guevara* is not a constitutional or a statutory mandate; it is the BIA's own evidentiary rule. And for that reason, if I thought the BIA had misapplied its own rule, I would give it the opportunity to address our concerns in the first instance. Accordingly, I respectfully dissent.

In *Guevara*, the respondent was charged with entering the United States without inspection in 1987 in violation of 241(a)(2) of the Immigration and Nationality Act, then codified at 8 U.S.C. § 1251(a)(2) (1988). 20 I. & N. Dec. at 239. He never admitted to the crime and contested the allegations from the beginning, and, in an initial appearance before the IJ, apparently informed the IJ through counsel that he would move to suppress any evidence produced as a result of his apprehension. *Id.* He appeared a second time before the IJ and was called as a witness by the government. *Id.* He refused to testify, asserting his Fifth Amendment privilege against self-incrimination, even after the IJ informed him of the existence of an "Agency Order" from the Immigration and Naturalization Service ("INS") that directed him to testify and purported to immunize him from the use of any of his testimony in any future criminal proceedings. *Id.* at 239–40. "The Service presented no evidence to establish the respondent's alienage and deportability other than the respondent's silence in the face of questioning." *Id.* at 240. On the basis of that silence alone, the IJ drew an adverse inference, shifted the burden of proof to Guevara, and noted that he had not established the time, place, or manner of his entry, and was, therefore, deportable as charged. *Id.*

The BIA reversed. It began by noting that "an adverse inference may indeed be drawn from a respondent's silence in deportation proceedings." *Id.* at 241. "Thus, it is clear that when confronted with evidence of, for example, the respondent's alienage, the circumstances of his entry, or his deportability, a respondent who remains silent may leave himself open to adverse inferences, which may properly lead in turn to a finding of deportability against him." *Id.* at 242. It distinguished Guevera's case, though, by explaining that "[u]nder the circumstances presented here, the respondent's silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage, sufficient to shift the burden of proof to the respondent under [8 U.S.C. § 1361]." *Id.* "[W]hile we have held that a respondent's silence may fairly corroborate other evidence presented for the record, we have also stated that '[s]uspicion cannot be solidified into proof by the mere silence of respondent.'" *Id.* at 243 (internal citations omitted;

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5. The Immigration Court Practice Manual replaced all Local Operating Procedures nationally on July 1, 2008. *See* U.S. Dep't of Justice, Exec. Office for Immig. Rev., Immigration Court Practice Manual. The Manual continues to require advance disclosure of proposed exhibits with the exception of exhibits used for impeachment or rebuttal. *See also* Fed. R. Civ. P. 26(a)(1)(B) (providing an exception to the regular disclosure requirements when documents will be used "solely for impeachment"); *Tamenut v. Ashcroft*, 361 F.3d 1060, 1061 (8th Cir. 2004) (holding that "evidence . . . offered to impeach Petitioner's credibility" is excepted from disclosure requirements).

second alteration in original). And in that case, the INS had "introduced no other evidence" but respondent's silence. *Id.* at 244.

This is not the case here. In the instant case, the IJ did not rely "mere[ly on Urooj's] silence," *id.* at 243, but on the DHS exhibits, particularly the record of her August 25, 2005 Sworn Statement where she admitted paying an acquaintance $5,000 to help her and Petitioner Turk become U.S. permanent residents and admitted to memorizing a false story to tell at her asylum interview. The IJ, quoting 8 C.F.R. § 1208.24(a)(1), found that Urooj's "refusal to testify, taken in conjunction with the documentation submitted by the DHS . . . [wa]s sufficient to demonstrate by a preponderance of the evidence that '[t]here is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted.'" Urooj was granted asylum based on her application and interview, the IJ observed, which Urooj had "previously indicated under oath were both false." *Guevara* was concerned with "the absence of any other evidence of record at all," *Guevara*, 20 I. & N. at 242, aside from the alien's silence. The facts are far different here, and the IJ was likely justified in drawing an inference from the Petitioner's silence.[6]

The majority believes that because this evidence was entered as impeachment evidence instead of on the merits, it should be ignored. Maj. at 8–9. In retrospect, perhaps the IJ should have granted a continuance *sua sponte* to remedy the DHS's failure to provide notice of the proposed witnesses and exhibits to Petitioners, as required by the Local Operating Procedures of the San Francisco, California Immigration Court. The IJ here tried to manage a confused and awkward proceeding. Although DHS could have prevented the confusion by submitting Urooj's name as a witness in conformity with the local rules, it is not entirely clear that, in a proceeding to terminate Urooj's asylum status for her fraudulent statements, the DHS had to indicate it would call Urooj herself if she declined to testify in her own defense.

In any event, we have no warrant for overturning the BIA's decision based on its application of its own rules. I do not think the BIA erred, but if we are convinced the BIA has behaved inconsistently, the proper procedure is to remand the case to the BIA for an explanation and further proceedings.

I respectfully dissent.

6. The majority also cites *Navia-Duran v. Immigration and Naturalization Serv.*, 568 F.2d 803 (1st Cir. 1977) for support. There, the court vacated a deportation order where the only evidence presented by the government in a deportation proceeding was the alien's statement admitting to illegal presence, because the statement was involuntary and taken in violation of the alien's due process rights, and was, thus, inadmissible. *Id.* at 811. Here, by contrast, Urooj's August 25, 2005 statement was not procured involuntarily; according to the record, Urooj "does not dispute the veracity of her signed, sworn statement, nor did she offer any explanation for the document."

Cite as 13 C.D.O.S. 12253

SEVEN ARTS FILMED ENTERTAINMENT LIMITED, an English corporation, Plaintiff-Appellant,

v.

CONTENT MEDIA CORPORATION PLC, an English corporation, Defendant,

and

PARAMOUNT PICTURES CORP., a Delaware corporation, Defendant-Appellee.

No. 11–56759
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:11-cv-04603-ABC-FMO

Appeal from the United States District Court for the Central District of California

Audrey B. Collins, District Judge, Presiding

Argued and Submitted August 29, 2013 — Pasadena, California

Filed November 6, 2013

Before: Diarmuid F. O'Scannlain, Carlos T. Bea, and Morgan Christen, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Neil Netanel, Los Angeles, California, argued the cause and Peter Hoffman, West Hollywood, California, filed the briefs for the plaintiff-appellant.

Joan Mack, Los Angeles, California, argued the cause and filed the brief for the defendant-appellee. With her on the brief were Jeanne A. Fugate, Los Angeles, California, and Matthew O'Brien, Los Angeles, California.

OPINION

O'SCANNLAIN, Circuit Judge:

We are invited to decide the ownership of copyrights in several motion pictures. The question is whether the three-year statute of limitations in the Copyright Act applies.

I

This appeal is the latest chapter in a decade-long quest by Seven Arts Filmed Entertainment Limited ("Seven Arts")[1] to establish ownership of copyrights in several motion pictures — as relevant here: *Rules of Engagement*, *An American Rhapsody*, and *Who is Cletis Tout?*.

1. Except as necessary for clarity, this Opinion uses "Seven Arts" to describe the Plaintiff as well as its predecessors-in-interest: CineVisions, Stander Productions Ltd., Seven Arts Pictures PLC, and Seven Arts Pictures, Inc.

On May 27, 2011, Seven Arts sued Paramount Pictures Corp. ("Paramount") and Content Media Corp. PLC ("Content") for copyright infringement, a declaration of ownership rights, and an accounting, seeking a declaration that neither Content, nor its predecessors-in-interest (collectively "CanWest"),[2] "is the owner or grantee" of rights in the films. Rather, Seven Arts claims that it is "the registered owner or assignee of the registered owner" of United States copyrights to the films. Seven Arts also alleges that Paramount is the licensee of certain distribution rights in and to the pictures, and that it has paid receipts from their distribution to Content, not Seven Arts, despite Seven Arts's demands.

Seven Arts voluntarily dismissed Content, deciding to pursue it in the High Court of England and Wales. Nonetheless, Seven Arts claimed a viable cause of action for copyright infringement against Paramount because of a summary judgment order it obtained in 2011 from the Superior Court of Justice in Ontario, Canada.

That Canadian action was first brought in 2003 against CanWest. In it, Seven Arts claimed co-ownership rights to the pictures stemming from a document referred to as the "Heads of Agreement" or "Master Structure Agreement." The case found its way to Canada because CanWest defended Seven Arts's first lawsuit — a 2002 action in the Central District of California — on the ground that the Heads of Agreement had a Canadian forum-selection clause. CanWest defended in Canada by denying that the Heads of Agreement was an enforceable contract.

While the Canadian action was pending, Seven Arts returned to the United States in 2005 and filed a second action in the Central District of California. Just as the instant 2011 action, the 2005 lawsuit alleged causes of action for copyright infringement, declaratory relief, and an accounting against CanWest. Unlike the 2002 action, which had alleged Seven Arts was a co-owner, the 2005 lawsuit claimed that Seven Arts was the sole owner of the disputed film rights. The new theory of ownership was that when CanWest denied the Heads of Agreement in Canada, Seven Arts obtained and exercised a right to "rescind any contracts which may have existed among the parties." Such contracts included: the Heads of Agreement in which Seven Arts's predecessor-in-interest had assigned all its rights to *Rules of Engagement* to Paramount's predecessor-in-interest; a 1999 agreement in which Seven Arts had assigned away its rights to *An American Rhapsody*; and a 2000 agreement concerning *Who Is Cletis Tout?*.

In August 2005, the district court granted CanWest's motion to stay the proceedings pending prosecution of the Canadian action. Seven Arts belatedly appealed that stay to this court, and we affirmed. *See Seven Arts Pictures PLC v. Fireworks Entm't, Inc.*, 244 F. App'x 836 (9th Cir. 2007). In 2008, the district court dismissed the 2005 action with prejudice for failure to prosecute after issuing two prior warnings. Seven Arts appealed to this court, and we affirmed. *See Seven Arts Pictures PLC v. Fireworks Entm't, Inc.*, 329 F. App'x 726 (9th Cir. 2009).

Seven Arts finally prosecuted its Canadian action and ultimately secured the February 2011 summary judgment order already mentioned. The Canadian proceeding was not adversarial, because the initially named defendants had entered bankruptcy and had not opposed the motion; so the Canadian court reviewed only the evidence presented by Seven Arts. Nonetheless, the Canadian order granted Seven Arts a declaration that it is and at all relevant times had been the owner of "copyrights registered and enforceable pursuant to the United States Copyright Act of 1976" for *An American Rhapsody* and *Who is Cletis Tout?*, and also that it had "exclusive rights" for international distribution of *Rules of Engagement*. The Canadian order further determined that Seven Arts had "granted no rights or interest in the Copyrights or the Copyrighted Works to any Defendant" and that therefore "the Defendants have infringed and continue to infringe the Plaintiffs' rights."

Seven Arts — with the summary judgment order in hand — returned to federal district court and filed this case, a near-duplicate of the 2005 lawsuit, except that Seven Arts sued Paramount for the first time and alleged that the Canadian summary judgment order established its ownership rights. Paramount moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).[3] On October 3, 2011, the district court dismissed the complaint with prejudice on the ground that Seven Arts's claim for copyright infringement against Paramount was barred by the Copyright Act's three-year statute of limitations, 17 U.S.C. § 507(b).

II

We review the district court's dismissal of the complaint for failure to state a claim and the legal issues it presents *de novo*. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). A statute-of-limitations defense, if "apparent from the face of the complaint," may properly be raised in a motion to dismiss. *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980). "We accept as true all well-pleaded allegations of material fact" but are not "required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

2. According to the complaint, "Content is the assignee and/or licensee of all interests that Fireworks Entertainment, Inc., an Ontario, Canada corporation, Fireworks Pictures Releasing (U.S.) Inc., a California corporation, CanWest Entertainment Inc., an Ontario, Canada corporation, and CanWest Entertainment International Distribution, an Irish jointventure… purport to own in the Pictures."

3. Content also moved to dismiss under Rule 12(b)(6) but, as previously mentioned, Seven Arts voluntarily dismissed Content before the district court ruled on Content's motion.

III

The Copyright Act of 1976 provides that all civil actions must be brought "within three years after the claim accrued." 17 U.S.C. § 507(b). When a claim accrues depends on the nature of the copyright claim.

For ordinary claims of copyright infringement, each new infringing act causes a new claim to accrue; thus, we have held that "an action may be brought for all acts that accrued within the three years preceding the filing of the suit." *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481–82 (9th Cir. 1994).[4] By contrast, we have held "that claims of co-ownership, as distinct from claims of infringement," accrue only once, "when plain and express repudiation of co-ownership is communicated to the claimant, and are barred three years from the time of repudiation." *Zuill v. Shanahan*, 80 F.3d 1366, 1369 (9th Cir. 1996); *see also Aalmuhammed v. Lee*, 202 F.3d 1227, 1230–31 (9th Cir. 2000) (Where "creation rather than infringement is the gravamen of an authorship claim, the claim accrues on account of creation, not subsequent infringement, and is barred three years from 'plain and express repudiation' of authorship.").

Copyright infringement claims have two basic elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In the ordinary infringement case, ownership is not in dispute, *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011); rather, the dispute centers on the second prong — whether, for example, the copying was a "fair use,"[5] or whether the materials taken were "original," *see, e.g.*, *Roley*, 19 F.3d at 480.

But this dispute is about ownership — Paramount concedes it is exploiting the pictures, but denies that Seven Arts owns the copyrights. That such is the nature of this dispute is apparent from the face of Seven Arts's complaint, which alleges that Seven Arts, not CanWest or Content, owned the copyrights, and that Paramount improperly paid royalties to CanWest or Content rather than Seven Arts.[6] We must decide, then, whether a claim for copyright infringement in which ownership is the disputed issue is time-barred if a freestanding ownership claim would be barred.

A

Although this is an issue of first impression in our circuit, we are guided by the Second and Sixth Circuits. Our sister circuits have held that, where the gravamen of a copyright infringement suit is ownership, and a freestanding ownership claim would be time-barred, any infringement claims are also barred. *See Kwan*, 634 F.3d at 229–30; *Ritchie v. Williams*, 395 F.3d 283, 288 n.5 (6th Cir. 2005); *see also Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 389–90 (6th Cir. 2007).[7] "When claims for both infringement and ownership are alleged," according to the Sixth Circuit, "the infringement claim is timely only if the corresponding ownership claim is also timely." *Roger Miller Music, Inc.*, 477 F.3d at 389–90. Or, as the Second Circuit puts it, "[w]here… the ownership claim is time-barred, and ownership is the dispositive issue, any attendant infringement claims must fail." *Kwan*, 634 F.3d at 230.

1.

Our sister circuits' approach makes good sense — allowing infringement claims to establish ownership where a freestanding ownership claim would be time-barred would permit plaintiffs to skirt the statute of limitations for ownership claims and lead to results that are "potentially bizarre," 3 Nimmer & Nimmer, *Nimmer on Copyright*, § 12.05[C][3]. An alternative approach would allow plaintiffs who claim to be owners, but who are time-barred from pursuing their ownership claims forthrightly, simply to restyle their claims as "infringement" and proceed without restriction. Such would negate our reasoning in *Zuill*—

> It is inequitable to allow the putative co-owner to lie in the weeds for years after his claim has been repudiated, while large amounts of money are spent developing a market for the copyrighted material, and then pounce on the prize after it has been brought in by another's effort.

80 F.3d at 1370–71.

Still, Seven Arts urges us to create a circuit split by refusing to extend *Zuill*'s accrual-upon-express-repudiation rule from ownership claims among co-authors to infringement claims where the dispositive issue is ownership. To be sure, Seven Arts is correct that *Zuill* was a dispute between co-authors, who cannot sue one another for copyright infringement, whereas our sister circuits have extended *Zuill* to claims of sole authorship. Yet, as the leading copyright treatise explains, that is a distinction without a difference. *See* 3 Nimmer & Nimmer, *Nimmer on Copyright*, § 12.05[C]

4. *See also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12.05[B][1][b] (2011) (explaining that *Roley* "adopted a 'rolling' concept of looking back three years from the date of filing," an approach which "rejects the continuing wrong theory, whereby" damages would be available all the way back to the day the infringement started).

5. *E.g.*, *SOFA Entm't, Inc. v. Dodger Prod., Inc.*, 709 F.3d 1273, 1276 (9th Cir. 2013) (involving "a copyright infringement suit over a seven-second clip of Ed Sullivan's introduction of the Four Seasons on *The Ed Sullivan Show*").

6. We need not consider Seven Arts's assertion that Paramount is precluded from disputing Seven Arts's ownership of the copyrights because it stood in privity with CanWest in the Canadian action. Both parties concede that the issue of "estoppel by privity" was not adjudicated by the district court and is not properly before us. Even if Seven Arts were ultimately to prevail on the merits of that theory, it would not prove that the gravamen of this dispute is something other than ownership.

7. Both circuits were, in turn, guided by *Zuill*. *See Kwan*, 634 F.3d at 230 ("Creation, rather than infringement, was the gravamen of plaintiffs' co-ownership claim, so the claim did not accrue upon subsequent publication." (quoting *Zuill*, 80 F.3d at 1371)); *Ritchie*, 395 F.3d at 288 n.5 (extending *Zuill*'s accrual upon "plain and express repudiation" rule "from co-authors to others in close relationships, such as those who transfer copyright ownership via contract").

[2] ("If *A* cannot be heard to claim belatedly that he co-authored a work with *B* twenty years ago, which would result in *A* owning 50% of the copyright, then all the moreso *C* must be barred from belatedly claiming that she solely authored a work on which *D* has been claiming authorship credit for twenty years, which would result in *C* owning 100% of the copyright.").

Relying on legislative history, Seven Arts maintains that the statute of limitations for declaratory-judgment actions should not be applied to claims for copyright infringement because Congress's intent in enacting the statute of limitations was to bar particular remedies, not extinguish any substantive rights. *See, e.g.*, S. Rep. 85–1014 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1961, 1963 ("The committee wishes to emphasize that it is the committee's intention that the statute of limitations, contained in this bill, is to extend to the remedy of the person affected thereby, and not to his substantive rights."). The plaintiff in *Zuill* cited the same passage of legislative history. 80 F.3d at 1369 & n.1. As in *Zuill*, the "legislative history does not speak to the issue" in this case. *Id.* at 1369.

We agree with our sister circuits' reasoning, and are unpersuaded by Seven Arts's criticism of it. Moreover, "the creation of a circuit split would be particularly troublesome in the realm of copyright." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (*en banc*). Creating "[i]nconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide." *Id.* Such would contravene Congress's intent in revising the Copyright Act. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) ("Congress' paramount goal in revising the 1976 Act [was] enhancing pre*dicta*bility and certainty of copyright ownership."); *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) ("Congressional intent to have national uniformity in copyright laws is clear."). We decline Seven Arts's invitation to create a circuit split.

2.

Seven Arts contends that, even if we follow the Second and Sixth Circuits, our sister circuits' caselaw is inapposite because Paramount is a "putative downstream, third party licensee"[8] rather than a co-author or otherwise "in [a] close relationship[], such as those who transfer copyright ownership via contract," *Ritchie*, 395 F.3d at 288 n.5; *see also Kwan*, 634 F.3d at 226–27 (holding that suit by editor of a book against book's publisher, who hired her, and author was barred by statute of limitations). Extending *Zuill*'s accrual rule to encompass claims against those who are not in a close relationship could introduce uncertainty into the enforcement of copyrights and require copyright holders to file suit against any third party that might be deemed to have repudiated the copyright owner's title.

We need not decide which rule applies to suits against unknown third parties. Paramount and Seven Arts's predecessors-in-interest were in the sort of "close relationship" envisioned by *Ritchie* and reflected in *Kwan*. Peter Hoffman, then-president of Seven Arts's predecessor-in-interest CineVisions, described the relationship in his affidavit filed in support of summary judgment in the Canadian action. CineVisions and Hoffman entered into a "first look" deal with Paramount in January 1998. Later that year, CineVisions and Fireworks, one of Content's predecessors-in-interest, "agreed to enter into an agreement for the financing, production, acquisition and distribution of theatrical motion pictures (the 'Venture') under and pursuant to [CineVisions's] 'first look' production arrangement with Paramount."

"Pursuant to the Venture… [CineVisions] obtained from Paramount the exclusive grant of all international distribution rights, i.e. theatrical, non-theatrical, video and television rights outside the United States and Canada… to the motion picture entitled *Rules of Engagement*," which "was the first of the major Paramount motion pictures acquired by [CineVisions] under the 'first look' arrangement with Paramount." Similarly, Hoffman "obtain[ed] an agreement with Paramount for the distribution of *American Rhapsody* in most territories." And, CineVisions "arranged several presales for [*Who is Cletis Trout?*] and arranged for distribution of the picture in the United States through Paramount."

Of particular note, Hoffman, now Seven Arts's CEO and counsel in this appeal, personally signed and negotiated those contracts and agreements with Paramount. Seven Arts cannot claim ignorance about Paramount's interest in, and distribution of, the pictures during the statutory period.

B

Paramount plainly and expressly repudiated Seven Arts's copyright ownership more than three years before Seven Arts brought this suit. According to the complaint, Seven Arts's predecessors-in-interest "gave notice to Paramount in three letters dated January 20, 2005, March 18, 2005, and May 5, 2005… that all sums due to the CanWest Parties with respect to the Pictures was [sic] and would become due to [Seven Arts's] Predecessors."

The January letter informed Paramount that "Seven Arts claims ownership of the Pictures," that "[CanWest] has no further right to distribute the Pictures or collect any sums due as respect to the Pictures," and therefore that "Seven Arts demands that Paramount pay all sums due with respect to such Pictures to Seven Arts and not to pay such sums to [CanWest] until resolution of the litigation currently pending in Canada." In March, Hoffman requested "Paramount to demand of CanWest production of [the appropriate] chain

8. Paramount disputes this characterization, claiming that it has validly registered copyrights to *An American Rhapsody* and *Who is Cletis Tout?* and that its German partner, MFP Munich Films, holds the copyright for *Rules of Engagement*. Furthermore, Paramount claims that it assigned the international distribution right for *Rules of Engagement* to Seven Arts's predecessor and was therefore "upstream" from Seven Arts.

of title as a prerequisite to payment of any future sums." By May, Hoffman had "read the documents" Paramount sent to him and found it "truly outrageous that CanWest would use these documents as chain of title."

Despite the letters, "Paramount failed and refused to comply with [Seven Arts's] Predecessors' demand." By choosing to continue paying royalties to CanWest and Content, rather than to Seven Arts's predecessors, as demanded, Paramount plainly and expressly repudiated Seven Arts's copyright ownership by 2005 at the latest. This action was filed over three years later, on May 27, 2011.

C

Seven Arts asserts that, even if its claim accrued in 2005 and is barred by the statute of limitations, it is entitled to equitable tolling because of some combination of the 2002 suit, the long-dormant 2003 Canadian action, or the 2005 stay order tolled its claim against Paramount. Such assertion borders on the frivolous.

Seven Arts admits, as it must, that it is not entitled to tolling on the basis of concealment or lack of knowledge. It has known about Paramount's distribution of the pictures from the first and has never, before this case, added Paramount as a defendant in any of its multifarious actions.

Furthermore, Seven Arts concedes that it cannot cite any case tolling the Copyright Act's statute of limitations by reason of a prior pending claim.[9] And Seven Arts points to no case holding that a plaintiff may rely on the filing of a separate action against a separate defendant to toll a subsequent copyright action against a new defendant.[10] We decline to hold so here, especially where Seven Arts offers no compelling reason for its failure to sue Paramount in any earlier action, or to bring suit within the statute of limitations.

IV

We join our sister circuits in holding that an untimely ownership claim will bar a claim for copyright infringement where the gravamen of the dispute is ownership, at least where, as here, the parties are in a close relationship. Because it is apparent from the complaint that Paramount clearly and expressly repudiated Seven Arts's ownership of the copyrights more than three years before Seven Arts brought suit, the district court properly dismissed.

AFFIRMED

9. Seven Arts relies, as it did below, on two cases that "applied equitable tolling in the situation where… a bankruptcy petition erected an automatic stay under 11 U.S.C. § 362 which prevented the claimant from taking steps to protect her claim," *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2006) (citing *Young v. United States*, 535 U.S. 43, 50–51 (2002)). In each of those cases, though, "the defendants" had "created the situation which impeded" the plaintiffs from pursuing their claims. *Id.*; *see also Young*, 535 U.S. at 50. Paramount did nothing to prevent Seven Arts from bringing suit in a timely fashion.

10. Tellingly, Seven Arts's reply brief states "[i]ndeed, 4*'s* [sic] *central point is that* equitable tolling may be available *even if* the now affected party was *not* sued in the prior action" From context, Seven Arts appears to be relying on *Daviton v. Columbia/HCA Healthcare Corp.*, which interpreted California's equitable tolling law and concerned the tolling effect of an administrative complaint for "the same wrong . . . *against the same defendant*," 241 F.3d 1131, 1133 (9th Cir. 2001) (*en banc*) (emphasis added); *see also id.* at 1138 ("Typically," under California law, "both claims name the same defendant.").

Cite as 13 C.D.O.S. 12258

SALVADOR MONDACA-VEGA, Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General, Respondent.

No. 03-71369
United States Court of Appeals for the Ninth Circuit
Agency No. A019-263-384
Filed November 6, 2013

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

California Courts of Appeal

Cite as 13 C.D.O.S. 12259

EEL RIVER DISPOSAL AND RESOURCE RECOVERY, INC., Plaintiff and Appellant,

v.

COUNTY OF HUMBOLDT, Defendant and Respondent.

No. A135744
In the Court of Appeal of the State of California
First Appellate District
Division Two
(Humboldt County) (Super. Ct. No. CV110352)
Filed November 5, 2013

COUNSEL

Attorneys for Appellant: Harland Law Firm, LLP, Allison G. Jackson

Attorneys for Respondents: County of Humboldt-County Counsel, Wendy B. Chaitin, County Counsel, Jefferson Billingsley, Deputy County Counsel

No Appearance for Real Party in Interest.

OPINION

Appellant Eel River Disposal and Resources Recovery Inc., the lowest bidder on an exclusive franchise to collect and dispose of solid waste, seeks to compel Humboldt County (the County), by writ of mandate, to vacate its award of the franchise to real party in interest, Tom's Trash. Appellant contends the award was unlawful because bids were not evaluated pursuant to the "lowest responsible bidder" requirement implicit in the phrase "competitive bidding" as used in the governing county ordinance and related statutes. Rejecting that argument, the trial court denied relief. We shall reverse the ruling.

FACTS AND PROCEEDINGS BELOW

In 2008, the County enacted Ordinance 2063, which amended Section 521–6, subdivision (a)(1) and (2), of the Humboldt County Code (Humboldt Code section 521–6), pertaining to the granting of franchises and permits for the right to collect solid waste or source-separated materials within the County. Humboldt Code section 521–6, subdivision (a)(1) and (2), which is set forth in its entirety in the margin below,[1] provides that the Board "may grant partially or wholly exclusive franchises, with or without competitive bidding," but that "[b]efore granting an exclusive franchise without competitive bidding, the Board shall make specific findings as to why the public health, safety and well-being are best served by proceeding without competitive bidding."

Since 1973, the County had awarded an exclusive franchise to collect solid waste in the Willow Creek area to Tom's Trash. However, on September 21, 2010, after determining that the company was delinquent in remitting franchise fees and otherwise not in compliance with the terms of its contract with the County, the Board refused to extend Tom Trash's contract, which expired on December 31, 2010. On September 21, 2010, the Board directed the Public Works Department (PWD) "to competitively bid a new solid waste franchise in the Willow Creek Area."

Because the process of soliciting and evaluating bids for such a franchise was expected to take several months, and in order to provide for continuous solid waste collection and disposal in the Willow Creek area during that period, the Board approved entering into a "short-term" or interim franchise on the basis of competitive bids. After the solicitation by the PWD of such bids, the Board granted the six-month interim franchise to appellant. The interim franchise expired on June 30, 2011.

The legal confusion in this case began with two reports to the Board from the Director of the PWD recommending that the Board take specified actions necessary to solicit and evaluate bids for a new long-term franchise. The first report, dated March 3, 2011, recommended that at its next meeting on March 22 the Board authorize the PWD to issue a request for proposal (RFP) for an exclusive franchise for a service period of 10 years commencing July 1, 2011, with the possibility of a five-year extension. The report stated that proposals "will be evaluated based on a number of factors," specifically including "responsiveness to the RFP, company qualifications and comparable experience, financial creditworthiness, acceptance of the franchise terms, and the com-

1. "SEC. 521–6. GRANTING OF FRANCHISES AND PERMITS.

"(a) The Board may grant any permit or franchise or enter into any contract with any person, for the right and privilege of collecting solid waste or source-separated materials within the County or any portion thereof, or district, to be fixed by the Board upon such terms and conditions, consistent with this chapter and the Public Resources Code of the State of California, as the Board may deem for the best interests of the County, for such period of time as the Board deems advisable, but not to exceed twenty (20) years.

"(1) If, in the opinion of the Board, the public health, safety, and well-being so require, the Board may grant partially or wholly exclusive franchises, either with or without competitive bidding.

"(2) The grant of exclusive franchises shall require that the Board of Supervisors call and hold a public hearing, for which hearing publication of notice shall be made by the Board of Supervisors pursuant to Section 6066 of the Government Code. Before granting an exclusive franchise without competitive bidding, the Board shall make specific findings as to why the public health, safety and well-being are best served by proceeding without competitive bidding." (Humboldt Code section 521–6.)

As noted, *post,* at pages 8 and 9, footnote 4, much of the foregoing language tracks that of Public Resources Code section 40059, though the two provisions are not entirely consistent.

pany's proposed management plan. Service rates will receive a factor of 65% in the evaluation criteria." The report went on to explain that "[b]ecause the evaluation considers criteria beyond strictly pricing, the process is not then a 'competitive bid,' and certain findings in accordance with Humboldt Code section 521–6[, subdivision] (a)(2) will need to be made at a public hearing noticed in accordance with Government Code Section 6066 before the exclusive franchise can be granted."

Finally, the March 3 report stated that the findings required by subdivision (a)(2) of Humboldt Code section 521–6 — namely, "why the public health, safety and well being are best served by proceeding without competitive bidding" — were "appropriate, and recommended" because "the proper collection and disposal of solid waste has environmental, health and safety consequences for residents of this county and, as such, should only be performed by a firm that has demonstrated experience, capability and capacity to handle such a responsibility." The Board never made the findings required by Humboldt Code section 521–6, subdivision (a)(2), in order to proceed "without competitive bidding" because it ultimately decided to employ a competitive bidding process.

The RFP for an exclusive franchise for the collection of solid waste in the Willow Creek area was approved by the Board on March 22, identified six criteria to be considered by the review committee, specified the weight to be given each criterion, and stated that the scoring of individual bids "will reflect the extent to which the criteria are fulfilled relative to other proposals." The criteria and corresponding weights assigned to each are as follows: "Responsiveness to RFP 5%; [¶] Company qualifications and comparable experience 10%; [¶] Financial creditworthiness 5%; [¶] Acceptance of RFP and franchise terms (evaluation of exceptions) 5%; [¶] Evaluation of management plan 10%; [¶] [and] Service rates 65%."

The second report from the Director of the PWD, which was made on May 13, 2011, after the sealed bids were opened, informed the Board that the four proposals received by the review committee had been evaluated and scored, and appellant had received the highest total score on the criteria listed in the RFP. On that basis, the report recommended that at its next meeting on May 24 the Board award appellant the 10-year exclusive franchise.

The Director's May 13 report also addressed the statements in his March 3 report that, because the process of evaluating bids "considers criteria beyond strictly pricing," it is not "competitive bidding," and therefore the findings required by Humboldt Code section 521–6, subdivision (a)(2), would need to be made at a noticed public hearing. The Director stated that his earlier statement "directly contradicts the intent of Section 521–6(a)(2) and staff is returning to the Board to clarify and correct that statement. The RFP process used by the department for this exclusive franchise *was a competitive bid as detailed below. Consequently, findings are not necessary.*" (Italics added.) The process employed was "competitive bidding," the Director explained, because the evaluation of the four proposals by the review committee "was based on a number of factors including responsiveness to the RFP, company qualifications and comparable experience, financial creditworthiness, acceptance of the franchise terms, and the company's proposed management plan… [and] [s]ervice rates received a factor of 65% in the evaluation criteria."

The May 13 report stated that appellant proposed the lowest service rate, the criterion weighted most heavily, and scored highest or tied for highest on each of the five other criteria, although the scores were very close. Blue Lake Garbage's score was second, and Humboldt Sanitation & Recycling Co. and Tom's Trash tied for last.

Finally, under the heading "ALTERNATIVES TO STAFF RECOMMENDATIONS," the May 13 report stated: "The Board could [at its May 24 hearing] choose not to award the exclusive franchise to Eel River Disposal and Resource Recovery, Inc. If the Board so chooses, they [*sic*] can evaluate the proposals on the same basis as the evaluation criteria outlined in the RFP and award the exclusive franchise to one of the other companies."

A day or two before the May 24 Board meeting, Supervisor Ryan Sundberg, whose district included the Willow Creek area, distributed packets to other members of the Board containing 14 letters from residents of his district supporting award of the franchise to Tom's Trash.

At the commencement of the Board hearing on award of the franchise, the Director made the case for awarding the franchise to appellant, emphasizing that in the minds of the three members of the review committee (himself and two other employees of the PWD) the company "hit all the buttons." It not only " scored 100% on the evaluated criteria identified in the RFP," but also offered "the lowest cost to the community and a reasonable cost for adding curb-side recycling availability to the community and even with the curb-side recycling, they are still the lowest cost provider."

Supervisor Sundberg then moved to award the franchise to Tom's Trash. The motion was seconded, and the Board heard brief statements from the owner and an employee of Tom's Trash and several residents of the Willow Creek area urging award of the franchise to Tom's Trash, and the owner and an employee of appellant urging award of the franchise to appellant. The gravamen of the testimony in favor of Tom's Trash was that its earlier loss of the franchise for failure to remit franchise fees resulted from the negligence and criminal conduct of a former bookkeeper and this was no longer a problem, residents of the Willow Creek area had long had and still wanted a locally-based service provider who knew customers personally and employed local residents, residents were very satisfied with the service provided by Tom's Trash, and that the service provided by appellant during the interim period in which it served the area was deficient in several ways. The owner and operations manager of appellant testified that the company was based in Humboldt County and had for 27 years provided residents of towns in the county "impeccable service," had "never heard" the "allegations"

made at the hearing or received any complaints; it also provided certain free services for residents, and would continue to respond positively for requests for special assistance from seniors and others in need.

At the close of testimony, County Counsel pointed out that the purpose of the noticed hearing was to vote on the six "recommendations" made to the Board by the Director. [2] Because the purpose of Supervisor Sundberg's motion was to reject the Director's third recommendation to award the franchise to appellant, and award it instead to Tom's Trash, County Counsel suggested the motion be amended to clarify this intention. She also suggested that recommendations four, five and six should also be modified to effectuate the intention to reject the Director's proposal to award the exclusive franchise to appellant and award it instead to Tom's Trash. County Counsel recommended that the motion also be amended to include a statement that the Board has evaluated the criteria outlined in the RFP and finds it is "in the best interests of the County to award the exclusive franchise to Tom's Trash." At the June 27 hearing in the Humboldt County Superior Court, county counsel explained the gist of the foregoing suggestions: "Look[,] if you are going to award it to Tom's Trash, include in the motion that you've evaluated the criterion [*sic*], you find it is in the best interest of the County. And also recommendations four, five and six on the Board report, you do have to put Tom's [Trash] in instead of [appellant][;] otherwise the Board would have awarded it to Tom's [Trash] and told the chair and the public works director to go ahead and sign the contract with [appellant]."

Supervisor Sundberg, and Supervisor Clendenen, who seconded the motion, agreed to the modifications suggested by county counsel, and the motion passed by a vote of 4-to-1.

Although Supervisor Sundberg's motion was orally amended by the statement that that the Board had evaluated the criteria outlined in the RFP and found that award of the franchise to Tom's Trash was in the best interests of the County, the Board made no changes in the PWD review committee's scoring of bidders relative to the criteria specified in the Board-approved RFP. The County admits that, as alleged in the petition, a "substantial reason" for awarding the exclusive franchise to Tom's Trash "was that Tom's was a local employer in Willow Creek and that [appellant] was not." The four supervisors who voted to pass Supervisor Sundberg's motion at the May 24, 2011 hearing all indicated the view that local ownership of Tom's Trash and its employment of several local residents outweighed the fact it was not the lowest bidder, and this was the chief reason they voted for the motion.

On June 8, 2011, appellant filed a verified petition for writ of mandate and complaint for declaratory relief (Code Civ. Proc., §§ 1085, 1060) in the superior court seeking a peremptory writ mandating that the County (1) award the exclusive franchise at issue "to the entity scoring the highest under the criteria under the RFP process in the competitive process established [by Humboldt Code section 521–6]" and (2) "immediately vacate its vote awarding the [franchise] to Tom's Trash, an entity which did not receive the highest score in the competitive bid RFP process." The complaint alleged that, having elected to proceed by a competitive bid process, Humboldt Code section 521–6 imposed upon it a legal duty to award the exclusive franchise to the lowest responsible bidder, and the County represented that it would discharge that duty pursuant to the process and evaluative criteria set forth in the RFP. The complaint sought a declaration to that effect under Code of Civil Procedure section 526, subdivision (a), as well as a declaration that the vote awarding the franchise to Tom's Trash, taken after not complying with the competitive bidding process mandated by Humboldt code section 521–6 and specified in the RFP, was "null and vo*id*." Finally, the complaint sought recovery of costs and reasonable attorney fees incurred in the action, and such other relief as the court deemed just and proper.

On April 18, 2012, after conducting a hearing, the superior court issued a nine-page order denying appellant's request for writ of mandate and declaratory relief. On May 3, 2012, the court entered judgment denying the relief sought by appellant and awarding costs to the County.

Timely notice of this appeal was filed on June 15, 2012.

THE TRIAL COURT RULING

In large measure, the language of Humboldt Code section 521–6 (set forth, *ante*, at p. 2, fn. 1) tracks that in Public Resources Code section 40059, a provision of the Integrated Waste Management Act of 1989 (§§ 40050–49620) (the 1989 Act).[3] As material, section 40059 authorizes a Board of Supervisors, upon a finding that that "the public health, safety or well-being so require," to grant a "partially exclusive or wholly exclusive franchise… either with or without competitive bidding."[4] Like the county ordinance, section 40059

2. The Director's six recommendations to the Board were as follows:

"1. Open a public hearing and receive the staff report and public comments on the proposed awarding of exclusive franchise agreement for the Willow Creek Area to Eel River Disposal and Resource Recovery, Inc. for the period July 1, 2011 to June 30, 2021 and to establish a rate schedule for the Willow Creek Area.

"2. Close the public hearing.

"3. Award the exclusive franchise to Eel River Disposal and Resource Recovery, Inc. for obtaining the highest percentage score after evaluation of proposal by the review committee.

"4. Approve proposed rate adjustments for services.

"5. Authorize the Chair to sign the Notice of Award/Certificate of Acceptance… and direct the Public Works Department to require the Eel River Disposal and Resource Recovery to execute the Certificate of Acceptance of Contract within two weeks following the granting of the franchise.

"6. Delegate authority to the Public Works Director to execute an exclusive franchise agreement with the approved rate and on the terms and conditions set forth in the franchise agreement… with the Eel River Disposal and Resource Recovery, Inc. upon approval of the agreement by County Counsel and review and approval of insurance certificates by Risk Manager.". . . .

3. All untitled section references are to the Public Resources Code.

4. Despite the similarities between Humboldt Code section 521–6

uses the phrase "competitive bidding" but does not explicitly indicate whether the phrase embodies a "lowest responsible bidder" requirement, as appellant maintains.

The trial court appears to have accepted, as we do, that a "responsible bidder" "means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness capacity, and experience to satisfactorily perform the public works contract." (Pub. Contract Code, § 1103 [codifying language in *City of Inglewood-L.A. County Civic Center Auth. V. Superior Court* (1972) 7 Cal.3d 861, 867) (*City of Inglewood*)]; see also *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1450–1452; *Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341–1343; American Bar Association (ABA), Section of Public Contract Law, Model Procurement Code for State and Local Governments (2000), § 3–101 [a responsible bidder possesses "the capability in all respects of bidders to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance"]; 10 McQuillin, Municipal Corporations (3d rev. ed. 2009) § 29:81, at pp. 644–656.) Thus, the "lowest responsible bidder requirement" imposes on governmental agencies that solicit bids for public contracts a duty to evaluate bidders' possession of such attributes in a reasonable way on the basis of specified criteria timely made known to bidders and the general public. The lowest bidder is not necessarily the lowest *responsible* bidder. (*City of Inglewood, supra*, 7 Cal.3d at p. 867.)

The trial court first addressed appellant's contention that the "lowest responsible bidder" requirement was compelled by sections 49200 and 49201, provisions of the 1989 Act prescribing the process for awarding franchises for solid waste handling services. Section 49200 provides that a board of supervisors may grant such a franchise "only under the terms and conditions of this chapter." Section 49201, which is most pertinent, provides, among other things, that "[u]pon examination by the board of supervisors of the bids, the franchise may be awarded to the lowest *qualified* bidder." (49201, subd. (c), italics added.)

The trial court acknowledged that the phrase "lowest qualified bidder" in section 49201 imposed a "lowest responsible bidder" requirement. It found, however, that this statute conflicts with section 40059, which does not use the word "responsible" or "qualified" and, in the court's view, "clearly allows [the County] to make the award to someone other than the lowest responsible bidder." As we later discuss, the court concluded that, because section 40059 commences with the phrase "Notwithstanding any other provision of law," it prevails when its application conflicts with section 49201 (see 79 Ops. Cal. Atty. Gen. 28, 33–34 (1996), 1996 WL 179823), which is here the case.

The court next rejected the argument that a "lowest responsible bidder" requirement arose from the fact that on September 21, 2010, the Board directed the PWD " 'to competitively bid a new solid waste collection franchise in the Willow Creek area.' " The court stated: "Unless one assumes that 'competitive bidding' necessarily entails a 'lowest responsible bidder' requirement… there is no evidence that the Board's direction to the PWD was intended to adopt that requirement. The evidence is that the Board was aware that competitive bidding would be achieved through a [RFP] process… but that evidence is of little help, since an RFP process could very well include or exclude a 'lowest responsible bidder' requirement."[5]

The trial court relied heavily on the Board-approved RFP. The court was "persuaded that the Board must *not* have intended to direct the PWD to adopt a 'lowest responsible bidder' requirement, because the Board unquestionably approved the RFP prepared by the PWD that contained no such requirement." Apparently relying on a provision in the RFP stating that the County "reserves the right to modify this [evaluative] process in any way and at any time during the

and section 40059, the two measures are different in one significant respect. Unlike Humboldt Code section 521–6, section 40059 does not require a county wishing to proceed without competitive bidding to make findings "as to why the public health, safety and well-being" are best served by doing so. The statute requires such findings only if the governmental agency wishes to grant a franchise or contract *that is partially or wholly exclusive*, regardless whether a competitive bidding process is employed. Perhaps understandably, because section 40059 is badly drafted and somewhat confusing, the drafters of Humboldt Code section 521–6 seem to have misconstrued the statute. This assumption is supported by the fact that, although the franchise the County put out to bid in this case was wholly exclusive, the Board never made the findings required in order to do that. We do not pursue this issue because appellant has never raised it.

5. The use by the County of an RFP seems curious. Most government contract procurement guidelines, and the law in many jurisdictions (see 10 McQuillin, Municipal Corporations, *supra*, § 29:33, at pp. 475–476), distinguish between the solicitation of "bids" and the solicitation of "proposals." For example, the State Contracting Manual instructs that an Invitation for Bids (IFB) "seeks an answer to the following: '*Here is exactly what we need to have done.* Here are the qualification requirements, performance specifications, time frames, and requirements that must be met. How much will you charge us?' " (State Contracting Manual, ¶ 5.11 A.) On the other hand, "An RFP seeks an answer to the following: '*Here is what we wish to accomplish.* Here are the qualification requirements, performance specifications, time frames, and other requirements that must be met. How would you accomplish the job for us and for how much?' " (*Id.*, § 5.15 A.) Similarly, the Model Procurement Code distinguishes between "Competitive Sealed Bidding" (§ 3–202), which is most commonly employed, and "Competitive Sealed Proposals" (§ 3–203), which is used when the appropriate procurement officer "determines in writing, pursuant to regulations, that the use of competitive sealed bidding is either not practicable or not advantageous to the [State]." Notwithstanding that use of an RFP indicates otherwise, we assume the solicitation in this case is for bids, not proposals, because the County is capable of completely defining the scope of work required. (See 10 McQuillin, Municipal Corporations, *supra,* § 29:33, at p. 475.) Ordinarily, the "lowest responsible bidder" requirement is applied to both solicitations for bids and for proposals. (See State Contracting Manual, § 5.07); ABA, Model Procurement Code for State and Local Governments, §§ 3–202(5), 3–203(7).) The RFP with which we are concerned appears to conform to that authorized by Public Contract Code section 10344, which pertains to state service contracts; county franchises for solid waste handling services are, however, governed by section 49201, which directs the county to "call for bids."

RFP and contractor selection process," the court agreed with the County's argument that "even if the Board had initially intended to limit itself to an award based solely on the lowest responsible bidder, the Board was free to change its mind by adopting an RFP omitting that requirement."

Turning to the question whether the "competitive bidding" referred to in Humboldt Code section 521–6, subdivision (a)(2), contemplates an award to the "lowest responsible bidder," the court dismissed the suggestion that "competitive bidding" as used in Section 521–6, subdivision (a)(2), should be defined by reference to Public Contract Code section 10180, which relates to the awarding of construction contracts by state agencies. Public Contract Code section 10180 provides that after opening sealed bids, the department shall "award the contracts to the lowest responsible bidder." The trial court refused to consider section 10180 of the Public Contract Code (or section 10344, subdivision (b)(3), of the same Code, which also directs that certain state contracts be awarded to the "lowest responsible bidder") as extrinsic evidence bearing upon the meaning of "competitive bidding" because those statutes do not purport to define "competitive bidding." (See also Pub. Contract Code, §§ 20128, 20162 [requiring counties and cities to award certain public contracts to "lowest responsible bidder"].)

Construing appellant's reliance on the Public Contract Code to include the idea that "competitive bidding" has a technical or legal meaning that should be applied in lieu of its ordinary meaning (see Code Civ. Proc., § 16; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19 ["when a word used in a statute has a well-established *legal* meaning, it will be given that meaning in construing the statute"]), the court rejected the argument because in its view the phrase had no such technical or well-established legal meaning. After "considerable research," the court had been unable to find "any decision in which a court interpreted or defined the phrase 'competitive bidding' to include necessarily a 'lowest responsible bidder' requirement, unless that requirement was also separately stated in the statute." The court reasoned that if the Board intended subdivision (a)(2) of Humboldt Code section 521–6 to incorporate a "lowest responsible bidder" requirement, it "would have done so either explicitly or by incorporating an appropriate state statute" that was explicit.

In the end, the court concluded that the "common, ordinary meaning of "competitive bidding," as that phrase is used in both section 40059 and Humboldt Code section 521–6, "would be met by [the governmental agency] having solicited and evaluated a number of bids submitted in competition for the award of the Franchise," a standardless definition perceived by the court as relieving the Board of the need to comply with the requirements set forth in section 49201 or those enunciated in the RFP. Applying that interpretation of "competitive bidding," the trial court found "that the Board complied with the requirement of section 521–6(a)(2) that [it] utilize 'competitive bidding' in the absence of 'specific findings as to why the public health, safety, and well-being are best served by proceeding without competitive bidding.' "

The court also rejected the contention that the award to Tom's Trash was unlawful because appellant was not treated "in a fair and equal manner." Citing *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1010 (*Cypress Security*), the court stated that its review was limited to a determination whether the Board's actions were arbitrary, capricious, and entirely lacking in evidentiary support, or inconsistent with proper procedure, and that appellant had the burden of overcoming the presumption that the Board's actions were supported by substantial evidence. In finding the decision to award the franchise to Tom's Trash supported by substantial evidence, the court emphasized that the RFP "made it abundantly clear that (1) the recommendation of the review committee was not binding on the Board; (2) factors other than those listed in the RFP could be considered; and (3) that [the Board] 'reserves the right to act in the best interest of the County and its residents and businesses, including the right to reject a proposal that is given the highest ranking in the evaluation process."

As we shall explain, the trial court's confusing analysis fails to properly inquire into the ambiguity of the phrase "competitive bidding," fails to consider substantial extrinsic evidence bearing upon the meaning of that ambiguous phrase, fails to recognize that sections 40059 and 49201, which are both part of the 1989 Act and in pari materia, can readily be reconciled, misapplies *Cypress Security*, and ignores important policies regarding the letting of public contracts and settled principles of statutory construction. As we shall explain, the court's ruling renders section 49201, subdivision (c), and subdivision (a)(2) of Humboldt Code section 521–6 meaningless and vindicates a grossly unfair bidding process that would invite the very favoritism, fraud and corruption the law relating to the letting of public contracts is designed to prevent.

THE STANDARD OF REVIEW

"On appeal from the denial of a writ of mandate challenging an award of a public contract, we perform the same function as the trial court and are not bound by its determinations. [Citations.] We review the public entity's decision for substantial evidence. [Citations.] Our review is limited to a determination of 'whether the [public entity's] actions were arbitrary, capricious, entirely lacking in evidentiary support, or inconsistent with proper procedure.' [Citations.] In determining these issues, we defer to the [public entity's] factual findings when they are supported by substantial evidence. [Citation.] To the extent our analysis requires us to decide questions of statutory interpretation or determine whether the [public entity's] actions violate applicable law, we exercise our independent judgment. [Citations]" (*Schram Construction, Inc. v. Regents of University of California* (2010) 187 Cal.App.4th 1040, 1051–1052, fn. omitted.)

"Because of the potential for abuse arising from deviations from strict adherence to [competitive bidding] standards… the letting of public contracts universally receives close judicial scrutiny… ." (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 456 (*Konica*).)

ANALYSIS

1. The Phrase "Competitive Bidding" is Ambiguous

In construing statutes and ordinances our task is to ascertain and give effect to the legislative intent. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) "We begin by examining the words of the statute, giving them their usual and ordinary meaning and construing them in the context of the statute as a whole. [Citations.] If the plain language of the statute is unambiguous and does not involve an absurdity, the plain meaning governs. [Citations.] If the statute is ambiguous, the court may consider a variety of extrinsic aids, including the apparent purpose of the statute. [Citation.]" (*Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 526–527.)

The trial court found that the phrase "competitive bidding" has a plain meaning and therefore does not need interpretation. According to the court, "[a]ny common, ordinary meaning of 'competitive bidding' would be met by Respondent's having solicited and evaluated a number of bids submitted in competition for the award of the Franchise," a definition excludes not just a "lowest responsible bidder" requirement, but even a "lowest bidder" requirement; indeed, the definition eliminates any requirement at all. The court's analysis, which is really no more than a conclusion, is far too simplistic.

Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. (2A Singer & Singer, Sutherland, *Statutes and Statutory Construction* (7th ed., 2007) § 45:2, p. 13) Considered in the context of the government procurement process, "competitive bidding" is capable of being understood in two senses: (1) as a process whereby a franchise, contract, license, or permit shall be awarded on the basis of the lowest bid, and (2) as a process that also takes into account the qualifications of the bidder, so that the low bid may be rejected if the bidder does not qualify as a responsible bidder. County's Director of Public Works, who must be deemed a reasonably well-informed government procurement officer, has at different times adopted each of these different meanings. In his March 3 report to the Board, he stated that the proposed RFP did not involve "competitive bidding" because it considered criteria "beyond strictly pricing," but in his May 13 report he changed his position, declaring that the same RFP constituted "competitive bidding," even though the evaluative criteria it prescribed went beyond merely pricing.

By using the absence in the ordinance of any explicit reference to a "qualified" or "responsible" bidder as the basis upon which to conclude the ordinance imposed no "lowest responsible bidder" requirement — an approach many courts reject [6] — the court relieved itself of the need to inquire whether the phrase "competitive bidding" was capable of being understood by reasonably well-informed persons in different ways. In essence, the court used the feature of the ordinance rendering the phrase ambiguous as the basis upon which to conclude it was unambiguous. As a leading treatise observes, "[t]he assertion in a judicial opinion that a statute needs no interpretation because it is 'clear and unambiguous' is in reality evidence the court has already considered and construed the Act. It may also signify that the court is unwilling to consider evidence bearing on the question how the statute should be construed, and is instead declaring its effect on the basis of the judge's own uninstructed and unrationalized impression of its meaning." (2A Singer & Singer, Sutherland Statutes and Statutory Interpretation, *supra*, § 45:2, p. 16.)

That is what appears to have happened here. The trial court's statements that "competitive bidding" does not include a "lowest responsible bidder" requirement and consists simply of "having solicited and evaluated a number of bids submitted in competition for the award," without regard to any evaluative criteria and process, is in fact a judicial interpretation of the phrase "competitive bidding." made without regard to extrinsic evidence bearing on its proper interpretation.

2. The Phrase "Competitive Bidding" in Humboldt Code Section 521–6 and Section 40059 Must be Construed in Pari Materia with Related Statutes Applying a "Lowest Responsible Bidder" Requirementt

Where, as here, the statutory language is susceptible of more than one reasonable interpretation, " ' " 'we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' "" ' " (*People ex rel. Lockyer v. A. J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 715, citing *People v. Jefferson* (1999) 21

6. Where a statute, charter, or ordinance requires a public contract to be let to the "lowest" bidder without qualifying it by the words such as "responsible," "qualified," or "best," many courts have "held that the provision is not to be 'construed literally, and accepted as an absolute restriction,' and that it does not mean that the contract must be awarded to the lowest bidder without regard to his or her fitness, responsibility, or capacity to perform the work or furnish the supplies." (10 McQuillin, Municipal Corporations, *supra*, § 29:81, at pp. 648–649, citing *J.W. Rombach, Inc. v. Parish of Jefferson* (La. Ct. of App. 5th Cir. 1996) 670 So.2d 1305; *Huey Stockstill, Inc. v. Hales* (Miss. 1998) 730 So.2d 539; *Thompson Electronics Co. v. Easter Owens/Integrated Systems, Inc.* (Ill.App.Ct. 3d Dist. 1998) 702 N.E.2d 1016; *State ex rel. George Jensen Printing Company v. Snively* (Minn. 1928) 221 N.W. 535; *Clapton v. Taylor* (1892) 49 Mo.App. 117; *International Motor Co. v. City of Plainfield* (N.J.L. 1921) 115 A. 391; *Prime Contractors, Inc. v. Girard* (Ohio App. 1995) 655 N.E.2d 411; *Kaufman v. City of Erie* (Pa. 1934) 175 A. 406; *Pearlman v. City of Pittsburgh* (Pa. 1931) 155 A. 118*; Krat z v. City of Allentown* (Pa. 1931) 155 A. 116; *Wilson v. City of New Castle* (Pa. 1930) 152 A. 102.)

Cal.4th 86, 94.) Our responsibility is to " 'select the construction that comports most closely with the apparent intent of the Legislature, with a view toward promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citations.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) "In addition, we are required to harmonize statutes by considering a particular clause or section in 'the context of the… statutory scheme of which it is part.' [Citations.]" (*Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897, 909.)

The most edifying extrinsic evidence available as to the meaning of the phrase "competitive bidding," as it appears in Humboldt Code section 521.6 and section 40059, consists of other statutes pertaining to the same subject — i.e., statutes in pari materia — or enacted at the same time.

As we have seen, the language of Humboldt Code section 521–6, subdivision (a)(2), derives from its use in section 40059. However, although section 40059 is no more illuminating than Section 521–6 as to whether the "lowest responsible bidder" requirement is implicit in the phrase, other provisions of the 1989 Act are helpful; particularly sections 49200 and 49201.

Section 49200 provides that "[e]very franchise or permit for the collection, disposal, or destruction, or any combination thereof, of garbage, waste, offal, and debris, shall be granted by the board of supervisors only under the terms and conditions of this chapter."

Subdivisions (a) through (c) of section 49201 define the process by which such franchises or permits are to be awarded, including the manner in which franchises or permits bids are to be authorized and bids solicited and evaluated. Subdivision (a) provides that "Any county may, by resolution adopted by the board of supervisors, call for bids for the granting of a franchise or permit, exclusive or otherwise, for the collection [and] disposal [of garbage and other forms of waste,] according to the terms and conditions set forth in the resolution, for a period of time not to exceed 25 years." Subdivision (b) states that after adoption of the resolution, the board of supervisors shall provide the public specified notice of "the terms and conditions in the resolution and the time, date, and place for the receiving and opening of sealed bids, which shall not be sooner than four full weeks from the date of the first publication of the notice." Subdivision (c) of section 49201, which is most relevant to our analysis, provides, as material, that "[u]pon examination by the board of supervisors of the bids, the franchise or permit may be awarded to the lowest *qualified* bidder." (Italics added.) The "lowest qualified bidder" requirement seems to us, as it did to the trial court, the functional equivalent of the "lowest responsible bidder" requirement. The trial court did not, however, find this provision exegetically helpful.

Acknowledging that sections 49200 and 49201 "clearly require an award to the lowest responsible bidder," the trial court found it "inexplicable" that section 40059 "*clearly allows* Respondent to make the award to someone other than the lowest responsible bidder." (Italics in original.) The court resolved this perceived conflict by adopting the reasoning of a 1996 Opinion of the Attorney General (79 Ops.Cal.Atty. Gen. 28, *supra*, 1996 WL 179823) which found a different conflict between the two statutes and, in that context, concluded that section 40059 prevailed over section 49201. At the hearing, the trial court quoted the following portion of the opinion in which the Attorney General explained the significance of the fact that section 40059 commences with the phrase " 'Notwithstanding any other provision of law . . .' … It is as if the limitations of sections 49200–49205 do not exist if a county acts pursuant to the grant of authority contained in section 40059. The Legislature has recognized that the terms of section 40059 may be inconsistent with the language of some other statute or statutes and has determined that the conflict should be resolved in favor of section 40059's terms and conditions." (79 Ops.Cal.Atty.Gen., at p. 33.) The trial court's reliance on this language was unjustified.

First of all, with respect to the issues before us, the County has acted not just pursuant to the grant of authority in section 40059, but pursuant to *both* section 40059 and sections 49200–49205,[7] all of which are part of the same Act. The Board enacted Humboldt Code section 521–6 in 2008 pursuant to authority granted by section 40059; however, the Board approved the RFP on March 22, 2011, pursuant to the prescriptions set forth in sections 49200 through 49205. Section 40059 is germane to this case only because it authorizes a county to dispense with "competitive bidding" and appears to be the basis for Humboldt code section 521–6, which employs the same phrase. The *substance* of section 40059 does not bear upon any issue in this case, because the County did not desire to dispense with "competitive bidding" and therefore never made the findings required by Section 521–6(a)(2) in order to do so.[8] Although they strongly disagree about the meaning of the phrase, the parties agree that the Board intended to use and employed a process that constitutes "competitive bidding."

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7. In addition to sections 49200 and 49201, which we have described, section 49202 requires the successful bidder to file a bond upon grant of the franchise, section 49203 authorizes the county to impose terms and conditions other than those proposed by the county not in conflict with that act, and section 49204 permits bidders to propose terms and conditions that may be in addition to or conflict with those in the resolution or notice of calling for bids, provided they are not in conflict with Division 30 of the Public Resources Code. Section 49205 prescribes the allowable extension of franchise terms.

8. Dispensing with competitive bidding may be appropriate and consistent with the public interest "where the nature of the subject of the contract is such that competitive proposals would be unavailing or would not produce an advantage, and the advertisement for competitive bid would thus be undesirable, impractical, or impossible. [Citations.]" (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 635–636; accord, League of California Cities CEB, The California Municipal Law Handbook 2012, § 7.5 at p. 732 ["competitive bidding requirement may also be waived in the following situations: in the event of emergency; in contracts for professional services; in contracts for special services; and when the design-build method is used"]; 10 McQuillin, Municipal Corporations, § 29:38, at pp. 497–501.)

Moreover, and much more importantly, there is no conflict between sections 40059 and 49201 regarding any matter at issue in this case. The "conflict" perceived by the trial court was one of its own making.

The Attorney General's opinion the trial court relied upon addressed the question: "May a county which awarded an exclusive trash collection franchise in 1982 after receiving competitive bids, and which terminated that agreement and executed another exclusive franchise with the same franchisee in 1985, now terminate the existing franchise and award a new contract to the same franchisee without obtaining competitive bids?" (79 Ops.Cal.Atty.Gen. 28, *supra*, 28.) The conflict the Attorney General resolved resulted from the fact that sections 49200 through 49205 require a county to obtain competitive bids before awarding a trash collection franchise, whereas section 40059 allows a county to award a trash collection franchise without ever obtaining competitive bids. The question presented was the *necessity* for competitive bids*, not the nature of the competitive bidding process.* The *necessity* for competitive bids is not an issue here because, as we have said, the County never sought to proceed without competitive bidding, and could not do so under its own ordinance without findings it never made.

The trial court erred in assuming that section 40059 prevails over section 49201 not just as to matters about which they genuinely conflict, but as to all matters. That is not so. The 1989 Act itself provides that the part in which section 40059 appears "shall prevail" over the part of the measure in which sections 49200 – 49205 appear, only "[i]n the event of any conflict or inconsistency" between the two parts of the 1989 Act. (Stats. 1989, ch. 1095, § 32, subd. (c), quoted in 79 Ops. Cal.Atty.Gen., *supra*, at p. 34; see also *Rodeo Sanitary Dist. v. Board of Supervisors* (1999) 71 Cal.App.4th 1443, 1451 [section 40059 only "overrides or supersedes… other provisions of the 1989 Act *which might indicate to the contrary*"], italics added.) The "lowest qualified bidder" requirement of section 49201 is not in conflict or inconsistent with the references in section 40059 to "competitive bidding," or with anything else in that statute, which does not relate to the substantive and procedural requirements of the "competitive bidding" process.

As the Attorney General explains, the legislative history of the provisions now contained in section 40059 (which were previously contained in Government Code section 66756, now repealed) shows the measure was designed "to grant cities, counties, and other local governmental agencies the authority to determine whether trash collection services should be 'provided with or without competitive bidding,' " because previously "only some agencies could provide such services under contract without obtaining competitive bids." (79 Ops. Cal.Atty.Gen., *supra*, at p. 33.) The need for the legislation was created by the opinion of the United States Supreme Court in *City of Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389 (*Lafayette*), which addressed the extent to which federal antitrust laws prohibit a state's cities from imposing certain anticompetitive restraints " 'as an act of government.' " (*Id.* at p. 391.) As stated in the report of the Senate Committee on Local Government on the measure now embodied in section 40059, the holding in *Lafayette* — that the definition of "person" or "persons" covered by federal antitrust laws included cities — caused concern "that local agencies may, in the provision of solid waste disposal services either directly or by contract or franchise as authorized by existing law, be construed to be subject to federal antitrust laws. … The [*Lafayette*] court held that where a local government [agency] provides a public utility service, such activity may be exempt from the provisions of federal antitrust laws *only if State law authorizes such anti-competitive or monopoly activity.*" (Report of the Senate Committee on Local Government on AB 2454 (McVittie), p. 1 (June 16, 1980), italics added.)

Whether the competitive bidding referred to in section 40059 embodies a "lowest responsible bidder" requirement is irrelevant to the purpose of that statute, which was to authorize local governmental agencies to decide for themselves whether to award franchises for solid waste handling services on the basis of "competitive bidding" and thereby exempt this activity from application federal antitrust laws. Because the *nature* of the competitive bidding process a county may require in awarding such franchises was addressed by the Legislature elsewhere — most specifically in sections 49200 through 49205 — there was no need for the Legislature to specify *in section 40059* whether the "competitive bidding" process a county may employ in awarding franchises for solid waste handling services embodies a "lowest responsible bidder" requirement. Since section 49201 is among the provisions of the 1989 Act defining that bidding process, it was a more appropriate place than section 40059 for the Legislature to prescribe the lowest "responsible" or "qualified" bidder requirement.

The court's conclusion that section 40059 prevails over section 49201 for all purposes, including the competitive bidding process applicable to franchises for solid waste handling services, renders section 49201 meaningless, thus undermining the legislative effort to define the terms and conditions pursuant to which counties may grant such franchises when, as in this case, they wish to employ a "competitive bidding" process.

Indifferent to the absence of any conflict in the application to this case of sections 49201 and 40059, and the consequences of its ruling, the trial court made no attempt to reconcile the two provisions of the 1989 Act insofar as they relate to the properties of the "competitive bidding" process applicable to the franchise at issue. While statutes relating to the same matter or subject are regularly employed as extrinsic aids in interpretation (see, *e.g.*, Y*assin v. Solis* (2010) 184 Cal.App.4th 524, 536, citing *Altaville Drug Store, Inc. v. Employment Development Department* (1988) 44 Cal.3d 231, 236, fn. 4; *Old Homestead Bakery, Inc. v. Marsh* (1925) 75 Cal.App. 247, 258.), " '[a]pplication of the rule that statutes

in pari materia should be construed together is most justified, and light from that source has the greatest probative force, in the case of statutes relating to the same subject matter that were passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day… .' [Citation.] When as in the present case both statutes are part of the same bill, enacted and chaptered together, the rule requiring the courts to reconcile the statutes is even more compelling, for neither can be viewed as an implied repeal of the other. [Citation.]" [9] (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 932.)

Sections 40059 and 49201 can easily be harmonized. Statutes and ordinances that authorize or require competitive bidding in the letting of public contracts ordinarily serve the purpose " 'of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable.' " (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173 (*Domar*).) Such measures "are enacted for the benefit of property holders and taxpayers, and not for the benefit of or enrichment of bidders, and should be so construed and administered as to accomplish said purpose fairly and reasonably with sole reference to the public interest. These provisions are strictly construed by the courts, and will not be extended beyond their reasonable purpose. Competitive bidding provisions must be read in the light of the reason for their enactment, or they will be applied where they were not intended to operate and thus deny municipalities authority to deal with problems in a sensible practical way.' [Citation.] Thus, charters requiring competitive bidding are not to be given such a construction as to defeat the object of insuring economy and excluding favoritism and corruption. [Laws] requiring competitive bidding are not to be given such a construction as to defeat the object of insuring economy and excluding favoritism and corruption. [Citations.]" (*Ibid.*)

Section 40059 is not designed to encourage or require "competitive bidding," but merely to allow counties to decide for themselves whether to award franchises for solid waste handling services through a "competitive bidding" process. Sections 49200 through 49205, on the other hand, assume that, as here, the county has decided to employ a "competitive bidding" process, and address the manner in which the process must be carried out, including use of a "lowest responsible bidder" requirement. The "lowest qualified bidder" requirement of section 49201 serves the purposes of insuring economy and eliminating fraud and corruption in a competitive bidding process, while section 40059 is silent as to whether "competitive bidding" includes a "lowest responsible" or "qualified bidder" requirement. It seems to us absurd to interpret the silent statute as overriding the clear direction of the one that speaks explicitly to the issue and advances the policy favored by the law. By employing the ambiguity in section 40059 to eliminate the "lowest responsible bidder" requirement imposed by section 49201, the trial court extended the reach of section 40059 into an area in which it was not intended to operate, and in so doing "defeat[ed] the object of insuring economy and excluding favoritism and corruption" in the letting of public contracts. (*Domar, supra,* 9 Cal.4th at p. 173.)

Distracted by section 40059, the trial court ignored the fact that, like the provisions of the Public Contract Code appellant vainly urged the court to consider extrinsic evidence of legislative intent (Pub. Contract Code, § § 10180, 10344), California statutes authorizing local government agencies to award public works contracts invariably require the governing board of a county or city to award the contract to the "lowest responsible bidder" (See, *e.g.*, Pub. Contract Code, §§ 20128 [counties] and 20162 [cities].) If, as provided in the statutes just cited, Boards of Supervisors must award a public works contract to the "lowest responsible bidder," and city councils must do so where the public project involves an expenditure exceeding $5,000, why (even if section 49201 did not exist) would the Legislature want to relieve a local governmental agency of that requirement when awarding a long-term exclusive franchise for solid waste handling services? The trial court made no such inquiry.

The trial court also unjustifiably ignored appellant's request that it inquire into the technical meaning of the phrase "competitive bidding" when used in the context of public procurement, which also could properly have been used to discern the real intention of the law-making power. (*In re Smith* (1928) 88 Cal.App. 464, 467–468; *Yassin v. Solis, supra*, 184 Cal.App.4th 524, 531; *Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1299; 2A Singer & Singer, Sutherland Statutory Construction, *supra*, § 47:29, p. 474, fns. omitted ["In the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning."].)

Virtually all authorities on government procurement and public contract law define the competitive sealed bidding process employed by the County in this case as one in which "the award is made to the responsible bidder having the lowest responsive b*id*." (Conway, *State and Local Procurement*, ABA Section of State and Local Government Law (2012) at p. 64.) Both the National Association of State Procurement Officials and the National Institute of Governmental Purchasing, define "competitive sealed bidding" as "[t]he preferred method for acquiring goods, services, and construction for public use in which award is made to the lowest responsive and responsible bidder." (Nat'l Assn. of State Procurement Officials, *State and Local Government Procurement: A Practical Guide* (2008) at p. 307; Nat'l. Inst. of Governmental Purchasing, *Public Procurement: Dictionary of Terms* (2010) at p. 27.) According to one authority, "[t]he competitive bidding process in public contracting *presumes* that award will

9. Section 40059 is in Division 30, Part 1 of the Public Resources Code, and sections 49200 through 49205, are in Part 8 of that Division of the same Code, but all of these statutes were added by Statutes 1989, chapter 1095,section 22.

be made to the *qualified* individual or firm submitting the lowest price quotations." (Keyes, *Encyclopedic Dictionary of Contract and Procurement Law* (5th ed. 1992), at p. 47, italics added.)

The court's analysis of the Board's intention with regard to a lowest responsible bidder requirement was irrelevant to the fundamental question whether governing law imposed the requirement. As earlier noted, the court reasoned that "the Board must *not* have intended to direct the PWD to adopt a 'lowest responsible bidder' requirement, because the Board unquestionably approved the RFP prepared by the PWD that contained no such requirement." Even if the court's view of the Board's intention was correct, however, the Board lacked the power to avoid the "lowest qualified bidder" requirement of section 49201.

In any event, the court's reading of the RFP grossly distorts its meaning and purpose. Though the RFP does not refer to the lowest responsible bidder requirement explicitly, it could not more strongly imply that requirement. As the Director of the PWD stated in his May 13 report to the Board, the RFP required the review committee to evaluate the bidders not just on the basis of "service rates," but on five other weighted criteria also specified in the RFP ("responsiveness to the RFP, company qualifications and comparable experience, financial creditworthiness, acceptance of franchise terms, and the company's proposed management plan") and the RFP states that percentage scores "will reflect the extent to which criteria are fulfilled relative to other proposals." This specification of the evaluative criteria employed to assess bidders "responsibility" or "qualifications," and comparison of bidders' scores on the basis thereof, and the provision in the RFP that in certain cases in which "a bidder may not be technically qualified… a proposal may be rejected even though it proposes the lowest monthly fee for subscribers," can only mean that the franchise is to be awarded the lowest responsible bidder.

The RFP describes in detail the nature of the inquiry the review committee will engage in with respect to each of the specified criteria. For example, with respect to the "management plan" bidders are required to submit, the RFP directs that the plan describe "how the bidder plans to provide for the collection and disposal of solid waste and collection of recyclables. … The description must include, but not be limited to: (a) an explanation of the method(s) [by which] recyclable materials will be collected and how the bidder will minimize the amount of rejects that will be produced; (b) any potential service improvements; (c) a description of how the bidder will ensure that availability of sufficient personnel and equipment to provide satisfactory service; and (d) a description of how the bidder will ensure that quality subscriber services will be provided." These requirements, and numerous others relating to each one of the specified criteria set forth in the Board-approved RFP, were obviously designed to transparently provide the "common basis" upon which the review committee and the Board would ascertain and score bidder's qualifications or responsibility.

The RFP before us "does not clearly provide potential bidders with notice that a fully complying bid may be rejected in favor of one which is not" (*Konica, supra*, 206 Cal.App.3d at p. 457), or that bids would be evaluated on the basis of criteria not identified in the RFP or otherwise disclosed prior to the submission of bids. Bidders cannot be required to guess at the standards by which they will be measured, and are entitled to expect that the bid that most fully satisfies the specified criteria would be awarded the franchise.

Because the percentage scores of all bidders were in a very narrow range, the PWD review committee appears to have determined that all four bidders were "qualified" or "responsible"; the favorable service rate proposed by appellant, which was weighted at 65 percent out of a possible 100 percent, was the dispositive factor and reason the review committee recommended appellant be awarded the franchise. As one authority succinctly describes the process, "the public official charged with the duty of making the award of contract to the lowest responsible bidder must determine two things in order to make a valid award: (1) the responsibility of the bidders, and (2) which of the responsible bidders has submitted the lowest b*id.* The second step requires only a comparison of arithmetical figures and does not involve the exercise of judgment and discretion." (Rosenbaum, *Criteria for Awarding Public Contracts to the Lowest Responsible Bidder* (1942) 28 Cornell L. Q. 37, at pp. 40–41) In *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court, supra,* 7 Cal.3d 861, Justice Mosk stated the proposition this way: "a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration. Whether or not an express finding of nonresponsiveness is required [citation], if a contract is awarded to one other than the lowest monetary bidder, the ineluctable implication is that the latter is not responsible." (*Id.* at p. 867; see also McQuillin, Municipal Corporations, *supra*, § 29:38 at pp. 651–652 [absent a valid provision of a statute or ordinance giving preference to certain types of businesses, "the lowest responsible bidder who submits a sample which complies with the standard fixed by the proposal is entitled to be awarded the contract."]; League of California Cities CEB, The California Municipal Law Handbook 2012, § 7.15 at p. 735 ["If the lowest monetary bidder is responsible and submits a responsive bid, the contract must be awarded to the lowest monetary bidder even if another bidder is more responsible"].)

In short, for the foregoing reasons, the substance of the RFP and the conduct of the PWD and its review committee are all consonant with acceptance and application of the "lowest responsible bidder" requirement. By imputing to the RFP a meaning and consequence it does not have, and by failing to properly resolve an ambiguity so as to eliminate conflict between provisions of the 1989 Act, the trial court effectively eliminated the "lowest responsible bidder"

requirement of the 1989 Act (insofar as it relates to county franchises for solid waste handling services obtained through "competitive bidding") which is among the paramount precepts of public contract law.

3. The Manner in Which the Franchise was Awarded Deviated From Strict Compliance with Applicable Bidding Requirements and Gave the Successful Bidder an Unfair Advantage

As noted at the outset of our analysis, "the letting of public contracts universally receives close judicial scrutiny" (*Konica, supra,* 206 Cal.App.3d at p. 456) because deviations from strict adherence to competitive bidding standards may facilitate corruption or extravagance, or affect the amount of bids or the response of potential bidders.[10] (*Schram Construction, Inc. v. Regents of University of California, supra*, 187 Cal. App.4th at p. 1061; *Konica, supra*, 206 Cal.App.3d at pp. 456–457; *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal. App.2d 570, 578.) As will be seen, the deviations from applicable bidding requirements in this case gave real party in interest an enormous unfair advantage over other bidders.

We begin our analysis by examining the trial court's rejection of appellant's attack on the fairness of the process in which the franchise was awarded. In finding the process fair, the court relied on our opinion in *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003 (*Cypress Security*), in which we affirmed denial of relief to an unsuccessful bidder's challenge of an award of a public contract to a competitor. The language in *Cypress Security* the court relied upon was the conventional statement that in a mandamus action challenging an award of a public contract, review is " 'limited to an examination of the proceedings to determine whether the City's actions were arbitrary, capricious, entirely lacking in evidentiary support *or inconsistent with proper procedure.* There is a presumption that the City's actions were supported by substantial evidence, and [petitioner/plaintiff] has the burden of proving otherwise.' " (*Id.* at p. 1010, italics added.) The trial court ignored the italicized phrase, which is most pertinent to this case. There was no procedural problem in *Cypress Security* because San Francisco is a charter city, to which state bidding requirements do not apply (*R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1191–1192), the bidding process prescribed by the applicable provision of the city charter did not require the award to go to the lowest responsible bidder, and the successful bidder's proposal substantially conformed to the RFP. (*Cypress Security,* at pp. 1010, 1015–1018.) None of those factors are present here. As we have seen, the bidding process prescribed by applicable state statutes and county ordinance, as well as the RFP, all embody a "lowest responsible bidder" requirement.

The critical deviation from the proper bidding process in this case was from the provision of the RFP stating that any modifications of its provisions, such as changing the evaluative criteria, must be made "*prior to the date and time fixed for submission of proposals*, by issuance of a revision to all parties that have received the RFP." (Italics added.) Ignoring this requirement, and also the evaluative criteria identified in the RFP and employed by the PWD, the Board not only changed the criteria after bids were unsealed, but did so by introducing a previously unknown factor that appears to have disadvantaged all bidders except the one who received the franchise. If a majority of the Board believed the evaluation of bids would turn on whether a bidder was locally owned and operated, meaning based in the Willow Creek area — and not in any other city or town in Humboldt County (the losing bidders were based in Fortuna, Blue Lake, and McKinley) — Tom's Trash would probably have been the only bidder, which would have effectively eliminated competition. If the goal was to award the franchise to a Willow Creek area owner and employer, and the Board could properly find that "the public health, safety and well-being are best served" by doing so, the Board could have lawfully done that without competitive bidding. But the Board did not take that course. Instead, it turned the evaluative criteria and process described in the RFP, and the detrimental reliance thereon of the bidders, into a charade.[11] One need not be Raymond Chandler to see that such a scenario could easily be employed to facilitate favoritism, fraud, corruption and extravagance.

" 'A basic rule of competitive bidding is that bids must conform to specifications, and if a bid does not so conform, it may not be accepted. [Citations.]' " (*Konica, supra*, 206 Cal.App.3d at p. 454, quoting 47 Ops.Cal.Atty.Gen. 129, 130–131 (1966); *Valley Crest Landscape, Inc. v. City Council* (1966) 41 Cal.App.4th 1432, 1440.) "[N]otices sent to the bidders changing the specifications after bids have been

10. As one court has observed, the salutary effects of the "lowest responsible bidder" requirement also include the safeguarding of public officials "from temptation and opportunity for fraud and favoritism," as they "assist in removing suspicion of unfairness and favoritism, and relieve honest men [and women] upon whom these duties devolve of unjust charges." (*Hannon v. Board of Education* (Okla. 1909) 107 Pac. 646, 655.) Thus protected, honest citizens, "without fear of being corrupted or slandered" will be willing to enter public service and "the dishonest man [or woman] will find more difficulty in plundering the public." (*Ibid.*)

11. The trial court reached a different conclusion because the RFP "made it abundantly clear that: (1) the recommendation of the review committee was not binding on the Board; (2) factors other than those listed in the RFP could be considered; and (3) that [the County] 'reserves the right to act in the best interest of the County and its residents and businesses, including the right to reject a proposal that is given the highest ranking in the evaluation process.' " However, neither the provisions referred to by the court nor anything else in the RFP told bidders that the evaluative criteria specified in the RFP or the weight assigned each criterion could be materially changed after bids had been submitted, which not only violates an express provision of the RFP but makes a mockery of the RFP. An RFP cannot be employed by a local governmental agency to exempt itself from statutory duties, such as that imposed by the "lowest qualified bidder" requirement. (§ 49201, subd. (c).) Though the RFP does provide that "a proposal may be rejected even though it proposes the lowest monthly fee for subscribers," that caveat applies where the low bidder is not "technically qualified," which is not here the case.

advertised for and received render the contract inval*id*. A contract will be set aside where specifications are changed after the bidding has been closed." (10 McQuillin, Municipal Corporations, *supra,* § 29.69, at p. 589, fns. omitted, and cases there cited.)

It is appropriate to re-emphasize that, though it could have, the Board never rectified its failure to employ the evaluative criteria specified in the RFP it approved. As earlier noted, the Director of the PWD and County Counsel informed the Board that it could choose not to award the exclusive franchise to appellant, but that if it chose to award the exclusive franchise to another bidder, it would need to evaluate the proposals *on the same basis as they had been evaluated by the PWD review committee; that is, on the basis of the criteria outlined in the RFP.* This advice went unheeded. The incorporation in Supervisor Sundberg's motion to award the franchise to Tom's Trash of County Counsel's suggestion that the Board reevaluate the bids incorporated a *suggestion*; it did not itself constitute an actual reevaluation of the bids received. Moreover, as we have said, the franchise was awarded primarily on the basis of a criterion never mentioned in the RFP.

We do not believe Tom's Trash was awarded the franchise on the basis of favoritism, fraud or corruption, because the record does not show that. But the fact that bidders were misled and did not compete on a level playing field opens the door to such possibilities, and that is enough to warrant judicial intervention. The mere potential for abuses likely to arise from significant deviations from standards designed to eliminate favoritism, fraud, and corruption, avoid misuse of public funds, and stimulate advantageous market place competition is a sufficient basis upon which to grant judicial relief even without a showing that the deviations actually resulted in such abuses. As stated in *Konica, supra*, 206 Cal. App.3d 449, a "preventive approach is applied even where it is certain there is in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money. [Citations.] *The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.* [Citation.]" (*Id.* at pp. 456–457, italics added, cited with approval in *Domar, supra,* 9 Cal.4th at p. 176.) Where, as here, the deviations from such strict compliance are not minor technicalities or nonsubstantive, but rather are capable of facilitating corruption or extravagance, or likely to affect the amount of bids or response of potential bidders, the deviating bid must be set aside. (*Schram Construction, Inc. v Regents of University of California, supra,* 187 Cal.App.4th 1040, 1061; *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 907–908; *Konica, supra,* 206 Cal.App.3d at pp. 456–457.)

4. Remedy

"There are essentially two prerequisites to issuance of a writ of mandate under Code of Civil Procedure section 1085: '(1) the respondent has a clear, present, and usually ministerial duty to act, and (2) the petitioner has a clear, present, and beneficial right to performance of that duty.' [Citation.]" (*Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1413–1414) Those requirements are met in this case. Having elected under Humboldt Code section 521–6 to proceed with "competitive bidding," and having found that all bidders were "qualified" or "responsible," the County was statutorily bound to award the franchise, if at all, to the lowest bidder (§ 49201, subd. (c)), and as the lowest responsible bidder, appellant has a beneficial interest in seeing that the franchise is awarded in the manner prescribed by law. Because appellant has the right to require the County to apply the criteria specified in the RFP, as it failed to do, the trial court erred in sustaining award of the franchise to real party in interest. (*Id.* at p. 1414)

The remaining question pertains to the judicial remedies now available to appellant. As the Supreme Court has noted, "the most effective enforcement of the competitive bidding law is to enforce by injunction the representation that the contract will be awarded to the lowest responsible bidder. This is generally done by setting aside the contract award to the higher bidder. [Citations.]" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 313, fn. 1 (*Kajima*).)[12] The *Kajima* court also noted, however, that as a practical matter, by the time the basis for relief is persuasively demonstrated, the underlying contract may already have been substantially or fully performed" (*Kajima, supra*, 23 Cal.4th at p. 313, fn. 1, citing *Swinerton & Walberg Co. v. City of Inglewood–L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 103, as an example of this recurring scenario), so that it can no longer be awarded to the lowest responsible bidder. That is apparently not the case here, however, because the 10-year exclusive franchise has not yet been fully or even substantially performed by real party in interest it may in this case be possible to enforce by injunction the representation

12. Injunctive relief is "most effective" because " '[a] bidder deprived of a public contract, by the wrongful misaward of that contract, has neither a tort nor a breach of contract action against the public agency" (*Kajima, supra*, 23 Cal.4th 305 at p. 315, fn. 2), and the only monetary relief available to such a bidder is that recoverable under a promissory estoppel theory, which is limited to bid preparation costs, and does not include lost profits. (*Id.* at p. 315) Moreover, though successful judicial enforcement of the competitive bidding laws usually confers significant pecuniary and nonpecuniary benefits on the general public or a large class of persons, and the necessity and financial burden of such private enforcement may make an award of reasonable attorney fees appropriate, such an award has been held inappropriate under the "private attorney general" theory codified in Code of Civil Procedure section 1021.5 in a case involving competitive bidding law in which the granting of injunctive relief remained possible, because the private enforcement was incentivized by the plaintiff's economic interest, to which the public benefit is coincidental. (*United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1013; *cf.*, *Kajima, supra*, 23 Cal.4th at pp. 309–310, where, in determining whether the trial court properly awarded the bidder bid preparation costs and lost profits, the court declined to review the trial court's award of $89,223 in "bid protest costs," which presumably included legal fees.)

of the RFP that the franchise will be awarded to the lowest responsible bidder, as directed in *Konica, supra,* 206 Cal. App.3d 449.)[13] This is a matter appropriate for the trial court to consider and determine on remand. If, as now appears, the granting of injunctive relief is practicable, and the County does not elect to dispense with competitive bidding pursuant to section 40059 upon the findings required by Humboldt Code section 521–6, such relief should be granted.

DISPOSITION

The judgment of the superior court is reversed and the case remanded to that court to enter a judgment granting the petition and to issue a peremptory writ of mandate directing such other relief as may be appropriate in the circumstances and consistent with this opinion. Appellant shall recover its costs on appeal.

Kline, P.J.

We concur: Richman, J., Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

13. In *Konica* the Court of Appeal directed the superior court "to issue a writ mandating the [public agency] to publish a new RFQ and call for rebids within 30 days of our remittitur. Pending acceptance of the successful rebid, [real party in interest] shall continue to provide services conforming to the terms of the now vacated contract and the [public agency] shall compensate [real party in interest] on a per diem basis for services received." (*Konica, supra*, 206 Cal.App.3d at p. 458.)

Cite as 13 C.D.O.S. 12271

Guardianship of the Person of D.W., a Minor.

J.G., Petitioner and Respondent,

v.

D.W., Objector and Appellant.

No. A136982
In the Court of Appeal of the State of California
First Appellate District
Division Four
(Sonoma County) (Super. Ct. No. SPR-84391)
Filed November 10, 2013
Pub. order November 5, 2013

COUNSEL

Counsel for Objector and Appellant: D.W. in Propria Persona

Counsel for Petitioner and Respondent: Law Office of Richard Sax, Richard Sax

Counsel for Intervener: California Indian Legal Services, Nicholas Mazanec

ORDER

BY THE COURT:

The request filed on October 30, 2013 by intervenor, the Karuk Tribe, that this court's October 10, 2013 opinion be certified for publication is granted. The Reporter of Decisions is directed to publish said opinion in the Official Reports.

Ruvolo, P. J.

I. INTRODUCTION

Appellant D.W., proceeding in propria persona, appeals after respondent J.G. was appointed guardian of appellant's six-year-old grandson, D.W. (the minor). She contends the court failed to comply with the inquiry and notice requirements of the federal Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 *et seq.* (ICWA)). The Karuk Tribe of California (the Tribe), a federally recognized Indian tribe (65 Fed.Reg. 13298 (Mar. 13, 2000)), has exercised its right to intervene in this matter in support of appellant's position.[1] (See 25 U.S.C. § 1911; California Rules of Court, rule 5.482(e).[2]) We agree

1. On July 17, 2013, the Tribe filed a motion requesting this court to invalidate the underlying guardianship proceeding and remand the matter for proceedings in compliance with the ICWA. This court issued an order on July 29, 2013, indicating that the Tribe's motion would be considered with the merits of this appeal. (Ruvolo, P.J.)

2. All further rule references are to the California Rules of Court unless other stated.

with appellant and the Tribe that the inquiry and notice conducted by the court was not in compliance with the requirements of the ICWA. Consequently, we reverse and remand for further proceedings.

II. FACTS AND PROCEDURAL HISTORY

Because the issues on appeal relate solely to ICWA compliance, we will restrict our statement of facts to those bearing on the adequacy of the ICWA notice.

On or about February 22, 2012, respondent, the minor's maternal aunt, filed a petition for appointment of guardian and a petition for appointment of temporary guardian. The court granted respondent's petition for appointment of temporary guardian on or about February 28, 2012. Letters of temporary guardianship were issued the same day. Respondent does not claim any Indian heritage.

The record contains appellant's handwritten objections to the petition for appointment of guardian of the person filed on March 16, 2012. Appellant describes herself as the minor's paternal "Grandmother & Indian Custodial Appointed Caretaker." In stating the reasons for her objection, appellant invoked the "I.C.W.A." explaining she is a "Native American of a Recognized Yurok Tribe… ." She claimed to "have cared for [the minor] over 4 1/2 years of his life… . I am requesting [the minor] be returned to his Native Home."

The courtroom minutes from June 22, 2012, indicate that the court decided to bifurcate the issue of the minor's ICWA status to be heard on August 17, 2012. The minutes also indicate that the court assigned appellant, the minor's paternal grandmother and objecting party to the proposed guardianship, the task of notifying the Indian tribes of respondent's pending guardianship petition and providing proof of service to the court. Respondent's temporary guardianship was extended until August 17, 2012.

The reporter's transcript of the ICWA compliance proceeding held on August 17, 2012, indicates the court had before it some type of document indicating the minor was not eligible for enrollment in the Yurok Tribe, which led the court to rule ICWA did not apply to the present action.[3] However, appellant was present and pointed out that the Karuk Tribe had not been properly notified. The Karuk Tribe is a federally recognized Indian tribe, independent from other federally recognized tribes, and different than the Yurok Tribe.

Appellant stated, "It shows on record in all the statements that I made to every hearing, that I addressed that the [the minor] is a potential member of the Yurok and Karuk tribe [*sic*]. I found out from the Karuk tribe that they were not contacted… . [¶] And I contacted them… ," and they said that they would be responding to his potential application as a member. The record contains a letter from the Karuk Tribe dated August 17, 2012, "To Whom It May Concern," indicating the minor's request for "possible potential membership" in the tribe was currently being processed. The court indicated that the matter should proceed without any further delay. When appellant asked the court if the Karuk Tribe could intervene in the future, the court indicated, "I will cross that bridge when I come to it."

After a contested hearing on September 25, 2012, the court granted respondent's request to be appointed the minor's permanent guardian. During the hearing, appellant requested "that the Karuk [T]ribe be allowed to intervene." When the court pointed out that the Tribe had not taken any steps to intervene, appellant replied that the Tribe had not yet received the records it requested. The court indicated the matter was closed, stating, "[t]he ship has sailed on the issue of ICWA." Appellant filed a timely appeal from the orders entered on September 25, 2012.

While this matter was pending on appeal, the Tribe intervened and filed an "Intervenor's [*sic*] Brief" in support of appellant's position on appeal. The Tribe's intervener's brief states: "The lack of notice and inquiry violated ICWA and state law, resulting in the Tribe's inability to participate in the underlying action. As such, the underlying Guardianship Order must be invalidated." Appended to the brief is a declaration executed under the penalty of perjury by the enrollment officer for the Tribe confirming that the minor is an "enrolled descendant member of the Karuk Tribe."[4] We have been informed that all proceedings in the trial court have been stayed pending the outcome of this appeal.

III. DISCUSSION

A. Timeliness of Appeal

Proceeding in propria persona, appellant's sole contention on appeal is that the court failed to comply with the notice provisions of the ICWA and that this failure invalidates the orders issued on respondent's guardianship petition. Appellant's position derives substantial support from the Tribe's intervener's brief filed in this matter. Respondent does not address the contentions made regarding ICWA compliance. Instead, she claims appellant has forfeited her right to challenge any defects in ICWA notice by failing to file a timely appeal. We first address respondent's forfeiture claim.

Respondent contends that we lack jurisdiction to consider appellant's appeal because appellant did not timely appeal from the juvenile court's determination made on August 17, 2012, that the ICWA does not apply in this matter. Instead, appellant filed an appeal from the September 25, 2012 decision of the trial court granting respondent's petition to be the minor's guardian. Respondent argues: "Since the trial court's order regarding the application of the ICWA and the right of

3. The document is not included as part of the record on appeal.

4. Whether the minor actually is an Indian child is a question that must be answered by the Tribe. (*In re Junious M.* (1983) 144 Cal. App.3d 786, 792, 794.) " 'A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.' [Citation.]" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 255 (*Dwayne P.*).)

intervention, the essential gravamen of [a]ppellant's appeal, was made on August 17, 2012," thus appellant's appeal "was untimely because it was not filed until October 23, 2012… more than sixty days after the trial court's minute order of August 17, 2012."[5]

Contrary to respondent's argument, the court's ICWA determination was not immediately appealable because further judicial action was required on the matter dealt with by the order. As explained by *San Joaquin County Dept. of Child Support Services v. Winn* (2008) 163 Cal.App.4th 296 (*San Joaquin County*), "[i]f an order is ' "important and essential to the correct determination of the main issue" ' and ' "a necessary step to that end," ' " it is not immediately appealable because further judicial action is required before all of the rights of the parties can be determined. (*Id.* at p. 300.) Put another way, an order can be considered immediately appealable as a "collateral" order if it does not involve or affect the determination of the merits of the main action. (See *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 904 [an order is collateral when "appellate review… can be accomplished without implicating the merits of the underlying controversy"].)

In this case, the court's determination that the ICWA did not apply cannot be considered collateral to its decision to appoint respondent as the minor's guardian. Had the court found the ICWA applicable, it would have used the ICWA's more stringent standards in making its ruling on respondent's guardianship petition. (See, *e.g.*, Welf. & Inst. Code, § 361.7, subd. (c) [guardianship may not be ordered "in the absence of a determination, supported by clear and convincing evidence… that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"].) The guardianship hearing was conducted without these protections. Therefore, the court's ICWA determination provided "a necessary step" for the trial court's ruling ordering the guardianship. Consequently, it cannot be considered collateral to the general subject matter of the litigation. (*San Joaquin County*, *supra*, 163 Cal.App.4th at p. 300.) Therefore, contrary to respondent's argument, the ICWA notice issue was preserved for review, even though the appeal was taken from the order granting respondent's request to become the minor's guardian. Accordingly, we deny respondent's motion to dismiss this appeal.

Furthermore, even assuming arguendo appellant's notice of appeal was untimely, there has been no forfeiture of the Tribe's ability to contest the court's noncompliance with the ICWA. "The purposes of the notice requirements of the ICWA are to enable the tribe to determine whether the child is an Indian child and to advise the tribe of its right to intervene. The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived [or forfeited] by the parent." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Based on this reasoning, numerous courts have concluded that parents cannot properly be deemed to have waived the tribe's rights under the ICWA. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471 (*Desiree F.*) ["[t]here is nothing either in the ICWA or the case law interpreting it which enables anyone to waive the tribe's right to notice and right to intervene in child custody matters"]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408 (*Antoinette S.*) [" 'Because the notice requirement is intended, in part, to protect the interests of Indian tribes, it cannot be waived by the parents' failure to raise it' "]; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849 (*Nikki R.*) ["[c]ase law is clear that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court"].) The *Nikki R.* court clarified: "The notice requirement is designed to protect the interests of the tribe; to the extent a notice defect impairs the tribe's ability to participate, another party cannot waive it." (*Ibid.*)

B. ICWA Notice Requirements

The purpose of the ICWA is, of course, to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902; *In re Karla C.* (2003) 113 Cal.App.4th 166, 173–174.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource. [Citation.]" (*Desiree F.*, *supra*, 83 Cal.App.4th at p. 469.) The provisions of the ICWA, which are said to be the highest standard of protection for Indian children, apply to guardianship proceedings in this state. (Prob. Code, § 1459.5, subd. (a)(1); rule 7.1015(b)(1)(A).)

Among other things, the ICWA requires proper notice before a court may place an Indian child in a foster home or under a legal guardianship. Where the court knows or has reason to know that an Indian child is involved, notice must be given to the child's Indian tribe, or if the tribe is unknown, the Bureau of Indian Affairs, of the pending proceedings and the tribe's right to intervene. (25 U.S.C. § 1912(a); see *Samuel P.*, *supra*, 99 Cal.App.4th at p. 1265.) The Indian status of the child need not be certain in order to trigger the notice requirement. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110.)

In a guardianship proceeding, it is the petitioner's burden, if represented by counsel, to provide proper notice to the tribes. (Rule 7.1015(c)(3).) If not represented, it is the clerk of the court's responsibility to give notice. (Rule 7.1015(c)(4).) Although the court may assign the inquiry provisions to certain parties, the person objecting to the guardianship petition is not one of the designated parties. (Rule 7.1015(d)(5), (6).) Because the failure to give proper notice forecloses participation by interested Indian tribes, the ICWA notice

5. On July 8, 2013, respondent filed a motion to dismiss this appeal advancing the identical argument. Opposition to this motion was filed by appellant on July 23, 2013, and the Tribe on July 25, 2013. On July 29, 2013, this court entered an order indicating that respondent's motion to dismiss would be considered with the appeal. (Order, Ruvolo, P.J.)

requirements are strictly construed. (*Desiree F.*, *supra*, 83 Cal.App.4th at pp. 474–475.)

The ICWA confers on tribes the right to intervene at any point in a court proceeding, including on appeal. (25 U.S.C. § 1911(c); see also Prob. Code, § 1459.5, subd. (b); rule 5.482(e).) However, a tribe's right to intervene in the proceedings is meaningless if it has not received notice of the pending action. (*Dwayne P.*, *supra*, 103 Cal.App.4th at p. 253.)

C. ICWA Notice Was Insufficient

Appellant, joined by the Tribe, contends the notice provided to the Tribe was insufficient to satisfy the ICWA. Using a *de novo* standard of review, we agree. (*Dwayne P.*, *supra*, 103 Cal.App.4th at p. 254 [where facts undisputed, "we review independently" whether the ICWA notice was sufficient].)

The record in the present case discloses that from the outset of these proceedings until respondent was appointed the minor's guardian, appellant consistently informed the court that the minor had Indian ancestry, and that his father was an enrolled member of the Yurok or Karuk tribes. "Because 'biological descendance' is often a prerequisite for tribal membership… [a relative's] suggestion that [the child] 'might' be an Indian child [is] enough" to satisfy the minimal showing required to trigger the statutory notice provisions. (*Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1408, fn. omitted.) In carrying out its obligation under the ICWA to provide notice, the court incorrectly assigned appellant, the party objecting to the guardianship, the responsibility of providing notice to the possible Indian tribes.

By the time of the contested hearing on respondent's guardianship petition, the Yurok Tribe had completed its investigation and found the minor was not eligible for enrollment. However, appellant had a letter from the Karuk Tribe, indicating that the minor was potentially affiliated with the Tribe and that the matter was currently under investigation. Rather than waiting for the results of that investigation for at least 60 days, as required by the rule 7.1015(c)(9), the court proceeded with the guardianship proceeding as if the minor was not an Indian child, granted respondent's guardianship petition, and placed the minor in respondent's care.

While the matter was pending on appeal, the Tribe intervened, indicating the minor is an Indian child, requesting that the guardianship order be vacated and proceedings consistent with the ICWA be conducted. In light of the foregoing — and the fact that respondent essentially concedes the ICWA notice requirements were not satisfied in this case — we are compelled to reverse the orders entered in this guardianship proceeding, and to remand for compliance with the requirements of the ICWA and applicable state law.

IV. DISPOSITION

The order entered on September 25, 2012, establishing the guardianship is reversed. Because the Tribe has determined the minor is an Indian child, the court shall conduct a new guardianship hearing with respect to the minor in conformity with the ICWA and applicable state law. Appellant is awarded her costs on appeal.

RUVOLO, P. J.

We concur: REARDON, J., HUMES, J.

Cite as 13 C.D.O.S. 12275

In re SHANNON M., a Person Coming Under the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent,

v.

F.S., Defendant;

SHANNON M., Objector and Appellant.

No. A136730
In the Court of Appeal of the State of California
First Appellate District
Division Five
(Alameda County) (Super. Ct. No. OJ06002923)
Filed November 6, 2013

COUNSEL

S. Lynne Klien, under appointment by the Court of Appeal, for Objector and Appellant.

Donna Ziegler, County Counsel, Grace Fongmei Tam, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Defendent F.S.

OPINION

Many children who become dependents of our juvenile courts remain so when they are, at least chronologically, no longer children. The juvenile court has discretion to retain jurisdiction over a dependent until he or she attains the age of 21 years (Welf. & Inst. Code, section 303, subd. (a)),[1] but until recently the utility of doing so was limited by insufficient funds to assist nonminor dependents. This situation changed dramatically on January 1, 2012, when provisions of the California Fostering Connections to Success Act (CFCS Act or Act) (Assem. Bill No. 12 (2009–2010 Reg. Sess.); Assem. Bill No. 212 (2011–2012 Reg. Sess.)) became operative, allowing California to take advantage of newly-available federal funding for extended foster care benefits for certain nonminor dependents who were under an order of foster care placement when they turned 18 (§ 11400 *et seq.*; see 42 U.S.C. § 675(8)). The question presented here is, under this new statutory scheme, what rules, standards and procedures apply when a juvenile court is asked to terminate jurisdiction over a nonminor dependent who was *not* under an order of foster care placement at the time she turned 18.[2]

Appellant Shannon M., after years of foster care, was returned to her mother's home not long before her 18th birthday and abandoned by her mother shortly after she turned 18. The Alameda County Social Services Agency (Agency) asked the court to terminate dependency jurisdiction pursuant to section 364, subdivision (c), which generally governs continued supervision of dependents in home placements and *requires* termination of jurisdiction unless the court finds that grounds for assumption of jurisdiction exist or will likely exist absent court supervision. Shannon argued that section 391, as revised by the CFCS Act, governs the termination issue for *all* dependents who have turned 18 — not, as argued by the Agency, only section 11400(v) nonminor dependents — and requires the court to consider the best interests of the nonminor dependent in deciding whether to terminate jurisdiction. The trial court terminated jurisdiction, articulating its order under the section 364 standard. We conclude that, except as otherwise specified in the statute, section 391 applies to all nonminor dependents, and we remand for the trial court to reconsider termination of dependency jurisdiction under the appropriate standard.

I. DEPENDENCY HISTORY

Shannon first became a juvenile dependent in 2006, when she was 12 years old. She and her three siblings were detained after their mother (F.S., hereafter Mother) was arrested and incarcerated when a large quantity of drugs was found in her home. After Mother's failure to comply with her case plan and a failed relative placement, the children were formally placed in foster care in August 2006.[3] In July 2007, Mother's reunification services were terminated in Shannon's case.

Between August 2006 and May 2011, Shannon lived in a series of foster homes and briefly with her maternal grandmother. She had a series of permanent plans of long-term foster care, initially with a goal of return home and later with goals of adoption or guardianship. On several occasions, Shannon's foster parents or grandmother requested her removal due to behavioral issues or Shannon ran away from her placements. All plans for adoption and guardianship fell through. Beginning in May 2009, Shannon's permanent plans anticipated emancipation and independent living. A "transitional independent living plan" was prepared and repeatedly updated, and she was referred to independent living skill classes. Shannon was diagnosed with depression and other mental disorders, and she took prescription psychotropic drugs and attended individual therapy.

Throughout this period, Mother continued to have problems with drug use and criminal violations, but she main-

1. All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2. For the purposes of this opinion, nonminor dependents are all persons who have reached the age of majority and over whom the juvenile court has dependency jurisdiction. As will be discussed *post,* the subset of nonminor dependents who are eligible, or potentially eligible, for extended foster care benefits as described in section 11400, subdivision (v) (section 11400(v)) are referred to as section 11400(v) nonminor dependents.

3. Shannon's father had abandoned the family and his whereabouts were unknown.

tained contact with Shannon. Their continuing relationship seemed to interfere with Shannon's ability to form bonds with other adults. In July 2010, the court authorized visits with Mother and modified Shannon's permanent plan to include a goal of returning her to Mother's care. A September report, however, stated that Mother had not cooperated with the Agency's attempts to investigate the background of her roommates, and later permanent plans anticipated Shannon's emancipation and independent living.

In May 2011, Shannon petitioned to change her permanent plan from foster care to reunification with Mother. The petition stated: "Mother has been clean and sober for at least 2 years, … has completed treatment[,]… has one of her younger daughters… in her care[,]… now has stable housing that can provide suitable space for Shannon, and wishes to provide full time care for Shannon. [¶]… [¶]… [Shannon] is spending a substantial amount of time with her mother and wishes to reunify with her mother." The court authorized a 14-day trial home visit and referred Mother and Shannon for family therapy. In June, on the Agency's recommendation, the court returned Shannon to Mother's home with family maintenance services because the 14-day visit had gone well. Shannon's 18th birthday was in September.

In November 2011, the Agency filed a status review report that recommended dismissal of dependency jurisdiction over Shannon. The Agency reported that Shannon had been living in Mother's home since June 6. "[M]other has reported… that since the return of Shannon to the home, there have been several verbal arguments between her and Shannon wherein Shannon has chosen to leave home and take respite at her friend's home. … However, [Mother] reports that she is always willing to have Shannon in her home." The Agency noted that Mother "has provided Shannon with shelter and food" and opined, "There appears to be no detriment to dismissal at this time as the items on the petition are no longer true and Shannon has reached the age of majority." Shannon objected to the recommendation of dismissal and the court set a contested hearing for January 5, 2012.

In December 2011, the Agency asked the court to issue a protective custody warrant for Shannon because Mother had been "arrested and later released on or about 11/05/11 and is believed to be fleeing from the law. [¶]… The residence of [Mother] is vacated and her whereabouts… are unknown. [¶]… [Shannon] was residing with her maternal great aunt, [T.S.], who as of 12/10/11 kicked her out of the home… [T]he aunt has stated that Shannon is probably with some friends. The aunt does not know the whereabouts of the minor's friend." The court issued the warrant. Shannon appeared in court on January 5, 2012 and the warrant was withdrawn.

At the January 5, 2012 hearing, Shannon's counsel reported that Shannon had none of the required documents that normally must be obtained before jurisdiction is terminated. The Agency agreed to provide the former section 391 (see Stats. 2010, ch. 559, § 27) documents and the court set a hearing for January 26 to review the Agency's progress doing so.[4] At hearings held on January 26, February 23, and April 5 and in a June report, the court received updates on the collection of those documents, Shannon's application for MediCal benefits, high school graduation, referrals to transitional housing and other independent living services, and arrangements to remove Shannon's braces.[5]

On June 28, 2012, Shannon filed a written objection to the dismissal of jurisdiction and petitioned the court to maintain jurisdiction. Citing *In re Robert L.* (1998) 68 Cal. App.4th 789, 794 (*Robert L.*), *In re Holly H.* (2002) 104 Cal. App.4th 1324, 1330 (*Holly H.*), and *In re Tamika C.* (2005) 131 Cal.App.4th 1153, 1160 (*Tamika C.*), she argued that the court could terminate her dependency jurisdiction only if the Agency established that termination was in her best interest. Shannon argued termination of jurisdiction was not in her best interest because she was "in immediate need of support services from the [A]gency including mental health services, transportation assistance, and housing." Shannon stated she was destitute and had been essentially homeless since before she turned 18. At an August 1 hearing, she argued her situation was not typical of dependents under a family maintenance plan subject to review under section 364: "Shannon has had to do so many things on her own that she wouldn't have [had] to do if she was actually in a functioning Family Maintenance situation… . [T]he statutes that are designed to help minors transition into adulthood are the statutes that the Court should use in determining whether it is appropriate to dismiss her case. [¶] The best interest of the child is always at play in these cases… ."

The Agency argued that section 364 applied and there was no legal justification for continued jurisdiction over Shannon under that statute: "[C]onditions do not exist which would justify initial assumption of jurisdiction… , and are not likely to exist if supervision is withdrawn. This is the standard used to dismiss juvenile court jurisdiction under a Family Maintenance Order, and thus the standard that should be relied upon by this Court." The Agency argued that section 391 did not apply because Shannon was not under a foster care placement order when she turned 18 and thus was not eligible to become a nonminor dependent under section 11400 *et seq.* At the August 1, 2012 hearing, the Agency further argued, "The dependency statutes were not enacted to make sure that every child receive all of the benefits that some children receive… . [¶]… [¶]… I get that [Shannon] is having trouble with transportation and places to stay and… in her foreseeable future she won't have the therapist that she has had a relationship

4. At the January 5, 2012 hearing, Shannon's counsel said, "We are not contesting the dismissal once those documents that are required are provided." The Agency, however, did not argue in the trial court and does not argue on appeal that Shannon thereby waived her argument that jurisdiction should have been continued even after the documents were provided.

5. On January 30, 2012, Mother was once again arrested. She was reinstated on probation in February. As of June 2012, her whereabouts were again unknown.

with. All of that does not mean, though, this Court is to maintain its jurisdiction."

The court ruled: "For all of the reasons set forth in the [Agency's] trial brief… and all of the arguments by [the Agency], which the Court agrees with, [that]… '[c]onditions do not exist which would justify initial assumption of jurisdiction under section 300 and are not likely to exist if supervision is withdrawn." The court terminated dependency jurisdiction over Shannon.

II. DISCUSSION

A. Legal Standards Governing Termination of Dependency Jurisdiction

The primary issue on appeal is which legal standard governed the juvenile court's decision to terminate or continue jurisdiction over Shannon at the August 2012 hearing, when she was formally under an order placing her in Mother's care and had already turned 18. We review this legal question *de novo.* (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800.) While a termination decision is usually reviewed for abuse of discretion (*Robert L., supra,* 68 Cal.App.4th at p. 794), a court abuses its discretion when it applies incorrect legal standards (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634).

Shannon argues the court erred in applying the section 364 legal standard. We agree.

1. Invited Error

As a preliminary matter, we reject the Agency's argument that the trial court's reliance on section 364 was invited error. "[T]he doctrine of invited error applies where a party, for tactical reasons, persuades the trial court to follow a particular procedure. The party is estopped from claiming that the procedure was unlawful. [Citations.]" (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 772.)

The Agency draws our attention to a form "Joint Contested Hearing Statement" that the parties filed in November 2011, nine months before the hearing under review. In the statement, the parties identified the contested hearing as a section 364 hearing and identified the disputed factual issues as "conditions that gave rise to jurisdiction still exist; continued supervision is necessary," which paraphrases the section 364 standard. In June 2012, however, when Shannon formally objected to dismissal of jurisdiction and petitioned the court to maintain jurisdiction, she cited section 391 and *Robert L., supra,* 68 Cal.App.4th 789, and she argued the best interest of the child standard governed the court's decision whether to terminate jurisdiction. The Agency argued in response that the legal standard was set by section 364 and that section 391 and the *Robert L.* rationale did not apply, but the Agency did not argue that Shannon was estopped from disputing application of the section 364 standard because of the Joint Contested Hearing Statement. Again at the August 2012 hearing, Shannon's counsel argued the controlling legal standard was section 391 and the best interest of the child, and the Agency argued the controlling standard was section 364, without arguing estoppel. At the conclusion of the hearing, the court resolved the parties' legal dispute in favor of applying the section 364 standard and expressly adopted the arguments made by the Agency in its briefing and at the hearing.

In sum, while Shannon was dilatory in raising her argument that dependency jurisdiction could be continued in her case under section 391, nothing in the record indicates that she withheld the argument for a tactical reason, and the Agency never urged estoppel in the trial court. Moreover, there is no evidence of prejudice due to Shannon's delay: by the time of the August 2012 hearing, the Agency and the court were well aware that the governing legal standard was a disputed legal issue and that Shannon contended section 364 did not control. The Agency had ample opportunity to dispute Shannon's legal position, and the court expressly resolved the legal dispute in the Agency's favor. There was no invited error.

2. Termination of Jurisdiction Unrelated to Dependent's Minor Status

Turning now to the primary legal issue in this case, we review the distinct legal standards that govern (a) termination of jurisdiction for reasons independent of the minority status of a dependent child and (b) termination of jurisdiction because the dependent has reached the age of majority.

Before the juvenile dependency statutes were substantially revised in 1982 and again in 1987 (see *In re Marilyn H.* (1993) 5 Cal.4th 295, 301–304), dependency jurisdiction did not terminate before age 21 unless a party established that supervision was no longer needed. "[T]he juvenile court having properly asserted its jurisdiction the minor became subject thereto; and the court's jurisdiction continues until he reaches 21 years of age or until the juvenile court becomes convinced on the evidence that the protection of the minor no longer requires supervision (*Slevats v. Feustal* [(1963)] 213 Cal.App.2d 113, 117) at which time it is the duty of the juvenile court to dismiss the proceedings. (*In re Syson* [(1960)] 184 Cal.App.2d 111, 117.)… [T]he burden was on the person seeking a termination of the court's jurisdiction 'to show cause, if [he has] cause, why the jurisdiction of the court over the minor should be terminated.' ([Former] § 729… ; *In re Robinson* [(1970)] 8 Cal.App.3d 783, 786.)" (*In re Francecisco* (1971) 16 Cal.App.3d 310, 314.)

Under the dependency scheme enacted in the 1980's, the standard for terminating dependency jurisdiction varies depending on the stage of the proceeding. In the early stages of a case, when services are being provided to the dependent child's parents, there is a statutory presumption in favor of terminating jurisdiction and returning the children to the parents' care without court supervision. Under section 364, for example, when dependents are in the offending parent's (or parents') care (either because they were never removed or because they were removed and returned home), the court "*shall* terminate its jurisdiction *unless* the social worker or

his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervisions is withdrawn." (§ 364, subd. (c),[6] italics added; see *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 313–315 [§ 364 applies where dependent returned home after an out-of-home placement]; *In re N.S.* (2002) 97 Cal.App.4th 167, 171–172 [same]; *In re Gabriel L.* (2009) 172 Cal.App.4th 644, 650 [same].) Similarly, under section 366.21, when dependents have been removed from their parents' care but the parents are receiving reunification services, "the court *shall* order the return of the child to the physical custody of his or her parent or legal guardian [at the status review hearing] *unless* the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment." (§ 366.21, subds. (e), (f), italics added; see *In re Marilyn H., supra,* 5 Cal.4th at p. 308 ["at each review hearing prior to permanency planning, there is a statutory presumption that the child will be returned to parental custody"].) If the dependent is returned to the parent's care under section 366.21, section 364 governs at the next review hearing and, as noted *ante*, jurisdiction must be terminated unless the court makes the required finding.

After the parents' services are terminated (or if services have been denied), the case proceeds to permanency planning and the termination standards change. (See *In re Marilyn H., supra,* 5 Cal.4th at p. 309 ["[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability"].) At permanency planning, three general options are available to the court: (1) termination of parental rights and placement for adoption; (2) appointment of a relative or nonrelative as legal guardian for the dependent; and (3) placement in long-term foster care. (§ 366.26, subd. (b).) If adoption is chosen, the court terminates its dependency jurisdiction once the adoption is completed. (§ 366.3, subd. (a).) If guardianship is chosen, the court must retain jurisdiction until the guardianship is established and may retain dependency jurisdiction during the guardianship (with some restrictions on the court's discretion in the case of relative guardianships). (*Ibid.*) If long-term foster care is chosen, the court's dependency jurisdiction continues. (§§ 366.26, subd. (b)(6), 366.3, subd. (d).)

6. Under section 361.2, when dependents are placed with a formerly noncustodial parent, jurisdiction may be terminated if the court determines there is no need for continuing supervision. (§§ 361.2, subd. (b), 366.21, subd. (e); see *In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1495–1496, disapproved on other grounds by *In re Chantal S.* (1996) 13 Cal.4th 196, 204; *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1450–1451.) It is unclear who bears the burden of proof on the issue.

3. Termination of Jurisdiction Related to Dependent's Minor Status

a. Section 303

Dependency jurisdiction does not automatically terminate at age 18 (see *In re D.R.* (2007) 155 Cal.App.4th 480, 487), and the decision to retain or terminate jurisdiction generally remains within the sound discretion of the juvenile court (*Holly H., supra,* 104 Cal.App.4th at p. 1333). Since 1976, the juvenile dependency scheme has specifically provided that "[t]he court may retain jurisdiction over any person who is found to be a ward or a dependent child of the juvenile court until the ward or dependent child attains the age of 21 years." (§ 303, subd. (a); see former § 301, added by Stats. 1976, ch. 1068, § 6, p. 4759; Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2013) § 2.180[5][a] at p. 2–562 (Seiser & Kumli) ["dependency jurisdiction ceases by operation of law when the dependent reaches the age of 21"].) Before the dependency scheme was overhauled in the 1980's, case law indicated that the standard for terminating dependency jurisdiction did not vary based on the dependent's age (up to age 21): jurisdiction continued unless a party proved there was no continuing need for supervision. (See *In re Francecisco, supra,* 16 Cal.App.3d at p. 314.)

Under the dependency scheme as enacted in the 1980's and before the enactment of former section 391 in 2000, there was little statutory guidance on how a court should exercise its discretion under section 303, and we can identify only one published decision that addressed the issue, *Robert L., supra,* 68 Cal.App.4th 789. (See *Holly H., supra,* 104 Cal.App.4th at p. 1332 [citing *Robert L.* as only published decision on subject].) Dependents Robert and Michelle were placed with their grandparents in long-term foster care so that the grandparents could receive monthly foster care benefits allowing them to care for the children. At a review hearing after both Robert and Michelle were past the age of majority and attending college, a social worker recommended termination of dependency jurisdiction in light of their success. The trial court instead continued jurisdiction over Robert and Michelle to help defray educational and living expenses and ensure continued medical coverage. (*Robert L.*, at pp. 791–793.) The trial court found that "continued jurisdiction is necessary because *conditions exist which justify jurisdiction under* [*sections*] *300* [and] *364*[*, subdivision*](*c*)." (*Id.* at p. 793.) Observing first that section 364 had no application in the context of a foster home placement and that the court does not review the original basis for exercise of jurisdiction (under § 300) in that setting, the Court of Appeal held that, absent any evidence of current or future threatened harm to the dependent, the juvenile court abused its discretion in extending jurisdiction. (*Id.* at pp. 793–794, 797.) Applying section 303, the court held that "[t]his section declares what case law had previously determined: that exercise of jurisdiction must be based upon existing and reasonably foreseeable future harm to the welfare of the child. [Citation.] Similar factors should come into play in determining whether jurisdiction should

extend beyond the age of majority." (*Robert L.,* at p. 794.) Courts at the time, however, rarely continued jurisdiction past age 18 due in part to the termination of federal funding for foster youth at age 18. (See *Holly H., supra,* 104 Cal. App.4th at p. 1330; *Tamika C., supra,* 131 Cal.App.4th at p. 1164 & fn. 5; *In re K.L.* (2012) 210 Cal.App.4th 632, 637.)

b. Former Section 391

In 2000, the Legislature enacted former section 391, which established procedural prerequisites to the termination of dependency jurisdiction at or after age 18. (Former § 391, as enacted by Stats. 2000, ch. 911, § 3.) The statute required agencies to provide dependents turning 18 identification, a social security card, and other documents, and to help the dependents obtain health insurance, housing and admission to postsecondary schools or training programs. (Former § 391, subd. (b).) The statute expressly allowed the court to continue jurisdiction if these procedural requirements had not been fulfilled as well as "for other reasons." (Former § 391, subd. (c); see *Holly H., supra,* 104 Cal.App.4th at pp. 1330–1331.) In *Holly H.*, another division of this court held that the *Robert L.* standard continued to govern the court's discretion to continue jurisdiction for those other reasons. (*Holly H.*, at pp. 1332–1333.) Two other cases have followed *Holly H.*, holding dependency jurisdiction over a dependent who turns 18 should continue unless it was proved that the dependent would face no existing or foreseeable risk of harm absent the supervision of the court (i.e., termination would be in the best interest of the dependent). (See *Tamika C., supra,* 131 Cal.App.4th at pp. 1160, 1164, 1168; *In re D.R., supra,* 155 Cal.App.4th at pp. 486–488 [addressing motion to reinstate dependency jurisdiction under §§ 366.3, subd. (b), 366.4 for child in legal guardianship].) Although the dependents in each of these cases were either in foster care or under a guardianship at the time they turned 18, nothing in the language or reasoning of these cases suggests that, as the Agency argues, the standard adopted in the cases applied *only* to dependents in such placements. In our view, the case law establishes that under former section 391 the standard for terminating dependency jurisdiction at age 18 was whether termination was in the best interest of the dependent, i.e., whether there was an existing or foreseeable risk of harm to the dependent if jurisdiction were terminated.

c. The CFCS Act

As noted *ante,* the CFCS Act amended section 11400 *et seq.* to take advantage of newly available federal benefits for certain dependent children who are under an order of foster care placement when they turn 18. (See *K.L., supra,* 210 Cal.App.4th at pp. 634, 637; § 11403, subd. (a).) For purposes of the section 11400 *et seq.* statutory scheme, section 11400(v) defines a "nonminor dependent" (as relevant here and referred to as a section 11400(v) nonminor dependent) as "a foster child… who is a current dependent child… [and] who satisfies all of the following criteria: [¶] (1) He or she has *attained 18 years of age while under an order of foster care placement* by the juvenile court, and is not more than 19 years of age on or after January 1, 2012 … . [¶] (2) He or she is in foster care… . [¶] (3) He or she is participating in a transitional independent living case plan… as described in Section 11403." (Italics added.) Section 11403 in turn specifies that the nonminor dependent must be employed or participating in an educational or training program or have a medical condition that prevents him or her from doing so. (§ 11403, subd. (b)(1)–(5); hereafter § 11403(b)(1)–(5).)

The Act also revised or added several statutes that govern termination or continuation of dependency jurisdiction at age 18 and post-permanency planning hearings for dependents for whom jurisdiction is continued past age 18. (See, *e.g.*, Stats. 2010, ch. 559, §§ 8, 15–28, 61–62.3, 64–64.5 & Stats. 2011, ch. 459, §§ 7–11.5, 41, 43 [Welf. & Inst. Code, §§ 303, 366, 366.21, 366.22, 366.25, 366.3, 366.31, 366.4, 388, 391, 16501, 16501.1, 16503, 16504.5].) The parties dispute the effect of these statutory changes on the trial court's power or discretion to continue or terminate dependency jurisdiction over dependents who do not potentially qualify as section 11400(v) nonminor dependents.[7] Shannon argues that revised section 391 applies to all nonminor dependents. We agree.

(1) Changes to Section 303

Although the Act amended section 303, that statute still provides that "[t]he court *may* retain jurisdiction over *any person* who is found to be a ward or a dependent child of the juvenile court until the ward or dependent child attains the age of 21 years." (§ 303, subd. (a), italics added.) Section 303, subdivision (b) now further provides that "[o]n and after January 1, 2012, the court *shall* have within its jurisdiction any nonminor dependent, as defined in [section 11400(v)]," either general or dependency jurisdiction. (Italics added.) Section 303, subdivision (b), therefore, is limited to section 11400(v) nonminor dependents, whereas subdivision (a) of section 303 is not.

7. Shannon argues that, where they conflict, sections 303, 390, and 391 prevail over section 364 under the rule that specific statutory provisions control over general provisions. The Agency argues the opposite, that section 364 prevails over the others. (See *Arbuckle-College City Fire Protection Dist. v. County of Colusa* (2003) 105 Cal. App.4th 1155, 1166.) We disagree with both parties' characterization of sections 303, 364, 390 and 391 as general or specific statutes covering the same subject matter. Instead, we read sections 303 and 391 as governing a court's consideration of whether to terminate jurisdiction on the ground that a dependent has reached the age of majority, section 364 as governing a court's consideration of whether to terminate jurisdiction on the ground that a dependent in his or her parent's care is no longer at risk of harm if left in the parent's care without court supervision, and section 390 as governing a court's dismissal of a dependency *petition*, not dependency jurisdiction. (See *In re Natasha H.* (1996) 46 Cal.App.4th 1151, 1156 [§ 390 not relevant to dismissal of jurisdiction].) Because the statutes address distinct situations that are not necessarily mutually exclusive, the rule that a specific statutes prevails over a general statute does not apply.

Section 303, subdivision (c) provides that a nonminor who exited foster care at or after age 18 may, until age 21, petition the court to resume dependency jurisdiction over him or her pursuant to section 388, subdivision (e) (hereafter section 388(e)), and the latter statute provides that "a nonminor who attained 18 years of age while subject to an order for foster care placement" and whose dependency jurisdiction was terminated pursuant to section 391 may, until age 21, petition for reinstatement of dependency jurisdiction. To qualify for such reinstatement, the nonminor must demonstrate he or she intends to satisfy the requirements of section 11403(b)(1)–(5). (§ 388, subd. (e)(2)(ii), (5)(A)(iv).) That is, the nonminor must demonstrate he or she is potentially eligible for section 11400(v) nonminor dependent status. Thus, section 303, subdivision (c) applies to potential section 11400(v) nonminor dependents.[8]

In sum, revised section 303, subdivision (a) *allows* the court to continue its jurisdiction over *any nonminor dependent* until age 21; section 303, subdivision (b) *requires* the court to maintain at least general jurisdiction over a *section 11400*(*v*) *nonminor dependent* until age 21; and section 303, subdivision (c) and section 388(e) allow *potential section 11400*(*v*) *nonminor dependents* to petition for *resumption* of dependency jurisdiction until age 21.

(2) Changes to Section 391

Section 391 establishes requirements for termination hearings.[9] The statute variously includes references to a "nonminor," "dependent nonminor," "nonminor dependent, as defined in [section 11403(b)(1)–(5)]," and "nonminor dependent as described in [section 11400(v)]." The Agency argues that the overall statutory scheme indicates that all "nonminor" and "dependent nonminor" references in section 391 are implicitly if not explicitly limited to section 11400(v) nonminor dependents. In opposition, Shannon invokes the canon of statutory interpretation that "[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. [Citation.]" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.) Again, we agree with Shannon.

Section 391 as revised by the CFCS Act has six relevant subdivisions, each of which is applicable to a specified class of nonminor dependents. Section 391, subdivision (a) applies to "a nonminor" without qualification and provides that a "dependency court" may not terminate jurisdiction unless a hearing is conducted pursuant to the section. Subdivision (a) would therefore at least facially apply to all nonminor dependents, whether or not in foster care.

Section 391, subdivision (b) again applies to "a nonminor" without qualification and provides that at "any hearing" to determine whether to terminate jurisdiction, the court must follow certain procedures. Again, dependents subject to this subdivision necessarily are nonminor dependents. The further subparagraphs within subdivision (b) repeatedly refer to "the dependent nonminor" or "the nonminor," referencing the "nonminor" who is the subject of the termination hearing, i.e., any nonminor who is subject to a termination hearing.

The Agency argues that certain provisions in section 391, subdivisions (b)(2) and (b)(3), necessarily imply that subdivision (b) applies only to section 11400(v) nonminor dependents. We disagree. Section 391, subdivision (b)(2) requires child welfare departments to submit a report on whether continuing dependency jurisdiction is in the nonminor's best interest and, if it recommends continued jurisdiction, to include in the report a "transitional independent living case plan for the nonminor." The Agency notes that section 11400 defines "transitional independent living case plan" as a plan that is applicable only to section 11400(v) nonminor dependents. (§ 11400, subd. (y); hereafter § 11400(y).) However, we reject the Agency's argument that the entire subdivision must, therefore, apply only to section 11400(v) nonminor dependents. First, section 11400's definitions do not apply to the entire CFCS Act, as Agency incorrectly contends. They apply only to the article that contains section 11400, which does not include section 391. (§ 11400 ["For the purposes of this article, the following definitions shall apply… "]; see §§ 11400–11410 [statutes comprising art. 5 of Welf. & Inst. Code, div. 9, part 3, ch. 2].) Second, even if we were to assume that the section 11400(y) definition controlled the meaning of "transitional independent living case plan" in section 391, we would agree with Shannon that the statutory scheme is better harmonized by construing this language to mean that the report must include the case plan *if applicable.* (See *In re A.F.* (2013) 219 Cal.App.4th 51, 57–58 [construing CFCS Act to permit appointment of successor guardian when guardian for nonminor dependent dies after dependent turned 18 to avoid conflict with statutory purpose].) Otherwise, there would be no distinction between the "nonminor" referenced in section 391, subdivision (b) and the "nonminor who meets the definition of a nonminor dependent as described in [sec-

8. Section 303, subdivision (d) provides, as relevant here, that "a person who has attained 18 years of age" retains his or her rights as an adult regardless of whether he or she remains under dependency jurisdiction (§ 303, subd. (d)(1)), and subdivision (e) provides that the county welfare agency nevertheless retains the obligations toward the nonminor dependent that it would have if he or she was a minor dependent. Although section 303, subdivision (d)(1) refers to provisions of section 11400 that apply only to section 11400(v) nonminor dependents, we do not understand the entire subdivision to apply only to section 11400(v) nonminor dependents. However, this is not an issue we need to decide in this case.

9. The Agency places great emphasis on the fact that former section 391 was entirely repealed and a new section 391 was added as part of the CFCS Act. (See Stats. 2010, ch. 559, §§ 27–28.) In our view, however, the changes to the statute do not differ significantly from ordinary statutory amendments: subdivisions (b)(1) and (e) of current section 391 are very similar, respectively, to subdivisions (a) and (b) of the former statute; and current section 391, subdivision (d) incorporates part of subdivision (c) of the former statute. (Compare § 391 with Stats. 2000, ch. 911, § 3, pp. 6739–6740.)

Only nonsubstantive amendments have been made to this statute since August 2012, when Shannon's dependency jurisdiction was terminated. (See Stats. 2012, ch. 162, § 190.)

tion 11400(v)]" in section 391, subdivision (c), contrary to the canon of statutory interpretation that different terms in the same statute are presumed to have different meanings.[10]

Section 391, subdivision (b)(3) requires an agency that is recommending termination of jurisdiction to assist the nonminor in meeting or maintaining eligibility for section 11400(v) nonminor dependent status, specifically by meeting the requirements of section 11403(b)(1)–(5). The Agency argues that this provision necessarily implies that section 391, subdivision (b) applies only to section 11400(v) nonminor dependents. Particularly in light of the fact that section 391, subdivision (a) does not limit the "nonminor[s]" entitled to a termination hearing, we conclude a more natural reading of the statute is that, for *every* dependent facing possible termination of jurisdiction at age 18, the child welfare department must prepare a report on the termination issue and include information relevant to *whether* the dependent can establish eligibility for extended foster care payments under section 11400 *et seq.*[11]

In sum, despite references to the section 11400 *et seq.* statutory scheme, we conclude that section 391, subdivision (b), by its plain language, applies to any nonminor dependent facing a termination hearing.

Section 391, subdivision (c) expressly applies to "a nonminor who meets the definition of a nonminor dependent as described in [section 11400(v)]" and requires the court to continue jurisdiction unless it makes certain findings. (§ 391, subd. (c)(1).) The plain language of this subdivision indicates it applies only to section 11400(v) nonminor dependents, and later references to "the nonminor" clearly referring back to the section 11400(v) nonminor dependent who is the subject of subdivision (c).

Section 391, subdivision (d) applies to "a nonminor" who "cannot be located" and allows the court to terminate dependency jurisdiction but requires it to maintain general jurisdiction until the nonminor reaches the age of 21. Again, the plain language of this subdivision indicates it applies only to a *subset* of nonminor dependents, those who cannot be located, and subsequent references to "the nonminor" in the subdivision refer back to a nonminor within this subset. The last sentence of section 391, subdivision (d)(2) — "A nonminor may petition the court pursuant to subdivision (e) of Section 388 to resume dependency jurisdiction at any time before attaining 21 years of age" — appears to refer to "a nonminor" without qualification, but as noted *ante* the provisions of section 388(e) apply only to nonminors who are potentially eligible for status as section 11400(v) nonminor dependents. The reference to section 388(e) in this subdivision of section 391 makes sense because nonminors who could not be located when they turned 18 are likely beneficiaries of section 388(e). We reject the Agency's argument that the reference to section 388(e) supports its position that section 391 applies exclusively to section 11400(v) nonminor dependents.

Section 391, subdivision (e) applies to "a nonminor dependent who has attained 18 years of age" — i.e., any nonminor dependent — and requires, before dependency jurisdiction is terminated, that the social services department provide certain documents and assistance to the minor (or, in the case of a nonminor dependent who cannot be located, verify that efforts were made to make the documents and assistance available to the nonminor). This subdivision incorporates the main procedural requirements of former section 391.[12] Repeated references to "the nonminor" in the further subparagraphs of subdivision (e) are clear references to the nonminor dependent who is the subject of the subdivision, i.e., any nonminor dependent.[13]

10. We further observe that transitional independent living plans were in use before adoption of the CFCS Act, as exemplified by Shannon's case history. Therefore, we could alternatively harmonize the statutory scheme by construing section 391, subdivision (b)(2) to require a section 11400(y) transitional independent living case plan for a potential section 11400(v) nonminor dependent and a transitional independent living plan (or a modified transitional independent living case plan) for other nonminor dependents.

11. Similarly, section 391, subdivision (b)(4) requires the agency to advise a nonminor who is seeking termination of dependency jurisdiction of his or her options, including the right to file a section 388(e) petition. As noted *ante*, only section 11400(v) nonminor dependents may file section 388(e) petitions. We read the subdivision to require advice about section 388(e) petitions *where applicable.*

12. Section 391, subdivision (e)(2)(I) requires that a section 388(e) petition form be included among the documents, and section 391, subdivision (e)(8) also references section 388(e). The Agency argues that these references support its position that section 391 applies exclusively to section 11400(v) nonminor dependents because only potential section 11400(v) nonminor dependents may file section 388(e) petitions. We disagree. First, if the Agency's position were correct, there would be no current statute requiring agencies to provide the listed documents and assistance to the group of nonminors most likely to face termination of jurisdiction at age 18 — i.e., those who are not eligible to be section 11400(v) nonminor dependents — even though they would have received these services before enactment of the CFCS Act pursuant to former section 319. The Agency cites no legislative history demonstrating that the Legislature intended to withdraw this safety net from dependents aging out of the system at 18. Second, if the Legislature intended to restrict section 391, subdivision (e) to section 11400(v) nonminor dependents, it could have said so expressly as it did in subdivision (c). We again conclude that the statutory scheme is best harmonized by construing section 391, subdivision (e)(2)(I) to require the agency to provide a section 388(e) petition form to those nonminor dependents who *potentially* could file such a petition in the future, or to all nonminor dependents for their *possible* use if they qualify as a section 388(e) petitioner.

13. Section 391, subdivision (e)(8) is perplexing. Although it is part of a subdivision that applies to "a nonminor dependent who has attained 18 years of age" for whom dependency jurisdiction has not yet been terminated, it requires the agency to assist in petitioning for *resumption* of jurisdiction under section 388(e) and section 11400, subdivision (z). We need not resolve this anomaly here.

Section 391, subdivision (e)(9) refers to "the child." This appears to be a drafting error, as the plain language of section 391, subdivision (e) indicates that the subdivision applies to "a nonminor dependent who has attained 18 years of age" and subdivision (e)(9) requires the department to inform "the child" that a preference for student assistant or internship positions with state agencies is available to current or former dependent children who are or have been in foster care *up to age 26.* The subdivision was enacted separately from the bulk of the CFCS Act. (See Stats. 2011, ch. 464, § 2.5.)

Section 391, subdivision (f) requires the department to report its progress in completing the subdivision (e) requirements at the hearing closest to and before a "dependent minor's" 18th birthday and at every review hearing thereafter for "nonminors," without qualification. Because the "nonminors" at issue are subject to review hearings, they are necessarily nonminor dependents. We construe the latter part of this subdivision to apply all nonminor dependents without qualification.

In sum, the plain language of section 391 indicates that the statute applies to all nonminor dependents, with the exception of subdivisions (c) and (d), which are applicable to specific subsets of nonminor dependents.[14] For nonminor dependents who do not fall within one of those subsets, section 391 requires the court to hold a hearing before terminating dependency jurisdiction (§ 391, subds. (a), (b)); requires the department to verify that it provided the nonminor dependent with certain documents and assistance (§ 391, subds. (b)(3), (b)(4), (e), (f)), and requires the department to ensure the nonminor dependent's presence at the hearing if possible (§ 391, subd. (b)(1)) and report on "whether it is in the nonminor's best interests to remain under the court's dependency jurisdiction" (§ 391, subd. (b)(2)). This "best interest" standard suggests that the legal standard set forth in the *Robert L., supra,* 68 Cal.App.4th 789 line of cases continues to govern the determination whether to terminate dependency jurisdiction for nonminors who do not fall within section 11400(v).

Our interpretation is supported by court rules adopted by the Judicial Council to implement the CFCS Act. California Rules of Court, rule 5.555,[15] which became effective July 1, 2012, applies to termination hearings for "a nonminor dependent as defined in section 11400(v)" and a "dependent of the juvenile court who is 18 years of age or older and subject to an order for a foster care placement." (Rule 5.555(a)(1)(A), (B).) Notably, rule 5.555 indirectly recognizes that nonminor dependents who are not in foster care even when they turn 18 might be eligible for a continuation of dependency jurisdiction: "Nothing in the Welfare and Institutions Code or the California Rules of Court restricts the ability of the juvenile court to maintain dependency jurisdiction or delinquency jurisdiction over a person, 18 years of age or older, who does not meet the eligibility requirements for status as a nonminor dependent[16] and to proceed as to that person under the relevant sections of the Welfare and Institutions Code and California Rules of Court."[17] (Rule 5.555(a)(2).)

Our interpretation is also consistent with the description of the CFCS Act in a leading treatise on California juvenile law. (Seiser & Kumli, *supra,* § 2.180[5]-[12], pp. 2–562 to 2–574.) The 2013 edition of the treatise includes three sections on "Terminating Jurisdiction When Child Reaches Age of Majority": "Existing Law," "Extended Foster Care," and "Emancipation." (*Id.* at § 2.180[5], pp. 2–562 to 2–568.) The "Extended Foster Care" section addresses continued jurisdiction for section 11400(v) nonminor dependents. (Seiser & Kumli, at § 2.180[5][b], pp. 2–564 to 2–568; see also *id.* at § 2.180[8], pp. 2–569 to 2–570.) The "Emancipation" section addresses emancipation petitions filed pursuant to Family Code, section 7120 *et seq.* and is not relevant here. (Seiser & Kumli, at § 2.180[5][c], p. 2–568.) The "Existing Law" section addresses continued jurisdiction for "children aging out of the system" who do "not qualify for or want to participate in programs for nonminor dependents." (Seiser & Kumli, at § 2.180[5][a], p. 2–563.) In context, it is clear that the treatise's "Existing Law" discussion applies to dependents turning 18 who are not potential section 11400(v) nonminor dependents. For such dependents, the treatise explains, "The juvenile court may, in an appropriate case, maintain dependency over a child who has reached the age of majority, but not yet reached the age of 21 years [(§ 303)]. … If the child has reached the age of majority, the child should be present at any hearing to terminate dependency jurisdiction… . At the hearing the agency must submit a report verifying [section 391, subdivision (e)] information, documents, and services have been provided to the child… . [¶]… [¶] The burden

14. The Agency argues section 366.32 (similar to former section 366.31, which was enacted as part of the CFCS Act; see Stats. 2010, ch. 559, § 24 & Stats. 2011, ch. 459, § 8) demonstrates that the Legislature intended section 391 to apply only to section 11400(v) nonminor dependents. Section 366.32, subdivision (a) provides that a juvenile court may continue or terminate dependency jurisdiction over a section 11400(v) nonminor dependent pursuant to section 391. However, section 366.32, subdivision (a) does not state that section 391 applies *only* to section 11400(v) nonminor dependents. All of section 366.32 applies only to section 11400(v) nonminor dependents, so it is logical that subdivision (a) would address only that subset of nonminor dependents. We do not agree that this statute, by negative implication, establishes that section 391 applies only to section 11400(v) nonminor dependents despite the fact that the Legislature expressly provided that only certain subdivisions of section 391 apply to section 11400(v) nonminor dependents.

Subsequent to Shannon's August 2012 hearing, a new statute related to termination of dependency jurisdiction went into effect. (§ 366.31; see Stats. 2012, ch. 846, § 26, effective January 1, 2013.) Although we need not construe the statute here, we note that our review of the statute has not undermined our confidence in our interpretation of section 391. Briefly, section 366.31 governs (as relevant here) review hearings for nonminor dependents. Like the subdivisions of section 391, section 366.31's multiple subdivisions apply to various categories of nonminor dependents, not all of which are limited to section 11400(v) nonminor dependents. Section 366.31, subdivision (b) applies to "the nonminor dependent, as described in [section 11400(v)]," whereas section 366.31, subdivision (c) applies to "any nonminor dependent." Although section 366.31, subdivision (c) also refers to a section 11400(y) transitional independent living case plan, we construe this language, like the language in section 391, subdivision (b)(2), to apply to such a plan only *if applicable.* Otherwise, the Legislature's distinction between a "nonminor dependent, as described in [section 11400(v)]" and "any nonminor dependent" in subdivisions (b) and (c) of section 366.31 would be meaningless.

15. All rule references are to the California Rules of Court.

16. Reference to "the eligibility requirements for status as a nonminor dependent" is best understood as a reference to the eligibility requirements for status as a "nonminor dependent as defined in section 11400(v)" that is mentioned in rule 5.555(1)(A).

17. Identical language appears in rule 5.900(a)(2), which also became effective January 1, 2012.

of proof is with the agency when it is seeking to terminate dependency jurisdiction for a dependent child who has turned 18 years of age. … [I]t must show termination of dependency jurisdiction is in the child's best interest. [(*Tamika C., supra,* 131 Cal.App.4th at pp. 1160–1161.)]" (Seiser & Kumli, at § 2.180[5][a], pp. 2–562 to 2–564.) Thus, the treatise recognizes that jurisdiction may be continued beyond age 18 for a dependent who is not an actual or potential section 11400(v) nonminor dependent, and that the *Robert L., supra,* 68 Cal. App.4th 789 best interest standard governs the termination decision in that context.

While the primary legislative focus of the CFCS Act was clearly on making continued services and benefits available to juvenile court dependents in foster care who would otherwise "age out" of the system, we find nothing in the statutory scheme that withdraws the court's preexisting power to extend dependency jurisdiction for nonminor dependents generally. Significantly, a lack of federal funding to support the cost of providing services beyond age 18 is not a proper basis for termination of dependency jurisdiction. (See *Tamika C., supra,* 131 Cal.App.4th at pp. 1164 & fn. 5, 1168 [holding court erred by terminating jurisdiction in the absence of unusual circumstances so as to spare the agency the cost of extended foster care without federal financial assistance]; § 10103.5 [effective June 27, 2012, extending benefits to nonminor dependents or former dependents who received aid during 2012 and turned 19 in 2012, even if "the county has provided aid using county-only funds"].) We reject the Agency's argument that under section 391 the court has *no* discretion to extend dependency jurisdiction to such nonminor dependents.

B. Termination of Jurisdiction in Shannon's Case

The Agency argues that, even if section 391 governed the decision whether to continue Shannon's dependency jurisdiction beyond age 18, the judgment should be affirmed because the trial court knew it had discretion to continue jurisdiction, exercised that discretion in terminating jurisdiction, and did not abuse its discretion in doing so. The record is at best ambiguous on these points. It is true that the evidence presented at the August 2012 hearing related primarily to Shannon's ability to obtain housing, health care, higher education, and financial assistance as a young adult (facts relevant to termination of jurisdiction under § 391) rather than to Mother's availability and ability to support Shannon at the time Shannon turned 18 or at the time of the hearing (facts relevant to termination of jurisdiction under § 364). Moreover, the court's repeated continuances of the termination hearing, which effectively continued dependency jurisdiction over Shannon for several months, were based on matters relevant to section 391 termination of jurisdiction: the need to provide Shannon with documentation and assistance in her transition to independent living. (See § 391, subd. (e).) On the other hand, the Agency argued in its brief and throughout the hearing that only section 364 was relevant, and the court articulated its decision under the section 364 standard. We cannot confidently conclude that the court understood and exercised its discretion under a section 391 standard that the Agency repeatedly urged the court to reject.

The Agency also argues that the termination of Shannon's jurisdiction was harmless (rendering a remand unnecessary) because Shannon was statutorily ineligible for the specific services she primarily cited in support of her request for continued jurisdiction, i.e., therapy and case management services through a particular clinic. There was evidence that these services would be covered by MediCal only if she was a section 11400(v) nonminor dependent. Although Shannon appeared not to be eligible for federally supported extended foster care benefits (but see § 10103.5 [extending certain services for persons who turned 19 in 2012]), the absence of such eligibility is not an absolute bar to continuation of jurisdiction. (See *Tamika C., supra,* 131 Cal.App.4th at pp. 1164 & fn. 5, 1168 [error to terminate jurisdiction due to lack of federal funding].) In her reply brief, Shannon notes that she continued to receive such services after she had turned 18 and before the court terminated jurisdiction, and she suggests that other services may become available to her if jurisdiction were continued. On this record, we cannot conclude that the court's reliance on the wrong legal standard when it terminated jurisdiction over Shannon was harmless.

III. DISPOSITION

The order terminating jurisdiction over Shannon is reversed and the case is remanded for further proceedings consistent with the views expressed in this opinion.

Bruiniers, J.

We concur: Simons, Acting P. J., Needham, J.

Cite as 13 C.D.O.S. 12284

LATINOS UNIDOS DE NAPA, Plaintiff and Appellant,

v.

CITY OF NAPA et al., Defendants and Respondents.

No. A134959
In the Court of Appeal of the State of California
First Appellate District
Division One
(Napa County Super. Ct. No. 26–49634)
Filed October 10, 2013
Pub. order November 5, 2013

COUNSEL

Law Offices of David Grabill, David Grabill; Law Office of Amber Kemble and Amber L. Kemble for Plaintiff and Appellant.

Michael Barrett, City Attorney; Jarvis, Fay, Doporto & Gibson and Rick W. Jarvis for Defendant and Respondent City of Napa.

ORDER

THE COURT:

The opinion in the above-entitled matter filed on October 10, 2013, was not certified for publication in the Official Reports. After the court's review of requests under California Rules of Court, rule 8.1120, and good cause established under rule 8.1105, it is hereby ordered that the opinion should be published in the Official Reports.

Margulies, Acting P. J.

OPINION

Affordable housing advocates Latinos Unidos de Napa (plaintiff) filed a petition for writ of mandate against the City of Napa (City), its city manager, and its community development director seeking to set aside the City's approval of revisions to the housing element of its general plan, and related general plan and zoning amendments (the Project), on the ground that an environmental impact report (EIR) for the Project is required. The City had concluded the Project would not result in any new significant environmental effects that were not identified and mitigated in its 1998 General Plan Program EIR, and filed a notice of determination to that effect. After the trial court erroneously dismissed plaintiff's petition on statute of limitations grounds, we reversed the judgment in *Latinos Unidos de Napa v. City of Napa.* (2011) 196 Cal.App.4th 1154. The trial court subsequently denied the petition on its merits, agreeing with the City's legal analysis and concluding plaintiff had waived its right to challenge the sufficiency of the evidence. We find no error and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. THE PARTIES

Plaintiff identifies itself as "an unincorporated association which advocates for environmentally sound and legally adequate development policies that address the housing needs of all economic segments of the population in the City of Napa and surrounding areas." The City is the "lead agency" for the subject approvals for the purposes of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*)[1] and is charged with duties to disclose, analyze, and mitigate significant impacts from the Project. (§§ 21067, 21165.)

II. CEQA

Under CEQA, an EIR must be prepared before a public agency approves any project that may have a significant effect on the environment. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 687–688.) CEQA and its related regulations — ordinarily referred to as "Guidelines" (Cal. Code Regs., tit. 14, § 15001 *et seq.* (Guidelines)) — define an EIR as "an informational document" whose purpose "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."[2] (Pub. Resources Code, § 21061; Guidelines, § 15003, subds. (b)–(e).)

Public Resources Code section 21166 and Guidelines section 15162[3] mandate that once a public agency has prepared an EIR for a project, no further EIR is required unless either (1) substantial changes are proposed in the project that will require major revisions of the EIR, or (2) substantial changes occur with respect to the circumstances under which the project will be undertaken that will require major revisions in the EIR, or (3) new information, which was not known and could not have been known when the EIR was certified, becomes available.[4] Additionally, where an agency prepares

1. All subsequent statutory references are to the Public Resources Code except as otherwise indicated.

2. "The Guidelines are developed by the Office of Planning and Research and adopted by the Secretary of the Resources Agency. [Citations.] 'In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or erroneous.' [Citation.]" (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 276, fn. 10.)

3. Guidelines section 15162 implements Public Resources Code section 21166. (See *Benton v. Board of Supervisors* (1991) 226 Cal. App.3d 1467, 1479–1481.)

4. The Guidelines generally define "new information" as information that shows the project will have new or more severe "significant effects" on the environment not disclosed in the prior EIR. (Guidelines, § 15162, subd. (a).) A "significant effect" is further defined in

a "program EIR" for a broad policy document such as a local general plan, Guideline section 15168, subdivision (c)(2) allows agencies to limit future environmental review for later activities that are found to be "within the scope" of the program EIR.

III. THE CITY'S GENERAL PLAN

The Planning and Zoning Law (Gov. Code, § 65000 *et seq.*) requires each city and county to "adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Gov. Code, § 65300.) A city's general plan is its " ' "constitution" for future development'… 'located at the top of the hierarchy of local government law regulating land use.' " (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772–773.) " '[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.' [Citations.]" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570–571.) The Planning and Zoning Law requires that each general plan include seven mandatory elements, including a land use element, a circulation element, a housing element, a conservation element, an open-space element, a noise element, and a safety element. (Gov. Code, § 65302.)

State law imposes many requirements for housing elements, including a requirement that they be periodically updated pursuant to a statutory schedule. (Gov. Code, § 65580 *et seq.*) The Housing Element Law provides: "The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and emergency shelters, and shall make adequate provision for the existing and projected needs of all economic segments of the community." (Gov. Code, § 65583.) The City was required to have adopted updates to its housing element by December 31, 2003 (third revision) and by June 30, 2009 (fourth revision). (Gov. Code, § 65588, subd. (e)(1)(F)).[5]

The City adopted a comprehensive update of its general plan — entitled *Envision Napa 2020* — in December 1998 (2020 General Plan). As its name suggests, the 2020 General Plan sets forth the City's future plans for development through the year 2020. The 2020 General Plan includes updates to all elements of the City's general plan except for the Housing Element, which at the time the City anticipated updating in 2001.

Prior to approving the 2020 General Plan, the City prepared, circulated, and ultimately certified a program EIR (1998 Program EIR). The 1998 Program EIR analyzed the environmental impacts of future projected growth within the City through the year 2020, in accordance with the 2020 General Plan, including analysis of environmental impacts relating to land use, transportation, community services and utilities, cultural resources, visual quality, biological resources, geology, soils, seismicity, hydrology, air quality, noise, and public health and safety. The City updated and/or amended its Housing Element in 2001 and in 2005.

IV. THE 2009 HOUSING ELEMENT UPDATE PROJECT

In April 2008, the City began the process of again updating its Housing Element, a course of action that resulted in the Project. This process ultimately included 28 public meetings, including community workshops and other opportunities for public input.

On April 20, 2009, City staff prepared an Initial Study to analyze the Project.[6] The Initial Study identified all changes that the Project would make to the existing Housing and Land Use Elements. The Initial Study first summarized the overall policy changes to the Housing Element, including policies to increase housing densities to provide additional housing opportunities, to "maintain and improve neighborhood livability," to "expand community involvement and outreach," to "address housing needs and affordability," and other policy changes to comply with current state requirements.

The Initial Study then further described the specific new actions contemplated by the Project, including: (1) changes to the Land Use Element to increase *the minimum* residential densities in seven areas zoned as "mixed use" or "community commercial" from 10 to 40 residential units per acre to 20 to 40 residential units per acre, (2) changes to the Land Use Element to increase the permitted density for eight multi-family sites located in three areas of the City by a total of 88 units, (3) various zoning amendments to comply with current state laws regarding emergency shelters and transitional, supportive, and farm worker housing, (4) zoning amendments to require a use permit for conversion of certain types of stores and to provide for "co-housing," and (5) Land Use Element and zoning amendments to permit single family detached homes at the same densities of single family attached homes.

The Initial Study then analyzed the extent to which these changes contemplated by the Project could result in any new or different environmental impacts not already analyzed with respect to the 2020 General Plan, specifically and separately analyzing the issues of aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and

the Guidelines as a "substantial, or potentially substantial, adverse change." (Guidelines, § 15382.)

5. Government Code section 65588 has been amended many times, resulting in some shifting of the dates. As of the time the City prepared the 1998 Program EIR, the City considered the third revision due in 2001.

6. An "initial study" is used by an agency to determine whether a project will have a significant effect on the environment under CEQA. (Guidelines, § 15063.)

soils, greenhouse gas emissions, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public services, recreation, transportation/traffic, and utilities and service systems. Based on its analysis, the Initial Study concluded that the Project was "within the scope" of the City's 1998 Program EIR, such that the Project required no further environmental review.

On May 22, 2009, the City received a 24-page comment letter from David Graves objecting to the Initial Study and making various arguments that the City should instead prepare a supplemental EIR. The comment letter attached a seven-page letter prepared by traffic engineer Daniel T. Smith, who asserted that the information in the 1998 Program EIR relating to traffic impacts was outdated.

On June 15, 2009, the City's Principal Planner and Public Works Director prepared a 10-page memorandum response to the two letters, disputing the claims made therein. This memorandum included two and a half pages of analysis from the City Public Works Department explaining why it disagreed with the traffic-related comments in the two letters and found them to be "misleading and inaccurate" insofar as they were based on information that was "incorrect and/or incomplete."

On June 17, 2009, the City Council adopted detailed findings restating the Initial Study's determinations summarized above, including findings that the Project was within the scope of the 1998 Program EIR prepared for the 2020 General Plan, and that it would "not result in any new significant environmental effects that were not identified, evaluated and mitigated through [the 1998 Program EIR.]" The council approved the Project, adopting the amendments to the Land Use Element, the updated Housing Element, and, later, approving the various zoning amendments.

V. THE PETITION FOR WRIT OF MANDATE

On October 9, 2009, plaintiff filed a first amended petition for writ of mandate challenging the City's compliance with CEQA in adopting the updated Housing Element and the related conforming changes.[7] As noted above, after the trial court dismissed the action on statute of limitations grounds, we reversed the judgment and the case was returned to the trial court.

On February 1, 2012, the trial court issued a tentative ruling denying the petition, finding that the City properly applied section 21166 in determining that the Project was within the scope of the 1998 Program EIR. The court also found plaintiff had waived its substantial evidence challenges because it "failed to set forth in its opening brief all the evidence which might have a bearing on the administrative decision," and that, even if these challenges were not deemed waived, the City's findings were, in fact, supported by substantial evidence.

On February 21, 2012, the trial court filed its judgment denying plaintiff's petition for the reasons stated in its tentative ruling. This appeal followed.

DISCUSSION

I. STANDARD OF REVIEW

A. General Standard of Review

"The standard of review in an action to set aside an agency determination under CEQA is governed by section 21168 in administrative mandamus proceedings, and section 21168.5 in traditional mandamus actions. The distinction between these two provisions 'is rarely significant. In either case, the issue before the trial court is whether the agency abused its discretion. Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence.' [Citations.]" (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945.)

B. "Fair Argument" Versus "Substantial Evidence" Tests

Relying in part on *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 (*Sierra Club*), an opinion authored by this court, plaintiff claims the "fair argument" test applies to the City's decision to refrain from preparing a new EIR because the Project was not adequately covered or mitigated in the 1998 Program EIR. "The 'fair argument' test is derived from section 21151, which requires an EIR on any project which 'may have a significant effect on the environment.' That section mandates preparation of an EIR in the first instance 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citation.] If there is substantial evidence of such impact, contrary evidence is not adequate to support a decision to dispense with an EIR." (*Id.* at p. 1316.) The fair argument standard creates a "low threshold" for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review. (*Id.* at pp. 1316–1317.)

The City contends, and the trial court agreed, that the substantial evidence standard of review applies here because the Project falls under section 21166. "[W]hen a court reviews an agency decision under section 21166 not to require a subsequent or supplemental EIR on a project, the traditional, deferential substantial evidence test applies. The court decides only whether the administrative record as a whole demonstrates substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR." (*Sierra Club, supra,* 6 Cal.App.4th at p. 1318; accord, *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 800) Thus, "the statutory

7. The present matter pertains to the first cause of action of the first amended petition. The petition originally contained seven causes of action. On June 22, 2010, plaintiff voluntarily dismissed the remaining causes of action.

presumption flips in favor of the [agency] and against further review." (*Moss v. County of Humboldt* (2008) 162 Cal. App.4th 1041, 1049–1050 (*Moss*).) " '[S]ection 21166 comes into play precisely because in-depth review has already occurred, [and] the time for challenging the sufficiency of the original EIR has long since expired… .' " (*Id.* at p. 1050.)

C. Standard of Review Applicable to the City's Environmental Review Process Here

As the court in Division Three of our appellate district has observed, "[a]lthough the standards for judicial review of an agency's decision under sections 21151 and 21166 are well settled, the issue is not so clear with respect to the agency's decision about *which* of these statutes governs the environmental review process. Courts have reached different conclusions about the appropriate level of judicial scrutiny to be applied to an agency's determination about whether a project is 'new,' such that section 21151 applies, or whether it is a modification of a previously reviewed project, such that section 21166 applies." (*Moss, supra,* 162 Cal.App.4th at p. 1051.)

In *Save Our Neighborhood v. Lishman* (2006) 140 Cal. App.4th 1288, 1297 (*Save Our Neighborhood*) the Third District Court of Appeal held that this "threshold question" (*id.* at p. 1301) is a question of law for the court. (*Id.* at p. 1297.) Subsequently, in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 (*Mani Brothers*), Division Two of the Second District Court of Appeal strongly disagreed with this aspect of *Save Our Neighborhood,* particularly in cases in which there is a previously certified EIR: "Treating the issue as a question of law, as the court did in *Save Our Neighborhood,* inappropriately undermines the deference due the agency in administrative matters. That principle of deference is otherwise honored by the substantial evidence test's resolution of any ' "reasonable doubts in favor of the administrative finding and decision." ' [Citation.]" (*Mani Brothers, supra,* at p. 1401.)

In *Moss,* the appellate court noted these two opposing cases and did not take a direct stand on the issue, finding it unnecessary to do so under the circumstances of that case. (*Moss, supra,* 162 Cal.App.4th at pp. 1052–1053). However, the court did state in a footnote that it agreed with *Mani Brothers* "to the extent its discussion meant to suggest that a court should tread with extraordinary care before reversing a local agency's determination about the environmental impact of changes to a project." (*Moss, supra,* at p. 1052, fn. 6.) We agree with our colleagues in Division Three, and elect to evaluate the City's decision to proceed under section 21166 using the substantial evidence test.[8]

We also observe that the facts of this case are not analogous to the facts at issue in *Sierra Club.* In *Sierra Club,* the county had certified a program EIR for a resource management plan that regulated mining. The plan specified lands available for future mining and provided for preservation of identified agricultural lands. (*Sierra Club, supra*, 6 Cal. App.4th at pp. 1313–1314.) Years later, a mining company proposed to amend the EIR to designate for mining a large parcel that had been identified as agricultural in the EIR. (*Id.* at p. 1314.) We held that the deferential review provided by section 21166 did not apply in this context because the proposed project was not "either the same as or within the scope of" the program described in the EIR, which had expressly exempted the agricultural land from future mining. (*Sierra Club, supra,* at p. 1321.) In the present case, the most recent Project is the same as, or within the scope of, that which is described in the 1998 Program EIR. Unlike *Sierra Club* this case does not involve any site-specific plans or any other actual changes to a designated area.

D. Substantial Evidence Supports the Decision to Proceed Under Section 21166

Plaintiff relies on *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156 (*County of El Dorado*) in arguing that the Project is not covered by the 1998 Program EIR. In *County of El Dorado,* the county's 2004 general plan and attendant EIR required on-site mitigation of the loss of oak woodland habitat, but anticipated the option of allowing developers to pay a conservation fee under an oak woodland management plan instead. (*Id.* at p. 1165.) Since neither the general plan nor the EIR specified the fee rate or how the collected fees should be used to mitigate the impact on oak woodlands, the appellate court held the county was required to prepare a tiered EIR before it adopted the oak woodland management plan and implemented the fee. (*Id.* at p. 1162.) Plaintiff argues that the Project, like the later approved oak woodland management plan in *County of El Dorado,* was *anticipated* by the 1998 Program EIR, but that the "high density residential units" approved as part of the Project were neither addressed, known, nor adequately covered. We disagree.

Here, the entire Project consists of (1) limited amendments to the Housing Element and the Land Use Element of the 2020 General Plan, and (2) relatively minor amendments to the City's zoning ordinances. In contrast to the facts in *County of El Dorado,* no aspect of the Project involves any approval (site specific or otherwise) of any actual development or other activity. To the extent the Project amends the City's 2020 General Plan, Guidelines section 15162 clearly applies and explicitly requires additional environmental review only for amendments that represent "[s]ubstantial changes… proposed in the project which will require *ma-*

8. We note CEQA includes express legislative intent that the courts shall not interpret its provisions or the Guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated" therein. (Pub. Resources Code, § 21083.1.) And the Guidelines also make clear that it is CEQA policy that decisions be "informed and balanced. [CEQA] must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement." (Guidelines, § 15003, subd. (j); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.)

jor revisions of the previous EIR… .” (Guidelines, § 15162, subd. (a)(1), italics added.) As to the zoning amendments, those amendments merely incorporate the density revisions already made to the Land Use Element and make other minor changes to comply with current state law. ~(1 AR 369, 33–48)~ Thus, these changes are “within the scope” of the 1998 Program EIR. (See Guidelines, § 15168, subd. (c)(2) [“If the agency finds that pursuant to [Guidelines] Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve [a subsequent] activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.”].)

Plaintiff primarily relies upon the fact that, while the City modified every other element of its general plan when it adopted the 2020 General Plan in 1998, it did not change the Housing Element at that time because the City had anticipated updating that element in 2001. Thus, plaintiff asserts that the Housing Element revisions were not a part of the 1998 environmental review and planning process. However, while the City did not change the Housing Element at the time it approved the 2020 General Plan, the 1998 Program EIR analyzed the effects of the then-existing Housing Element. For example, the project description chapter of the 1998 Program EIR summarized all of the general plan goals from each of the elements, including the Housing Element. Thus, the Housing Element was not excluded from consideration.[9] Further, as the City aptly notes, the environmental impacts associated with a community’s housing element are necessarily addressed in the land use element. Under Government Code section 65583, the housing element consists of housing-related policies whose site-based objectives must be accounted for in the land use element.[10]

All of the alleged changes resulting from the Project that plaintiff complains will result in significant impacts — primarily the changes in density — are changes that the Project makes to the Land Use Element, not the Housing Element. There is no dispute that the 2020 General Plan as adopted in 1998 included a fully revised and updated Land Use Element, and there thus can be no dispute that this aspect of the Project clearly is a modification to the 2020 General Plan that was analyzed in the 1998 Program EIR and therefore is properly analyzed under Guidelines section 15162. Thus, substantial evidence supports the City’s decision to proceed under Public Resources Code section 21166.

The same standard applies to the amendments to the zoning ordinance: “Once an agency has prepared an EIR, its decision not to prepare a supplemental or subsequent EIR for a later project is reviewed under the deferential substantial evidence standard. [Citations.] ‘This rule applies to determinations regarding whether a new EIR is required following a program-EIR level of review.’ [Citations.]” (*Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 610, fn. omitted.) Accordingly, we conclude the City properly determined that sections 15162 and 15168, subdivision (c) of the Guidelines applied to its CEQA review of the Project.

II. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE DECISION TO REFRAIN FROM PREPARING AN EIR IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE

We review the City’s conclusion that the Project did not require any further environmental review to determine whether there is substantial evidence to support it. (E.g., *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 110 (*Citizens for a Megaplex-Free Alameda*) [stating that an agency’s determination concerning whether to prepare EIR under Pub. Resources Code, § 21166 is reviewed for substantial evidence].) In reviewing an agency’s decision not to require additional environmental review “pursuant to section 21166, courts ‘are not reviewing the record to determine whether it demonstrates a possibility of environmental impact, but are viewing it in a light most favorable to the [agency’s] decision in order to determine whether substantial evidence supports the decision not to require additional review.’ [Citation.]” (*Mani Brothers, supra,* 153 Cal.App.4th at p. 1398.)

As noted above, the Initial Study determined the Project would not create any new or more severe environmental impacts over those analyzed in the 1998 Program EIR. While the Project incrementally raises maximum densities in limited areas of the City, the Initial Study indicates that this will not increase total potential development above what was already analyzed in the 1998 Program EIR. This is largely because “(a) many project approvals have permitted less development than would have been allowed under the applicable 2020 General Plan designations, and (b) the [C]ity’s rate of growth has been less than anticipated by the Plan’s 1994 projections.” The City resultingly concluded that the Project would not require any major revisions to the 1998 Program EIR, was “within the scope” of the 2020 General Plan, and required no further environmental review under CEQA. The trial court found this determination to be supported by substantial evidence.

As a threshold matter, the City contends that because plaintiff, in its opening brief on appeal, failed to fairly summarize the evidence in the administrative record supporting the City’s findings, it has waived its right to challenge those findings. For example, the City states that “instead of

9. An addendum to the final version of the 1998 Program EIR observes: “It should be noted that the housing element update, due in 2001, will provide the City with an opportunity to *refine* the housing numbers based on a systematic review and consideration of the most current information available at that time… .” (Italics added.)

10. Under Government Code section 65302, subdivision (a), a land use element must include “the proposed general distribution and general location and extent of the uses of the land for housing.”

addressing the City's actual analysis of the impacts of the density changes, [plaintiff] simply asserts that the City did not study it." The City also observes that plaintiff failed to fairly summarize the City Public Works Director's "detailed response" to Smith's traffic report, instead falsely asserting Smith's "expert" evidence is "undisputed."[11] As noted above, the trial court found plaintiff had waived its right to bring a substantial evidence challenge, though it nevertheless reached the merits of plaintiff's substantial evidence contentions.

Plaintiff concedes it was the City that provided detailed evidentiary arguments to the trial court, including citing to specific documents as substantial evidence supporting the City's findings. Plaintiff essentially admits it made no effort to carry its burden, stating: "[C]entral to [plaintiff's] argument, here and in the lower court, is that [the City] abused its discretion by failing to proceed in the manner required by law. [Citation.] That being a legal issue, *judicial review need not reach the issue of whether* [*the City's*] *factual findings are supported by 'substantial evidence*.' " (Italics added.) The obvious flaw with this argument is that we have ruled against plaintiff on the issue of whether the City erred in conducting its environmental review of the Project pursuant to section 21166. In effect, plaintiff thus concedes that, having lost its legal argument, there are no further issues for us to address.

As our colleagues in Division Five have explained, the petitioner bears the burden of demonstrating that the record does not contain sufficient evidence justifying a contested project approval. "To do so, an appellant must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation.] A failure to do so is deemed a concession that the evidence supports the findings." (*Citizens for a Megaplex-Free Alameda, supra,* 149 Cal.App.4th at pp. 112–113.) The court further stated, " '[I]f the appellants fail to present us with all the relevant evidence, then the appellants *cannot* carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the appellants ignore.' [Citation.] This failure to present all relevant evidence on the point 'is fatal.' [Citation.] 'A reviewing court will not independently review the record to make up for appellant's failure to carry his burden.' [Citation.]" (*Id.* at p. 113.)

In its reply brief, plaintiff contends that it did cite to relevant evidence supporting the City's findings and claims it has not waived a substantial evidence challenge. Regardless, we agree with the trial court that substantial evidence supports the City's decision not to proceed with any additional environmental review. The 1998 Program EIR analyzed among other things the environmental impacts of land use designations pertaining to housing density, including impacts on traffic, air quality, biological resources, population, public services, and other resources. As noted above, the general plan amendments and zoning changes here at issue increase the *minimum* density of development allowed in certain areas, and allow for 88 potential new units to certain designated locations. Residential density was addressed in the 1998 Program EIR, and the changes made by the Project in narrowing density ranges do not fall outside of the ranges therein discussed.

As to the additional 88 units, the 2020 General Plan anticipated development of slightly more than 300 residential units per year from 1994 to 2020. As of 2009, however, the City had issued about 700 fewer residential building permits for neighboring properties than what was anticipated. In the Initial Study, the City also noted that "many residential projects have developed at less than the maximum than would have been allowed under the applicable 2020 General Plan designations." In light of these facts, plaintiff does not satisfactorily explain how the Project's impacts are so different from, or more severe than, the impacts identified in the 1998 Program EIR so as to require further review. Its assertions that the Project will result in "unmitigated impacts" does not show that the analysis in the EIR is inadequate for the present project, but only hypothesizes that it must be.[12] Even if plaintiff has pointed to contradictory evidence, (Smith's traffic report, for example), it is not our task to weigh this evidence against the evidence relied on by the City. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)

III. OTHER CHALLENGES

Plaintiff claims the substantial evidence standard of review does not apply because the City "failed to comply with CEQA's informational disclosure requirements, such that the decision makers and public could not make a meaningful assessment of potentially significant environmental impacts." Plaintiff goes on to cite to various alleged deficiencies in the Initial Study that, in essence, amount to an attack on the City's decision to refrain from preparing a new EIR.[13]

11. "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (§ 21080, subd. (e)(1).) It includes the opinion of a city's "expert planning personnel" on matters within their expertise, even in the absence of "additional evidence or consultation." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380.)

12. As a court of law, we lack the resources and the scientific expertise to evaluate the merits of plaintiff's assertions. Thus, we defer to the lead agency's findings in cases involving the substantial evidence standard of review. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 ["A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' [Citation.]"].)

13. For example, plaintiff asserts that the City failed to disclose and analyze the Project's impacts and cumulative impacts to traffic

However, as previously discussed, the administrative record contains substantial evidence that the revised project will not cause any new significant impacts. In conclusion, we find no abuse of discretion in City's approval of the Project.[14]

DISPOSITION

The judgment is affirmed.

Dondero, J.

We concur: Margulies, Acting P. J., Banke, J.

and greenhouse gases, failed to incorporate mitigation measures, geographically segmented the Project's impacts, and failed to provide relevant information and analysis as to how the Project's impacts are offset by the overall reduction in residential housing.

14. Plaintiff's remaining challenges relating to environmental setting and the statement of overriding considerations are procedurally barred for failure to raise them in the administrative proceedings before the City and because plaintiff did not raise them in the trial court.

Cite as 13 C.D.O.S. 12290

DAVID M. VESCO, Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY, Respondent;

TAWNE MICHELE NEWCOMB, Real Party in Interest.

2d Civil No. B249447
In the Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. 56–2010- 00384846-CU-OR-VTA)
(Ventura County)
Filed November 6, 2013

COUNSEL

Law Offices of Mark Pachowicz, Christina S. Stokholm for Petitioner.

No appearance for Respondent.

Tawne Michele Newcomb, in pro. per. for Real Party in Interest.

OPINION

California Rules of Court, rule 1.100[1] allows persons with disabilities to apply for "accommodations" to ensure they have full and equal access to the courts. Rule 1.100 (c)(4) prohibits disclosure of the applicant's confidential information to persons "other than those involved in the accommodation process."

The trial court twice granted real party in interest's motion for continuance of trial pursuant to rule 1.100. Petitioner received no prior notice and the court denied his request to view the medical documents on which real party in interest relied to obtain a continuance.

We conclude petitioner is a person involved in the accommodation process. Therefore he has the right to notice, to view the documents on which the real party in interest relies, and to an opportunity to be heard. We issue a peremptory writ of mandate. We direct the superior court to vacate its June 12, 2013 order granting a continuance to real party in interest.

FACTS

David M. Vesco is plaintiff in a civil action. He alleges that: He and defendant Tawne Michele Newcomb were in a long-term relationship. During the relationship, Vesco purchased a home. Although Newcomb did not contribute to

1. All references to rules are to the California Rules of Court.

the purchase or maintenance of the home, she now has its sole possession. While Newcomb is living in the home, rent-free, Vesco is paying the mortgage and other expenses. Vesco seeks to recover possession of the home.

On June 11, 2012, the trial court scheduled trial in the action for April 22, 2013.

On April 4, 2013, Newcomb filed a motion to continue trial, claiming that she needed urgent medical procedures. Vesco opposed her motion. On April 12, 2013, the trial court denied Newcomb's motion without prejudice to her right to refile it with supporting documentation.

On April 15, 2013, Newcomb filed an *ex parte* motion for accommodations under the Americans With Disabilities Act (ADA), 42 United States Code section 12101et seq., requesting a continuance of trial based on her health, pursuant to rule 1.100 (a)(1). Vesco was not served with a copy of the motion nor notified of it until after the trial court granted it.

On April 16, 2013, the trial court sent Vesco's counsel a copy of its minute order that stated: "Defendant Tawne Newcomb has made a confidential ADA request. As part of the court's response to the request, the trial date in this matter is continued from April 22, 2013, to June 3, 2013, at 1:30 p.m., in Courtroom 20."

On April 18, 2013, Vesco filed an *ex parte* application to examine and photocopy all documents in the trial court's possession concerning Newcomb's request for ADA accommodation. Vesco claimed that (1) Newcomb's sole objective was to delay trial so she could remain in the home he was paying for; (2) she had a proven history of filing false documents with the court; and (3) he needed to review her request to determine the basis for the court's order, and whether he should seek reconsideration or writ review of the order pursuant to rule 1.100 (g).

On April 18, 2013, the trial court denied Vesco's *ex parte* application. The hearing was not reported.

On April 24, 2013, Vesco petitioned this court for a writ of mandate ordering the trial court to allow him access to all materials it relied on to grant the trial continuance. On May 29, 2013, we summarily denied his petition.

The trial court's minute order of May 30, 2013, states that Newcomb made another confidential request for an accommodation under the ADA. The court ordered the trial continued to June 17, 2013, so that it would have time to review the request.

On June 12, 2013, pursuant to Newcomb's ADA request, the court again continued the trial to August 12, 2013.

On June 16, 2013, Vesco renewed his petition for writ of mandate in this court.

DISCUSSION

Vesco contends the trial court erred in granting Newcomb continuances without first allowing him the opportunity to view the documents on which she relies and the opportunity to be heard. Vesco claims he is prejudiced in that he continues to pay the mortgage and maintenance costs on the house while Newcomb lives there rent free.

Rule 1.100 (a) and (b) allows persons with disabilities covered by the Unruh Civil Rights Act, Civil Code section 51 *et seq.*, the ADA, or other applicable state and federal laws to apply for accommodations to ensure full and equal access to the judicial system. The application may be made *ex parte.* (Rule 1.100 (c)(1).) Under the appropriate circumstances, an accommodation may be a trial continuance. (*In re Marriage of James M. & Christine J. C.* (2008) 158 Cal.App.4th 1261, 1273, fn. 4.)

Rule 1.100 (c)(4) provides, in part, that "[t]he applicant's identity and confidential information may not be disclosed to the public or to persons other than those involved in the accommodation process." Here the question is whether Vesco is a person "involved in the accommodation process." (*Ibid.*) The answer is obvious: It is his trial that is being continued and he is the person forced to make the accommodation.

When a party raises her physical condition as an issue in a case, she waives the right to claim that the relevant medical records are privileged. (See Ev*id.* Code, § 996 & *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 232 ["The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too"].) The reason for the waiver is self-evident. It is unfair to allow a party to raise an issue involving her medical condition while depriving an opposing party of the opportunity to challenge her claim. A challenge requires access to the medical records on which a party relies and an opportunity to be heard. Otherwise, the challenge is in name only. That rule 1.100 (c)(1) allows the application to be made *ex parte* does not dispense with the requirement of notice. (Rule 3.1203 (a).)

Vesco contends the trial court incorrectly analogized Newcomb's motion to a *Pitchess* motion when a defendant in a criminal case seeks to discover information contained in a peace officer's personnel file. (Ev*id.* Code, § 1043 *et seq.*; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We agree. A *Pitchess* motion must be noticed with a supporting affidavit disclosing good cause. (Ev*id.* Code, § 1043, subds. (a) & (b)(3).) The peace officer's personnel records are presented to the court by a custodian of public records, not by a party to the action. (See *People v. White* (2011) 191 Cal.App.4th 1333, 1339.) It is true that the trial court examines the records in camera, outside the presence of the defendant and his counsel. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) But the trial court's duties in a *Pitchess* motion are limited. The court must first perform the ministerial task of determining whether the peace officer's personnel records contain the type of information the defendant is entitled to discover. The court then makes the legal determination whether the information is relevant. (See Ev*id.* Code, § 1045, subd. (b).)

These are substantial differences between the procedures employed in a *Pitchess* motion and the procedure employed

here. Here the trial court determined that Newcomb's claim of a disability was credible. But Vesco did not have the opportunity to challenge the credibility of the claim. No such opportunity is required in a *Pitchess* motion because the court makes no determination whether the information contained in the personnel file is credible.

The *Pitchess* procedures are designed to provide a balance between the defendant's right to a fair trial and a peace officer's interest in privacy. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1227.) The procedure employed by the trial court in deciding Newcomb's claim of disability provides no such balance. Vesco was shut out of the process entirely.

Vesco has the right to have his trial as soon as circumstances permit. (See *In re Marriage of Johnson* (1982) 134 Cal.App.3d 148, 154.) It follows that he may challenge Newcomb's request for a continuance. He therefore must be given notice and an opportunity to view the medical records and other material on which Newcomb relies. Of course, the trial court must protect Newcomb's privacy as far as practical. For example, it may hold the hearing in camera, order Vesco and his counsel not to disclose the contents of the medical records, seal the record of the proceedings, and take other steps as it deems appropriate to accomplish this goal.

DISPOSITION

We grant the petition. Let a peremptory writ of mandate issue. We direct the respondent court to vacate its order of June 12, 2013, granting a continuance of trial as an accommodation under rule 1.100 without providing petitioner notice, an opportunity to view the documents on which real party in interest relies and an opportunity to be heard, and to enter a new order consistent with this opinion. The order to show cause, having served its purpose, is discharged.

The parties shall bear their own costs.

GILBERT, P. J.

We concur: YEGAN, J., PERREN, J.

Cite as 13 C.D.O.S. 12292

THE PEOPLE, Plaintiff and Respondent,

v.

ADAM DANIEL ANAYA et al., Defendants and Appellants.

No. F063835 & F064116
In the Court of Appeal of the State of California
Fifth Appellate District
(Super. Ct. Nos. VCF232942C & VCF232942A)

APPEALS from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Filed October 7, 2013;
Mod. & partial pub. order November 5, 2013

COUNSEL

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Adam Daniel Anaya.

Robert L. S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant Eric Thomas Wolfe.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING OPINION FOR PUBLICATION
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on October 7, 2013, be modified as follows:

1. On page 44, the first sentence of the first paragraph beginning "As previously noted, section 518 defines as" is modified to delete the introductory clause so the sentence reads:

> Section 518 defines extortion as the "obtaining of property from another, with his consent… induced by a wrongful use of force or fear."

2. On page 65, footnote 24 is modified by adding an additional paragraph:

> In a petition for rehearing, defendant Wolfe for the first time asks this court to remand the matter for resentencing on count 8. He notes the analysis applied to count 5 applies with equal force to count 8, which also charged

a violation of section 136.1. Rather than grant the relief requested because the People have been given no opportunity to address this issue, we will direct the trial court on remand to consider the propriety of its sentence with respect to defendant Wolfe on count 8 in the first instance, in light of our discussion and analysis with respect to count 5.

3. On page 65, under the heading Disposition, after the fourth sentence ending "terms imposed in counts 4, 6, and 7" add the following:

Also as to defendant Wolfe, the trial court is directed to consider on remand for resentencing the propriety of the sentence imposed on count 8. (See fn. 24, *ante*.)

There is no change in the judgment. As modified, defendant Wolfe's petition for rehearing is denied.

The opinion in the above-entitled matter filed on October 7, 2013, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports with the exception of parts I., II., III.E., III.F., IV., and V., and it is so ordered.

PEÑA, J.

WE CONCUR: POOCHIGIAN, Acting P.J., FRANSON, J.

OPINION

INTRODUCTION

Defendants Adam Daniel Anaya and Eric Thomas Wolfe were tried together in the Superior Court of Tulare County on various criminal charges stemming from their forceful attempts to collect a criminal street gang debt. After their convictions, defendants were sentenced separately and appealed separately. Following consolidation of their appeals, defendants contend: (1) The convictions must be reversed because (a) the jury was provided conflicting instructions on the manner to assess the key witness's credibility, and (b) juror misconduct; (2) There is insufficient evidence to support (a) the extortion convictions, (b) the dissuading a witness convictions, and (c) the one battery conviction; (3) The life terms imposed for the extortion and the dissuading a witness convictions are not authorized; (4) As defendants have been improperly convicted of both robbery and receiving stolen property, the convictions for receiving stolen property must be reversed; (5) This case must be remanded for the trial court to impose or strike the gang enhancements to the term for the burglary convictions and the receiving stolen property convictions; and (6) Multiple enhancements for one prior serious felony conviction are not authorized, and only one stayed prior prison term should appear on the abstracts of judgment. As outlined below, we agree with defendants' contentions (3), (4), (5), and (6). Accordingly, the judgments are reversed in part and affirmed in part.

PROCEDURAL BACKGROUND

In a first amended information, both defendants were alleged to have committed the crimes of extortion (Pen. Code,[1] § 520; count 1), burglary (§ 459; count 2), home invasion robbery (§ 211; count 3), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 4), dissuading a witness or victim (§ 136.1, subd. (b)(2); count 5), participation in a criminal street gang (§ 186.22, subd. (a); count 6), and receiving stolen property (§ 496, subd. (a); count 7). An additional count of dissuading a witness or victim (§ 136.1, subd. (b)(2); count 8) was alleged as to defendant Wolfe. Excepting count 6, it was further alleged that the crimes were committed for the benefit of a street gang (§ 186.22. subds. (b)(1)(A), (C), (b)(4)). As to all counts, it was also alleged that each defendant had a prior strike conviction and a prior serious felony conviction (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)). Except for count 8, it was also alleged that defendant Anaya had suffered a prior prison term under section 667.5, subdivision (b). And it was further alleged with regard to the home invasion robbery that the crime was committed in concert with others (§ 213, subd. (a)(1)(A)).

During trial, the dissuading a witness or victim offenses (counts 5 & 8) were amended to allege violations of subdivision (b)(1) of section 136.1, and the assault likely to produce great bodily injury offense (count 4) was reduced to a battery (§ 242).

Following an eight-day trial, defendants were convicted on all counts. In bifurcated proceedings, defendant Anaya admitted the prior conviction allegations and the trial court found the prior strike and serious felony allegations against defendant Wolfe to be true.

On October 21, 2011, defendant Anaya was sentenced to a total of 30 years to life on count 3, plus five years for the prior serious felony conviction. Additional terms were imposed on the remaining counts, to be served either concurrently or stayed pursuant to section 654.

On November 7, 2011,[2] defendant Anaya filed a timely notice of appeal.

On December 13, 2011, defendant Wolfe was also sentenced to a total of 30 years to life on count 3, plus five years for the prior serious felony conviction. The sentences imposed on the remaining counts and special allegations were imposed concurrently or were stayed.

On December 22, 2011, defendant Wolfe filed a timely notice of appeal.[3]

1. All further statutory references are to the Penal Code unless otherwise indicated.

2. A second notice of appeal was filed November 16, 2011, by defendant Anaya *pro se*.

3. On February 14, 2013, this court granted Wolfe's motion to consolidate the appeals. Further, defendants were deemed to have joined in one another's arguments to the extent the arguments were

FACTS

Facts Specific to the January 2010 Incident

Eric Dahlberg lived across the street from his friend Roy Gomez in Tulare. On January 31, 2010, Dahlberg called 911 after he became concerned about a number of people he observed at Gomez's home. He had never seen these six or so men at his neighbor's home before. Gomez and the others were standing near the driveway and appeared to be talking. But then Gomez started backing up and the others were getting closer, "kind of circling around him." Dahlberg thought it was a "little suspicious." Gomez had backed up to the garage door and put his hands up. Shortly thereafter, Gomez's cousin came out from inside the house.

Although Dahlberg could not hear what was being said, he could see clearly. He focused on one person who appeared older and "darker." That individual stood out and seemed like he was telling the others what to do. He made lots of hand gestures: when he pointed to the curb, two individuals went to the curb; when he pointed to the house, everyone else went inside.[4] That individual also used his cell phone a couple times. The individual "was in Roy's face," while the others were behind him. Dahlberg did not witness any physical altercation.

By the time the police arrived in response to his call, Dahlberg was at the back of his house. Because he could not clearly see individual faces, he could not identify anyone other than Gomez and his cousin. Later, Gomez came to Dahlberg's door. He was "breathing hard" and was "acting shocked."

Another neighbor, Richard Hernandez, was outside working on his truck that same date. He recalled seeing "a bunch of guys" pull up in a couple cars. He figured they were friends of Gomez's. It was not unusual until he noticed the group had Gomez backed up against the garage door. There were six or seven men, most of whom were young. Two were older and one stood out because he was the only one talking and everyone else surrounded him. Hernandez could not decide if that man was African-American or a dark complexioned Hispanic. That man was loud, "running his mouth," yelling and screaming.

Hernandez became concerned because Gomez was standing against the garage and everyone was "surrounding him." They no longer looked like friends. Although he did not talk to Gomez's cousin much, he knew who he was and he recognized him when he came outside. The group's focus then shifted to Gomez's cousin and they all went inside. About 10 minutes later, the police arrived.

When Hernandez gave his statement to police, his memory was fresh; he told the truth. He told Detective Jesus Guzman that the darker man had told Gomez's cousin, "This doesn't concern you. Get out of here." He recalled seeing the darker man on his cell phone; he wore a red hat. Gomez's cousin told the darker man that he did not have much money, but that he could take what he had. Hernandez recalled telling the detective that he saw "a larger white guy try to strike" Gomez.

In January 2010, Norteno gang member A.T. was living with his aunt, uncle, and cousin Roy Gomez in Tulare. In response to a midmorning knock, A.T. answered the door to find a man he believed to be John Delgado[5] asking to speak with his cousin. He knew who Delgado was because Delgado had visited Gomez in the past. A.T. noted there were other people waiting outside near a white truck and a white car, but he did not recognize the others. Gomez stepped outside with Delgado.

A.T. resumed speaking on the telephone with his girlfriend. Eventually, he heard people talking loudly or shouting. He hung up the telephone, assuming there was an argument, and went outside.

Once outside, A.T. found his cousin with his back to the garage. About seven people were encircling him. Gomez's hands were out (palms out at shoulder height) in front of him. He seemed scared and confused. Those surrounding Gomez were later identified as Wolfe, Anaya, Steven Delgado, Robert Pompa and others. Wolfe was standing "kind of offset"; A.T. had never met Wolfe but knew who he was.

Realizing the argument was about a debt[6] he himself owed, A.T. asked what was going on. Wolfe told A.T. to mind his own business and continued to confront Gomez over the fact he "owed the homies money." Eventually, A.T. was able to tell Wolfe that it was not Gomez they were looking for, rather it was him. Wolfe made a phone call. He then apologized to Gomez and pointed to A.T., saying, "You are the one."

Anaya, who had been standing near the sidewalk, said "cops," and pointed down the street. In response to this news, everyone went inside the house. Once inside, A.T. was surrounded by Wolfe, Delgado, Pompa and another individual. Anaya and a second individual stayed at the window as lookouts. Pompa struck him in the face and he was verbally harassed. Wolfe told A.T. he owed money and began grabbing items in the house. A.T. tried to explain that the house belonged to his aunt and that the property in the home was not his. He offered to pay what he owed, and also offered the $200 he had in his possession. In the room A.T. shared with his cousin, Wolfe and Anaya were "taking things apart"; A.T. again explained most of the property belonged to his aunt. Wolfe or Delgado told him to shut up.

At about this same time, the police knocked on the door. The officers had everyone exit the back room with their hands up. Identification was checked and names were taken. A.T. gave the officers a false name because he had violated his

beneficial to each of them.

4. Two individuals stayed at the curb when the others went inside. They looked up and down the street.

5. "John" Delgado was actually Steven Delgado.

6. A.T.'s debt was incurred as a result of borrowing money or drugs from the gang (then selling the drugs for profit). A.T. borrowed from the gang on two occasions, fell behind on payments, and had not repaid that debt plus "tithe" and interest.

parole.[7] Ultimately, no one was arrested and the police left. A.T. did not say anything to the police then because he had been told to shut up.

After the police left, Wolfe, who did most of the talking, told A.T. what was going to happen. Wolfe said A.T. owed $5,000, it needed to be paid, and they would be taking items with them. He was reminded that he knew "what happens" to people who do not "pay up." He would be given a phone number for "Pablo." He was to call Pablo in an hour to receive additional information about whom to pay. A.T. told Wolfe he would do his best to pay the debt. Thereafter, A.T.'s belongings were loaded into a white or cream-colored Blazer, including computers, printers, hard drives and keyboards. He did not give anyone permission to take the items.

After Wolfe, Anaya and the others left, A.T. called the telephone number he was given for Pablo. He recognized the voice on the other end as that of Wolfe. A.T. was told to call the number the following day about a meeting. The next day, he called Pablo's number again; Wolfe answered. Wolfe advised A.T. that he would be picked up in 30 minutes; however, a few moments later, Wolfe called back. A.T. was advised they were waiting for him outside.

A.T. went outside and got into the car as requested. Wolfe was driving, Pompa was the front seat passenger, and Delgado was in the back. They went to what A.T. assumed was Pompa's home. Pompa offered him a beer, but he declined. He was nervous and fearful. Wolfe advised him he had 29 days within which to pay back $5,000. Although A.T. had borrowed $3,000, the amount increased significantly because of "fines." A.T. asked that his belongings be returned, but Wolfe denied the request. A.T. also asked if he could have "assistance" in repaying the debt. After making a telephone call, Wolfe denied A.T.'s request for assistance.

Despite having no job[8] or other financial resources, A.T. understood that if he did not repay the debt, he would be "done," as stated by Wolfe. A.T. understood "done" as meaning he would "be whacked" or killed. A.T. was further advised that if he loved his kids, he would pay the money within the time frame provided. He was then taken home.

Three or four days later, A.T. was arrested for absconding from parole and was taken to jail. Although he did not want to tell police about what had happened, and knew he was risking his life by doing so, A.T. also feared what would happen when the debt repayment deadline expired. He gave a statement to Detective Guzman and received protective custody.[9]

While serving time in jail, A.T. was transported to the Bob Wiley Detention Center. On a bus returning from court,

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7. In 2006, A.T. was convicted of second degree burglary and receiving stolen property.

8. When in good standing, A.T. sold drugs on behalf of the Norteno gang. He is no longer a Norteno gang member.

9. Once he was released from custody, A.T. was provided with additional protection in the form of housing, utilities, and food assistance, and was provided a cell phone as well. He received that assistance between February and September 2010, but was ultimately asked to leave the program after breaking a rule.

Wolfe was seated behind him. Wolfe told him "not to do it," and that he could fix everything, including A.T.'s status with the gang. Wolfe offered A.T. a car and some money not to say anything. A.T. did not believe him. On another occasion, as he and Detective Guzman passed Wolfe in a cell, Wolfe said, "Don't do it A[.]."[10] That meant A.T. should not talk to the police.

A.T. is still afraid because he still owes money. By testifying, he is considered to be "telling on" defendants and "the whole rest of the gang."

Tulare Police Officer Jeremy Faiman testified that on January 31, 2010, about 1:10 p.m., he responded in a marked K9 patrol unit to a possible home invasion in progress. As he approached the home, he observed two subjects standing out front, looking up and down the street. After calling for additional units, he contacted those subjects, who were identified as Manuel Rubio and Mario Duarte. As he directed Rubio and Duarte to sit down with their hands in sight, Roy Gomez exited the home, quickly shutting the door behind him. Gomez consented to a look around the house, indicating a couple "homies" were inside. He was nervous.

Officer Faiman and an undercover officer approached the unlocked door. They entered and cleared the home. Several people exited a bedroom. Everyone was "really calm. It was almost a scary calm." Wolfe, Anaya, Pompa, Delgado, Jaime Rodriguez, and Adrian Vasquez were identified. Other than a legal folding pocketknife, no weapons were found on anyone located in the home. When asked for identification, A.T. provided a false name. Later, Officer Faiman learned A.T.'s true name and that he was wanted for a parole violation.

While the police were present, no one in the home said anything about a crime being committed. They said "everything was cool, they didn't need any police assistance." Officer Faiman did not notice any computer equipment, but he was not looking for it. His focus was on the people inside. The television was not on, there was no beer in view, nor was there any food being prepared or grilled at the home. Thereafter, the investigation concluded and the officers left the residence.

Roy Gomez testified that he was living with his parents and cousin in January 2010. He recalled the day the police came to the house. A couple friends had come over to watch football and "hang out." He could not recall everyone's name.[11] Wolfe was there; he and Wolfe would get together now and then to watch football. Gomez could not recall how often Wolfe had been to his home; he had never been to Wolfe's house. Anaya was also there, arriving with Wolfe. Gomez had been introduced to Anaya previously through a friend whose name he did not remember. There were five or six people total.

Everyone arrived at the same time because Gomez recalled hearing the doorbell. He believed he answered the door and went outside to speak with them first. Everyone greeted one another, "nothing really serious." Then, with the exception of a few people who had stayed outside to smoke, the group headed inside. They had only been sitting down and watching television for two to three minutes when the police arrived. Gomez could see through the front window when the police arrived, and he went outside to see what the problem was.

The police advised him they had been sent about "a burglary or something going on." Gomez did not want the police to go inside his home, but he did acknowledge he was on parole and thus subject to search. He told the police there was no reason for them to go inside. He sat outside on the curb while the house was searched. After the police left, the group stayed at the house "for a little bit, watched TV and stuff, you know, and then everybody took off."

His cousin A.T. had a lot of computers. A.T. tried to sell everything he had that day, and did sell a computer to Wolfe after the police left. A.T. carried the computer he sold to Wolfe out to Wolfe's white Blazer.

Gomez stated there had not been any dispute or argument that day, nor did any physical violence occur. He did not know if he talked to Detective Guzman after his cousin's arrest. At the police station, Gomez "pled the right to remain silent," so he did not give a statement.[12] He denied telling the detective there had been a little misunderstanding and it had been straightened out and was not gang related. He did not tell Guzman he was struck or hit, nor did he tell Guzman that he did not know Wolfe. Neither did he recall telling Guzman anything about computers.

Although he used to be a gang member, Gomez was no longer a gang member because he "grew out of it." And he just "hung out" with the West Side Tulare Nortenos. Gomez has three felony convictions, the last in 2005.

Jaime Rodriguez testified for the defense. In January 2010, he recalled walking on the street in Tulare on his way to see his friend Isabel. He saw two friends standing outside a house he later learned belonged to Gomez. He stopped to say hello to Manuel Rubio and Mario Duarte. They spoke for a few minutes and then Gomez invited them inside to watch the polo game and to barbeque. There were no arguments, fights, or disagreements. They watched the polo game for a few minutes before the police arrived. They had gone into a back room to smoke the marijuana Rodriguez had with him. They also looked at some computers; A.T. offered to sell the computers. The police arrived, but after checking everyone's identification, they left. Rodriguez then left because he was

10. Jesus Flores, a correctional deputy with the Tulare County Sheriff's Department, testified that on February 5, 2010, he was working at the main jail. He and Detective Guzman were escorting A.T. toward an interview room. As the group passed cell number 7, Flores heard someone say, "A[.], don't do it, don't do it." Flores looked back and saw Wolfe.

11. Later, Gomez testified that he knew who Delgado and Pompa were. He thought he knew who Mario Duarte, Manuel Rubio and Jaime Rodriguez were as well. He claimed hearing the names of the others present that day "refreshed [his] mind."

12. Detective Guzman interviewed Gomez on February 4, 2010, at the Tulare Police Department. The videotaped interview was played for the jury.

nervous. He was on probation and did not want to go back into custody.[13]

On February 4, 2010, Tulare police officers conducted a probation compliance check at a residence in Tulare. The officers were going to attempt to take Wolfe into custody. No one responded to the front door. Helicopter surveillance, however, noted someone leaving through the back. After a vehicle pulled out of the garage, a traffic enforcement stop was conducted on a white Chevy Blazer. Wolfe's girlfriend Desiree Villareal was contacted. She reported that Wolfe was at work. A subsequent probation search was conducted and numerous computer parts and equipment were located in the garage.

Detective Guzman with the Tulare County Police Department was assigned to investigate an incident involving A.T. Related thereto, on February 4, 2010, Wolfe and Anaya were taken into custody. Following *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) warnings, Anaya gave a recorded statement. He indicated he was helping his girlfriend's uncle — Robert Pompa — pick up and load some computer equipment. He recalled carrying out a monitor and keyboard from inside a home. Anaya admitted knowing Delgado. He denied being a gang member himself, but acknowledged associating with Northerners, or Nortenos.

On February 5, 2010, Detective Guzman responded to the main jail. He and Deputy Flores were walking with A.T. Passing Wolfe's cell, he heard Wolfe say, "[D]on't do it A[.], don't do it."

During the investigation Detective Guzman listened to more than 10 calls made from the Tulare County Sheriff's Department pretrial facility. He recognized the persons speaking in those phone calls as Wolfe, his girlfriend Desiree Villareal, and Wolfe's stepbrother Dexter Rabadan. Several of the recorded phone calls were played for the jury.[14]

Facts Relevant to the Gang Allegations

Patrick O'Donohoe is a peace officer with the City of Tulare. While on duty on November 20, 2006, O'Donohoe came into contact with Anaya. At the time, Anaya was wearing blue jeans, a gray sweatshirt, and white shoes with red shoe laces, a red belt, and a red and black '49ers beanie.

Tony Espinoza is a detective with the Tulare Police Department assigned to the gang unit. On July 16, 2009, the detective came into contact with Mario Duarte and Manuel Rubio. Duarte and Rubio, accompanied by Johnny Hernandez, were sitting on a park bench in Tulare. Duarte was photographed wearing various items of red clothing. There was writing or gang graffiti on the table in red ink, and each of the individuals had a red permanent ink marker in his possession.

On January 29, 2010, Detective Espinoza was on duty and conducted a traffic stop of a vehicle; the front license plate was not fully secured. Wolfe was the driver and Steven Delgado was the passenger. In a photo taken during the traffic stop, Wolfe was photographed wearing various items of red clothing. A few days later, on February 4, 2010, Detective Espinoza assisted with the search of a residence. The car he had pulled over a few days earlier containing Wolfe was located at the home.

Detective Guzman was designated a gang expert. He estimated there were over 400 active gang members in Tulare. He described the formation of the Norteno gang and the signs and symbols related to the gang. The gang's activities included assaults, assaults with a deadly weapon, robberies, drug sales, and weapons possession. Guzman also testified to predicate offenses, gang packets, and the gang modules at the Bob Wiley Detention Facility.

In Detective Guzman's opinion, Wolfe is an active Northerner gang member and was on January 31, 2010. His opinion is based upon police reports, arrests, contacts, jail housing assignments, and information known to the department.

It is also the detective's opinion that Anaya is an active Northerner gang member and was on January 31, 2010. Guzman's opinion is based on the fact he asked Anaya if he was a gang member and Anaya responded, " 'I guess so.' " His opinion is also based on Anaya's jail housing assignment and the fact that San Francisco '49ers clothing is typically worn as a symbol of the Northern gang.

Detective Guzman was also of the opinion that Delgado, Pompa, Duarte, Rubio and Rodriguez were all active gang members. Further, the detective believed A.T. was a gang member until January 31, 2010. He was no longer a gang member because he failed to pay his debt and because A.T. was considered a "rat" for telling the police about a crime committed by a fellow gang member.

Presented with a hypothetical situation involving similar facts, Detective Guzman believed the type of crimes alleged to have been committed would have been committed at the direction of and for the benefit of the Norteno criminal street gang. Additionally, those crimes would have been committed in association with the Norteno criminal street gang and furthered its objectives.

Defense expert Albert Ochoa, a behavioral interventionist, worked at a charter school in Visalia. He met with students, including those involved in gangs, every day. His past experience as executive director of a community center and mental health specialist at a youth services agency also put him in contact with young people involved in gangs, either as members or as associates. Ochoa has a certificate in basic

13. On cross-examination, Rodriguez qualified the group was only discussing a barbeque. Detective Guzman testified he took Rodriguez's statement, and Rodriguez had told him there was a barbeque going on in the backyard. Rodriguez made no mention of marijuana.

14. An investigator aide with the Tulare Police Department downloaded recordings of inmate phone calls made from the Tulare County jail to a particular telephone number provided by Detective Guzman. Phone calls were made on January 16, February 14, February 18 and February 25, 2010. The same telephone number was associated with all four calls.

counseling and psychology from La Puente Bible College. He is regularly contacted regarding his opinion on gang issues and has been previously certified as a gang expert in Tulare County.

Following his interviews with Wolfe and Anaya, and his review of the materials provided by Wolfe's attorney, Ochoa concluded that Wolfe and Anaya associate with the gang. In his opinion, they are not active gang members.

On cross-examination, Ochoa indicated that a photograph of Anaya wearing items of red clothing, taken during a 2006 contact with law enforcement, would not change his opinion that Anaya was not a gang member because the photo was six years old. Ochoa indicated he had not listened to the phone call between Wolfe and his half brother so that fact was not considered for purposes of his opinion. Ochoa acknowledged that he is paid to testify. He further acknowledged that were he to have found Wolfe and Anaya to be active gang members, he would not have been pa*id.* Ochoa could not opine as to whether Delgado, Pompa and the others were gang members because he did not interview them. Ochoa agreed that an associate of the gang does not "call shots." He further agreed that if someone "pleads to a crime" and admits a related gang enhancement, he would opine that individual is an active gang member.

DISCUSSION

[I & II, *See* ORDER, *Ante*]

III. SENTENCING ISSUES

Defendants contend the court committed *Apprendi* (*Apprendi v. New Jersey* (2000) 530 U.S. 466) error when it sentenced them to life terms on counts 1 and 5 pursuant to section 186.22, subdivision (b)(4)(C).

A. Relevant Authorities

The Sixth and Fourteenth Amendments to the United States Constitution preclude a trial court from imposing a sentence above the statutory maximum based on a fact, other than a prior conviction, not found to be true by a jury. (*Cunningham v. California* (2007) 549 U.S. 270, 274–275; *Blakely v. Washington* (2004) 542 U.S. 296, 303–304; *Apprendi*, *supra*, 530 U.S. at p. 490.)

In a recent decision, issued after briefing had been completed in this matter, the United States Supreme Court determined that facts that increase a mandatory minimum sentence must be submitted to the jury. (*Alleyne v. United States* (2013) 570 U.S. __ [133 S.Ct. 2151] (*Alleyne*).) In so holding, the court overruled its earlier contrary decision in *Harris v. United States* (2002) 536 U.S. 545.[15]

In *Alleyne*, the jury convicted the defendant of robbery affecting interstate commerce (18 U.S.C. § 1951(a)) and using or carrying a firearm in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)). Using or carrying a firearm subjects an offender to a term not less than five years, brandishing the firearm subjects an offender to a term not less than seven years, and discharging the firearm subjects an offender to a term not less than 10 years (18 U.S.C. § 924(c)(1)(A)(i)-(iii)). More specifically, the jury's verdict indicated the defendant had used or carried a firearm during the commission of the offense. (*Alleyne*, *supra*, 133 S.Ct. at pp. 2155–2156.)

The presentence report recommended a seven-year sentence, which reflected the mandatory minimum sentence relative to an offender who had brandished a firearm during commission of the offense. Alleyne objected to the recommended seven-year term, contending it would violate his Sixth Amendment right to a jury trial as the jury did not find brandishing beyond a reasonable doubt. The district court, however, relied upon *Harris v. United States* in overruling Alleyne's objections, explaining that brandishing was a sentencing factor it could properly find by a preponderance of the evidence. Thus, it imposed the seven-year term. The court of appeals affirmed. (*Alleyne*, *supra*, 133 S.Ct. at p. 2156.) In reversing, the Supreme Court stated:

> "In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. [Citation.] While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. [Citations.] Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." (*Alleyne*, *supra*, 133 S.Ct. at p. 2158.)

The *Alleyne* court held that "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." (*Alleyne*, *supra*, 133 S.Ct. at p. 2161.)

Subdivision (b) of section 186.22 concerns increased terms of imprisonment when the jury finds that a crime is committed for the benefit of a criminal street gang. When applicable, subdivision (b)(1) imposes an additional term of imprisonment when a defendant is convicted of a felony and the jury determines the crime was committed for the benefit of a criminal street gang. It begins by stating, "Except as provided in paragraphs (4) and (5), any person convicted of a felony" committed for the benefit of a criminal street gang

15. A decision of the United States Supreme Court that results in a new rule will apply to all criminal cases still pending on direct review. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

shall receive the following sentence enhancements: (1) an additional term of two, three, or four years if only the enhancement is found true (§ 186.22, subd. (b)(1)(A)), (2) an additional term of five years if the felony is a serious felony as defined in section 1192.7, subdivision (c) (§ 186.22, subd. (b)(1)(B)), or (3) an additional term of 10 years if the felony is a violent felony as described in section 667.5, subdivision (c) (§ 186.22, subd. (b)(1)(C)). Subdivision (b)(2) and (3) of that section assists the trial court in determining which term of the sentencing triad should be imposed when the court has discretion to choose the additional term.

On the other hand, subdivision (b)(4) of section 186.22 requires the trial court to impose a term of life in prison instead of the sentence otherwise required by law for the following crimes: home invasion (§ 213), carjacking (§ 215), felony shooting at an inhabited building (§ 246), infliction of great bodily injury while discharging a firearm from a vehicle in the commission of a felony (§ 12022.55), "extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1." (§ 186.22, subd. (b)(4)(B), (C).)

When imposing the indeterminate term of life in prison, the trial court must choose a minimum sentence that is the greater of two alternatives. The first alternative is the term that would otherwise be imposed pursuant to section 1170 for the underlying conviction, including any enhancements. (§ 186.22, subd. (b)(4)(A).) The second alternative depends on the crime committed. The minimum term is 15 years if the crime is a home invasion (§ 213), carjacking (§ 215), felony shooting at an inhabited building (§ 246), or if the defendant inflicts great bodily injury while discharging a firearm from a vehicle in the commission of a felony (§ 12022.55). (§ 186.22, subd. (b)(4)(B).) The minimum term is seven years if the crime is "extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1." (§ 186.22, subd. (b)(4)(C).)

In sum, when a crime is committed for the benefit of a criminal street gang, subdivision (b) of section 186.22 requires the trial court to impose either (1) a term of imprisonment in addition to the term otherwise imposed by law, or (2) a life term with a minimum term of imprisonment determined as explained in the preceding paragraphs if the crime is specifically identified in subdivision (b)(4).

B. Analysis

Count 5 charged defendants with dissuading a witness in violation of section 136.1, subdivision (b)(1), by unlawfully attempting to prevent and dissuade A.T. from reporting a crime to law enforcement. Count 1 charged defendants with extortion in violation of section 518. It was further alleged as to both counts that defendants committed the offenses "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members." Additionally, it was alleged the offenses caused "the sentencing to be pursuant to section 186.22(b)(4)."

The verdicts found defendants guilty of "Dissuading a Witness From Reporting a Crime, to wit [A.T.], a violation of… Section 518 [*sic*: 136.1, subd. (b)(1)]" as charged in count 5. The jury also found the enhancement true: "We, the Jury, further find to be true the special allegation that said offense was COMMITTED FOR THE BENEFIT OF, AT THE DIRECTION OF, OR IN ASSOCIATION WITH A CRIMINAL STREET GANG …." The jury returned a guilty verdict on count 1 that read:

> "We, the Jury, find the Defendant guilty as charged in Count 1 of the First Amended Information, to Extortion by Threat or Force of [A.T.], a violation of… section 518 which occurred on or about January 31, 2010.
>
> "We, the Jury, further find to be true the special allegation that said offense was COMMITTED FOR THE BENEFIT OF, AT THE DIRECTION OF, OR IN ASSOCIATION WITH A CRIMINAL STREET GANG, within the meaning of… sections 186.22(b)."

The trial court imposed sentences of 14 years to life for the convictions as charged in count 5 and count 1. The base term was seven years to life, which was doubled because each defendant had suffered a prior "strike" conviction within the meaning of section 667, subdivision (e).

In this case, the trial court relied on subdivision (b)(4)(C) of section 186.22 to impose terms of seven years to life. Imposition of this sentence is permissible only if defendants were convicted of "extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1." (*Ibid.*)

C. The Terms Imposed for Witness Intimidation

Defendants argue they were convicted only of attempting to dissuade a witness from reporting a crime, rather than attempting to dissuade a witness from reporting a crime with threats. The People assert that because the phrase "threats to

victims and witnesses" refers to section 136.1, any conviction pursuant to this section permits imposition of the indeterminate sentence of life with a minimum term of seven years.

Subdivision (b)(1) of section 136.1 provides that anyone who attempts to prevent or dissuade another person who has been the victim of a crime from reporting a crime to law enforcement is guilty of an offense that may be punished as either a misdemeanor or a felony. It also specifically names subdivision (c) as an exception to its provisions.

By comparison, subdivision (c) of section 136.1, in relevant part, provides that every person who commits an act described in subdivision (b) where the act is accompanied by force or by an express or implied threat of force is guilty of a felony punishable by imprisonment for two, three, or four years. Accordingly, a defendant who attempts to dissuade a witness from reporting a crime is guilty of either a misdemeanor or a felony, but, if the defendant's attempt is accompanied by an express or implied threat of force, the defendant is then guilty of a felony with an increased term of imprisonment.

As explained above, defendants were alleged to have violated section 136.1, subdivision (b)(1), attempting to dissuade a victim of a crime from reporting a crime to law enforcement. The amended information did not charge defendants with using an express or implied threat of force. The instructions also did not inform the jury it must find defendants used an express or implied threat of force.[16] Nor did the jury make a specific finding the defendants used an express or implied threat of force. This is the exact factual setting in *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1065, where we held:

> "Section 186.22, subdivision (b)(4)(C) permits imposing a sentence of seven years to life only if the defendant makes 'threats to victims and witnesses, as defined in Section 136.1.' Only subdivision (c)(1) of section 136.1 refers to the use of an implied or express threat. Therefore, the plain meaning of section 186.22, subdivision (b)(4)(C) is that a seven-year-to-life sentence can be imposed only if the jury convicts the defendant of attempting to dissuade a witness by use of an implied or express threat of force pursuant to section 136.1, subdivision (c)(1)."

The People assert that the holding in *People v. Neely* (2004) 124 Cal.App.4th 1258 permits the sentence imposed because the reference to section 136.1 in section 186.22, subdivision (b)(4)(C) is not limited to any particular subdivision of that section and should be construed as including all the offenses set forth in section 136.1. We do not agree. In *Neely*, the defendant contended his prior conviction of violating section 136.1, subdivision (a)(2) did not qualify as a serious felony under section 1192.7, subdivision (c)(37). (*People v. Neely*, *supra*, at p. 1261.) Section 1192.7, subdivision (c)(37) defines "intimidation of victims or witnesses, in violation of Section 136.1" as a serious felony. Noting that none of the specific offenses in section 136.1 mentions "intimidation," *Neely* concluded that the phrase "intimidation of victims or witnesses" in section 1192.7, subdivision (c)(37) constituted a shorthand description of section 136.1 generally. (*People v. Neely*, *supra*, at p. 1266.) Unlike section 1192.7, subdivision (c)(37), however, section 186.22, subdivision (b)(4)(C) cannot be construed as a shorthand description of section 136.1 in its entirety. The requirement of force or threat in section 136.1 is particularly limited to a violation of subdivision (c) that expressly and unambiguously creates a statutory distinction between offenses that require force or threat and offenses that do not.

Although the intent of section 186.22, subdivision (b)(4) is to increase the punishment for gang-related crimes,[17] we cannot overlook the clear and unambiguous language of both section 186.22, subdivision (b)(4)(C) and section 136.1.

Defendants were not convicted of violating section 136.1, subdivision (c)(1). The jury did not find defendants used an implied or express threat of force in committing the crime. Therefore, the trial court erred in imposing a sentence of seven years to life pursuant to section 186.22, subdivision (b)(4)(C) because the section did not apply to the crime of which defendants were convicted and because the sentences imposed were based on a fact not found true by the jury. (*People v. Lopez, supra*, 208 Cal.App.4th at pp. 1064–1065.) We will vacate the sentences imposed pursuant to count 5 and remand the matters to the trial court for resentencing on that count.

D. The Terms Imposed for Extortion

Similarly, defendants contend the life terms imposed for the extortion convictions are not authorized because the jury did not find the crime of extortion was committed by means of fear induced by threat. They further argue the errors are not harmless.

In the first amended information, defendants were charged, in pertinent part, as follows:

16. The jury instruction on count 5 was read to the jury as follows: "The defendants are charged in Count 5 with intimidating a witness in violation of… Section 136.1. [¶]… [¶] To prove that a defendant is guilty of this crime, the People must prove that: [¶] One, the defendant maliciously tried to encourage [A.T.] from making a report that he or she was the victim of a crime to any peace officer or state or local law enforcement officer. [¶] And, two, [A.T.] was a crime victim. [¶] And, three, the defendant knew he was trying to discourage [A.T.] from causing arrest or causing prosecution, and intended to do so. [¶] A person acts maliciously when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice. [¶] As used here, witness means someone… who knows about the existence or nonexistence of facts relating to a crime. [¶] A person is a victim if there's reason to believe that a federal or state crime is being or has been committed or attempted against him or her. [¶] It is not a defense that the defendant was not successful in preventing or discouraging the victim. It is not a defense that no one was actually physically injured or otherwise intimidated."

17. See *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1256.

> "COUNT 1 [¶] On or about January 31, 2010, in the County of Tulare, the crime of EXTORTION, in violation of… SECTION 520, a FELONY, was committed by [defendant] WOLFE and [defendant] ANAYA, who did unlawfully extort money and other property from A.T., by means of force and threat such as is mentioned in Section 519."

The jury was instructed with CALCRIM No. 1830, Extortion by Threat or Force.[18]

As previously noted, section 518 defines extortion as the "obtaining of property from another, with his consent… induced by a wrongful use of force or fear." Section 519 defines fear for purposes of the crime of extortion: "Fear, such as will constitute extortion, may be induced by a threat…: [¶] 1. To do an unlawful injury to the person or property of the individual threatened." With regard to punishment for the crime of extortion, section 520 provides as follows:

> "Every person who extorts any money or other property from another, under circumstances not amounting to robbery or carjacking, by means of force, or any threat, such as is mentioned in Section 519, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three or four years."

Essentially, on appeal defendants argue that because the verdict forms specifically referenced section 518, rather than section 519, the sentences imposed are unauthorized. Defendants argue there exists a distinction between "means of force" and "means of a threat" for purposes of the applicability of either subdivision (b)(1)(C) or (b)(4)(C) of section 186.22.

Defendants were alleged to have committed the crime of extortion pursuant to section 518, although the information specifically references sections 519 and 520. Section 518 requires a finding of the use of force or fear induced by threat. The jury was instructed with CALCRIM No. 1830, which expressly provided the People must prove the defendants "threatened to unlawfully injure or used force" and "[w]hen making the threat or using force, the defendant intended to use that fear or force" to obtain consent, and that as "a result of the threat or use of force, the other person consented to give the defendant money or property," and that as a result of that same "threat or use of force" the victim gave the defendant money or property. The jury's verdicts found defendants guilty "as charged in Count 1 of the First Amended Information," "Extortion by Threat or Force… a violation of… section 518 …." Here, too, the jury did not make the required factual findings pertaining to fear necessary to permit the trial court to impose the alternative sentence pursuant to section 186.22, subdivision (b)(4)(C).

A punishment of seven years to life is authorized "if the felony is extortion, as defined in Section 519." (§ 186.22, subd. (b)(4)(C).) We are not convinced, as argued by the People, that specific reference to section 519 instead of section 518 is a legislative oversight. Rather, the plain language of section 186.22, subdivision (b)(4)(C) is that it applies to criminal street gang threats that induce fear, such as will constitute extortion, "as defined in Section 519; or threats to victims and witnesses as defined in Section 136.1." It seems clear that this subdivision seeks to impose longer imprisonment for felony convictions for extortion and witness/victim intimidation when they are committed by criminal street gang members using felonious threats to commit these felonies. For that reason, we are also not persuaded by the People's assertion that defendants' interpretation of the statute is one that the "Legislature cannot have intended" for it would lead to "an absurd result." As defendants contend in their reply brief, reserving the seven years to life term for the crime of extortion that involves a threat comports with the Legislature's desire to punish that threat more harshly. The use of force only, on the other hand, could amount to nothing more than a battery. Therefore, we believe the Legislature intended extortion committed via a felonious threat to be treated more harshly than extortion by simple force.

Under *Apprendi*, the court could not properly impose sentences under this statute without findings by the jury that the elements were met. Because the jury was instructed on extortion under two theories — force or fear — and was not required to find that the extortion was based on threats inducing fear, it did not necessarily find this element true when it rendered its verdicts in count 1.

We cannot say the error in sentencing the defendants under section 186.22, subdivision (b)(4)(C) was harmless beyond a reasonable doubt. Without a specific finding, we can only speculate which theory the jury accepted as true, or whether it accepted both theories. If we were to engage in such speculation, however, we would conclude it is unlikely the jury found the extortion conviction based on a threat inducing fear. Instead, the evidence established that the victim handed over the money in his possession after one of the per-

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18. "The defendants are charged in Count ONE with extortion by threat or force in violation of… section 518.

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

"1. The defendant threatened to unlawfully injure or used force against another person or a third person;

"2. When making the threat or using force, the defendant intended to use that fear or force to obtain the other person's consent to give the defendant money or property;

"3. As a result of the threat or use of force, the other person consented to give the defendant money or property;

"AND

"4. As a result of the threat or use of force, the other person then gave the defendant money or property.

"The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

"The threat or use of force must be the controlling reason that the other person consented. If the person consented because of some other controlling reason, the defendant is not guilty of extortion.

"The threat may involve harm to be inflicted by the defendant or by someone else."

petrators punched him in the face. This was also the theory the People argued to the jury. Consequently, the sentences imposed on count 1 must be vacated and the matter remanded for resentencing under section 186.22, subdivision (b)(1)(C).

[III.E, III.F, IV & V *See* ORDER, *Ante*]

DISPOSITION

The convictions for receiving stolen property (§ 496, subd. (a); count 7) are reversed. Additionally, the matter is remanded for resentencing on count 5 (§ 136.1[19]) and count 1 (§ 518). The trial court is directed to amend the abstracts of judgment as follows: As to defendant Anaya, (1) only a single reference to the prior serious felony enhancement pursuant to section 667, subdivision (a) should appear (delete the subsequent five references) and (2) delete all references to the section 667.5, subdivision (b) enhancement. As to defendant Wolfe, delete the references to the prior serious felony enhancement in regards to the determinate terms imposed in counts 4, 6, and 7. In all other respects, the judgments are affirmed.

PEÑA, J.

WE CONCUR: POOCHIGIAN, Acting P.J., FRANSON, J.

19. We note the abstract of judgment for defendant Anaya incorrectly refers to the statute as section 136.