# THE RECORDER

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### NINTH CIRCUIT COURT OF APPEALS



### CALIFORNIA COURTS OF APPEAL





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# SUMMARIES

## Appellate Law

**New York corporation could not reinstate dismissed appeal of California judgment absent unequivocal showing of compliance with judgment-creditor's enforcement efforts in New York (Mosk, Acting P.J.)**

### *Stoltenberg v. Ampton Investments, Inc.*

C.A. 2nd; April 4, 2013; B235731

The Second Appellate District denied an application to reinstate an appeal. The court held that a New York corporation that was a California judgment-debtor could not reinstate its dismissed California appeal absent an unequivocal showing that it had fully complied with the judgment-creditor's New York enforcement efforts.

Herbert Stoltenberg and others (collectively, Stoltenberg) sued New York corporation Ampton Investments, Inc. and an individual (collectively, Ampton) in California. A jury found in Stoltenberg's favor. The trial court entered judgment against Ampton. Ampton filed an appeal with the California court of appeal, but did not post the necessary bond to stay its enforcement.

Stoltenberg registered the California judgment in New York. Stoltenberg subpoenaed financial information from Ampton. Ampton failed to comply with the subpoena. A New York trial court found Ampton in contempt. The New York court fined Ampton and ordered it to comply with Stoltenberg's subpoena or face further sanctions. Ampton filed an appeal in New York. Purportedly, the appeal challenged Stoltenberg's registered California judgment as well as the New York trial-court orders.

Stoltenberg filed a motion before the California court of appeal to dismiss Ampton's California appeal under the disentitlement doctrine. In response, Ampton contended the disentitlement doctrine could not be applied to orders from another jurisdiction, especially those that were not final pending appeal in that jurisdiction.

The court of appeal dismissed Ampton's appeal, holding that Ampton was not entitled to maintain its California appeal.

Ampton's willful disobedience and obstruction of the presumptively valid orders of the New York trial court were sufficient basis for dismissing its appeal under the disentitlement doctrine. Pursuant to *MacPherson v. MacPherson* (1939) 13 Cal.2d 271 and other cases, it is well settled that an appellate court has the inherent power to dismiss an appeal by a party that refuses to comply with a lower-court order. Under New York law, the Ampton orders had to be obeyed unless and until they were reversed on appeal. Under California law, the disentitlement doctrine applied to Ampton's non-compliance with and contempt of those same orders of the New York trial court.

The court rejected Ampton's argument that in explaining that the disentitlement doctrine bars a party from seeking "the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state," *MacPherson* intended to exclude the doctrine's application to sister-state orders or judgments. Neither *MacPherson* nor the other California cases that repeated the phrase "courts of this state" dealt with whether the disentitlement doctrine could be based on contempt or frustration of court orders issued by trial courts that were not "courts of this state."

Further, the court saw no basis in logic or law for treating the orders of the New York trial court differently than orders entered in California, given the federal Full Faith and Credit Clause and its implementation in 28 U.S.C. §1738. For purposes of the disentitlement doctrine, there was no meaningful distinction between New York trial-court orders and California trial-court orders related to enforcement of Stoltenberg's California judgment.

After the court filed its opinion, Ampton moved to reinstate its appeal. Ampton's counsel stated that Ampton had complied with Stoltenberg's information subpoena, but there was no offer of sworn proof. On the last day before the court's jurisdiction over the appeal was to expire, Ampton filed a supplement to its motion in which counsel represented that the New York trial court had just denied Stoltenberg's ex parte application to reinstate the contempt order. It appeared, however, that the New York trial court's order simply denied immediate reinstatement of the contempt order pending a later-scheduled hearing on its order to show cause.

The court denied the application to reinstate the appeal and issued a modified opinion to that effect. The court admonished that Ampton provided no competent and unequivocal evidence, in a timely fashion. Ampton needed to, and failed to, show that it had fully complied with Stoltenberg's information subpoena, that the New York trial court expressly found full compliance and vacated the contempt order, and that no further proceedings were pending or contemplated concerning the contempt order.

At most, Ampton submitted information not under oath that suggested it had made last-minute efforts to comply with the information subpoena, but that further proceedings concerning that compliance were pending in the New York trial court.

The court therefore denied the application to reinstate the appeal.

## Criminal Law

**Medical examiner's reliance on statements by non-testifying investigator did not violate confrontation clause (Gilbert, P.J.)**

## *People v. Mercado*

C.A. 2nd; May 7, 2013; B223451

The Second Appellate District affirmed a judgment of conviction and sentence as modified and denied a petition for writ of habeas corpus. The court held that a medical examiner's reliance on the out-of-court statements of a nontestifying investigator did not violate the defendant's rights under the confrontation clause.

For three years, Monica Mercado and Porsche Davis vied for the attention of the same man, Bryant Waller. One morning, after spending the night with Mercado, Waller was a passenger in her car when they encountered Davis, who was eight months pregnant with Waller's child. Davis and Waller had an angry exchange of words before Mercado, who was also angry, drove away. Mercado asked Waller how he could consider letting Davis have his baby. Mercado drove only a short distance, however, before she turned around and drove back towards Davis.

According to Mercado, she was arguing with Waller, who was trying to get out of the car. She reached across the front seat to hold the passenger door closed. Before she realized it, Davis was in front of her and Mercado had no time to stop. The car struck and ran over Davis, seriously injuring her and killing her unborn child.

Two independent witnesses who saw Mercado's car strike Davis gave a different version of events. They both stated that Mercado struck Davis deliberately before speeding away.

Waller initially told police that Mercado struck Davis deliberately. He later recanted and said it was an accident.

Mercado was charged with the attempted murder of Davis and the second degree murder of her child.

At trial, medical examiner Ogbonna Chinwah opined the baby's cause of death was blunt force trauma, resulting in a skull fracture. He characterized the death as a homicide, basing that conclusion on information he had received from a coroner's investigator. The investigator had told him the baby's mother had been intentionally run over by a car. Chinwah testified that this explanation was consistent with the baby's injuries. When asked if new information "that contradicted the investigator's report" might change his mind, Chinwah testified: "Except that information is totally unrelated to the original information that I got. For example, if I got an information [sic] that this incident happened when there was no altercation, that this driver was not even at the scene of this altercation, and this driver was just driving by, then I would say maybe, maybe that's true.... But the information that I got was so convincing and compatible to the finding that all the other information to me would be, maybe making up a story."

Mercado was convicted.

Defense counsel later moved for a new trial based on his post-trial receipt of a report by marriage and family therapist Sandra Baca, who was an expert on domestic violence. According to Baca, who had evaluated Mercado prior to trial, Mercado's history as the victim of domestic violence significantly impacted her impulse control in response to stress.

The trial court denied the motion.

Mercado appeal and filed a petition for writ of habeas corpus, arguing, among other things, that Chinwah's testimony regarding the cause of the baby's death violated her rights under the confrontation clause because Chinwah relied on the statements of the investigator, who was unavailable to be cross-examined at trial.

The court of appeal affirmed, holding that the admission of Chinwah's testimony was not prejudicial error.

Relying on *People v. Dungo* (2012) 55 Cal.4th 608, the court found the extra-judicial statements relied on by Dr. Chinwah in reaching his conclusion about the baby's manner of death were not "testimonial" under *Crawford v. Washington* (2004) 541 U.S. 36. The statements failed both the formality and the primary purpose tests as discussed in *Dungo. Dungo* held that a pathologist's observations about the condition of a victim's body merely recorded objective facts and lacked the formality to be deemed testimonial in nature. *Dungo* also concluded that an autopsy report, which is routinely prepared even in the absence of any criminal investigation, does not have as its primary purpose the furtherance of such an investigation. Rather, the purpose is to ascertain the cause or causes of the decedent's death. Both of these principles applied here, the court found. The investigator's statements lacked the formality necessary to be considered testimonial. Further, their purpose was not to facilitate Mercado's prosecution, but, rather, to assist Chinwah in determining the cause of the baby's death.

Even if there was (I)Crawford(I0 error, the court found, such error was harmless. In light of the overwhelming evidence of Mercado's guilt, including, but not limited to the testimony of the two independent eyewitnesses, the court found it not reasonably probably that the exclusion of Chinwah's testimony would have resulted in a more favorable verdict.

The court also rejected Mercado's contention that defense counsel was ineffective for failing to obtain Baca's report prior to trial. Mercado argued that Baca's report, and testimony, would have supported a heat-of-passion voluntary manslaughter defense. The court explained that such a defense has two components: a subject element and an objective element. The defendant must show that he or she actually, subjectively, killed under the heat of passion. But he or she must also show that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.

Here, the evidence presented at trial was more than sufficient to establish the subjective element of heat-of-passion provocation, i.e., that Mercado assaulted Davis in a jealous rage after learning Davis was pregnant with Waller's child. What was missing from Mercado's heat-of-passion defense was the objective element. Any testimony that Baca might have given was irrelevant to this objective element. Baca's report merely concluded that Mercado's responses were unique based on her alleged history of abuse. At best, this

substantiated the subject element of Mercado's heat of passion defense, but provided nothing to support the object element. There was thus, the court concluded, no reasonable probability the psychological evidence at issue here would have made any difference in the result.

The court modified the judgment of sentence to strike a three-year great bodily injury enhancement and otherwise affirmed, rejecting Mercado's remaining contentions of error as without merit.

# Criminal Law

**Counsel may waive jury trial on behalf of client at hearing on petition to extend commitment of client found not guilty by reason of insanity (Rushing, P.J.)**

## *People v. Tran*

C.A. 6th; May 7, 2013; H036977

The Sixth Appellate District affirmed a trial court order. The court held that defense counsel may waive a client's right to jury trial on a petition to extend the client's commitment as a person found not guilty by reason of insanity

Dawn Tran pleaded not guilty by reason of insanity (NGI) to a sexual offense and was committed to a state mental hospital for treatment. Before the commitment expired, the Santa Clara County District Attorney filed a petition to extend it pursuant to Penal Code §1026.5(b). At that time, under subdivisions (b)(3) and (b)(4), the trial court was required to "advise the person named in the petition ... of the right to a jury trial" and to conduct a jury trial "unless waived by both the person and the prosecuting attorney.".

At a pretrial hearing, the court met with defense counsel and the prosecutor in chambers to discuss procedural matters. At that time, both parties waived a jury trial off the record.

Tran thereafter appeared at the bench trial. The trial court sustained the petition and extended Tran's commitment.

Tran appealed, arguing he was denied the right to a jury trial because the court failed to advise him of his right to a jury and erred in accepting counsel's waiver. He argues that the court was required to obtain his express, personal waiver.

The People countered that the bench trial was proper because, as a rule, counsel in NGI commitment cases has exclusive control over whether to have a bench or jury trial.

The court of appeal affirmed, holding that counsel's waiver of Tran's right to a jury trial was effective.

The court found that that §1026.5 does not require an NGI's personal waiver or give counsel exclusive control over the jury decision. Rather, counsel can waive a jury trial at the NGI's direction or with his or her knowledge and consent; and counsel can also do so when the circumstances even over an NGI's objection when the circumstances give counsel reason to doubt the NGI's competence to determine what is in his or her best interests.

The court noted, however, the well established rule that "an appellate court will never indulge in presumptions to defeat a judgment. It will never presume that an error was committed, or that something was done or omitted to be done which constitutes error." Accordingly, the appellant bears the burden to affirmatively establish error and then demonstrate that it resulted in a miscarriage of justice that requires reversal.

Here, the record was silent concerning whether Tran was in fact aware of his right to a jury trial in this proceeding and whether he knew about, directed, authorized, or objected to counsel's waiver. Under the circumstances, Tran could not possibly satisfy his burden to show that counsel's waiver was invalid and therefore that the court erred in conducting a bench trial.

The court directed, however, that to protect the defendant's right to a jury trial and ensure compliance with the statute, when a trial court conducts a bench trial, the record must affirmatively establish the circumstances and validity of the jury waiver. The trial court and parties must state on the record the facts establishing the NGI's awareness of the right to a jury and the validity of counsel's waiver or, in the alternative, the record must contain an advisement and waiver form signed by the NGI.

Justice Elia concurred on the ground that no reversible error had been shown. Just Elia nonetheless declined to endorse the majority's new rules other than as nonbinding, recommended practices, finding the court lacked the authority to impose procedural rules on local courts.

# Criminal Law

**Defendant showed good cause for discovery of dishonesty complaints about law enforcement officers who may have lied about identifying themselves when they arrested him at home (McConnell, P.J.)**

## *Sisson v. Superior Court (Dumanis)*

C.A. 4th; May 6, 2013; D063022

The Fourth Appellate District granted in part and denied in part a petition for writ of mandate. The court held that a defendant showed good cause for the discovery of dishonesty complaints about law enforcement officers who may have lied about identifying themselves when they arrested the defendant at his home.

Ronald Sisson absconded from parole. Several law enforcement officers and parole agents went to Sisson's home to arrest him. Sisson attempted to leave his home in an auto just after the officers arrived. In the ensuing confrontation, Sisson's passenger in the auto was killed by gunfire. Sisson

was charged with one count of murder and three counts of assaulting a peace officer with a deadly weapon. Pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and statutes, Sisson sought discovery of any complaints of excessive force, dishonesty, and fabrication of charges or evidence in the personnel files of the officers and the parole agents.

The trial court granted Sisson's motion in part, finding good cause for in camera review of the personnel files of three of the officers and one of the parole agents for complaints of dishonesty and false reporting. The trial court denied Sisson's motion in part as to such complaints about three other officers and a second parole agent and as to all of the officers and parole agents with respect to complaints of excessive force. Following in camera review, the trial court found discoverable information as to two of the officers, which it provided to Sisson. Sisson petitioned for writ of mandate.

The court of appeal granted in part and denied in part the petition, holding that Sisson showed good cause for discovery of complaints of dishonesty by some of the officers.

Sisson showed good cause for discovery of information related to complaints of dishonesty or false reporting as to officers Scott May, George Escanuelos, Kevin Westman, and parole agent Shad Colbert. Sisson's declaration stated that May, Escanuelos, Westman, and Colbert lied about having heard officers identify themselves to Sisson. Thus, he declared, he was caused to believe that he was under attack and therefore attempted to escape.

The court found that whether Sisson knew that the men who approached his auto were officers potentially bore on whether Sisson intentionally assaulted the officers and on whether he acted provocatively for purposes of the provocative-act murder doctrine. Sisson's declaration provided a specific factual scenario of officer misconduct that consisted of the officers' deliberately lying about what transpired to cover up one another's transgressions.

Sisson's declaration also provided a plausible factual foundation. He claimed the officers were not wearing uniforms, they were not driving marked vehicles, and they did not identify themselves. Thus, Sisson's declaration supported a defense based on his lack of knowledge and lack of intent. There was a logical link between the information sought and this defense because Sisson might be able to use information related to past acts of dishonesty or false reporting to impeach the officers' credibility and to cast reasonable doubt on their version of events. Therefore, in camera review of the officers' personnel records for such information was required.

Accordingly, the trial court erred in denying Sisson's motion as to May, Escanuelos, Westman, and Colbert as to this type of information. As to officer Bang Le, however, the court found no error. Sisson declared merely that Le was evasive in his account of events, but did not elaborate. Sisson also declared that Le lied about seeing little to none of the incident, but Sisson did not provide a specific factual scenario with a plausible factual foundation to support that statement.

With respect to discovery of complaints of excessive force by officers Larry Fettis and Eric Wisener and parole agent Eric Kraus, the court rejected Sisson's argument that such past complaints were material. Sisson claimed the officers used excessive force in firing at Sisson's auto, which he argued would have served as an absolute defense to the murder charge. But under (I) In re Joe R. (1980) 27 Cal.3d 496, the focus of the provocative act murder doctrine is on the defendant's conduct and not on the state of mind of the party firing the fatal shot. Thus, whether the officers used reasonable force in firing at Sisson's auto was immaterial to Sisson's murder defense.

Finally, the court decided that in its in camera review, the trial court improperly relied on the sworn testimony of the custodians of the disputed personnel files as to the contents of those files. The trial court also improperly relied on the custodians' opinions as to whether any information in those files was discoverable. Under *People v. Mooc* (2001) 26 Cal.4th 1216, the trial court was required to examine the produced records themselves and could not rely on the custodians' testimony.

# Criminal Law

**No clear error in distric court's finding that government did not act in bad faith when it violated order that it preserve possibly exculpatory evidence (Noonan, J.)**

## *United States v. Sivilla*

9th Cir.; May 7, 2013; 11-50484

The court of appeals affirmed in part and reversed in part a judgment of the district court and remanded. The court held that there was no clear error in a trial court's finding that the government did not act in bad faith when it violated a court order directing that it preserve possibly evidence.

Victor Sivilla was arrested while crossing the border in a Jeep that contained cocaine and heroin hidden in its engine manifold. Law enforcement officers preserved the drugs. The district court granted Sivilla's motion to preserve the Jeep. However, Sivilla's Jeep was sold at auction and stripped for parts. Sivilla moved to dismiss or for a remedial instruction that Sivilla had no opportunity to inspect the Jeep because the government failed to preserve it in violation of the district court's order.

Sivilla defense to the charges was that, two days before he crossed the border, he had lent his Jeep for several hours to his sister-in-law's long-term but since deceased boyfriend. Sivilla claimed he was himself victimized.

The district court denied the motion, finding that there was no bad faith on the part of the government. The district court also refused to give the remedial instruction. At trial, Sivilla contended that he was a "blind mule" and did not know that

the drugs were in his Jeep. However, a jury convicted Sivilla as charged. The district court sentenced Sivilla to prison. Sivilla appealed, contending that the government's failure to preserve the Jeep denied him due process.

The court of appeals affirmed in part, reversed in part, and remanded, holding that the district court properly found that the government did not act in bad faith in not preserving the Jeep.

The exculpatory-evidence value of the Jeep was not obvious. Thus, Sivilla was unable to establish that the government's actions rose to the level of bad faith required by *Arizona v. Youngblood*, 488 U.S. 51, notwithstanding that the government was negligent in not preserving the Jeep.

However, the district court erred in basing its denial of the remedial instruction on its finding there was no bad faith. Bad faith was not the correct legal standard. Sevilla correctly identified the standard in *U.S. v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979), which held that where the government bears the burden of justifying its conduct and the accused of demonstrating prejudice, courts must balance "the quality of the government's conduct" against "the degree of prejudice to the accused."

Here, the court found, the quality of the government's conduct was poor. The Jeep was destroyed while in the custody of the government. Further, the prosecutor promised to protect the Jeep but actually participated in the events that led to the failure to preserve. As to the degree of prejudice to Sivilla, the court considered it significant. There was only inadequate substitute evidence that Sivilla could use to rebut the government's theory that he must have known that the drugs were in the Jeep based on how long and involved a process it was to remove them.

That substitute evidence consisted of photographs that were pixelated and at the least difficult to decipher. The court opined that any expert witness who was presented only with the photographs would have concluded that next to nothing could be determined from them. Rather, in order for Sivilla to mount his only defense – that he did not know that the drugs were in the Jeep – Sevilla's counsel's in-house expert witness for hidden compartments in vehicles would have needed access to the Jeep itself, not merely to grainy and indecipherable photographs.

Accordingly, under *Loud Hawk*, a remedial jury instruction was warranted.

# General Civil Practice

**Dispute over court reporter's rates should have been addressed in trial court where litigation was pending (Gilbert, P.J.)**

## *The Las Canoas Company, Inc. v. Kramer*

C.A. 2nd; May 7, 2013; B238729

The Second Appellate District affirmed a judgment. The court held that a party's dispute over the rates charged by a court reporter must be addressed in that trial court where the litigation is pending.

The Las Canoas Company, Inc. was a defendant in a legal action in Santa Barbara County. Las Canoas paid court reporter Evelyn Kramer some $1,200 for copies of three depositions, at a rate of $2 per page.

Four years later, in Ventura County, Las Canoas sued the court reporter and others, alleging it was entitled to copies at a reasonable rate pursuant to Code Civ. Proc. §2025.510(c), and that the court reporter's rates were "unlawful" and "unfair" within the meaning of Bus. & Prof. Code §§17200 et seq. Las Canoas sought restitution for excessive fees, as well as an injunction to impose limits on the court reporter's future rate for copies furnished to non-noticing parties.

The trial court sustained Kramer's demurrer without leave to amend, finding it lacked subject matter jurisdiction.

The court of appeal affirmed, holding that the trial court lacked subject matter jurisdiction.

The court explained that the trial court did not have subject matter jurisdiction to determine this action for equitable relief from alleged excessive court reporter's fees because Las Canoas did not enforce its right to a reasonable copy rate by motion to the judge presiding over the Santa Barbara action.

Under §2025.510(c), a non-noticing party has a statutory right to obtain a copy of deposition transcripts and exhibits at a "reasonable rate." The non-noticing party may challenge the "reasonableness" of the rate by motion in the trial court in which the action is pending. That court has authority to set the rate under its inherent authority to control the conduct of ministerial officers in pending actions in order to protect the administration of justice.

*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014 addressed the issue of alleged unreasonable fees. The *Serrano* court opined that the trial court that is in the best position to resolve such a dispute in a timely fashion is the court where the action is pending. The court of appeal agreed and held further that, absent extraordinary circumstances, the court in the action in which the dispute arises is the only court that has jurisdiction to resolve the issue.

Here, Las Canoas's complaint admitted that the rate dispute arose in the Santa Barbara action. Las Canoas might have had a remedy but it did not seek relief in that proceeding. It was not entitled to seek relief before the court of appeal.

# Tax

**Statutory method for assessing value of publicly owned property leased to private party violates California Constitution (Klein, P.J.)**

## *California State Teachers' Retirement System v. County of Los Angeles*

C.A. 2nd; May 7, 2013; B225245

The Second Appellate District reversed a judgment and remanded. The court held that a state statute setting the rate of taxation for government-owned property leased to a private entity is unconstitutional.

The California State Teachers' Retirement System (STRS) owned an office located in the County of Los Angeles. STRS leased a retail space in that building to Dong Kim and others.

Although property taxes could not be assessed against STRS, as a public entity, the county levied a property tax against Kim. STRS paid the tax, but later applied to the county's Assessment Appeals Board to reduce the assessed value of Kim's leasehold interest and for a refund. The board denied the application.

STRS sued the county for a refund.

The trial court granted summary judgment for the county.

The court of appeal reversed and remanded, holding that Gov. Code §7510(b)(1), insofar as it prescribes the method for determining the assessed value of a private lessee's leasehold interest in real property owned by a state public retirement system, is unconstitutional.

Section 7510(b)(1) provides that where, as here, a lessee has leased less than all of the property, the lessee's tax is based on "the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system," with the lessee's allocable share based on the lessee's percentage of the total leasable square feet of the property. In other words, the court found, under the statute the lessee's tax is based on the full cash value of the property, even though the lessee holds only a possessory interest in the property.

The court found two constitutional defects in the statute's valuation methodology. First, §7510(b), insofar as it requires a lessee to pay property tax on constitutionally exempt public owned real property, violates Cal. Const. art. XIII, §3(a) on its face. Section 3(a) provides that property owned by the state is exempt from taxation. Section 7510(b)(1) bases a lessee's assessment on the lessee's allocable share of the full cash value of the property, based on the lessee's percentage of the total leasable square feet of the property. The vice in §7510(b)(1) is that it values tax exempt real property using the fee simple value of the property, and taxes the lessees based on the entire assessed value. Under the statute, the exempt remainder or reversionary interest, belonging to the public retirement system owner, is included in the assessment of the lessee's possessory interest. Consequently, the statute violates the prohibition against assessing property taxes on publicly owned real property.

Further, by including the full value of the fee interest in the assessable value of the tenant's possessory interest, §7510(b)(1) also violates the constitutional prohibition on taxing property in excess of its fair market value set forth in Cal. Const. art. XIII, §1. Section states: "Unless otherwise provided by this Constitution or the laws of the United States: ... (a) All property is taxable and shall be assessed at the same percentage of fair market value." Accordingly, although Kim's possessory interest in STRS's building was taxable, the correct standard for valuation of the possessory interest was fair market value, rather than the formula dictated by §7510(b)(1).

# FULL TEXT OPINION

## Ninth Circuit Court of Appeals

Cite as 13 C.D.O.S. 4589

**UNITED STATES OF AMERICA,**
Plaintiff-Appellee,

**v.**

**VICTOR HUGO SIVILLA ,** Defendant-Appellant.

No. 11-50484
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:10-cr-02966-WQH-1
Appeal from the United States District Court for the Southern District of California
William Q. Hayes, District Judge, Presiding
Argued and Submitted December 4, 2012—Pasadena, California
Filed May 7, 2013
Before: Harry Pregerson, John T. Noonan, and Richard A. Paez, Circuit Judges.
Opinion by Judge Noonan

### COUNSEL

Todd Burns, Burns & Cohan, San Diego, California, for Appellant.

Bruce R. Castetter, and Joseph S. Smith Jr., United States Department of Justice, San Diego, California, for Appellee.

### OPINION

**NOONAN, Circuit Judge:**

This case allows us to clarify what a criminal defendant must show in order to receive relief when the government destroys evidence before trial. We hold that while Supreme Court precedent demands that a showing of bad faith is required for dismissal, it is not required for a remedial jury instruction. We therefore affirm the district court's denial of dismissal and reverse the denial of a remedial jury instruction. We remand for a new trial with a remedial jury instruction.

### FACTS

Victor Hugo Sivilla owned a business selling perfume in the street markets of Tijuana, Mexico. A few days a week, Sivilla would cross into California to buy perfumes. On the evening of June 2, 2010, Sivilla loaned his gold Jeep Cherokee to his sister-in-law's long-term boyfriend, Josue. Josue kept the car for several hours. On June 4, 2010, Sivilla was in the Jeep, crossing from Tijuana into San Diego County. When he reached the border, Sivilla was directed to a secondary inspection. During the secondary inspection, the inspector noticed that the engine manifold appeared to be hand cut. The case agent and a contract mechanic removed approximately $160,000 worth of cocaine and heroin hidden inside the manifold. The process took about two hours. The case agent took photographs of the engine area of the car and the packages. The photographs are of poor quality. Government agents preserved the packages of drugs.

Sivilla was arrested. Josue was shot dead by unknown persons one month later.

### PROCEEDINGS

Five days after Sivilla's arrest, his counsel submitted to the government a letter requesting the preservation of evidence seized from the Jeep. On August 16, 2010, Sivilla moved to preserve and inspect evidence; he re-filed the motion on August 20, 2010, when the case received a new number. In the government's reply, it indicated its general willingness to preserve the evidence and stated that it would take necessary steps to do so until Sivilla could arrange an inspection. On August 30, the district court issued an oral order to the government to preserve the vehicle, indicating that a written order would follow in due course. Then, on September 21, 2010, the district court signed an order granting Sivilla's motion, specifically listing the Jeep among the evidence to be preserved.

Meanwhile, the Jeep was in the custody of the Department of Homeland Security's Fines, Penalties and Forfeitures Section (FP&F). FP&F was preparing the Jeep for forfeiture. It was forfeited on September 22, 2010, the day after the order was signed. The Jeep was transferred to an auction wholesaler.

The case agent, Special Agent Esgate, testified that he was in training outside of the San Diego area on September 23, 2010, when he received a fax from the prosecutor with a copy of the preservation order. He returned to his office on Saturday, September 25, 2010. Esgate sent an email to FP&F that said, in part, "I just received an order to preserve all evidence related to the case. Please do not destroy any evidence until the case has concluded." Esgate and the Assistant United States Attorney on the case both assumed that FP&F would hold onto all evidence and would contact them prior to destroying any of the evidence. They were wrong. The auction wholesaler sold the Jeep on November 23, 2010. It was stripped for parts.

In June 2011, Sivilla requested an opportunity to inspect the vehicle. Then, in July 2011, as the newly-appointed counsel for Sivilla became aware that the Jeep had been sold, he filed a motion in limine for sanctions in the event that the evidence was destroyed. He renewed the motion in August 2011 and requested dismissal of the indictment, or in the alternative, an instruction to the jury "that Defense counsel had no opportunity to inspect the vehicle because the government failed to preserve the vehicle in violation of a Court order." He argued at the motion in limine hearing that a skilled me-

chanic could have inspected the area where the drugs were found, estimated how long the drugs had been there, and informed him of the degree of difficulty of placing drugs in and later removing drugs from the vehicle. In particular, the defense wanted to assess whether lifts would have been necessary, whether the drugs would have been accessible if the car were parked on a public street, and whether it would take more than one person to remove the drugs. Sivilla's counsel reiterated that he wanted the case dismissed, and in the alternative and "without waiving my first request . . . that the court instruct the jury that we were not allowed or given an opportunity to inspect the vehicle even though the court had ordered that the government preserve [it]." The judge gave a verbal order denying the motion to dismiss and refusing to grant the jury instruction. The order included the following language: "The court will not inform the jury that defense counsel did not have an opportunity to inspect the vehicle because the government failed to preserve it as ordered. There is no bad faith, and the government has provided photographs of the vehicle and the drugs for use by the defense. However defense counsel is free to explore the facts regarding the failure to preserve the vehicle during trial."

At trial the government based its case on specific information about the engine manifold and how hard it was to remove the drugs from the Jeep. The case agent's photographs of the engine manifold were admitted as evidence. Many of them are indecipherable.

The defense's theory was that Sivilla did not know that there were drugs in the car – that Sivilla was a so-called "blind mule." Showing that the manifold could be accessed quickly in a public area while Sivilla was away from the car would have strengthened the blind mule theory. If drug traffickers could have accessed the drugs quickly, then the jury might have harbored a reasonable doubt about Sivilla's knowledge that his Jeep contained drugs. The Federal Defender's Office of San Diego, which represented Sivilla, has an investigator on staff who specializes in assessing secret compartments in vehicles. Neither he nor any other expert witness was able to assess the compartment, because the government sold the Jeep. Josue borrowing the car shortly before Sivilla's last crossing, and being killed after Sivilla's arrest, helped to bolster the blind mule theory, but without the ability to rebut the government's evidence about the engine manifold itself, Sivilla could not convince the jury that he was unaware that there were drugs in the Jeep.

The jury returned a verdict of guilty on all four counts. Sivilla received a 120 month sentence. He appealed to this court, arguing that his due process rights were violated by the government's destruction of evidence and that the trial judge erred in denying his motion to dismiss. In the alternative, Sivilla argues that the trial judge erred in requiring a showing of bad faith in order to give a remedial jury instruction.

## ANALYSIS

"Whether a defendant's due process rights were violated by the government's failure to preserve potentially exculpatory evidence is reviewed de novo. We review factual findings, such as the absence of bad faith, for clear error." *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1149 (9th Cir. 2012) (quotation marks and internal citation omitted). "The clear error standard is highly deferential and is only met when the reviewing court is left with a definite and firm conviction that a mistake has been committed." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011) (citation and internal quotation marks omitted).

In order for destruction of evidence to rise to the level of a constitutional violation, a party must make two showings. First, that the government acted in bad faith, the presence or absence of which "turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed." *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (citing *Arizona v. Youngblood*, 488 U.S. 51, 56-57 (1988)). Second, that the missing evidence is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984); *Cooper*, 983 F.2d at 931. Another configuration of this test requires the showing of bad faith where the evidence is only potentially useful and not materially exculpatory. *Del Toro-Barboza*, 673 F.3d at 1149. For evidence to be materially exculpatory, its exculpatory nature must be apparent. *Id.*

Under either configuration of the test, the inquiry turns on whether any exculpatory value of evidence in the Jeep was apparent to the government agents. The border agent testified that when he arrested Sivilla, he did not think there was any additional evidentiary value to the vehicle. He was asked whether he thought there was "significant evidentiary value to keeping the [Jeep] Grand Cherokee itself," and he replied "I did not. Pictures were taken of the compartment. You know, pictures were made of the vehicle." Any exculpatory value of the Jeep itself was not apparent.

The district court did not clearly err in finding that the government did not act in bad faith. As we explained in *Cooper*, "presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed." 983 F.2d at 931. The exculpatory value of the Jeep was not obvious. Thus, while the government was negligent in not preserving the evidence, Sivilla is unable to establish that the government's actions rise to the level of bad faith required by *Youngblood*. We affirm the district court's holding that there was no constitutional violation and its refusal to dismiss on that ground.

Sivilla argues in the alternative that the district court erred in requiring a showing of bad faith in order to grant the remedial jury instruction. We review a district court's refusal to give an adverse inference instruction, when properly raised by the appellant, for abuse of discretion. *United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992). The government

argues that Sivilla did not raise this argument in the district court. In light of the court's ruling on Sivilla's pre-trial motions, we are satisfied that he preserved the issue for appellate review.

Abuse of discretion is a two-part test in this circuit. First, the panel must "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, [the panel] must conclude [the trial court] abused its discretion." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009). If the trial court identified the correct legal rule, then the panel "determine[s] whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (internal quotation marks and citation removed).

The district court based its denial of Sivilla's claim on a lack of bad faith. Bad faith is the wrong legal standard for a remedial jury instruction. Sivilla correctly identifies the appropriate legal standard in *U.S. v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979). *Loud Hawk* is an en banc decision with several opinions. The rule governing sanctions for destruction of evidence is found in Judge Anthony Kennedy's 6–5 concurrence. Judge Trask's opinion in *Loud Hawk*, which announced the judgment of the court, suggests a bad faith requirement for sanctions when the government destroys or loses evidence. 628 F.2d at 1146. However, that section of Judge Trask's opinion was not joined by any other members of the en banc panel. We clarify today that Judge Kennedy's concurring opinion, joined by a majority of the en banc panel, clearly controls this issue.

According to Judge Kennedy's controlling concurrence, "[o]ur principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial." *Id.* at 1151 (Kennedy, J., concurring). Courts must balance "the quality of the Government's conduct" against "the degree of prejudice to the accused," where the government bears the burden of justifying its conduct and the accused of demonstrating prejudice. *Id.* at 1152.

In evaluating the quality of the government's conduct:

> the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification . . . . It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

*Id.* Here, evidence was destroyed while in the government's custody. The government was negligent in failing to adhere to reasonable standards of care in its prosecutorial functions. The prosecutor promised to protect the evidence but failed to take any affirmative action to that end. The government attorney prosecuting the case participated in the events leading to the failure to preserve. In total, the quality of the government's conduct was poor.

We now turn to the prejudice to the defendant.

> In analyzing prejudice, the court must consider a wide number of factors including, without limitation, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

*Id. Loud Hawk* turned on the quality of the available secondary or substitute evidence, which in that case was quite high. *Id.* at 1155–56. Here, the opposite is true. Sivilla sought to use his inspection of the Jeep to rebut the prosecution's argument that he must have known that the drugs were in the Jeep because of how long and involved a process it was to remove them from the car. The government introduced the testimony of Officer Cardenas to prove this point. The photographs were the only substitute evidence available to Sivilla to rebut this argument. But the photographs are inadequate because they are pixelated and difficult to decipher. Any expert witness presented only with the photographs would have concluded that next to nothing could be determined from them. In order for Sivilla to mount his only defense, that he did not know the drugs were in the car, the defense's in-house expert witness for hidden compartments in vehicles would have needed access to the vehicle itself, not grainy and indecipherable photographs. The prejudice to the defendant was significant. Applying *Loud Hawk*'s balancing test, a remedial jury instruction was warranted.

## CONCLUSION

We affirm in part, reverse in part, and remand the case to the district court for a new trial with instructions to grant the defendant a remedial jury instruction.

# California Courts of Appeal

Cite as 13 C.D.O.S. 4592

**CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM,** Plaintiff and Appellant,

**v.**

**COUNTY OF LOS ANGELES,** Defendant and Respondent.

No. B225245
In the Court of Appeal of the State of California
Second Appellate District
Division Three
(Los Angeles County Super. Ct. No. BC389742)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Reversed and remanded with directions.

Filed May 7, 2013

## COUNSEL

Moore & Associates, Kevin J. Moore for Plaintiff and Appellant.

Pillsbury Winthrop Shaw Pittman, Craig A. Becker, for Amicus Curiae California Public Employees' Retirement System in support of Plaintiff and Appellant.

Randy Ferris, Chief Counsel, Robert W. Lambert, Assistant Chief Counsel, Kiren Kaur Chohan and Crystal Ying Yu, Tax Counsel, for Amicus Curiae California State Board of Equalization in support of Plaintiff and Appellant.

Andrea Sheridan Ordin and John F. Krattli, County Counsel, Albert Ramseyer, Principal Deputy County Counsel, for Defendant and Respondent.

## OPINION

Plaintiff and appellant California State Teachers' Retirement System (STRS), a public entity, appeals a judgment following a grant of summary judgment in favor of defendant and respondent County of Los Angeles (the County) on a complaint for refund of property taxes.

STRS is authorized to invest in real estate. Because STRS is a unit of state government, property it owns is exempt from property taxation. (Cal. Const., art. XIII, § 3(a). However, the private lessees of real property owned by STRS are subject to property tax based on the lessees' possessory interest. The essential issue raised on appeal is the constitutionality of Government Code section 7510, subdivision (b)(1), insofar as it prescribes the method for determining the assessed value of a private lessee's leasehold interest in real property owned by a state public retirement system, when the lessee has leased only a portion of the property. [1]

Section 7510, subdivision (b)(1) provides where, as here, a lessee has leased less than all of the property, the lessee's tax is based on "*the lessee's allocable share of the full cash value of the property* that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system," with the lessee's allocable share based on the lessee's percentage of the total leasable square feet of the property. (*Ibid.*, italics added.) In other words, under the statute the lessee's tax is based on the full cash value of the property, even though the lessee holds only a possessory interest in the property.

We conclude there are two constitutional defects in the statute's valuation methodology. Section 7510, subdivision (b)(1), is facially unconstitutional insofar as it bases a lessee's assessment on the lessee's allocable share of the full cash value of the property, based on the lessee's percentage of the total leasable square feet of the property. Under the statute, the exempt remainder or reversionary interest, belonging to the public retirement system owner, is included in the assessment of the lessee's possessory interest. Consequently, the statute violates the prohibition against assessing property taxes on publicly owned real property (Cal. Const., art. XIII, §3(a)), as well as the prohibition on assessing property in excess of its fair market value. (Cal. Const., art. XIII, § 1.)

Therefore, the judgment will be reversed and the matter remanded for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. The subject property and the assessment.

In 1984, STRS, a public retirement system, purchased the subject real property, an office building at 924 Westwood

1. Government Code section 7510 states in pertinent part at subdivision (b)(1): "(b)(1) Whenever a state public retirement system, which has invested assets in real property and improvements thereon for business or residential purposes for the production of income, leases the property, *the lease shall provide*, pursuant to Section 107.6 of the Revenue and Taxation Code, *that the lessee's possessory interest may be subject to property taxation and that the party in whom the possessory interest is vested may be subject to the payment of property taxes levied on that interest.* The lease shall also provide that the full cash value, as defined in Sections 110 and 110.1 of the Revenue and Taxation Code, of the possessory interest upon which property taxes will be based shall equal the greater of (A) the full cash value of the possessory interest, or (B), *if the lessee has leased less than all of the property, the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system.* The full cash value as provided for pursuant to either (A) or (B) of the preceding sentence shall reflect the anticipated term of possession if, on the lien date described in Section 2192 of the Revenue and Taxation Code, that term is expected to terminate prior to the end of the next succeeding fiscal year. *The lessee's allocable share shall, subject to the preceding sentence, be the lessee's leasable square feet divided by the total leasable square feet of the property.*" (Italics added.)

All further statutory references are to the Government Code, unless otherwise specified.

Boulevard in Los Angeles (hereafter, the building) for $28.5 million. The building has approximately 143,377 in net rentable square feet. STRS owns the building in fee simple.

Because STRS is a public entity, its interest in the building is exempt from property taxation. (Cal. Const., art. XIII, § 3(a).) However, a private lessee of publicly owned property is subject to property taxation on its "possessory interest" in the property. (§ 7510, subd. (b)(1).) Therefore, STRS's lessees in the building were subject to property tax.

In January 1998, Dong Eil Kim and Chang Nim Kim, doing business as Mail Boxes, Etc. (collectively, Kim) entered into a five-year lease with STRS for a retail space consisting of 1,280 square feet on the ground floor of the building. In a 2003 amendment to the lease, the parties extended the lease for an additional five years, to terminate February 4, 2008.

The original lease required Kim to pay, "[i]n addition to Base Rent, … Tenant's Proportionate Share of Operating Costs for each calendar year to compensate for changes in Landlord's Operating Costs." The original lease obligated Kim to pay all property taxes imposed in connection with the leasehold.

A 2003 amendment to Kim's lease provided: "5. Tenant shall continue to be responsible for its NNN charges under the lease, except that the real estate tax component shall be billed directly to Tenant, rather than as a percentage of total taxes paid for the building."[2]

For the tax year July 1, 2006 through June 30, 2007, the County assessed the value of Kim's leasehold interest at $418,618. Based on the assessed value, the County levied a property tax against Kim in the amount of $4,983.34. STRS paid the County the amount of the tax owed by Kim.

### 2. Application for a reduced assessment and refund.

STRS and Kim then filed an application with the County's Assessment Appeals Board (Board) to reduce the assessed value of Kim's leasehold interest and for a refund. The application identified STRS as an "*affected party*" in the matter, and indicated the application was being presented as a "*test case*" to determine the appropriate valuation methodology for the various buildings STRS owns in Los Angeles County.

The application by STRS and Kim challenged the constitutionality of section 7510, and further argued that even assuming the statute were constitutional, its provisions had been misinterpreted and misapplied by the Assessor.

The Board denied the application. With respect to the constitutionality of the pertinent statute, the Board ruled that, as a quasi-judicial body, it lacked jurisdiction to declare the statute unconstitutional. The Board further found the Assessor did not misinterpret or misapply the provisions of section 7510, subdivision (b).

2. An NNN, or triple net lease, is one that passes on to the tenant all the maintenance and operating costs incurred for the leased property. (*Sierra View Local Health Care Dist. v. Sierra View Medical Plaza Associates* (2005) 126 Cal.App.4th 478, 485, fn. 4.)

### 3. Trial court proceedings.

#### *a. Pleadings.*

On April 25, 2008, STRS and Kim (collectively, plaintiffs) filed a verified complaint for refund of property taxes. They alleged in pertinent part: "The valuation methodology that the County Assessor used in making this assessment was unsound and did not properly apply the governing provisions of the California Constitution, statutes, administrative regulations and assessment procedures in evaluating [Kim's] possessory interest under the Lease ('the Possessory Interest'). Among other things… , 'assessing property tax on the full fee interest in the property rather than just the leasehold interest in the property' results in a differential taxation of real property that violates Article XXX, Section I of the California Constitution because the value taxed is greater than the fair market value of the lessee's possessory interest alone."

The complaint sought a judicial determination that: (1) section 7510 is void and unenforceable in that it violates the provisions of articles XIII and XIIIA of the California Constitution; (2) the method of valuation used by the County Assessor and by the Board was unsound and resulted in an improper and arbitrary value for Kim's possessory interest in the premises; and (3) the common areas of the building do not constitute possessory interests subject to taxation because the common areas do not satisfy the requirements of possession, independence and exclusivity under the applicable law. Plaintiffs requested a refund of taxes paid and that the matter be remanded to the Board so that the County may value the possessory interest in a manner consistent with the trial court's determination.

#### *b. Summary judgment papers; undisputed facts.*

The County and STRS presented the case to the trial court by way of cross-motions for summary judgment. Kim was not a participant in the summary judgment proceedings. The papers reflect the pertinent facts are largely undisputed, to wit:

The County determined the base year value of the building based upon STRS's fee simple interest in the entire property. The base year was 1985 and the base year value was STRS's purchase price of $28.5 million. The County trended the base year value forward a maximum of two percent per year from 1985 to 2006, pursuant to Proposition 13 (Cal. Const., art. XIIIa, § 2(b)), and the cumulative upward adjustment from 1985 to 2006 was 48.642 percent. Thus, for the relevant tax year commencing July 1, 2006, the County assessed the value of the building at $42,362,834. Of that sum, the County allocated $29,744,119 to the office space and the remaining $12,618,715 to the retail space in the building. The County established Kim's percentage of the total retail rentable square footage by taking Kim's square footage and dividing it by the total retail rentable square footage. The County determined Kim's premises represented 3.317437 percent of the total retail rentable square footage. Applying that percentage to the $12,618,715 value of the retail space in the

building, the County assessed the value of Kim's leasehold interest at $418,618. Based on the assessed value, the County levied property tax against Kim in the amount of $4,983.34.

In its moving papers, the County asserted section 7510 is lawful and val*id.*

STRS, in turn, argued the valuation methodology prescribed by section 7510, subdivision (b)(1), violates the California Constitution because: (1) it does not value taxable possessory interests in accordance with their fair market value; (2) it taxes property exempt from taxation; (3) its classification of taxpayers violates equal protection; and (4) its valuation methodology is not uniform in its application to all similarly situated taxpayers. STRS further contended the County violated the California Constitution in its application of section 7510, subdivision (b)(1) to Kim.

### *c. Trial court's ruling.*

On January 14, 2010, the motions for summary judgment came on for hearing and were taken under submission. Thereafter, the trial court granted the County's motion for summary judgment and took STRS's motion off calendar as moot. The trial court ruled on the undisputed "facts and given the relevant case law, the statute on its face and the valuation methodology as applied here has not been shown to be unconstitutional, violative of equal protection or arbitrary."

### 4. Appellate proceedings.

On June 21, 2010, STRS filed a timely notice of appeal from the judgment.

It appeared to this court the appeal by STRS presented a case of first impression in California, involving the assessment of a taxable possessory interest, a leasehold, in tax exempt property owned by a public retirement system. Due to the dearth of case authority and the statewide importance of the issue, this court sent a letter to counsel requesting supplemental briefing and inviting interested parties to participate as amicus curiae.

Our letter identified "two basic questions before this court: (1) Does [STRS], which is exempt from property taxation and which paid the property tax assessed to its lessee, have standing to challenge the lessee's tax assessment? and (2), if this court can reach the merits of the controversy, does… section 7510, subdivision (b)(1) fail to tax a lessee's taxable possessory interest in accordance with the possessory interest's fair market value so as to render the statute's valuation methodology unconstitutional?"

The California Public Employees' Retirement System (CalPERS) and the California State Board of Equalization (BOE) subsequently filed amicus briefs in support of STRS.[3]

## CONTENTIONS

STRS contends section 7510, subdivision (b)(1), violates the California Constitution because: (1) it does not value taxable possessory interests in accordance with their fair market value; (2) it taxes property exempt from taxation; (3) its classification of taxpayers violates equal protection; (4) its valuation methodology is not uniform in its application to all similarly situated taxpayers. STRS further contends the County violated the California Constitution in its application of section 75101, subdivision (b)(1) to Kim.[4]

## DISCUSSION

### 1. STRS, although its property is exempt from real property taxation, has standing to challenge the methodology used by the County to levy tax against STRS's lessee because STRS actually paid the tax.

Although Kim was a party below, Kim is not a party to this appeal. STRS is the sole appellant. The County contends STRS lacks standing to prosecute this appeal because STRS acted as a volunteer in paying the disputed tax that was levied on an unsecured basis against Kim. We reject the County's contention and conclude STRS has standing to prosecute this matter.[5]

The statutory scheme clearly contemplates that one person may pay property taxes on the property of another. Revenue and Taxation Code section 2910.7 states: "Any person who receives a tax bill respecting property which has been assessed to *another and who has power, pursuant to written or oral authorization, to pay the taxes on behalf of another* shall after the taxes have been paid in full and within 30 days of the receipt of the written request of the assessee, either deposit the original or a copy of the bill in the United States mail in an envelope addressed to the last known address of the assessee… or deliver it otherwise to the assessee within said 30 days." (Italics added.)

Further, Revenue and Taxation Code section 5140, pertaining to property taxation, specifies the persons authorized to bring a refund action. It states: "*The person who paid the tax,* his or her guardian or conservator, the executor of his or her will, or the administrator of his or her estate may bring an action only in the superior court… against a county or a city to recover a tax which the board of supervisors of the county or the city council of the city has refused to refund on a claim filed pursuant to Article 1 (commencing with Section 5096)

3. The BOE has special expertise in this area (*EHP Glendale, LLC v. County of Los Angeles* (2011) 193 Cal.App.4th 262, 274) and therefore its interpretation of the meaning and legal effect of section 7510 "is entitled to consideration and respect by the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).) Pursuant to Government Code section 15606, subdivisions (c) and (e), it is the role of the BOE to "[p]rescribe rules and regulations to govern… assessors when assessing" and to "[p]repare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation… ." (*Hahn v. State Bd. of Equalization* (1999) 73 Cal.App.4th 985, 990–991, fn. 4.)

4. In addition, STRS argues the trial court erred in granting the County's motion for summary judgment because there is no evidence to support the factual allegations made in the County's motion, and the County failed to make a *prima facie* case that it properly assessed Kim's leasehold interest.

5. Amicus BOE agrees STRS has standing to maintain this action.

of this chapter. *No other person may bring such an action*; but if another should do so, judgment shall not be rendered for the plaintiff." (Italics added.)

The " 'limitation contained in section 5140 simply means that *only a person who has actually paid the tax* may bring an action as opposed to the situation where someone else pays the property taxes of an owner of property.' [Citation.] [¶] [S]ection 5140 does not affect the determination of what property is taxable and what property is exempt. It merely defines the procedure for refunding taxes improperly collected. The procedure provides for refund to the person who, or entity which, paid the tax if the property was exempt. This orderly approach prevents double refund of the taxes to the party who paid the tax and the party who owns the tax-exempt property… [¶] … [S]ection 5140 is a mechanism for enforcing constitutional and statutory rights. Failure to follow the correct procedural rules can result in forfeiture of the power to enforce the constitutional right." (*Mayhew Tech Center, Phase II v. County of Sacramento* (1992) 4 Cal.App.4th 497, 510, italics added [state, as lessee, lacked standing to seek refund of taxes which it did not pay].)

The reason for Revenue and Taxation Code section 5140's "restrictive standing requirement is evident. This limitation frees the taxing authority from the burden, often far greater than in the instant case, of untangling a web of agreements and/or accounts in order to ascertain who is the proper recipient of any refund due. This determination is, of course, critical to avoiding a double payment." (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1305 [pension plan lacked standing to sue for refund of property taxes and penalties paid by trustee of the plan on its behalf].)

Because STRS, not Kim, paid the tax, it is STRS and only STRS which has standing to prosecute the refund action and standing to maintain this appeal. (Rev. & Tax. Code, § 5140.)

The County's characterization of STRS as a "volunteer" does not defeat STRS's standing. "Under our modern refund statutes, whether a tax payment was voluntary or involuntary is irrelevant. A taxpayer may seek a refund even without protesting the payment. This is a far cry from the common law right of action… , which extended only to payments extracted under compulsion." (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1017 [held, taxpayer has no right to jury trial in action for refund of state income taxes].)

Therefore, the County's assertion that STRS acted as a volunteer in paying Kim's property tax does not meet the issue. The inquiry, for purposes of determining standing to bring a refund action, is who paid the property tax (Rev. & Tax. Code, § 5140), not the person's motivation for paying the tax. Because STRS paid the tax, it has standing to litigate this matter.

We now turn to the merits of the appeal.

### 2. Standard of review; the extent of judicial deference to administrative agency interpretation.

We independently determine the proper interpretation of section 7510. "As the matter is a question of law, we are not bound by evidence on the question presented below or by the lower court's interpretation." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

As for the degree of deference to be accorded to the interpretation of amicus BOE, the Supreme Court addressed the issue of judicial deference to administrative agency statutory interpretation in *Yamaha, supra,* 19 Cal.4th 1. While "agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts" (*id.* at p. 7), "agency interpretations are not binding or necessarily even authoritative" (*id.* at p. 8). "Courts must, in short, independently judge the text of [a] statute… ." (*Id.* at p. 7.) *Yamaha* determined the weight accorded to an agency's interpretation is "fundamentally situational" (*id.* at p. 12, italics omitted) and "turns on a legally informed, commonsense assessment of [its] contextual merit" (*id.* at p. 14). *Yamaha* set down a basic framework of factors as guidance and concluded that the degree of deference accorded should be dependent in large part upon whether the agency has a " 'comparative interpretative advantage over the courts' " and on whether it has probably arrived at the correct interpretation. (*Id.* at p. 12.) Further, a court is less inclined to defer to an agency's interpretation of a statute than to its interpretation of a self-promulgated regulation. (*Ibid.*)

### 3. General principles re taxation of possessory interests.

In order to provide a framework for analyzing section 7510, we begin with a brief overview of fundamental principles pertaining to the creation and taxation of possessory interests in real property.

It is hornbook law that a "lessee has a present possessory interest in the premises, [while] the lessor has a future reversionary interest and retains fee title. [Citations.]" (*Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1190.) In other words, "when a possessory interest is created, the bundle of rights that constitute the fee simple interest is divided into a possessory interest (or interests) and a nonpossessory interest (or interests)… . [I]n the creation of a lease, the fee simple interest is divided into the leasehold interest (i.e., the possessory interest) and the leased fee interest (i.e., the nonpossessory interest)." (Assessors' Handbook Section 510, Assessment of Taxable Possessory Interests, published by BOE in December 2002, p. 17 (hereafter, Handbook) (available at www.boe.ca.gov/proptaxes/pdf/ah510.pdf).) A "possessory interest consists of a right to the possession of real property for a period less than perpetuity by one party, the holder of the possessory interest, while another party, the fee simple

owner, retains the right to regain possession of the real property at a future date." (*Id.*, at p. 1.)

The term "possessory interests" is defined by statute as "[p]ossession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person." (Rev. & Tax. Code, § 107, subd. (a); see also 18 Cal. Code Regs., § 20(a) [defining possessory interests in real property].)

Although publicly owned real property is exempt from taxation (Cal. Const., art. XIII, § 3), possessory interests in such land or improvements " 'are taxable under section 107 of the Revenue and Taxation Code and in pursuance of the constitutional mandate that "all property… shall be taxed." (Const., art. XIII, § 1.)' [Citation.] Privately held possessory interests in property owned by the federal government, the state, and municipalities are subject to taxation. [Citation.] Because a large proportion of California land was (and is) in public ownership, taxation of possessory interests is an important source of local government revenue. [Citations.]" (*Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1118.)

With respect to the standard for taxing possessory interests, under section 1 of article XIII of the California Constitution (considered in conjunction with the provisions of article XIIIA (Proposition 13)), all property is taxed according to its "full value," meaning its fair market value, unless an alternative standard of value is constitutionally prescribed. (Handbook, *supra*, at p. 16.) [6]

The applicability of the market value standard to taxable possessory interests also was made clear by the California Supreme Court in *De Luz Homes v. County of San Diego* (1955) 45 Cal.2d 546 (*De Luz*). "*The standard of "full cash value" applies equally to a leasehold interest. Accordingly, the assessor must estimate the price a leasehold would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other.*" (*Id.* at p. 566, italics added.)

The statutory definition of fair market value for assessment purposes is found in Revenue and Taxation Code section 110. " '[F]air market value' means the amount of cash or its equivalent that property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and both the buyer and the seller have knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used, and of the enforceable restrictions upon those uses and purposes." (*Id.* at subd. (a).)

The BOE has promulgated a regulation, Property Tax Rule 21 (18 Cal. Code Regs., § 21), which addresses the valuation of taxable possessory interests. Rule 21 provides in relevant part that "the fair market value of a taxable possessory interest is the fair market value of the fee simple absolute interest reduced only by the value of the property rights, if any, granted by the public owner to other persons and by the value of the property rights retained by the public owner (excluding the public owner's right to receive rent)." (18 Cal. Code Regs., § 21(b)(1).)

Perhaps "the cardinal feature of a taxable possessory interest is that it is an interest of finite duration. At some future date, the interest of the private possessor will terminate, and possession of the property will revert to the public owner." (Handbook, *supra,* at p. 21.) Therefore, "[w]hen valuing a taxable possessory interest, the appraiser must determine a term of possession for the interest… . The term of possession also affects the value of a taxable possessory interest. All else being equal, the longer the term of possession, the higher the value of the possessory interest." (*Ibid.*)

With this overview of the creation and valuation of private possessory interests in publicly owned property, we turn to section 7510, which is the focus of this controversy.

### 4. History of section 7510.

In 1982, the Legislature enacted Education Code former section 22313 to authorize STRS to invest a portion of its assets in real estate, so as to broaden STRS's investment opportunities on behalf of its members and retirees. (Assem. Bill No. 662 (1981–1982 Reg. Sess.) (AB 662); Stats. 1982, ch. 24, § 1.)

Property which is owned by STRS is exempt from real property taxation. (Cal. Const., art. XIII, § 3(a).) Therefore, at the same time that it expanded STRS's investment authority, the Legislature enacted section 7510 (Stats. 1982, ch. 24, § 2), to require STRS to reimburse local governments by way of an "in lieu" fee, so as to offset the local governments' loss of property tax revenues resulting from such investments. (State and Consumer Services Agency, Enrolled Bill Rep. on AB 662, Feb. 4, 1982.)

As enacted, section 7510 stated in pertinent part: "A public retirement system, which has invested assets in real property and improvements thereon for business or residential purposes for the production of income, shall pay annually to the city or county, in whose jurisdiction the real property is located and has been removed from the secured roll, *a fee for general governmental services equal to the difference between the amount that would have accrued as real property secured taxes and the amount of possessory interest unsecured taxes paid for that property.* The governing bodies of local entities may adopt ordinances and regulations authorizing retirement

6. Article 13A, added by Proposition 13 (adopted June 6, 1978), imposed a one percent limitation, providing "The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. (Cal. Const., art. XIIIA, § 1(a).) Article XIIIA defines "full cash value" in two ways: "the county assessor's valuation of real property as shown on the 1975–76 tax bill under 'full cash value' or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment." (Art. XIIIA, § 2, subd. (a).) The full cash value base thereafter may be adjusted to "reflect from year to year the inflationary rate not to exceed 2 percent for any given year… , or may be reduced to reflect… a decline in value." (Art. XIIIA, § 2, subd. (b).)

systems to invest assets in real property subject to the forgoing requirements." (Stats. 1982, ch. 24, § 2, italics added.)

In other words, although the lessees of real property owned by STRS or CalPERS paid property taxes based on the lessees' possessory interest, "the amount of the combined possessory interest in a parcel [was] less than the amount of the parcel's full fair market value. Therefore, the property tax collected from [CalPERS] and STRS lessees [was] less than what would be collected by the county if the parcel were privately owned. To make up for this loss in property tax revenues, [section 7510] allow[ed] local governments to charge [CalPERS] and STRS an 'in-lieu' fee to pay for the county's general services." (Governor's Office of Planning & Research, Enrolled Bill Rep. on Sen. Bill No. 1687 (SB 1687), Sept. 2, 1992.)

In 1991, the Attorney General opined section 7510's imposition of an "in lieu" fee for general government services upon CalPERS based on its ownership of real property was unconstitutional. (74 Ops.Cal.Atty.Gen. 6 (1991).) The opinion reasoned the " 'fee for general governmental purposes' imposed by section 7510 [was] not a 'fee' at all," but rather, "an 'ad valorem tax on real property' … , since it is exacted for the general expenses of local governments." (*Id.* at p. 3.)

The following year, mindful of the Attorney General's opinion, the Legislature amended section 7510 to abolish the "in-lieu fee and instead require that all leases include a provision which would directly pass the full property tax onto the lessee." (Governor's Office of Planning & Research, Enrolled Bill Rep. on SB 1687, Sept. 2, 1992, p. 1.) Thus, the Legislature decided to shift the entire property tax burden to the lessee, even though the lessee merely had held a possessory interest in the property.

As amended in 1992, section 7510 provided in relevant part at subdivision (b)(1): "Whenever a state public retirement system, which has invested assets in real property and improvements thereon for business or residential purposes for the production of income, leases the property, the lease shall provide, pursuant to Section 107.6 of the Revenue and Taxation Code, that the lessee's possessory interest may be subject to property taxation and that the party in whom the possessory interest is vested may be subject to the payment of property taxes levied on that interest. The lease shall also provide that the full cash value, as defined in Sections 110 and 110.1 of the Revenue and Taxation Code, of the possessory interest upon which property taxes will be based *shall equal the greater of (A) the full cash value of the possessory interest, or (B), if the lessee has leased less than all of the property, the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system.* The lessee's allocable share shall be the lessee's leasable square feet divided by the total leasable square feet of the property." (Stats. 1992, ch. 1158, § 1, p. 5409.)[7]

The constitutionality of the 1992 enactment was an issue from the inception. The legislative history of SB 1687 reveals that at the time the bill was under consideration, the BOE took the position that the 1992 amendment to section 7510 was unconstitutional. The BOE opined that "requiring the full value of the full fee interest to be assessed against a private lessee would amount to taxation of constitutionally exempt property. Accordingly, it appears that a constitutional amendment would be necessary to accomplish the purpose of this bill." (BOE, Legislative Bill Analysis of SB 1687, July 7, 1992.)[8]

Similarly, the Assembly Republican Caucus opined "this bill may be unconstitutional because it may tax leaseholders at a higher rate than the fair market value of a leasehold estate and it would require leaseholders to make payments based on the ownership interest in the property even though the lessee holds only a possessory interest." (Governor's Office of Planning & Research, Enrolled Bill Rep. on SB 1687, Sept. 2, 1992, p. 5.)

Notwithstanding these concerns, the Governor approved the bill and it took effect as an urgency measure on September 30, 1992.

In sum, the 1992 amendment to section 7510 was a departure from the standard of assessing possessory interests based on fair market value. Section 7510, subdivision (b)(1) created a special rule for investment property owned by a state public retirement system. Instead of taxing lessees of such property based on the fair market value of their possessory interests, the lessees were to be taxed based on their "allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon

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7. The two subsequent amendments to section 7510 are not in issue. (See Historical & Statutory Notes, 32A Pt. 3 West's Ann. Gov. Code (2008 ed.) foll. § 7510, p. 470; Stats. 1993, ch. 1187, § 2 (SB 70); Stats. 1994, ch. 1281, § 1 (SB 1972).) Because Kim was a lessee for the entire tax year ending June 30, 2007, we are not concerned with the portion of section 7510, subdivision (b)(1), which requires the valuation of a possessory interest to "reflect the anticipated term of possession if, on the lien date described in Section 2192 of the Revenue and Taxation Code [i.e., January 1 preceding the fiscal year for which the taxes are levied], that term is expected to terminate prior to the end of the next succeeding fiscal year." We also are not concerned with section 7510, subdivision (a), which, by its terms, does "not apply to property owned by any state public retirement system." (§ 7510, subd. (a)(3).)

Further, this is not a situation in which a single lessee occupies an entire property. Our focus is squarely on section 7510, subdivision (b)(1), as it relates to lessees such as Kim, who leased only a portion of the subject property. The pertinent provision is "the possessory interest upon which property taxes will be based shall equal the greater of (A) the full cash value of the possessory interest, or (B), *if the lessee has leased less than all of the property, the lessee's allocable share of the full cash value of the property…* ." (§ 7510, subd. (b)(1), italics added.)

8. Regardless of the BOE's longstanding doubt as to the constitutionality of section 7510, subdivision (b), as an administrative agency it lacks the power to declare a statute unconstitutional or to refuse to enforce a statute. (Cal. Const., art. III, § 3.5.)

acquisition by the state public retirement system," with the lessee's allocable share based upon the lessee's percentage of "the total leasable square feet of the property." (*Ibid.*)

### 5. Section 7510, subdivision (b), insofar as it requires a lessee to pay property tax on constitutionally exempt public owned real property, violates California Constitution article XIII, section 3(a).

The constitutionality of section 7510, subdivision (b), an issue which has been dormant since 1992, is now squarely before this court.

The key constitutional provision for our purposes is article XIII, section 3(a) of the California Constitution, providing that "Property owned by the State" is exempt from property taxation. STRS, as a unit of the State and Consumer Services Agency, is a unit of state government performing a state function. (Ed. Code, § 22001; 68 Ops.Cal.Atty.Gen. 71.) Therefore, property owned by STRS is exempt from property tax.

The issue is the valuation of Kim's possessory interest, consisting of a portion of the retail space in the subject building owned by STRS. In this regard, section 7510 states in pertinent part at subdivision (b)(1): "The lease shall also provide that the full cash value, as defined in Sections 110 and 110.1 of the Revenue and Taxation Code, of the possessory interest upon which property taxes will be based shall equal the greater of (A) the full cash value of the possessory interest, or (B), *if the lessee has leased less than all of the property, the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system.*" (Italics added.)

The County applied the valuation methodology of the statute. As set forth above in some detail (Factual & Procedural Background, *ante*, § 3(b)), the County valued Kim's possessory interest by taking Kim's percentage of the total leasable square footage of the building (3.317437 percent of the retail rentable square footage), and multiplying it by the Proposition 13 adjusted value of the building's overall retail space ($12,618,715), thereby assessing Kim's leasehold interest at $418,618. Based on the assessed value, the County levied property tax against Kim in the amount of $4,983.34.[9]

The defect in this valuation methodology, which is prescribed by section 7510, subdivision (b)(1), is that is taxes property which is constitutionally exempt from taxation. The County allocated the entire valuation of the building to the various lessees, such as Kim, without any reduction for the value of the reversionary interest retained by STRS, the lessor, which owns the building in fee simple.

Further, the County made no adjustment for the fact that Kim's lease was winding down. As the BOE recognizes, absent special circumstances, a taxable possessory interest normally declines in value with each passing year. Here, however, the County assessed Kim's leasehold interest at $418,618, toward the end of the lease term, based on nothing more than STRS's acquisition price of the property in 1985, trended forward to 2006. Thus, Kim's assessment was based on the fee simple value of the property, rather than on the value of the possessory interest.

The vice in section 7510, subdivision (b)(1), is that it values tax exempt real property using the fee simple value of the property, and taxes the lessees based on the entire assessed value. California Constitution article XIII, section 3(a), exempts "[*p*]*roperty* owned by the State," rather than the State itself. (Italics added.) The reversionary interest in the subject real property is State-owned property and therefore is exempt from taxation. Section 7510, subdivision (b)(1) does not become constitutional simply because it shifts the tax on the reversionary interest to the lessees of STRS. We conclude that in order to satisfy article XIII, section 3(a), which exempts STRS's real property from taxation, the value of the rights retained by the exempt owner of the real property must be excluded in order to determine the proper valuation of Kim's taxable possessory interest.

The BOE Handbook, dealing with possessory interests generally, is mindful of these issues. [10] It states: "With a taxable possessory interest, since the underlying fee simple interest held by the public owner is almost always tax exempt, it is necessary to separately value the possessory interest held by the private possessor. (Handbook, *supra*, at p. 1.) The Handbook explains: "The valuation approaches for taxable possessory interests are similar to the conventional approaches to value – the comparative sales approach, the income approach, and the cost approach – that are generally accepted and used in the valuation of the fee simple interest. *However, the conventional approaches must be modified to accommodate the finite duration of a taxable possessory interest and the corresponding fact that a portion of the fee simple interest in those rights, the reversionary interest, is retained by the public owner and is nontaxable.*" (Handbook, *supra*, at p. 23, italics added.)

The BOE's regulation pertaining to the valuation of a taxable possessory interest in publicly owned real property, Property Tax Rule 21, also covers the point. The regulation states in pertinent part, "the fair market value of a taxable possessory interest is the fair market value of the fee simple absolute interest *reduced only by the value of the property*

9. The methodology the County utilized in assessing Kim's possessory interest was inconsistent with the methodology set forth on the Los Angeles County Assessor's website. (http://assessor.lacounty.gov/extranet/overview/possint.aspx.) The website states: "The valuation of possessory interests is different from other forms of property tax appraisal in two ways: [¶] 1. *Only the rights held by the private user are valued.* [¶] 2. *The Assessor must not include the value of the lessor's retained rights in the property or any rights that will revert back to the public owner (the 'reversionary interest') at the end of the lease.* [¶] *As a result, possessory interest assessments are frequently less than the assessments of similar privately-owned property.*" (*Ibid.*, italics added.)

10. A court may properly consider the Handbook in determining the appropriate method of valuation. (*Carlson v. Assessment Appeals Bd. 1* (1985) 167 Cal.App.3d 1004, 1013.)

*rights, if any, granted by the public owner to other persons and by the value of the property rights retained by the public owner…* .” (18 Cal. Code Regs., § 21(b)(1), italics added.) The BOE’s valuation method, applicable to possessory interests generally, prevents the lessee from being taxed on the value of the reversionary interest retained by the public lessor, and therefore comports with California Constitution, article XIII, section 3(a).

**6. Section 7510(b)(1), by including the full value of the fee interest in the assessable value of the tenant’s possessory interest, also violates the constitutional prohibition on taxing property in excess of its fair market value. (Cal. Const., art. XIII, § 1.)**

Section 7510(b)(1) is constitutionally infirm not only because it taxes property which is exempt from taxation, but also because it taxes the lessee’s possessory interest on an assessed value in excess of fair market value.

California Constitution article XIII, section 1 states: “Unless otherwise provided by this Constitution or the laws of the United States: [¶] (a) All property is taxable and shall be assessed at the same percentage of fair market value.”

A “cardinal principle of property taxation is that property is ordinarily taxable at its ‘fair market value.’ (Cal. Const., art. XIII, § 1; [Rev. & Tax. Code,] § 110.5.)” (*Prudential Ins. Co. v. City and County of San Francisco* (1987) 191 Cal. App.3d 1142, 1149.) The term “fair market value” is defined by statute as “the amount of cash or its equivalent that property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other, and both the buyer and the seller have knowledge of all of the uses and purposes to which the property is adapted and for which it is capable of being used, and of the enforceable restrictions upon those uses and purposes.” (Rev. & Tax. Code, § 110, sub. (a).)

Thus, Kim’s possessory interest in STRS’s building was taxable, but the correct standard for valuation of the possessory interest is fair market value, rather than the formula *dicta*ted by section 7510, subdivision (b)(1).

***a. Proper valuation of fair market value of lessee’s possessory interest requires exclusion of value of reversionary interest.***

With respect to the valuation of possessory interests in tax exempt property, we are guided by *De Luz, supra,* 45 Cal.2d 546. That case involved a 562-unit housing project built by De Luz, a private developer, on federal land at Camp Pendleton, a military installation in San Diego County. (*Id*. at p. 553.) The federal government leased a 95-acre parcel to De Luz for a period of 75 years. De Luz, at its own expense, constructed the buildings and leased the units at federally specified rents. (*Id*. at pp. 553–555.) De Luz’s obligations included paying all taxes and assessments which were imposed “ ‘upon the Lessee with respect to or upon the leased premises.’ ” (*Id*. at p. 554.)

The *De Luz* court was presented with the issue of the valuation of the taxpayer’s possessory interest in the federally owned tax exempt real property. (*De Luz, supra,* 45 Cal.2d at p. 561.) *De Luz* noted that possessory interests are not usually assessed for property tax purposes separately from the fee unless there is a need to do so, such as where the fee is exempt from taxation. (*Id.* at p. 563; see 1 Tax. Cal. Prop. § 3:7 (4th ed.).)

*De Luz* explained: “The Constitution requires not only that all nonexempt property be taxed [citations], but that except as otherwise specified all property be assessed by the same standard of valuation. … . [¶] Since nonexempt possessory interests in land and improvements, such as the leasehold estates involved in the present actions, are taxable property [citations], they too must be assessed at ‘full cash value.’ In practice, assessors usually enter the entire value of land and improvements on the tax roll without distinction between possessory and reversionary interests, and since this practice results in a single amount reflecting both interests on the roll, the constitutional mandate that all property be taxed is obeyed. [Citation.] As between reversioners and possessors payment of the tax is a private arrangement. [Citations.] *When, however, the possessory interest is taxable and the reversion is exempt, only the possessory interest is subject to assessment and taxation*. [Citations.] ‘*When… there is a lease of land owned by the state or a municipality, the reversion being exempt from taxation, the usufructuary*[11] *interest alone is subject to tax in proportion to its value*; and in the absence of agreement to the contrary, the tax necessarily falls upon the lessee.’ [Citation.]” (*De Luz, supra*, 45 Cal.4th at pp. 562–563, italics added, fn. omitted.)

Thus, *De Luz* teaches that in valuing the possessory interest of a private lessee in tax exempt publicly owned real property, only the possessory interest is subject to tax in proportion to its value. Because the reversionary interest is exempt from taxation, its value must be excluded in determining the value of the possessory interest.

***b. Proper standard for determining valuation of lessee’s possessory interest is fair market value.***

As for the *method* of valuing the lessee’s possessory interest, *De Luz* held: “In valuing property, the assessor must adhere to the statutory standard of ‘full cash value,’ and must therefore estimate the price the property would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other… . . [¶] *The standard of ‘full cash value’ applies equally to a leasehold interest. Accordingly, the assessor must estimate the price a leasehold would bring on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other.*” (*De Luz, supra*, 45 Cal.2d at p. 566.)

11. “Usufructary” denotes the right of enjoying a thing, the property of which is vested in another. (Black’s Law Dict. (5th ed. 1979) p. 1384.)

Section 7510, subdivision (b)(1) flies in the face of these principles. It provides that for a property such as the instant building owned by STRS, where "the lessee has leased less than all of the property," the lessee's assessment is based on "the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the state public retirement system." (§ 7510, subd. (b)(1).) The lessee's allocable share is based on the lessee's proportionate share of the "the total leasable square feet of the property." (*Ibid.*) Thus, the statute disregards the lessee's constitutional right to be taxed purely on the value of the lessee's possessory interest. Instead, the statute takes the full cash value of the property, that is to say, both the possessory and reversionary interests, and allocates the entire value to the lessee – even though the lessee has nothing more than a possessory leasehold interest (the value of which normally declines with each passing year). Because the statute requires a fee simple valuation methodology, without reduction for the value of the property rights retained by the public owner, the valuation by definition does not represent the fair market value of the lessee's possessory interest.

We conclude section 7510, subdivision (b)(1), is facially unconstitutional (Cal. Const., art. XIII, § 1) because it allocates the entire value of the fee to lessees who merely hold a possessory interest in tax exempt real property. By allocating the entire value of the fee to the public entity's lessees, the statute requires the lessees to be taxed on a value in excess of the fair market value of the lessees' possessory interest.

**7. Remaining issues not reached.**

Having determined that section 7510, subdivision (b)(1), is facially unconstitutional because it fails to make a reduction for the value of property rights retained by the public lessor, we need not address STRS's argument that Kim's assessed value also should have been reduced to exclude the value of areas common to all tenants, such as parking structures, lobbies, elevators, hallways and restrooms. Likewise, it is unnecessary to reach STRS's argument that section 7510, subdivision (b)(1), violates California's equal protection clause (Cal. Const., art. I, § 7) by taxing similarly situated taxpayers in disparate ways with no rational basis, or any other issues.

## CONCLUSION

Section 7510, subdivision (b)(1), is facially unconstitutional insofar as it bases a lessee's assessment on the lessee's allocable share of the full cash value of the property, based on the lessee's percentage of the total leasable square feet of the property. Under the statute, the exempt remainder or reversionary interest, belonging to the public retirement system owner, is included in the assessment of the lessee's possessory interest. Therefore, the statute violates the prohibition against assessing property taxes on publicly owned real property (Cal. Const., art. XIII, § 3(a)), as well as the prohibition on assessing property in excess of its fair market value. (Cal. Const., art. XIII, § 1.)

## DISPOSITION

The judgment in favor of the County is reversed. The matter is remanded to the trial court with directions to remand the matter to the County Assessment Appeals Board to determine the proper value of Kim's leasehold interest, pursuant to the valuation principles promulgated by the BOE at 18 California Code of Regulations section 21, in accordance with the views expressed herein. STRS shall recover its costs on appeal.

**KLEIN, P. J.**

**We concur: CROSKEY, J., KITCHING, J.**

Cite as 13 C.D.O.S. 4601

# THE LAS CANOAS COMPANY, INC.,

Plaintiff and Appellant,

**v.**

# EVELYN HOPE KRAMER et al.,

Defendants and Respondents.

2d Civil No. B238729
In the Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. 56–2011-00394830-CU-BT-VTA)
(Ventura County)
Filed May 7, 2013

## COUNSEL

Daniel E. Engel for Plaintiff and Appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, Vince M. Verde, Allison C. Eckstrom, for Defendants and Respondents.

## OPINION

A trial court has statutory authority to determine the "reasonable rate" a court reporter may charge a "non-noticing party" for copies of deposition transcripts in a pending action. (Code Civ. Proc., §§ 2025.510, 128, subd. (a)(5);[1] *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014 (*Serrano*).) Here we decide that a non-noticing party who does not move for such an order in the pending action may not bring a subsequent action to obtain restitution for "unreasonable" copy charges or obtain injunctive relief setting a "reasonable rate" to be charged by that court reporter in all future actions.

The Las Canoas Company, Inc., doing business as Construction Plumbing (Las Canoas), appeals a judgment of dismissal.[2] The trial court issued an order sustaining a demurrer without leave to amend a class action filed by Las Canoas against Evelyn Hope Kramer, Merrill Communications, LLC, Legalink, Inc., and Wordwave, Inc. (collectively "the court reporter"). We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In a prior construction defect case, the plaintiffs added Las Canoas as a defendant after 57 depositions had been taken (the Santa Barbara action). Las Canoas's attorney requested the court reporter to provide copies of the depositions. The court reporter quoted a rate of $2 per page. The cost would be about $16,000 for 8,000 pages. Las Canoas offered to pay a $30 flat rate in exchange for a computer disc containing uncertified copies of the transcripts and exhibits. The court reporter did not agree. Las Canoas later purchased copies of three depositions at the rate of $2 per page, at a cost of about $1,200. It did not challenge the court reporter's rate in the Santa Barbara action.

About four years later, Las Canoas filed this action in Ventura County Superior Court against the court reporter. It alleges that it was entitled to copies at a reasonable rate pursuant to section 2025.510, subdivision (c), and that the court reporter's rates are "unlawful" and "unfair" within the meaning of Business and Professions Code, section 17200 *et seq.* Las Canoas seeks restitution for excessive fees and an injunction to impose one of four limits on the court reporter's future rate for copies furnished to non-noticing parties: (1) 25 cents per page for paper copies; (2) a $25 flat rate for a computer disc containing electronic copies, regardless of the number of pages; (3) a $15 flat rate for an e-mail transmitting electronic copies, also regardless of the number of pages; or (4) a $35 flat fee for "24/7 online access" to all deposition transcripts and exhibits in any particular case. Las Canoas also requests certification of a class consisting of all non-noticing parties who paid the court reporter more than 25 cents per page for copies in the four years preceding February 2011. It also requests costs of suit and attorney fees under the private attorney general doctrine. (§ 1021.5.)

The Ventura Superior Court sustained a demurrer without leave to amend. It ruled that it lacks subject matter jurisdiction and the defect cannot be cured by amendment. It reasoned that "[t]he deposition process is central to the administration of civil litigation, and court reporters, as deposition officers, are officers of the court and subject to the court's supervision. A non-noticing party's right to obtain a deposition transcript at a reasonable fee is statutory, and, as determined in [*Serrano*], the means to enforce that right is by motion to the judge presiding over the action in which the deposition is conducted. That judge is in the 'best position' to resolve any dispute. Reserving the issue to be subsequently determined by another judge would undermine the discretion vested in the original trial judge to control proceedings in his or her courtroom." The court found "[p]articularly troublesome" the request for a preliminary injunction "which would, if granted, directly abridge the discretion of judges assigned to future cases to determine the reasonableness of defendant's fees."

## DISCUSSION

The superior court does not have subject matter jurisdiction to determine this action for equitable relief from alleged excessive court reporter's fees because Las Canoas did not enforce its right to a reasonable copy rate by motion to the

1. All statutory references are to the Code of Civil Procedure unless otherwise stated.

2. We construe Las Canoas's premature notice of appeal from the order sustaining the demurrer to be a notice of appeal from the appealable judgment subsequently entered. (*Collins v. City & Co. of S. F.* (1952) 112 Cal.App.2d 719, 723.)

judge presiding over the Santa Barbara action. (§ 2025.510, subd. (c) ["any… party or the deponent, at the expense of that party or deponent, may obtain a copy of the transcript"]; *Serrano, supra,* 162 Cal.App.4th at p. 1038.)

A non-noticing party has a statutory right to obtain a copy of deposition transcripts and exhibits at a "reasonable rate." (§ 2025.510, subd. (c); *Serrano, supra,* 162 Cal.App.4th at p. 1036.) The non-noticing party may challenge the "reasonableness" of the rate by motion in the court in which the action is pending. (*Serrano,* at p. 1020.) That court has authority to set the rate under its inherent authority to control the conduct of ministerial officers in pending actions in order to protect the administration of justice. (§ 128, subd. (a)(5); *Serrano,* at p. 1029.)

Neither *Serrano* nor section 2025.510 expressly prohibits a separate action to enforce the statutory right to copies at a "reasonable rate." *Serrano* cautioned, "[T]he court in the pending action is in the best position to resolve that dispute in a timely fashion. To defer the determination to a later separate proceeding would be impractical and inefficient and would undermine the trial court's necessary authority under section 128, subdivision (a)(5)… ." (*Serrano, supra,* 162 Cal. App.4th at pp. 1038–1039.) We agree, and take *Serrano's dicta* a step further. Here we hold that, absent extraordinary circumstances, the court in the action in which the dispute arises is the only court to resolve the issue.

When no cognizable cause of action is alleged, the trial court lacks subject matter jurisdiction. (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 383.) The complaint admits that the rate dispute arose in the Santa Barbara action. Las Canoas may have had a remedy but did not seek relief in that proceeding. It is not entitled to seek relief here.

Las Canoas asked for leave to amend, but did not propose an amendment that would cure the defect. It proposes none on appeal. It did not reply to the respondents' brief. The plaintiff has the burden of proving that there is a reasonable probability a defect can be cured by amendment. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.) The trial court did not err when it sustained the demurrer without leave to amend.

### *Disqualification*

Las Canoas forfeited its contention that the trial judge was disqualified pursuant to section 170.1, subdivision (a)(6)(A)(iii) because he used the services of the court reporter while in private practice. The trial judge disclosed the facts to counsel before it ruled on the demurrer and asked if counsel had any comment. Las Canoas's counsel replied, "Not at this time, Your Honor. Thank you though." Las Canoas may not now challenge the judge's qualification. "It is incumbent upon litigants seeking to disqualify a judge for bias and prejudice to make their challenge… at the earliest practical opportunity after their appearance in the action and discovery of the facts constituting the grounds of disqualification." (*Robinson v. Superior Court* (1960) 186 Cal.App.2d 644, 649.)

## DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

**GILBERT, P.J.**

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

Cite as 13 C.D.O.S. 4603

**THE PEOPLE,** Plaintiff and Respondent,

**v.**

**MONICA MERCADO,** Defendant and Appellant.

No. B223451
In the Court of Appeal of the State of California
Second Appellate District
Division Three
(Los Angeles County Super. Ct. No. TA105988)

**In re MONICA MERCADO, on Habeas Corpus.**

No. B230947

APPEAL from a judgment of the Superior Court of Los Angeles County,

Eleanor Hunter, Judge. Affirmed as modified.

PETITION for writ of *habeas corpus.* Denied.

Filed May 7, 2013

## COUNSEL

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Assistant Attorneys General, Zee Rodriguez, Mary Sanchez, Joseph P. Lee and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

## OPINION

Defendant and appellant, Monica Mercado, appeals the judgment entered following her conviction for second degree murder and attempted murder, with enhancements for inflicting great bodily injury and inflicting injury knowing the victim was pregnant (Pen. Code, §§ 664 187, 12022.7, 12022.9.)[1] She was sentenced to state prison for a term of 32 years to life. In a related *habeas corpus* petition, Mercado claims she was denied the effective assistance of counsel.

We originally issued the opinion in this case on July 21, 2011. On June 29, 2012, the United States Supreme Court vacated the judgment and remanded the case to us for reconsideration in light of a new opinion, *Williams v. Illinois* (2012) 132 S.Ct. 2221 [183 L.Ed.2d 89]. After an initial round of supplemental briefing was solicited in order to address *Williams*, a second round was solicited because the California Supreme Court subsequently issued a trio of decisions analyzing *Williams.* After giving due consideration to all these high court opinions, we now reach the same result we did before.

The judgment is affirmed as modified. The *habeas corpus* petition is denied.

## BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

### 1. Prosecution evidence.

#### *a. Porsche Davis's testimony.*

Defendant Mercado and Porsche Davis were romantically involved with the same man, Bryant Waller. Davis testified she and Mercado had been fighting over Waller for three years. Davis testified she and Waller were living together, and that she believed he had ended his relationship with Mercado.

On April 5, 2009, Davis was eight months pregnant with Waller's child. That morning, as Davis was walking home from a McDonald's restaurant, she saw Mercado and Waller in a green Range Rover. Mercado was driving. Davis was angry because Waller had their car keys and she had been calling him because she was hungry; she felt Waller should have brought her breakfast that morning.

Mercado stopped the car. Davis walked to the passenger side and told Waller to give her their car keys. Waller tried to open the passenger door, but it wouldn't open. Mercado called Davis a bitch and Davis threw a cup of orange juice into the car, splashing Waller. Mercado drove off as Davis walked away. Davis looked to make sure Mercado was gone because Mercado had tried to run her over in the past. When she saw Mercado pull into a driveway, Davis kept walking. But when she looked again, Mercado was driving right toward her. Davis heard Waller say something like "watch out" or "Porsche, move." Davis put her hands on the car hood, curled into a ball and held her stomach. The next thing she knew she was underneath the Range Rover: "I just felt my baby go in my back and that was it… . And my stomach just went flat instantly." The front and back tires of the Range Rover had driven over her. Davis testified the car did not swerve before it hit her, and she never heard any sound to indicate Mercado had applied the brakes.

Davis was taken to a hospital. Her baby, delivered by cesarean section, was born critically injured and did not survive. Davis suffered a cracked pelvis, broken ribs and injuries to her spine and shoulder. She was hospitalized for three and a half weeks before being transferred to a rehabilitation center.

#### *b. Bryant Waller's testimony.*

Waller testified he had spent the night before the incident at Mercado's home after she invited him to come over. Mercado had previously obtained a restraining order against Waller, who had a prior conviction for domestic violence, but they spent an enjoyable evening. The next morning, Mer-

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

cado drove them to a Jack in the Box in her Range Rover. After leaving the restaurant, Waller saw Davis walking down the street. He told Mercado to ignore her. Mercado stopped the car. She and Waller talked about spending a day with their two boys. Mercado brought up Davis's pregnancy and said, ". . . I can't believe that you're going to let her have this baby." Waller said Davis was eight months pregnant and there was nothing he could do about it. Mercado seemed upset, but not really angry.

While he and Mercado were talking, Davis walked up and asked him for the keys to their car. When Davis used the word "bitch," Mercado said, "[H]old on bitch," and Davis tossed her cup of orange juice into the car, hitting Waller in the face. Everybody started screaming. Mercado put the Range Rover into reverse and backed up. Waller told her to pull over. Mercado asked if he was going "to save this bitch." Waller tried to get out of the car but he had trouble opening the door. The car started moving.

Mercado turned into a driveway, backed out, and started driving down the street. Waller was still trying to get the passenger door open. When he finally succeeded in getting it open a little, Mercado grabbed him and again asked if he intended "to go help this bitch." The car swerved when Mercado grabbed him. At that moment, the Range Rover hit Davis, although Waller did not see the actual impact. After Mercado let Waller out of the car a half block away, he ran back to Davis. Mercado drove off.

After listening to a recording of his police interview from the day after the incident, Waller acknowledged that as Mercado turned her car around in the driveway she said, "Oh, I'm going to kill this bitch." He added, "But I don't think that she meant it in that form." Waller also told the police that Mercado "backs up and then she guns towards my girl. And runs her over." Asked at trial if Mercado had driven right at Davis, Waller answered no. But the recording showed Waller had told police that Mercado "went right at her." Although at trial Waller testified he could not say if Mercado had acted deliberately, he told police he had "no sympathy for her" because "don't nobody on God's green earth would do anything to gun a pregnant woman down." At trial, Waller agreed he had been pretty clear in his police interview that he believed Mercado acted deliberately.

Waller also acknowledged that when he subsequently spoke to Mercado in jail, he told her he would wait for her and marry her. He told her he would "give them all the information they need to help" Mercado get out of jail. Waller acknowledged he did not tell police there had been any kind of "tussle" inside the car between him and Mercado, or that Mercado had grabbed his arm just before the car hit Davis.

On cross-examination by defense counsel the following colloquy occurred:

"Q. Mr. Waller, looking back on everything that happened and trying to remember what all you heard, are you certain that she said, 'I'm going to kill that bitch,' or could she have said something else?

"A. If it's what I said… in the police report, it's what was sa*id*."

***c. Independent eyewitness testimony.***

Bruce Cotton, a truck driver, was sitting on his porch that morning. He saw Davis walking down the street and arguing with Waller, who was riding in a car. Davis was yelling at him: "Give me my keys, give me my keys." Mercado pulled over and parked, and Cotton heard all three of them arguing. When Mercado started driving again, Davis walked after the car yelling, "[P]lease give me my keys." Mercado turned around, headed back toward Davis and stopped right in front of her. Davis put her hand on the hood of the car and kept yelling for her keys. Waller yelled, "No, no, don't do it. Don't do it. Stop, don't do it." Mercado "hit the accelerator" and rolled slowly over Davis. The car did not swerve or brake. Cotton testified Davis screamed and he heard her bones being crushed as Mercado ran over her with the car's front and back tires. It looked like Waller tried to get out of the car, but Mercado sped around the corner and Waller could not get out until she came to a stop. After Waller got out, Mercado sped off.

Jai Gilyard testified she was sitting in the living room of her mother's house that morning and she looked out the window when she heard loud voices. She saw Davis walking and a Range Rover driving by in the same direction. Then the same car drove by in the opposite direction. Gilyard heard someone in the car say, "If you don't get from in front of my car, I'm going to run you over." Gilyard saw Davis "rolling under the car."

Meanwhile, Cotton had called 911, jumped into his car and followed Mercado. When Mercado stopped at a gas station, he pulled in behind her. Cotton testified Mercado jumped out of her car, came over to him and "in a vengeful voice… asked me what the hell am I following her for." When Cotton told her she'd just run over a woman and left the scene of an accident, Mercado gave him a "like, so what" look. She jumped back into her car and sped off.

***d. Medical evidence.***

Dr. Virender Rehan attended at the delivery of Davis's baby by emergency caesarian section. The baby was almost dead at birth, her heart beating only occasionally. Her skull had been fractured, she was suffering from convulsions and there was extensive internal head bleeding. It was obvious she would not survive. When life support was disconnected, the baby died within minutes.

Deputy Medical Examiner Dr. Ogbonna Chinwah was asked what his work in the Coroner's Department entailed:

"Q. What are your duties and responsibilities as a medical examiner?

"A. I examine the bodies brought into the department to determine the cause and manner of death.

"Q. What does 'manner of death' mean?

"A. Manner of death is classified in five classifications: Natural, accident, suicide, homicide, and undetermined."

Chinwah testified he performed the autopsy on Davis's baby. Because of a catastrophic skull fracture, it would have been virtually impossible to save the baby's life. Chinwah opined the cause of death had been blunt force trauma to the baby's head, and he characterized the death as a homicide. Chinwah based this homicide conclusion on information he received from a coroner's investigator indicating the baby's mother had been intentionally run over by a car.

***e. Prior violent incidents involving Mercado.***

Davis testified she and Mercado had had prior angry encounters during which Mercado had done such things as spraying mace into Davis's car, cutting her with a knife, and slashing her tires. During one of these encounters, Davis had pepper-sprayed Mercado. Mercado and Davis had a fight in January 2009, during which Mercado tried to run Davis down with her Range Rover. Waller had yelled at Davis to watch out, and Davis managed to jump out of the way. Mercado then crashed into the gates of a market and Davis threw a hammer at her. Davis got into her own car and Mercado chased her through the neighborhood. Later, Mercado drove into Davis's parked car.

Waller testified that once, in November 2007, he and a former girlfriend, Saraya Hollis, were riding in a car when Mercado drove up. Waller got out and Mercado started chasing Hollis. When Hollis returned, there was a dent in the car because Mercado had hit it. The next morning, Waller and Hollis were again driving when Mercado came up behind them and "bumped" their car.

Waller testified that, in addition to Davis's baby and the children he had with Mercado, he also had three children with Gwanna Hayes. In September 2007, Mercado came to Hayes's house looking for him. When Waller opened the door, Mercado "ran inside" and "[s]tarted banging up stuff." She smashed photographs of Waller and his children, and broke the window of Waller's car. Waller called the police.

Hollis also testified about the November 2007 incident. She was sitting in a car with Waller when Mercado approached and began arguing with him. When Hollis drove off, Mercado chased her and repeatedly ran into the car. The next morning, when Hollis was dropping Waller off, she noticed Mercado behind her. Hollis got out and they had words. Mercado then tried to hit Hollis with her car. Hollis moved out of the way and Mercado hit Hollis's car. Hollis filed a police report.

**2. Defense evidence.**

Mercado's sister, Violeta, testified that when she lived with Mercado in 2007–2008, Davis used to drive by and look at their house five or six times a month. Once, Davis came into their yard and threw a Coke can or bottle at the windshield of Violeta's car. When Violeta yelled at her, Davis asked, "Where the fuck is your bitch ass sister." Davis, who had a wrench in her hand, also said: "Oh, you just watch and see, I have something for that bitch."

Mercado's other sister, Gabriela, testified that once in March 2008 she was babysitting at Mercado's house while Mercado and Waller went out. At 2:30 a.m., she heard Mercado yelling. Running outside, Gabriela saw Mercado in her car and Davis running up to the car with a hammer. Davis started banging on Mercado's car with the hammer. Waller was there, yelling at Davis to leave. Mercado got out of the car and started fighting with Davis.

Mercado testified in her own defense. She had prior convictions for petty theft and grand theft. Mercado and Waller had two young children. Mercado testified Waller lived with her during the "whole course of [their] relationship." Mercado first learned Waller was seeing Davis two or three years ago. She and Davis had been engaged in a running battle over Waller, and she had told Davis to leave Waller alone many times.

On the morning of April 5, as she and Waller were driving home from Jack in the Box, Waller suddenly told her, "Man, just go straight and avoid the bullshit." When Mercado pulled over and asked what he was talking about, Waller said Davis was pregnant. Mercado started crying and asked why Davis was having the baby. Waller said there was nothing he could do because she was eight months pregnant. Mercado said, "I can't believe that she's going to have your baby." Just then, Davis appeared and said, "You're still fucking with this bitch. Give me my keys. Give me my keys." When Waller told her to hold on a minute, Davis threw her orange juice into the car.

Mercado decided to drive home, so she pulled into a driveway. Before backing up, she looked in both directions and saw Davis on the sidewalk. As Mercado put the car into reverse, Waller tried to get out. Mercado was upset. She pulled on him and Waller pushed her; they were screaming at each other. After turning around in the driveway, Mercado was going 20 or 25 miles per hour. Waller was still trying to get the car door open and Mercado was pulling on his arm. Mercado never saw Davis standing in the street. When she felt the impact, she got scared and drove off.

Mercado denied intentionally hitting Davis. She denied having said, "If you don't move, I'm going to run you over," or, "I'm going to kill this bitch." She testified Waller never said, "No, don't do it, don't run her over." Mercado also denied trying to run Hollis down, but admitted hitting the car Hollis had been sitting in.

## CONTENTIONS

1. The trial court misinstructed the jury when it asked a question while deliberating.

2. Defense counsel was ineffective for not obtaining a report of Mercado's psychological examination until after the trial.

3. The medical examiner's testimony characterizing the baby's death as a homicide violated the confrontation clause.

4. There was cumulative error.

5. There was sentencing error.

## DISCUSSION

### 1. Trial court properly answered the jury's question during deliberations.

Mercado contends her convictions must be reversed because the trial court gave an incorrect answer when, during deliberations, the jury asked a question about the murder and voluntary manslaughter instructions. This claim is meritless.

#### *a. Background.*

The jury was given CALCRIM No. 520, defining murder. This instruction stated, in part:

"The defendant is charged in Count I with murder. To prove the defendant is guilty of this crime, the People must prove that:

"Number one, the defendant committed an act that caused the death of another person;

"Two, when the defendant acted she had the state of mind called malice aforethought;

"And three, she killed without lawful excuse or justification.

The jury was also given CALCRIM No. 570, defining voluntary manslaughter, which stated:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in heat of passion.

"The defendant killed someone because of sudden quarrel or in heat of passion if:

"Number one, the defendant was provoked;

"Number two, as a result of the provocation the defendant acted rashly and under influence of intense emotions that obscured her reasoning or judgment;

"And three, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than judgment."

While deliberating, the jury sent the following note to the trial court: "Definition of § 520/570 contains 3 points; In both Sections does all 3 criteria have to be met in order to meet verdict of the § 520 or § 570?" The trial court responded with a one word answer: "Yes."

#### *b. Discussion.*

Mercado contends: "While the three elements of murder, of course, all had to be proven beyond a reasonable doubt in order for the jury to return a verdict of guilty of murder, the three 'criteria' contained in CALCRIM 570, the voluntary manslaughter instruction, did not have to be 'met' in order for the jury to return a voluntary manslaughter verdict. Rather, the prosecution had to disprove, beyond a reasonable doubt, the existence of passion/quarrel and provocation as defined by the three criteria in the instructions, in order for the jury to find Ms. Mercado guilty of murder. [¶] The court's error erroneously shifted the burden of proof on the issue of provocation and passion/quarrel and relieved the prosecution of proving an essential element of malice – the absence of provocation and passion/quarrel."

Noting that "[a]bsence of a sudden quarrel or heat of passion is a fact the prosecution must prove beyond a reasonable doubt when murder and voluntary manslaughter are under joint consideration" (*People v. Najera* (2006) 138 Cal. App.4th 212, 223), Mercado argues: "By informing jurors that the elements of passion/quarrel had to be 'met' in order for the jury to return a voluntary manslaughter verdict, *and by treating these elements as analogous or comparable to the elements of murder*, the trial court erred." (Italics added.)

We are not persuaded.

Mercado's argument appears to be predicated on a misreading of the record. For instance, she poses the issue this way: "The deliberating jury asked the court whether the elements of murder had to be met in order to return a murder verdict, and whether the three criteria establishing provocation/passion had to be met in order to return a voluntary manslaughter verdict. The court answered 'yes.' " But this formulation misconstrues the essence of the jury's question, which was: As to both instructions, do *all three elements* have to be satisfied? The proper answer to this question was indeed "yes." By focusing on the "had to be met" language, rather than on the "all three elements" language, Mercado makes it sound like the jury was asking about the burden of proof. As we read the jury's question, however, it had to do with whether *all three elements* of each instruction, both CALCRIM No. 520 and CALCRIM No. 570, were necessary elements, i.e., whether the elements were conjunctive or disjunctive. The trial court properly answered by saying the elements were conjunctive.

Moreover, the jury was given the following clear direction as part of the voluntary manslaughter instruction: "The People have the burden of proving beyond a reasonable doubt the defendant did not kill as a result of a sudden quarrel or in heat of passion. [¶] If the People have not met this burden, you must find the defendant not guilty of murder."

Hence, the trial court's answer was correctly directed at the actual question the jury asked. We agree with the Attorney General that, given all the instructions, it is not reasonably likely the jury "misapplied the trial court's… response in a manner that shifted the burden of proof."

The trial court did not err in responding to the jury's question.

### 2. Failure to obtain Mercado's psychological report from expert did not constitute ineffective assistance of counsel.

Mercado contends she was denied effective assistance because defense counsel arranged for her to be interviewed by a psychologist, but then failed to obtain the psychologist's report in time to use it at trial. This claim is meritless.

*a. Background.*

On the day voir dire commenced, the trial court asked defense counsel about the proposed testimony of Dr. Sandra Baca, who had been engaged as a defense expert. Baca, a licensed marriage and family therapist, and an expert on domestic violence, had interviewed Mercado five days earlier. Defense counsel replied, "I'll know when I get a report. This is an expert in domestic violence. We do know that Miss Mercado has been a victim of continuous domestic violence by Mr. Waller." When the trial court questioned the relevance of such psychological evidence since Waller had not been the victim, defense counsel said, "I won't know until I get the report."

Three days later, just prior to opening statements, the trial court remarked the defense theory had evolved from self-defense to accident and asked if Baca were being dropped as a witness. Defense counsel said he intended to have her testify, although he still did not have her report. The trial court ruled Baca's testimony would be excluded unless the defense could make a more specific offer of proof. There was no further offer of proof and Baca did not testify.

After Mercado's conviction, defense counsel included a copy of Baca's report, which was not written until after Mercado had been convicted, as part of a sentencing memorandum. The report said Mercado told Baca that, when she was a child, her father had been physically abusive. Mercado tried to protect her two younger sisters when her parents argued, and she tried to protect her mother from her father. The report said Mercado had two sons by a man named George Jenkins, and that these boys had been removed from Mercado's house in 2009 because of Waller's violence. Mercado described having been badly beaten by both Jenkins and Waller.

Baca's report concluded "the following susceptibility risk factors may help explain [Mercado's] actions on the day" of the incident: Mercado had been "exposed to high levels of violence in the home when she was growing up" at the hands of "an alcoholic and drug addicted father," and Mercado subsequently "repeated what she observed in her family home and became involved with men who used and abused her." Baca opined that, because "Mercado's case of repeated activation of her stress-response from the vicarious trauma she endured at [a] young age began when her brain was still developing, it may have caused an altered sensitivity and dysfunction throughout her brain. Ms. Mercado's impulse problems might be due to a change in the organization of her stress response in her neural networks."

Defense counsel subsequently filed a new trial motion. At the hearing on this motion, counsel said he did not receive Baca's report until after trial and that when he read it he realized he had not adequately represented Mercado. Counsel said he had been unaware Mercado's history of abuse included her relationship with Jenkins and her childhood. The new trial motion was denied.

*b. Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390–391 [120 S.Ct. 1495, 146 L.Ed.2d 389].) "[T]he burden of proof that the defendant must meet in order to establish [her] entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

An appellate court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

*c. Discussion*

Mercado contends she was prejudiced because defense counsel "proceeded to trial without having obtained a report from Dr. Baca, the expert he… retain[ed] – and, therefore, without considering whether expert testimony about the matters Dr. Baca wrote about in her report would have assisted Ms. Mercado's case." Mercado asserts the lack of this psychological evidence compromised her heat-of-passion attempted voluntary manslaughter defense.

But Mercado has not cited any authority allowing the admission of this kind of psychological evidence to establish the objective element of a heat-of-passion voluntary manslaughter defense. As *People v. Steele* (2002) 27 Cal.4th 1230, explained: "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago… 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.] [¶]

Defendant's evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just 'snapped' when he heard the helicopter, may have satisfied the subjective element of heat of passion. [Citations.] But it does not satisfy the objective, reasonable person requirement, which requires provocation by the victim. [Citation.] 'To satisfy the objective or "reasonable person" element of this form of voluntary manslaughter, the accused's heat of passion must be due to "sufficient provocation." ' [Citation.] '[E]vidence of defendant's extraordinary character and environmental deficiencies was manifestly irrelevant to the inquiry.' [Citation.]" (*Id.* at pp. 1252–1253.)

Here, even without the kind of testimony Baca might have provided, there was already more than enough evidence establishing the subjective element of heat-of-passion provocation, i.e., that Mercado assaulted Davis in a jealous rage after learning Davis was pregnant with Waller's child. What was missing from Mercado's heat-of-passion defense was the objective element and, as *Steele* explained, the kind of testimony Baca might have provided is irrelevant to the objective element. As the Attorney General argues, "Since Dr. Baca's report concludes that appellant's responses were unique based on her alleged history of abuse, Dr. Baca's testimony would not have supported a voluntary manslaughter verdict."[2] There is no reasonable probability the psychological evidence at issue here would have made any difference in the result.

Because there was no prejudice flowing from defense counsel's failure to obtain Baca's psychological report in time for use at trial, there was no ineffective assistance of counsel.[3]

### 3. Medical examiner's testimony about the baby's "manner of death" does not warrant reversal of Mercado's conviction.

Mercado contends her conviction must be reversed because her confrontation clause rights were violated when the deputy medical examiner, Dr. Chinwah, testified Davis's baby died as a result of a homicide. This claim is meritless.

#### *a. Background.*

After testifying his autopsy findings led him to conclude the baby's *cause of death* had been blunt force trauma to the head, Chinwah was asked if he had determined the baby's *manner of death*:

"Q. Did you determine the manner of death based on your autopsy?

"A. Homicide.

"Q. Why did you conclude homicide? "A. The circumstances under which this occurred was [*sic*] taken into consideration, and from the information I got was that this mother was intentionally run over by the operator of the vehicle."

The prosecutor's direct examination ended at this point. On cross examination, Chinwah was immediately asked where that information had come from:

"A. The coroner's office has an investigator that goes to the scene of anything that is brought into the coroner's office. [¶] And the investigator interviews different people and make [*sic*] report.

"Q. Do you know if the investigator interviewed the people that have testified in this trial about what happened?

"A. I have no idea.

"Q. So it is a flash report that you received, a flash report, a report based on one investigator's going to a scene and making a report?

"A. Yes.

"Q. Without follow-up of any other witnesses?

"A. No."

Chinwah said, "the information that I received was that the operator of this vehicle in anger moved away, rode, drove away, and made a U-turn and stated some word to the effect that I'm going to kill this – I don't want to use the word that was written in the report. [¶] And then this operator of the vehicle accelerated and ran over the pregnant mother."

Defense counsel then asked:

"Q. A car running over a person creates a massive force; isn't that true?

"A. Yes.

"Q. And your opinion of a massive force remains the same on whether it's an accidental hitting or a deliberate hitting. The massive force is still there, isn't it?"

Chinwah agreed the massive force injury could have been caused either intentionally or accidentally.

"Q. … You're basing your opinion upon the investigation report, isn't that right, as to how this happened?

"A. That's what I sa*id.* That's the circumstance."

Asked if new information "that contradicted the investigator's report" might change his mind, Chinwah testified: "Except that information is totally unrelated to the original information that I got. For example, if I got an information [*sic*] that this incident happened when there was no altercation, that this driver was not even at the scene of this altercation, and this driver was just driving by, then I would say maybe, maybe that's true. [¶] But the information that I got was so convincing and compatible to the finding that all the other information to me would be, maybe making up a story."

Asked if any additional information would make a difference, Chinwah testified: "I would say it has to be very, very, very strong to make, to contradict the original story on this thing here."

On redirect-examination, the prosecutor simply asked:

"Q. Doctor, the information you received was that the driver sped up and ran over the woman, correct?

2. Mercado argues Baca's evidence would have been admissible under *People v. Humphrey* (1996) 13 Cal.4th 1073. But that case involved the defendant's killing of her abuser and it related to the defendant's claim of self-defense.

3. Given this result, the related claim raised in Mercado's *habeas corpus* petition is denied.

"A. Yes.

"Q. And the injuries that you observed to the baby, were they consistent with the driver speeding up and running over the mother who was carrying that baby? "A. Yes."

***b. Legal principles.***

Mercado contends Chinwah's testimony "that, in his opinion, the manner of death was homicide, and that his opinion was based upon a report by the coroner's investigator who interviewed witnesses at the scene, who told the investigator that 'this mother was intentionally run over by the operator of the vehicle,' " violated the confrontation clause and requires a reversal of her conviction. We disagree.

As we have explained, *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], established a new confrontation clause test focusing "on the 'testimonial or nontestimonial nature' of the out-of-court statement. *Crawford* held that '[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.' [Citation.] Thus, out-of-court *testimonial* statements are admissible only when the witness is unavailable and there has been a prior opportunity for cross-examination of that witness. [¶] *Crawford* declined to define the term 'testimonial' [citation], but gave examples of testimonial statements. *Crawford* listed as testimonial: (1) plea allocutions showing the existence of a conspiracy; (2) grand jury testimony; (3) prior trial testimony; (4) *ex parte* testimony at a preliminary hearing; and (5) statements taken by police officers in the course of interrogations. [Citation.]" (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 172.)

In *Williams v. Illinois, supra,* 132 S.Ct. 2221, the U.S. Supreme Court's most recent case discussing *Crawford*, a prosecution DNA expert "testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood. On direct examination, the expert testified that Cellmark… provided the police with a DNA profile. The expert also explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark. The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced. Nevertheless, petitioner contends that the expert's testimony violated the Confrontation Clause as interpreted in *Crawford.* [¶] Petitioner's main argument is that the expert went astray when she referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim's vaginal swabs." (*Id.* at p. 2227 (plur. opn. of Alito, J.).)

The fundamental question posed by these facts was this: "[D]oes *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify?" (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2227, plur. opn. of Alito, J.).) Justice Alito's plurality opinion in *Williams* (joined by with three other justices),[4] concluded this testimony did not present a confrontation clause problem because: (a) the extra-judicial statements had not been offered to prove the truth of the matters asserted, but only as the basis for the testifying witness's opinion; and, (b) even if asserted for its truth, the primary purpose of the Cellmark report had not been to aid in the defendant's prosecution: "The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." (*Id.* at p. 2228.) In the plurality's view, to qualify as "testimonial" the extra-judicial statement must have had "the primary purpose of accusing a targeted individual." (*Id.* at p. 2243.)

Justice Thomas's concurrence, while agreeing there was no confrontation clause violation, rejected both grounds of the plurality's rationale. He concluded that, although the evidence had indeed been admitted for its truth, and although the plurality's "primary purpose" analysis was incorrect, there was no confrontation clause violation "solely because Cellmark's statements lacked the requisite 'formality and solemnity' to be considered ' "testimonial" ' for purposes of the Confrontation Clause." (*Williams v. Illinois, supra,* 132 S.Ct. at. p. 2255 (conc. opn. of Thomas, J.).)

Justice Thomas explained: ". . . I have concluded that the Confrontation Clause reaches ' "formalized testimonial materials," ' such as depositions, affidavits, and prior testimony, or statements resulting from ' "formalized dialogue," ' such as custodial interrogation. [Citations.] [¶] Applying these principles, I conclude that Cellmark's report is not a statement by a 'witnes[s]' within the meaning of the Confrontation Clause. The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. … [Citation.] And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2260, fn. omitted (conc. opn. of Thomas, J.).)

Justice Kagan's dissenting opinion (joined by three other justices),[5] disagreed with both the plurality and Justice Thomas, and would have found the confrontation clause had

4. Justice Alito's plurality opinion was joined by Chief Justice Roberts and Justices Kennedy and Breyer.

5. Justice Kagan's dissenting opinion was joined by Justices Scalia, Ginsburg and Sotomayor.

been violated. Most pertinent to our analysis, the dissent characterized the primary purpose test as "a statement meant to serve as evidence in a potential criminal trial." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2275 (dis. opn. of Kagan, J.).)

The California Supreme Court has given its initial analysis of *Williams* in a trio of cases: *People v. Dungo* (2012) 55 Cal.4th 608, *People v. Lopez* (2012) 55 Cal.4th 569, and *People v. Rutterschmidt* (2012) 55 Cal.4th 650. *Lopez* summed up *Williams* this way: "Although the high court has not agreed on a definition of 'testimonial,' a review of [its] decisions indicates that a statement is testimonial when two critical components are present. [¶] First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity. [Citations.] The degree of formality required, however, remains a subject of dispute in the United States Supreme Court. [Citations.] [¶] Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." (*People v. Lopez, supra,* 55 Cal.4th at pp. 581–582.)

Justice Chin's concurring opinion in *Dungo* (joined by three other justices), contains an amplified explanation of how to harmonize the views expressed in *Williams*: " 'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds… ." ' [Citation.] This rule does not work particularly well, if at all, unless 'one opinion can be meaningfully regarded as "narrower" than another,' that is, unless 'one opinion is a logical subset of other, broader opinions.' [Citation.] Here, neither the plurality opinion nor Justice Thomas's concurring opinion can be viewed as a logical subset of the other. Indeed, to some extent they are contradictory." (*People v. Dungo, supra,* 55 Cal.4th at p. 628 (conc. opn. of Chin, J.).) Nevertheless, "[w]e know what the *result* was in *Williams*… . The testimony at issue did not violate the confrontation clause. This is because a majority of the court so concluded. Four justices (the plurality) found no violation for their reasons. One justice (Justice Thomas) found no violation for his different reasons. This means that a majority of the *Williams* court would find no violation of the confrontation clause whenever there was no violation under the plurality's *and* under Justice Thomas's reasoning." (*Ibid.*)

Of the three California cases decided in the aftermath of *Williams,* the decision in *Dungo* is the most pertinent to the facts of the case at bar. "At… Dungo's murder trial, a forensic pathologist testifying for the prosecution described to the jury objective facts about the condition of the victim's body as recorded in the autopsy report and accompanying photographs. Based on those facts, the expert gave his independent opinion that the victim had died of strangulation. Neither the autopsy report, which was prepared by another pathologist [Dr. Bolduc] who did not testify, nor the photographs were introduced into evidence." (*People v. Dungo, supra,* 55 Cal.4th at p. 612.) The *Dungo* court held "the expert's testimony did not give rise to a right by defendant to question the preparer of the autopsy report." (*Ibid.*)

As *Dungo* explained: "We begin with the issue of formality. An autopsy report typically contains two types of statements: (1) statements describing the pathologist's anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death. The out-of-court statements at issue here – pathologist Bolduc's observations about the condition of victim Pina's body – all fall into the first of the two categories. These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature. [Citation.]" (*People v. Dungo, supra,* 55 Cal.4th at p. 619.)

As for the "primary purpose" factor, *Dungo* reasoned:

"The preparation of an autopsy report is governed by California's Government Code section 27491, which requires a county coroner to 'inquire into and determine the circumstances, manner, and cause' of certain types of death. Some of these deaths (such as deaths from alcoholism, 'sudden infant death syndrome,' and 'contagious disease') result from causes unrelated to criminal activities, while other deaths (such as deaths resulting from 'criminal abortion,' deaths by 'known or suspected homicide,' and 'deaths associated with a known or alleged rape') result from the commission of a crime. [Citation.] With respect to all of the statutorily specified categories of death, however, the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity.

"The usefulness of autopsy reports, including the one at issue here, is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes. For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies. [Citation.] Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members.

"In short, criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of Pina's body; it was only one of several purposes. The presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement do not change that conclusion. The autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official

explanation of an unusual death, and such official records are ordinarily not testimonial. [Citation.]

"In summary, Dr. Lawrence's description to the jury of objective facts about the condition of victim Pina's body, facts he derived from Dr. Bolduc's autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine Dr. Bolduc. *The facts that Dr. Lawrence related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question.* In holding that defendant's confrontation right was violated here, the Court of Appeal erred." (*People v. Dungo, supra,* 55 Cal.4th at pp. 620–621, italics added.)

***c. Discussion.***

**(1) There was no Crawford violation.**

The Attorney General asserts "*Williams* has no application to the facts here and nothing in *Williams* overrules the longstanding rule in California that experts may rely upon and testify to sources on which they base their opinions." We disagree. Although the *Williams* plurality concluded expert basis testimony does not constitute hearsay because it is not admitted for its truth, both Justice Thomas and the *Williams* dissenters rejected that analysis, concluding the evidence at issue had been admitted for its truth. (See *People v. Westmoreland* (2013) 213 Cal.App.4th 602, 621 ["A majority of the justices in *Williams*, *Dungo*, and *Lopez* determined that the challenged out-of-court statements admitted during the expert testimony in each of those cases were admitted for the truth of the facts asserted in the statements, at least for confrontation clause purposes."].)[6]

However, in light of *Dungo*'s analysis of *Williams,* we conclude the extra-judicial statements relied on by Dr. Chinwah in reaching his conclusion about the baby's manner of death were not "testimonial" under *Crawford*. Mercado mounts a series of arguments against this conclusion, but we do not find them persuasive.

Mercado argues *Dungo* is fundamentally different from the case at bar: "Although like the statements at issue in *Dungo*, the statements at issue here relate to the cause and manner of death, the similarity ends there. The statements at issue here, rather than being objective scientific facts, were the observations and conclusions of lay witnesses. These eyewitness statements are in no way 'comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment.' "

We disagree. *Dungo* was contrasting the "formality" of an expert's medical conclusions with the "informality" of the factual background material the expert relied on in reaching those conclusions. It is well-established that "[a]n expert witness… may base an opinion on reliable hearsay, including out-of-court declarations of other persons." (*In re Fields* (1990) 51 Cal.3d 1063, 1070.) Thus, in *People v. Shattuck* (1895) 109 Cal. 673, where a defense medical expert testified the defendant's brain tumor had rendered her liable to become insane if she were greatly excited, the trial court was found to have erred by precluding the expert from giving a clinical history of the case because that history had come from the defendant herself. Noting the expert had testified it was " 'necessary to refer to [her] previous condition in order to explain why I treated her, and why I came to the conclusion,' " our Supreme Court held: "Such declarations and statements, when they constitute in part the basis upon which the opinion of an expert is based, and are by him declared to be necessary to enable him to form an opinion as to the nature of the disease, are admissible. [Citations.]" (*Id.* at pp. 678–679.) Here, the extra-judicial witness statements relayed to Chinwah by the coroner's investigator constituted factual information that Chinwah relied on in reaching his "official conclusion" about the manner of death.

Hence, we conclude the extra-judicial statements Chinwah relied on in reaching his "homicide" determination did not qualify as testimonial because they failed both the formality and the primary purpose tests. That is, we conclude there was no confrontation clause violation under either the *Williams* plurality or Justice Thomas's *Williams* concurrence. Certainly the extra-judicial statements of the coroner's investigator would not qualify under Justice Thomas's "formality" test because they were "not the product of any sort of formalized dialogue resembling custodial interrogation." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2260, fn. omitted (conc. opn. of Thomas, J.).) Indeed, those statements were apparently gleaned from a very informal interview process conducted by the coroner's investigator. And given *Dungo*'s conclusion that criminal investigation is not the primary purpose for preparing an autopsy report, the disputed evidence here would also fail the plurality's "primary purpose" test.

There was no *Crawford* error.

**(2) Any Crawford error was harmless.**

Moreover, even assuming arguendo there was *Crawford* error, we conclude the error was undoubtedly harmless.

In *People v. Pearson* (2013) 56 Cal.4th 393, our Supreme Court resolved a *Crawford* autopsy report issue by skirting the substantive constitutional claim because it was apparent any error was harmless: "[W]e need not decide whether, following our decision in *Dungo*, the evidence here is testimonial because any error in the admission of the autopsy reports and Dr. Peterson's testimony was harmless beyond a reasonable doubt. [Citations.] [¶] 'The beyond-a-reasonable-

6. "[A] five justice majority of the high court and at least six of the seven justices on the California Supreme Court appear to agree that, for purposes of the confrontation clause, out-of-court statements admitted as basis evidence during expert testimony are admitted for their truth if treated as factual by the expert and, thus, implicate confrontation rights if the statements are testimonial." (*People v. Westmoreland, supra,* 213 Cal.App.4th at p. 623, fn. omitted.)

doubt standard of *Chapman*[7] "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [Citation.] "To say that an error did not contribute to the ensuing verdict is… to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the… verdict actually rendered in this trial was surely unattributable to the error." [Citation.]' [Citation.]" (*People v. Pearson, supra,* at p. 463; see also *People v. Rutterschmidt, supra,* 55 Cal.4th at p. 661 ["Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show 'beyond a reasonable doubt' that the error was harmless."].)

Mercado argues any error must have been prejudicial because: (a) the evidence "went to the heart of the case and consisted of expert opinion that, essentially, Ms. Mercado was guilty of homicide and that her defense was a 'story' "; (b) the prosecutor urged the jury to consider this evidence; and, (c) the evidence "stood out because it was presented through the testimony of an expert who unequivocally vouched for the credibility of the out-of-court declarants." We are not persuaded.

To show how the prosecutor "urged the jury to consider this evidence," Mercado points to this portion of the prosecutor's closing argument: "[Dr. Chinwah f]ound the cause of death to be blunt force trauma. [¶] He said that that was consistent with the car running over the mother while the baby was in the womb, what we know happened. The manner of death is homicide. [¶] He told us he had five choices, one of them being accident. And he chose homicide. [¶] And [defense] counsel cross-examined him pretty extensively on that. He said it took massive force to create this amount of injury. The various scenario[s] and sort of hypotheticals that the defense attorney tried to give do not correspond to the injuries the doctor saw. [¶] The information he received from the coroner's investigator was so convincing and compatible with the findings. I'm not telling you to convict her of murder because the coroner said it's homicide, but it's something you should take into consideration."

But this entire argument took up barely half a page of reporter's transcript out of a total prosecution closing argument of about 35 pages. And, as the Attorney General points out, "the prosecutor specifically argued to the jury that it could *not* convict appellant of murder just because Dr. Chinwah said it was homicide." (Italics added.) We find this single, fleeting reference to the matter during closing argument to have been inconsequential.

Contrary to Mercado's assertion, Chinwah did not actually vouch for the eyewitnesses' credibility. Indeed, he testified he had no idea whom the investigator had interviewed. Mercado argues Chinwah vouched for their credibility when he testified "the information that I got was so convincing and compatible to the finding that all the other information to me would be, maybe making up a story." But this suggestion, that Chinwah's use of the word "story" somehow demonstrates he was automatically prepared to denigrate any contrary information, is meritless. Chinwah also described the information he received from the coroner's investigator as "the original *story* on this thing here." (Italics added.)

Moreover, given Chinwah's acknowledgment that his *cause of death* finding was compatible with the *manner of death* having been either homicide or accident, and that he did not actually know whether the driver had intentionally hit the baby's mother, awareness of the extra-judicial statements could not have affected the jury's verdict. As Mercado herself acknowledges: "This hearsay formed the sole basis of Chinwah's opinion that the manner of death was homicide. (Dr. Chinwah acknowledges that the skull fracture suggesting blunt force trauma could have been caused either by an intentional striking of Davis with the vehicle, or by an accidental striking of Davis with the vehicle.) *As a matter of common sense and logic as well, it is implausible that an autopsy could reveal whether the defendant had accidentally or deliberately struck a person with her vehicle*." (Italics added) Regardless of whether Mercado's final assertion would hold true in every conceivable situation, we agree it was certainly true in this case that the jury would have realized the autopsy procedure was not going to answer the question whether she ran over Davis intentionally or accidentally.

What did answer that question was the overwhelming evidence showing Mercado intentionally struck Davis with her car. Waller's initial trial testimony was a transparent attempt to exculpate Mercado for personal reasons. By the end of his testimony, Waller acknowledged he had heard Mercado threaten to kill Davis just prior to driving the Range Rover right toward her, and that it was clear Mercado had struck Davis intentionally.

But the most damning testimony probably came from the two entirely independent eyewitnesses. Bruce Cotton testified he saw Mercado turn around, head back toward Davis and stop right in front of her. He saw Davis put her hand on the hood of the car and he heard Waller yell, "No, no, don't do it. Don't do it. Stop, don't do it." Mercado then "hit the accelerator" and rolled slowly over Davis. The car did not swerve or brake. Jai Gilyard testified she heard someone in the car, a person who logically could only have been Mercado, say: "If you don't get from in front of my car, I'm going to run you over." The witness statements collected by the coroner's investigator at most merely corroborated the testimony of Cotton and Gilyard.[8]

In addition, there was evidence of a long feud between Mercado and Davis over Waller's affections, and evidence

7. *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].

8. It also appears that, in all probability, the coroner's investigator spoke to the same two independent eyewitnesses who testified at trial.

that once before, in January 2009, Mercado had tried to run down Davis but she managed to jump out of the way because Waller yelled out a warning. There was also evidence of Mercado's past violent conduct in connection with Waller's other girlfriends, which included a November 2007 incident in which Mercado tried to drive a car into Saraya Hollis.

In the face of this overwhelming evidence of Mercado's guilt, the exclusion of Dr. Chinwah's testimony, that he concluded the baby's "manner of death" had been homicide based on information received from the coroner's investigator, would not have changed the verdict. (See *People v. Pearson, supra,* 56 Cal.4th at p. 463.)[9]

**4. There was no cumulative error.**

Mercado contends her convictions must be reversed for cumulative error. Because we have found at most one possible error, her claim of cumulative error fails. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 [where only one harmless error at penalty phase, cumulative evidence claim was without merit].)

**5. Sentencing error must be corrected.**

Mercado contends, and the Attorney General properly concedes, the trial court erred by imposing enhancements on count 2 (the attempted murder of Davis) for *both* the infliction of great bodily injury (§ 12022.7) *and* the infliction of injury on a pregnant woman resulting in the termination of her pregnancy (§ 12022.9).

Section 12022.7, subdivision (a), provides: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

Section 12022.9 provides, in pertinent part: "Any person who, during the commission of a felony or attempted felony, knows or reasonably should know that the victim is pregnant, and who, with intent to inflict injury, and without the consent of the woman, personally inflicts injury upon a pregnant woman that results in the termination of the pregnancy shall be punished by an additional and consecutive term of imprisonment in the state prison for five years."

Section 1170.1, subdivision (g) provides, in pertinent part: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense."

Because section 12022.9 punishes the infliction of bodily injury upon a victim who happens to be pregnant,[10] both it and section 12022.7 punish the infliction of great bodily injury. (See § 12022.53, subd. (f) [referring to "enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9"]; *People v. Pieters* (1991) 52 Cal.3d 894, 901 [referring to sections 12022.7 and 12022.9 as enhancements for "infliction of great bodily injury".) However, section 1170.1, subdivision (g), provides, in pertinent part: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." Hence, we will order stricken the three-year enhancement under section 12022.7.

## DISPOSITION

The three-year sentence enhancement under section 12022.7 is stricken. As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment. The *habeas corpus* petition is denied.

**KLEIN, P. J.**

**We concur: CROSKEY, J., ALDRICH, J.**

9. Given this result, the related claim raised in Mercado's *habeas corpus* petition is denied.

10. See *People v. Taylor* (2004) 119 Cal.App.4th 628, 644 ("[*People v.*] *Dennis* [(1998)] 17 Cal.4th 468, teaches that the point of the enhancement is to punish the defendant for injuring a woman in a particular manner with a particular result, not for the particular harm that comes to the fetus she is carrying.").

Cite as 13 C.D.O.S. 4614

**HERBERT W. STOLTENBERG, as Trustee, etc. et al.,** Plaintiffs and Respondents,

**v.**

**AMPTON INVESTMENTS, INC. et al.,** Defendants and Appellants.

No. B235731
In the Court of Appeal of the State of California
Second Appellate District
Division Five
(Los Angeles County Super. Ct. No. BC322141)
Filed May 6, 2013

## ORDER DENYING APPLICATION AND MODIFYING OPINION AND JUDGMENT

**THE COURT:**

It is ordered that the opinion filed herein on April 4, 2013, be modified as follows:

Add after the signatures on page 12 the following:

OPINION ON DENIAL OF APPLICATION TO REINSTATE APPEAL

Following the April 4, 2013, issuance of our opinion in this appeal, defendants filed a motion to reinstate their appeal on May 3, 2013 — one court day before our jurisdiction over the appeal would expire. Although defendants' counsel stated in the motion that they had complied with plaintiffs' information subpoena, that statement was not made under oath and no other evidence was provided, except an uncertified copy of the New York trial court's May 2, 2013, order to show cause that vacated the prior contempt order issued, pending a further hearing on May 30, 2013.

On May 3, 2013, plaintiffs filed a "preliminary" opposition to defendants' motion to reinstate their appeal. That unsworn opposition disputed defendants' claimed compliance with plaintiffs' information subpoena and attached a copy of defendant Ampton Investment, Inc.'s purported handwritten responses to plaintiffs' questions in connection with the information subpoena.

On May 6, 2013 — the last day upon which this court had jurisdiction over this appeal — defendants filed a supplement to their motion to reinstate their appeal. In the supplement, defendants' counsel represented that on May 6, 2013, the New York trial court denied plaintiffs' *ex parte* application to reinstate the contempt order. The supplement was filed with a request for judicial notice of (1) plaintiffs' May 6, 2013, application filed in the New York trial court for an order to show cause seeking to reinstate the New York trial court's prior contempt order; and (2) the New York trial court's May 6, 2013, order to show cause setting a hearing for May 30, 2013, on plaintiffs' application to reinstate the contempt order, but denying plaintiffs' request for immediate reinstatement of the contempt order pending the hearing on the order to show cause.

Defendants have not provided us, in a timely fashion, with a competent and unequivocal showing that they had complied fully with plaintiffs' information subpoena, that the New York trial court had made an express finding of full compliance and vacated the contempt order, and that no further proceedings were pending or contemplated concerning the contempt order. Defendants have submitted information not under oath that suggests they made last-minute efforts to comply with the information subpoena, but that further proceedings concerning that compliance were pending in the New York trial court.

Accordingly, we deny at this time defendants' application to reinstate the appeal.

This modification changes the judgment.

**MOSK, Acting P. J.**

**KRIEGLER, J.**

## COUNSEL

Akerman Senterfitt, James G. McCarney; Sheppard, Mullin, Richter & Hampton and Robert T. Sturgeon for Defendants and Appellants.

Love & Erskine, Richard A. Love, Kathleen M. Erskine; Greines, Martin, Stein & Richland and Marc J. Poster for Plaintiffs and Respondents.

## OPINION

### INTRODUCTION

Defendants, an individual and a corporation, appealed from a California judgment in favor of plaintiffs, but did not post a bond to stay enforcement of the judgment. Plaintiffs, after registering the judgment in New York where defendants are located, attempted to enforce the registered sister-state judgment there by serving a subpoena seeking financial information from the corporate defendant. Defendants did not comply with the subpoena or with a New York trial court order compelling them to respond to it. As a result, the New York trial court held defendants in contempt. In dismissing defendants' appeal under the disentitlement doctrine, we

hold that the doctrine applies to noncompliance with and contempt of New York trial court orders, which noncompliance and contempt directly affect and frustrate the enforcement of a California judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial, the trial court entered a judgment on the verdict in favor of plaintiffs and respondents,[1] awarding them a total of $8,516,704 in compensatory damages, plus costs.[2] Defendants Ampton Investments, Inc. and Laurence Strenger[3] (defendants) filed a timely notice of appeal from the judgment but did not, pursuant to Code of Civil Procedure 917.1, post a bond to stay enforcement of the judgment. Instead, defendants filed a petition for a writ of supersedeas to stay enforcement of the judgment pending appeal, which petition this court denied.

Because enforcement of the judgment was not stayed, plaintiffs registered their California judgment in the State of New York (N.Y. C.P.L.R 5401, *et seq.*), where defendants are domiciled, and initiated enforcement proceedings in the courts of that state. Among other steps, plaintiffs served a subpoena on defendant Ampton Investments, Inc.[4] for financial information, but defendants did not comply with it.

Plaintiffs then obtained from the New York trial court an order to show cause why defendants should not be held in contempt. Defendants objected and moved to stay all judgment enforcement proceedings. The New York trial court found there was no basis for a stay and ordered both defendants to respond to the financial information subpoena within ten days. The court's order stated, "Failure to comply with this Order may result in [defendants] being held in contempt." Nevertheless, defendants did not comply with that order.

Plaintiffs next obtained a second order to show cause why defendants should not be held in contempt. Defendants filed a cross-motion to dismiss the contempt proceeding contending that they were not served properly with the order to show cause and other underlying orders. Plaintiffs replied with their proof of proper service of the order to show cause on defendants. The New York trial court entered an order finding defendants in contempt, fining them $500, and ordering them to comply with the outstanding subpoena within 30 days or face further sanctions, including costs. Plaintiffs gave notice of entry of the contempt order, but defendants still did not comply with the subpoena, the order compelling compliance with it, or the contempt order.

In response to defendants' noncompliance with and contempt of the orders of the New York trial court, plaintiffs filed in this court a motion to dismiss defendants' appeal based upon the disentitlement doctrine. Defendants filed a notice of appeal in New York, purporting to appeal from "the Judgment from the Superior Court for the State of California, County of Los Angeles as entered in the Supreme Court of the State of New York," the initial order compelling compliance with the subpoena, and the subsequent contempt order. Defendants also filed their opposition to the motion to dismiss the appeal in this court contending that the disentitlement doctrine cannot be based on noncompliance with trial court orders from another jurisdiction and that, in any event, the New York trial court orders were not final and were pending appeal in that jurisdiction.

Plaintiffs subsequently filed a supplemental motion to dismiss this appeal, arguing that defendants' continued noncompliance with the New York trial court orders, including defendants' failure to comply with the subpoena within 30 days of the contempt order, had, in effect, placed defendants in "double contempt." Defendants then paid the $500 sanction required by the contempt order but, to date, have not complied with that portion of the contempt order requiring them to respond to plaintiffs' financial information subpoena. Defendants responded to plaintiffs' second supplemental motion to dismiss the appeal, maintaining, inter alia, that defendants had paid the $500 fine required by the contempt order. We requested letter briefing on certain issues related to the motion to dismiss the appeal, to which letter the parties responded.

Plaintiffs most recently filed a motion in the New York trial court for further sanctions pursuant to the contempt finding against defendants. Plaintiffs also filed in this court a second supplemental motion for judicial notice[5] advising that defendants had not yet complied with the New York trial court order compelling compliance with the information subpoena or the contempt order. Based on the foregoing, we scheduled the motion to dismiss the appeal for oral argument.

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1. Plaintiffs and respondents are Herbert W. Stoltenberg, trustee of the 1680 Property Trust; Michael L. Epsteen, trustee of the Michael L. Epsteen Trust; Stephen Ellis Gordon, trustee of the Stephen Ellis Gordon and Linda S. Gordon Revocable Trust; and Ruth Ann Runnels LaMonica, trustee of the LaMonica Family Trust. We refer to them collectively as plaintiffs.

2. The jury found that defendants acted with "malice or oppression," but did not award plaintiffs any amount for punitive damages.

3. The affidavit executed by plaintiffs' New York attorney in support of the second order to show cause states in paragraph 5 that "[d]efendant Laurence N. Strenger is the Chief Executive Officer, Managing Director, General Counsel, and a principle shareholder of Ampton [Investments, Inc.]."

4. The declaration of plaintiffs' attorney in support of the motion to dismiss states in paragraph 9 that "[p]laintiffs issued subpoenas for financial information," presumably one to the corporate defendant Ampton Investments, Inc. and one to the individual defendant Laurence Strenger. In that same paragraph, plaintiffs' attorney further states that "[p]laintiffs did not comply with the subpoenas." The only New York subpoena in the record, however, appears to be directed to Ampton Investments, Inc. alone. This point is not discussed by the parties and, in any event, both the initial order requiring defendants to respond to the subpoena and the subsequent order finding defendants in contempt were issued against Ampton Investments, Inc. and Laurence Strenger.

5. We grant each of the parties' respective motions for judicial notice.

## DISCUSSION

### *A. Disentitlement Doctrine*

An appellate court has the inherent power, under the "disentitlement doctrine," to dismiss an appeal by a party that refuses to comply with a lower court order. (See, *e.g.*, *Moffat v. Moffat* (1980) 27 Cal.3d 645, 652; *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277; *Knoob v. Knoob* (1923) 192 Cal. 95, 96–97; *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 378–379; see also 1 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) § 5:37.2, pp. 5–20 to 5–21.) As the Supreme Court observed in *MacPherson v. MacPherson*, *supra*, 13 Cal.2d at page 277, "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]"

We recently explained the equitable rationale underlying the doctrine. " 'Dismissal is not " 'a penalty imposed as a punishment for criminal contempt. It is an exercise of a state court's inherent power to use its processes to induce compliance' " with a presumptively valid order. [Citation.]' [Citation.]… [¶] Appellate disentitlement 'is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable concerns make it a proper sanction… .' (*People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897 [106 Cal.Rptr.3d 365]." (*In re E.M.* (2012) 204 Cal. App.4th 467, 474.) No formal judgment of contempt is required; an appellate court "may dismiss an appeal where there has been *willful disobedience or obstructive tactics.* (*Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1683.)" (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 244, italics added.) The doctrine "is based upon fundamental equity and is not to be frustrated by technicalities." (*Stone v. Bach* (1978) 80 Cal.App.3d 442, 444.)

The disentitlement doctrine has been applied in a diverse number of cases,[6] including cases such as this one in which an appellant is a judgment debtor who acts to frustrate or obstruct legitimate efforts in a trial court to enforce a judgment. For example, in *TMS, Inc. v. Aihara, supra,* 71 Cal.App.4th 377, the appellants and judgment debtors — an individual sole shareholder and two corporations he controlled — were sanctioned and ordered by the trial court to answer postjudgment interrogatories "designed to secure information to aid in the enforcement of a money judgment against them." (*Id.* at p. 378.) In response, the individual appellant moved to Japan and refused to assist his attorneys in answering the postjudgment interrogatories. (*Id.* at pp. 378–379.) The court concluded that it was "undisputed [that the appellants had] willfully refused to comply with [the trial court's order to answer interrogatories]" and that "[g]iven [the appellants'] willful disobedience of the trial court's order… , we dismiss their appeal from the judgment." (*Id.* at p. 379.)

Similarly, in *Stone v. Bach, supra,* 80 Cal.App.3d 442, the trial court entered a judgment dissolving a partnership and dividing assets. (*Id.* at p. 443.) The judgment recited that the appellant had previously been ordered to deposit partnership monies collected by him into a trustee account, which he had not done. (*Ibid.*) Prior to the judgment, the appellant had been found in contempt for failing to deposit partnership monies into the trustee account, and, after the judgment, he was again found in contempt, this time for failing to appear for a judgment debtor examination. (*Id.* at pp. 443–444.) Based on these facts, the court concluded, "Our duty in these circumstances is clear. [The appellant's] conduct is intolerable. *It demonstrates a deliberate effort to achieve a stay of execution of the money judgment against him without complying with legal procedures.* At oral argument, his reason for refusal to comply with the trial court's orders to deposit partnership funds into trust and to be sworn for examination was that the orders and the judgment of the court are invalid, as he will assertedly demonstrate during the appeal. This is the worst kind of bootstrapping. A trial court's judgment and orders, all of them, are presumptively valid and must be obeyed and enforced. [Citation.] They are not to be frustrated by litigants except by legally provided methods." (*Id.* at p. 448, italics added.)

In *Tobin v. Casaus, supra,* 128 Cal.App.2d 588, the appellant appealed from a personal injury judgment against him, but no stay of execution was sought or granted. (*Id.* at p. 589.) In the trial court, a receiver was appointed to take over certain of the appellant's assets and a judgment debtor examination of the appellant was scheduled. (*Ibid.*) When the appellant failed to appear for the examination, a bench warrant issued for his arrest. (*Ibid.*) The respondent moved to dismiss the appeal because, as of the time of the motion, the appellant still had not surrendered on the warrant or otherwise satisfied the demand of the trial court for his appearance. (*Ibid.*) Based on these facts, the court dismissed the appeal, (*id.* at p. 593) saying, "Thus [the] appellant, with full information obtained through this proceeding if in no other way, knew for at least three weeks that he was being sought by the court and that a bench warrant for his arrest had been issued… . It seems incredible that with the imminent prospect of losing his right of appeal in this case, [the] appellant would persist in ignoring

6. "The power to dismiss an appeal for refusal to comply with a trial court order has been exercised in a variety of circumstances, including: where a parent had taken and kept children out of the state in violation of a divorce decree (*MacPherson v. MacPherson*, *supra*, 13 Cal.2d at pp. 272–273; *Knoob v. Knoob*, *supra*, 192 Cal. at p. 96); where a husband had failed to pay alimony as ordered in an interlocutory judgment of divorce (*Kottemann v. Kottemann* [(1957)] 150 Cal.App.2d [483,] 484); where a party in a civil action was a fugitive from justice and in contempt of the superior court for failure to appear on criminal charges after being released on bail (*Estate of Scott* [(1957)] 150 Cal.App.2d [590,] 591–592); and where defendants willfully failed to comply with trial court orders regarding a receivership. (*Alioto Fish Co. v. Alioto*, *supra*, 27 Cal.App.4th at pp. 1682–1685.) Moreover, the inherent power to dismiss an appeal has been exercised in several cases where a party failed or refused to appear for a judgment debtor examination. (*Say & Say v. Castellano* [(1994)] 22 Cal. App.4th [88,] 94; *Stone v. Bach*, *supra*, 80 Cal.App.3d at pp. 443–444; *Tobin v. Casaus* [(1954)] 128 Cal.App.2d [588,] 589, 593.)" (*TMS, Inc. v. Aihara, supra*, 77 Cal.App.4th at pp. 379–380.)

the court process." (*Id.* at p. 592.) The court added, "The right to an appeal must not be lightly forfeited, and where a doubt exists as to a litigant's conduct being contumacious or wilful, an appellate court will tolerate temporarily the acts which were disruptive of the judicial process. We always prefer to resolve a cause on its merits; once the rights of the parties have been determined with finality, then the thwarted authority and offended dignity of the court may be assuaged with condign sanctions to the extent of the affront. [¶] But in the instant case we are dealing with a litigant who not only has previously failed to appear as ordered, but who up to this very time remains a fugitive from justice. Apparently he is unwilling to respond to a court order with which he disagrees, but seeks to obtain on appeal a conclusion with which he may be satisfied. As stated in *Soderberg v. Soderberg* (1923) 63 Cal.App. 492, 494, 'Defendant is in no position to stipulate with the court under what terms and conditions he will comply with the judgment.' There may be no infringement 'upon the court's inherent power to ignore the demands of litigants who persist in defying the legal orders and processes of this state.' (*MacPherson v. MacPherson, supra,* at p. 279)" (*Id.* at p. 592–593; see *Say & Say v. Castellano, supra,* 22 Cal. App.4th at p. 94.)[7]

### *B. Application of Disentitlement Doctrine*

In this case, defendants, as the appellants in *TMS, Inc. v. Aihara, supra,* 71 Cal.App.4th 377, have been ordered by a trial court to respond to a postjudgment discovery designed to obtain information to aid in the enforcement of the judgment being appealed. In addition, they have been found to be in contempt of that order. Their conduct "demonstrates a deliberate effort to achieve a stay of execution of the money judgment against [them] without complying with legal procedures." (*Stone v. Bach, supra,* 80 Cal.App.3d at p. 448.) Such willful disobedience and obstruction of presumptively valid orders can, and in this case does, provide a basis upon which to dismiss the appeal under the disentitlement doctrine.

Defendants, as the appellant in *Stone v. Bach, supra,* 80 Cal.App.3d 442, attempt to justify their willful disobedience of a trial court's orders — in this case issued by a New York trial court — by contending that those orders are invalid and therefore subject to reversal on appeal. "This is the worst kind of bootstrapping." (*Id.* at p. 448.) Those orders are presumptively valid and must be obeyed and enforced. Under New York law, orders must be obeyed unless and until reversed on appeal. (See *McCain v. Giuliani* (1997 N.Y.App. Div.) 653 N.Y.S.2d 556, 557; *Seril v. Belnord Tenants Association* (1988 N.Y.App.Div.) 526 N.Y.S.2d 462, 463–464.) Defendants have instead obstructed the enforcement of those orders, thereby frustrating the enforcement of the California judgment from which they appeal. This conduct is of the type to which the disentitlement doctrine has been applied.

Defendants contend that the disentitlement doctrine cannot be applied to a California appellant that is in violation of a trial court order from another jurisdiction. They point to the quote in *MacPherson v. MacPherson, supra,* 13 Cal.2d at page 277 explaining that the disentitlement doctrine bars a party from seeking "the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt *to legal orders and processes of the courts of this state*." (Italics added.) Defendants further assert that the "fugitive disentitlement doctrine," by which federal courts have dismissed appeals of a judgment against an appellant outside the jurisdiction because he or she is a fugitive from a related criminal prosecution, is not relevant as it arises under a specific statute — 28 U.S.C. section 2466.[8] According to defendants, because California's legislature has not specifically provided that the disentitlement doctrine applies to orders of sister-state courts, we should not extend the doctrine to such orders in this case. There are, however, federal authorities that predate the enactment of 28 U.S.C. section 2466 and do not limit the disentitlement doctrine to trial court orders from the same jurisdiction as the appellate court. (See, *e.g.*, *In re Prevot* (6th Cir. 1995) 59 F.3d 556, 566; *Conforte v. C.I.R.* (9th Cir. 1982) 692 F.2d 587, 589; *Broadway v. City of Montgomery, Alabama* (5th Cir. 1976) 530 F.2d 657, 659.)[9]

Neither the court in *MacPherson v. MacPherson, supra,* 13 Cal.2d at page 277, nor the other California cases that repeat the phrase "courts of this state," dealt with the issue of whether the disentitlement doctrine could be based on contempt or frustration of court orders issued by trial courts that were not "courts of this state." There is no indication in any of those cases that the language upon which defendants rely was intended to exclude the application of the disentitlement doctrine to sister-state orders or judgments.

There is no basis in logic or law to support the conclusion that we should treat a New York trial court's orders differently than ones entered in this state. Article IV, section 1 of the United States Constitution provides in pertinent part,

7. See also *Empire Blue Cross and Blue Shield v. Finklestein* (2d Cir. 1997) 111 F.3d 278, 282 [judgment debtor was disentitled to appeal judgment because he failed to comply with orders to appear in connection with posttrial enforcement proceedings]; *Motorola Credit Corp. v. Uzan* (2d Cir. 2009) 561 F.3d 123, 130, fn. 7 [evasion of enforcement procedure may invoke disentitlement doctrine].

8. That statute was enacted in response to *Degen v. United States* (1996) 517 U.S. 820, in which the United States Supreme Court held that the fugitive disentitlement doctrine should not apply in a civil forfeiture action when the claimant is a fugitive from a related criminal prosecution. (*Collazos v. United States* (2d Cir. 2004) 368 F.3d 190, 198; see *Empire Blue Cross and Blue Shield v. Finklestein, supra,* 111 F.3d at p. 282 [distinguishing *Degen* saying, "We hold that we have discretion to dismiss the appeal of a civil litigant who becomes a fugitive to escape the effect of the civil judgment"].) The United States Supreme Court has said, "the justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response." (*Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, 244; see *United States v. Morgan* (2d Cir. 2001) 254 F.3d 424, 427.)

9. The United States Supreme Court applied the fugitive disentitlement doctrine as early as 1876. (*Smith v. United States* (1876) 94 U.S. 97.)

that "Full Faith and Credit shall be given in each state to the Public Acts, Records, and judicial proceedings of every other state." Title 28 of the United States Code section 1738 implements the full faith and credit clause by providing, in substance, that judicial proceedings of any state are entitled to the same treatment in every court within the United States as they have by law or usage in the courts in which they occurred.

Had plaintiffs attempted to enforce the judgment in California by propounding postjudgment special interrogatories seeking defendants' financial information,[10] including information about assets defendants may have in New York, the disentitlement doctrine would have applied to any noncompliance with the California trial court's orders compelling responses to those interrogatories. (*TMS, Inc. v. Aihara, supra,* 71 Cal.App.4th at pp. 378–380.) For purposes of the disentitlement doctrine, there is no meaningful distinction between New York trial court orders and California trial court orders related to enforcement of a California judgment. The orders of the New York court in issue were based solely on a California money judgment and were intended to aid in the enforcement of that judgment. Thus, by violating those orders, defendants are obstructing and frustrating the enforcement of a judgment of this state, while at the same time seeking relief concerned that judgment in this court. Under the well-established disentitlement doctrine, defendants are not entitled to the relief they seek on appeal.

Because defendants have repeatedly, and in contempt of sister-state orders, frustrated the enforcement of the California judgment being appealed, we apply the disentitlement doctrine to dismiss the appeal. In doing so, we reject defendants' request that in the event we apply the disentitlement doctrine, we stay, rather than dismiss immediately, the appeal to allow defendants to reconsider their determination not to comply with the New York subpoena and the New York trial court orders. (See, *e.g.*, *Alioto Fish Co. v. Alioto, supra,* 27 Cal.App.4th at p. 1691; *Tobin v. Casaus, supra,* 128 Cal.App.2d at p. 593.) This dismissal does not become final for 30 days, during which time defendants can seek reinstatement of the appeal. (Cal. Rules of Court, rules 8.264(b)(1); 8.264(c); 8.268(a)(1); see *Stone v. Bach, supra,* 80 Cal.App.3d at pp. 448–449.) But we do not suggest or imply how we might act upon such a request or petition.

## DISPOSITION

The appeal is dismissed. Plaintiffs shall recover their costs on appeal.

**MOSK, Acting P. J.**

**We concur: KRIEGLER, J., O'NEILL, J.***

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

10. Code of Civil Procedure section 708.020.

Cite as 13 C.D.O.S. 4619

**RONALD JAY SISSON,** Petitioner,

**v.**

**THE SUPERIOR COURT OF SAN DIEGO COUNTY,** Respondent;

**BONNIE M. DUMANIS, as District Attorney, etc., et al.,** Real Parties in Interest.

No. D063022
In the Court of Appeal of the State of California
Fourth Appellate District
Division One
(San Diego County) (Super. Ct. No. SCN259845)

PROCEEDINGS in mandate following the partial denial of a motion for discovery of peace officer personnel information. Harry M. Elias, Judge. Petition granted in part and denied in part.

Filed May 6, 2013

## COUNSIL

Mark W. Fredrick for Petitioner.

No appearance for Respondent.

Bonnie M. Dumanis, District Attorney, Laura Tanney, Gary Schons and Laurie Hauf, Deputy District Attorneys for Real Party in Interest Bonnie M. Dumanis.

Kamala D. Harris, Attorney General, Alicia M.B. Fowler, Senior Assistant Attorney General, Chris A. Knudsen and Evan R. Sorem, Deputy Attorneys General, for Real Party in Interest Department of Corrections and Rehabilitation.

Jones & Mayer and Gregory P. Palmer for Real Party in Interest Costa Mesa Police Department.

## INTRODUCTION

In this petition, we must decide whether a criminal defendant charged with provocative act murder showed good cause for discovery of complaints of dishonesty, false reporting, and excessive force in peace officers' personnel records. We must also decide whether a trial court, when conducting an in camera review of such records, must examine the records itself or whether it may rely in whole or in part on the custodian's sworn testimony about the records' contents and the custodian's opinion about whether any information in the records is discoverable.

We conclude the defendant showed good cause for discovery of complaints of dishonesty or false reporting as to some officers, but did not show good cause for discovery of complaints of excessive force as to any officers. We further conclude a trial court conducting an in camera review of peace officer personnel records must examine the produced records itself and may not rely on the custodian's assessment of the discoverability of information contained in the records. We, therefore, grant the petition in part and direct the trial court to conduct further proceedings consistent with our decision.

## BACKGROUND

Ronald Jay Sisson, also known as Brian Lee Olsen, is charged with one count of murder (Pen. Code, § 187, subd. (a)) and three counts of assaulting a peace officer with a deadly weapon (Pen. Code, § 245, subd. (c)). The charges stem from an incident in which peace officers attempting to apprehend Sisson at a home in Carlsbad fired multiple shots into Sisson's vehicle, killing his front seat passenger.

### *Officers' Version of Events*

According to a report of the incident prepared by the Carlsbad Police Department, Costa Mesa Police Sergeant Scott May; Costa Mesa Police Detectives Eric Wisener, Larry Fettis, Aaron Parsons, Kevin Westman, Bang Le, and George Escanuelos; and state parole agents Eric Kraus and Shad Colbert traveled to Carlsbad on November 1, 2007, in three unmarked vehicles. May, Parsons and Westman were in a Nissan Armada; Escanuelos and Fettis were in a Chevrolet Impala; and Wisener, Le, Colbert, and Kraus were in a Chevrolet Uplander.

The purpose of the officers' trip was to apprehend Sisson, who had absconded from parole. At the time, the officers believed Sisson was an associate of a criminal street gang. They also believed he was wanted by another law enforcement agency on identity theft charges and for possibly kidnapping his infant child from foster care. They considered him to be armed and dangerous.

All of the officers wore badges. Four of the officers wore clothing identifying them as peace officers. Parsons wore the Costa Mesa Police Department's gang unit uniform, including "a black polo style shirt with a soft police badge patch sewn on the upper left chest. On the back of the shirt, POLICE GANG UNIT was written in large white lettering." Kraus[1] and Colbert both wore black T-shirts with "POLICE" written in large white letters on the front, back and both sleeves. They also wore soft body armor with "POLICE" written on both the front and back. Le wore a blue, long-sleeve nylon raid jacket with "POLICE" written on the back and both sleeves.

When the officers arrived at Sisson's home, Wisener contacted the Carlsbad Police Department and requested the assistance of two marked police units. While the officers waited for the marked police units, Fettis and Escanuelos, who were watching the home, radioed that Sisson was preparing to leave. May decided to stop Sisson and directed the officers to move in and make contact.

1. Although Kraus, following the advice of his attorney, declined to be interviewed by Carlsbad Police Department investigators, he submitted a written statement which is included in the Carlsbad Police Department's report.

The officers blocked Sisson's vehicle by parking the Uplander and the Armada behind it. Parsons, who had previous contacts with Sisson, and Westman got out of the Armada and approached the driver's side of Sisson's vehicle. Parsons had his gun drawn and his flashlight out. Wisener, who also had previous contacts with Sisson, and Colbert got out of the Uplander and positioned themselves at the rear passenger side of Sisson's vehicle.

Parsons stood next to the driver's side door of Sisson's vehicle and identified himself as a police officer. Parsons commanded Sisson to stop and to put his hands up. Sisson made eye contact with Parsons and initially raised his hands, as if complying with Parsons's commands. However, Sisson then put his hands back on the steering wheel of his vehicle and reversed it. He swerved it toward Parsons and ran over Parsons's foot and lower leg. Parsons yelled several times that he had been hit.

Meanwhile, Sisson repeatedly rammed his vehicle into the Uplander and Armada until he forced his way between them. At the time, Kraus and Le, both of whom had previous contacts with Sisson, were inside the Uplander and May was inside the Armada.

Sisson continued reversing his vehicle in a circular pattern through a neighbor's yard. Fettis was standing next to the driver's door of the Impala, which he had parallel parked west of Sisson's driveway. Sisson looked over his shoulder at Fettis and then drove his vehicle directly toward Fettis. Fettis ran to a safe location just before Sisson rammed the Impala.

After Sisson rammed the Impala, he continued driving his vehicle in reverse at an accelerated speed toward a nearby intersection. When Sisson reached the intersection, he turned his vehicle around and lurched forward as he transitioned from reverse to drive. By then, several of the officers had moved to the middle of the street and Wisener, Fettis, and Kraus fired their weapons at Sisson's vehicle. Wisener fired one shot, Fettis fired 13 shots, and Kraus fired 12 shots.

Sisson drove away, eventually crashing his vehicle into a telephone pole and fleeing on foot. Police officers apprehended him approximately an hour after the crash. He had only minor injuries; however, his front seat passenger was taken to a hospital for treatment and died two days after the incident from a gunshot wound to the head.

Parsons also received treatment at a hospital. He had a sprained ankle and there were tire marks on his right leg below the knee.[2]

### *Sisson's Motions and Version of Events*

Sisson filed two motions under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), Evidence Code section 1043, and Penal Code section 832.5. One motion sought discovery of certain documents from the Costa Mesa officers' personnel files, including any complaints of excessive force, dishonesty, and fabrication of charges or evidence. The other motion sought discovery of the same types of documents from the state parole agents' personnel files.

Sisson supported his motions with declarations from his attorney disputing the officers' version of events in several key respects. As to all of the officers, the declarations stated Sisson had no history of violence and had never been accused of possessing a deadly or dangerous weapon. The officers knew from a radio transmission by Fettis there was a passenger in Sisson's vehicle. Sisson was already backing out of the driveway when the officers drove up in their vehicles and their vehicles collided with his. Although it was nighttime, the officers did not have their vehicles' headlights turned on. In addition, the officers wore civilian clothing and did not identify themselves as police officers. Sisson believed he was under attack and attempted to escape. The officers fired 27 rounds at his vehicle. All of the rounds hit the passenger side of the vehicle.

As to specific officers, the declarations stated that during the police investigation and, in some instances, during the preliminary hearing:[3]

1. Parsons and Wisener lied about identifying themselves as police officers when they approached Sisson's vehicle as Sisson and unspecified witnesses stated the officers did not identify themselves.

2. Parsons lied about not knowing whether there was a passenger in Sisson's vehicle and Wisener similarly lied about not seeing a passenger in Sisson's vehicle.

3. Parsons changed his story about how he was holding his flashlight as he approached Sisson's vehicle because he wanted to cover up his knowledge there was a passenger in Sisson's vehicle and bolster his claim Sisson knew he was a police officer.

4. Parsons lied about being run over by Sisson's vehicle because he did not sustain any injury during the incident.

5. Wisener lied about Sisson driving his vehicle toward other officers, repeatedly smashing his vehicle into an unmarked police car, and crashing into a neighbor's garage. Sisson never drove his vehicles toward officers and instead simply tried to exit the area. The physical evidence supports Sisson's position, including the fact that all of the bullet holes are in the side of Sisson's vehicle. None of them are in the

2. A Carlsbad police field evidence technician took digital images of all the officers after the incident. He also took digital images of Parsons's injuries and collected Parsons's pants and shoes.

3. Parsons, Wisener, Fettis, and Kraus testified at the preliminary hearing. Sisson included a copy of the preliminary hearing transcript in the record he provided for this petition. When Sisson's counsel referenced the transcript at the hearing on the Sisson's *Pitchess* motions, the trial court stated it did not consider preliminary hearing transcripts in *Pitchess* proceedings. Although Sisson's counsel did not agree with the trial court's position, Sisson's petition does not challenge this aspect of the trial court's ruling and it does not affect our decision. We, therefore, do not address it. Nonetheless, we are not aware of any authority categorically excluding consideration of a preliminary hearing transcript or other documentary evidence in *Pitchess* proceedings. (See *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025 (*Warwick*) [in addition to defense counsel's affidavit, a trial court hearing a *Pitchess* motion may have before it "a police report, witness statements, *or other pertinent documents*"] italics added.)

front of it. In addition, the shooting officers admitted they spoke with one another after the incident and before their interviews with Carlsbad investigators, giving them ample opportunity to create a collusive story.

6. Fettis lied about not telling other officers there was a passenger in Sisson's vehicle. Kraus stated in his report of the incident he heard Fettis announce this information over the radio.

7. Fettis lied about Sisson driving his vehicle directly toward him. Sisson never drove toward Fettis. Unspecified physical evidence and unspecified witness accounts show Fettis's claim was fabricated. In addition, the shooting officers admitted they spoke with one another after the incident and before their interviews with Carlsbad investigators, giving them ample opportunity to create a collusive story.

8. Le was evasive in his account of events and lied about seeing little to none of the incident likely because he did not want to contradict his fellow officers.

9. Escanuelos, Westman, May, and Colbert lied about hearing officers identify themselves as police officers to Sisson. Sisson and unspecified witnesses stated the officers did not identify themselves.

10. Westman and Escanuelos lied about believing Sisson was targeting officers. Unspecified physical evidence shows Sisson never deliberately targeted the officers.

11. May failed to tell investigators he admonished officers for firing their weapons without having a clear shot.

12. Kraus lied about shooting at Sisson as Sisson was driving toward him. Sisson's account, unspecified witnesses' accounts, and unspecified physical evidence show this claim was fabricated. Carlsbad investigators also informed Kraus the placement of the shell casings at the scene did not match his version of events. In addition, the shooting officers admitted they spoke with one another after the incident and before their interviews with Carlsbad investigators, giving them ample opportunity to create a collusive story.

The trial court granted Sisson's *Pitchess* motions in part. The trial court found Sisson had shown good cause for an in camera review of the personnel files of Kraus, Wisener, Fettis, and Parsons for complaints related to dishonesty and false reporting. The trial court correspondingly found Sisson had not shown good cause for an in camera review of the other officers' personnel files for such complaints. It also found Sisson had not shown good cause for an in camera review of any of the officers' personnel files for excessive force.

After conducting the in camera review, the trial court found discoverable information as to two of the officers. The trial court provided the information to defense counsel subject to a protective order. Sisson then filed this petition seeking review of the trial court's decision.

## DISCUSSION

## I. APPLICABLE LEGAL PRINCIPLES

The legal principles guiding our review of *Pitchess* motions are well-established. "A defendant has a limited right to discovery of a peace officer's confidential personnel records if those files contain information that is potentially relevant to the defense. [Citations.]… [¶] To initiate discovery, a defendant must file a motion seeking such records, containing affidavits 'showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation. . . .' [Citation.] Good cause requires the defendant to establish a logical link between a proposed defense and the pending charge and to articulate how the discovery would support such a defense or how it would impeach the officer's version of events. [Citation.]

"The threshold for establishing good cause is 'relatively low.' [Citations] The proposed defense must have a 'plausible factual foundation' supported by the defendant's counsel's declaration and other documents supporting the motion. [Citation.] A plausible scenario 'is one that might or could have occurred.' [Citation] The 'defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. … Once that burden is met, the defendant has shown materiality under [Evidence Code] section 1043.' [Citation]

" 'If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation] "the trial court should then disclose to the defendant 'such information [that] is relevant to the subject matter involved in the pending litigation.' " [Citations.]" [Citation.]

"We review the denial of a *Pitchess* motion for abuse of discretion." (*People v. Moreno* (2011) 192 Cal.App.4th 692, 700–702.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason." ' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714; accord, *People v. Galan* (2009) 178 Cal.App.4th 6, 12.)

## II

### *A. Discovery of Dishonesty/False Reporting Complaints as to May, Escanuelos, Westman, Colbert and Le.*

Sisson contends the trial court abused its discretion by denying his motions for information related to complaints of dishonesty or false reporting as to May, Escanuelos, Westman, Colbert, and Le. We agree Sisson showed good cause for discovery of such information as to May, Escanuelos, Westman and Colbert, but not as to Le.

As summarized above, the declarations supporting Sisson's motions stated May, Escanuelos, Westman, and Colbert lied about hearing officers identify themselves as police officers to Sisson. According to Sisson and unspecified witnesses, the officers did not identify themselves. Sisson, therefore, believed he was under attack and attempted to escape.

Whether Sisson knew the men who approached his vehicle were police officers potentially bears on whether he intentionally assaulted the officers and whether he acted

provocatively for purposes of the provocative act murder doctrine. Sisson's supporting declaration provides a specific factual scenario of officer misconduct (the officers deliberately lied about what transpired to cover up one another's transgressions) with a plausible factual foundation (they were not wearing uniforms, they were not in marked vehicles, and they did not identify themselves) for a lack of knowledge/lack of intent defense. There is a logical link between the information sought and this defense because Sisson may be able to use information related to past acts of dishonesty or false reporting by these officers to impeach the officers' credibility and cast reasonable doubt on their version of events. Thus, Sisson has met the relatively low requirements for the trial court to conduct an in camera review of the officers' personnel records for such information and the trial court abused its discretion by denying Sisson's motion as to these officers and this type of information. (*Warrick*, *supra*, 35 Cal.4th at pp. 1024–1026; *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72; *Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 319.)

Conversely, as to Officer Le, we conclude Sisson has not met the good cause requirement. One of Sisson's supporting declarations states Le was evasive in his account of events, but the declaration does not elaborate on this point. Likewise, the declaration states Le lied about seeing little to none of the incident, but the declaration does not provide a specific factual scenario with a plausible factual foundation to support this statement. Accordingly, we conclude the trial court did not abuse its discretion by denying Sisson's motion for discovery of past complaints of dishonesty and false reporting against Le.

### *B. Discovery of Excessive Force Complaints as to Fettis, Kraus, and Wisener*

Sisson contends the trial court erred by denying his motion for discovery of information in the personnel files of Fettis, Kraus, and Wisener related to excessive force complaints. As previously discussed, to establish good cause for discovery of this information, Sisson must demonstrate a logical link between the information and a proposed defense to a pending charge. (*Warrick*, *supra*, 35 Cal.4th at p. 1021.)

As the trial court implicitly determined, Sisson has not met this requirement.[4]

#### 1. Murder Charge

At the hearing on the *Pitchess* motions, Sisson argued past complaints of excessive force were material because the officers' use of excessive force in firing at his vehicle was an absolute defense to the murder charge. Sisson is mistaken.

The prosecution is seeking to hold Sisson liable for his passenger's death under the provocative act murder doctrine. "The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander." (*People v. Cervantes* (2001) 26 Cal.4th 860, 867.)

"[A] provocative act murder has both a physical and a mental element that the prosecution must establish. [Citation.] To constitute the actus reus of provocative act murder, the defendant must commit an act that provokes a third party to fire a fatal shot. The *mens rea* element is satisfied if the defendant knows that his or her provocative act has a high probability — not merely a foreseeable possibility — of eliciting a life-threatening response from the person who actually fires the fatal bullet. [Citations.] Cases often discuss these two elements in terms of whether the defendant committed a *provocative act* which *proximately caused* the killing." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 582–583; see also CALCRIM No. 560.)

The focus of the provocative act murder doctrine is on the defendant's conduct and not on the state of mind of the party firing the fatal shot. (See *In re Joe R.* (1980) 27 Cal.3d 496, 506, fn. 6; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 137–139) Consequently, liability for provocative act murder is determined by whether the killing was a natural and probable consequence of the defendant's provocative act, not by whether the actual killer's use of force was reasonable. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 631; *People v. Briscoe*, *supra*, 92 Cal.App.4th 568, 592–593 [application of the provocative act murder doctrine does not require the killing result from the reasonable response by the actual shooter]; *People v. Gardner* (1995) 37 Cal.App.4th 473, 480 [same].) Thus, whether the officers in this case used reasonable force in firing at Sisson's vehicle is immaterial to Sisson's defense of the murder charge.

#### 2. Assault Charges

In his response to our request for supplemental briefing (see fn. 4, *ante*), Sisson argues for the first time that the reasonableness of the officers' use of force is material to his defense of the assault charges. More particularly, he argues the reasonableness of the officers' use of force is material to whether the officers were lawfully performing their duties at the time of alleged assaults. He bases his argument on his view of the conduct of the officers who stopped and approached his vehicle. However, he has not supplied any supporting authority indicating the officers' actions were, or could reasonably be found to be, unlawful or excessive under the circumstances (e.g., involving the apprehension

4. We requested supplemental briefing on this point. The district attorney's office responded to our request. Although the district attorney's office generally lacks standing to be heard on *Pitchess* motions (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1043–1046), we considered the response as an amicus curiae brief on behalf of real parties in interest Department of Corrections and Rehabilitation and Costa Mesa Police Department. (See, *e.g.*, *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1315, fn. 2.)

of a known gang member who had absconded from parole and was believed to be armed and dangerous). Similarly, to the extent Sisson bases his argument on the conduct of the officers who fired gunshots at his vehicle, he has not supplied any supporting authority indicating actions taken after his alleged assaults can provide a defense to them. Accordingly, Sisson has failed to establish a logical link between past complaints of excessive force and any defense in this case.

## III. PROCEDURES FOR IN CAMERA REVIEW

After partially granting Sisson's *Pitchess* motions, the trial court conducted two in camera hearings: one to review Kraus's personnel records and one to review the personnel records of Wisener, Fettis, and Parsons. At each hearing, the trial court placed the custodian under oath and asked the custodian general questions about the contents of the records the custodian produced. The trial court did not, however, examine any produced record unless the custodian indicated the record included discoverable information. For instance, although one of the custodians produced records of an internal affairs review of the subject shooting, the trial court did not examine the records and instead relied solely on the custodian's opinion that the records contained no discoverable information.

Because we questioned whether the trial court's in camera review complied with applicable law, we requested and received supplemental briefing from the parties. After considering the supplemental briefing, we conclude the trial court's in camera review did not comply with applicable law.

The California Supreme Court discussed the procedures for *Pitchess* motions at length in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*). Of pertinence here, the Court explained that when a trial court finds a defendant has shown good cause for discovery of peace officer personnel information, the custodian of records "is obligated to bring to the trial court all 'potentially relevant' documents *to permit the trial court to examine them for itself*." (*Id.* at pp. 1228–1229, italics added.) A custodian need not produce any documents clearly irrelevant to the defendant's *Pitchess* request; however, if a custodian is uncertain whether a document is relevant, the custodian "should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that *the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records.*" (*Ibid.*, italics added.) The custodian must also be prepared to state during the in camera review and for the record what documents or category of documents the custodian did not produce and why. A court reporter should document the custodian's statements and any questions from the trial court regarding the completeness of the record." (*Id.* at p. 1229.)

Before ruling on the *Pitchess* motion, the trial court must make a record of what documents it examined to permit future appellate review. To make the record, the trial court may photocopy the records the custodian produced and place them in a confidential file. Alternatively, the trial court can make a list of or state for the record the documents it examined. (*Mooc*, *supra*, 26 Cal.4th at p. 1229.) After examining the documents and questioning the custodian, the trial court should seal the record of the in camera hearing. (*Id.* at pp. 1229–1230.)

In this case, the transcripts of the in camera hearings show the trial court failed to comply with the Supreme Court's guidance in *Mooc* in key respects. Of chief concern, the trial court did not examine all of the potentially responsive documents the custodians produced. Rather, the trial court only examined a document if a custodian affirmatively indicated the document contained discoverable information. The trial court utilized this approach even for documents directly related to the case, such as an internal affairs review of the subject shooting.

While we have no reason to believe the custodians intentionally lied under oath or withheld discoverable documents in this case, we do not read the Supreme Court's guidance in *Mooc* to permit a trial court to abdicate to a custodian its responsibility to examine the produced documents and assess the discoverability of the information contained in them. (See, *Mooc*, *supra*, 26 Cal.4th at pp. 1229–1230, fn. 4 [the statutory scheme codifying *Pitchess* contemplates the trial court will be the entity deciding what information to disclose in response to a defendant's *Pitchess* motion].) To the contrary, it is the trial court's active involvement in the *Pitchess* process that allows the process to work as intended. "[B]oth *Pitchess* and the statutory scheme codifying *Pitchess* require the intervention of a neutral trial judge, who examines the personnel records in camera, away from the eyes of either party, and orders disclosed to the defendant only those records that are found both relevant and otherwise in compliance with statutory limitations. In this manner, the Legislature has attempted to protect the defendant's right to a fair trial and the officer's interest in privacy to the fullest extent possible." (*Mooc*, *supra*, 26 Cal.4th at p. 1227.)

Moreover, because the trial court did not examine all of the produced documents, the trial court did not make an adequate record of the produced documents should we need to review the matter on appeal. (*Mooc*, *supra*, 26 Cal.4th at p. 1229.) Further, while the trial court made an effort to inquire into what types of documents the custodians opted not to produce, the effort fell short of requiring the custodians to establish on the record what documents or category of documents were included in the officers' complete personnel files and, where applicable, to explain their decisions to withhold certain documents. "Absent this information, the court cannot adequately assess the completeness of the custodian's review of the personnel files, nor can it establish the legitimacy of the custodian's decision to withhold documents contained therein. Such a procedure is necessary to satisfy the Supreme Court's pronouncement that 'the locus of decisionmaking' at a *Pitchess* hearing 'is to be the trial court, not the prosecution or the custodian of records.' [Citation.]" (*People v.*

*Guevara* (2007) 148 Cal.App.4th 62, 69, citing *Mooc*, *supra*, at p. 1229.) Accordingly, we conclude the trial court must conduct a new in camera review of the personnel records of Kraus, Wisener, Fettis, and Parsons.

## DISPOSITION

Let a writ of mandate issue directing the superior court to review in camera the personnel records of May, Wisener, Fettis, Parsons, Westman, Escanuelos, Kraus, and Colbert for past relevant complaints of dishonesty and false reporting, and to conduct the reviews consistent with the procedures described in *Mooc*, *supra*, 26 Cal.4th 1216 and this decision. In all other respects, the petition is denied. The stay issued November 30, 2012 is vacated.

**McCONNELL, P. J.**

**WE CONCUR: McDONALD, J., AARON, J.**

Cite as 13 C.D.O.S. 4624

# **THE PEOPLE,** Plaintiff and Respondent,

**v.**

# **DAWN QUANG TRAN,** Defendant and Appellant.

No. H036977
In the Court of Appeal of the State of California
Sixth Appellate District
(Santa Clara County Super. Ct. No. 205026)
Filed May 7, 2013

## COUNSEL

Attorney for Defendant and Appellant Dawn Quang Tran: Carl A. Gonser, under appointment by the Court of Appeal for Appellant

Attorneys for Plaintiff and Respondent The People: Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Laurence K. Sullivan, Supervising Deputy Attorney General, Catherine A. Rivlin, Supervising Deputy Attorney General

## OPINION

## I. INTRODUCTION

Defendant Dawn Quang Tran pleaded not guilty by reason of insanity (NGI) to a sexual offense and was committed to a state mental hospital for treatment. (Pen. Code, § 1026.5, subd. (a).)[1] Before the commitment expired, the Santa Clara County District Attorney filed a petition to extend it. (§ 1026.5, subd. (b).) At that time, the trial court was required to "advise the person named in the petition… of the right to a jury trial" (§ 1026.5, subd. (b)(3)) and conduct a jury trial "unless waived by both the person and the prosecuting attorney" (§ 1026.5, subd. (b)(4)).

At a pretrial hearing, the court met with defense counsel and the prosecutor in chambers to discuss procedural matters. At that time, both parties waived a jury trial off the record. Thereafter, defendant appeared at the bench trial after which the court sustained the petition and extended his commitment.

On appeal, defendant claims he was denied the right to a jury trial because the court failed to advise him of his right to a jury and erred in accepting counsel's waiver. He argues that the court was required to obtain his express, personal waiver. The Attorney General counters that the bench trial

1. "Technically, once a defendant has been found not guilty by reason of insanity, he is no longer a criminal defendant, but a person subject to civil commitment." (*People v. Lara* (2010) 48 Cal.4th 216, 222, fn. 5.) We shall refer to such persons as defendants or NGIs rather than "committees" or "persons committed."

All unspecified statutory references are to the Penal Code.

was proper because, as a rule, counsel in NGI commitment cases has exclusive control over whether to have a bench or jury trial.

We conclude that section 1026.5 does not require an NGI's personal jury trial waiver. Counsel may waive a jury at the NGI's direction or with the NGI's knowledge and consent, and counsel may also do so even over a defendant's objection, particularly when the defendant is not sufficiently competent to determine what is in his or her best interests. To protect the right to a jury trial and ensure compliance with the statute, we further hold that when the court conducts a bench trial, the record must affirmatively establish the circumstances and validity of the jury.

## II. STATEMENT OF THE CASE

In 1998, defendant Tran pleaded not guilty by reason of insanity to lewd and lascivious conduct with a child under 14.[2] He was committed to a state hospital for treatment, and his commitment has been extended three times.[3] On April 1, 2011, before the last extension expired, the district attorney filed a petition to extend it again. On May 12, 2011, after a bench trial, the court sustained the petition and extended defendant's commitment to June 19, 2013. Defendant appeals from the extension order.

We affirm the order.

## III. THE JURY WAIVER AND EXTENSION TRIAL

### *A. Waiver*

Initially, the record on appeal did not reveal an advisement or express waiver. However, at the Attorney General's request, we directed the trial court to settle the record concerning an unreported, pretrial conference. (See Cal. Rules of Ct., rules 8.155 & 8.137.)

The court filed a settled statement. It reads, in pertinent part, "It was the custom and practice of [Honorable Gilbert T. Brown] to call the mental health calendar each Friday on the record. Prior to calling the calendar, all cases set were discussed in chambers. [¶]… . On April 29, 2011, Respondent's counsel, Thomas Sharkey, Deputy Public Defender, stated in chambers that Respondent was not willing to submit to an extension of his commitment to the Department of Mental Health and wanted a trial. He also stated, that he, counsel, was requesting a court trial rather than a jury trial. The People were in agreement with having a court trial. Trial was set for May 12, 2011 … ."

### *B. The Extension Trial*

At the extension trial, Dr. Eric Khoury, M.D., defendant's treating psychiatrist at Napa State Hospital (NSH), testified that defendant suffered from bipolar disorder, which has at times been severe and caused psychotic episodes. Dr. Khoury explained that the disorder is a chronic condition, and controlling the symptoms requires the continued use of medication. Dr. Khoury said that although defendant was currently taking his medication, he vascillated between doing so and thinking he was cured. He said that defendant had not acknowledged that he would have to take medication for the rest of his life; rather, defendant said only that if medication is prescribed, he would take it. This and defendant's interest in being unconditionally released caused Dr. Khoury to be concerned that defendant would stop taking medication if he were not being closely supervised. Dr. Khoury opined that if defendant stopped, he would pose a danger to himself and others due to his mental disorder. He further argued that defendant would be ready for conditional release on outpatient status when he understood that he was not "cured," when he had developed the ability to recognize the signs of an onset of a manic episode, and when he understood that he had to take medication even when he felt better. Dr. Khoury noted that defendant currently was being evaluated for outpatient status and treatment, but that evaluation was not yet complete. At this time, NSH was not recommending outpatient status, and Dr. Khoury agreed that defendant was not ready for conditional release yet. Dr. Khoury opined that defendant's preference for unconditional release was unrealistic.

Defendant acknowledged that when he was first committed, he was mentally ill and had hallucinations. However, he believed that he was now fine. He said that if released, he would take his medication for the rest of his life. He admitted, however, that in the past, when he had felt fine and the doctor had refused to lower the dosage of his medication, he got angry and stopped taking it.

## IV. AN NGI COMMITMENT AND EXTENSION

Under the statutory scheme for NGI commitments, a defendant who has been committed to a state hospital after being found NGI may not be kept in actual custody longer than the maximum state prison term to which he or she could have been sentenced for the underlying offense. (§ 1026.5, subd. (a)(1).) At the end of that period, the district attorney can seek a two-year extension by filing may petition alleging that the defendant presents a substantial danger of physical harm to others because of his or her mental disease, defect, or disorder. (§ 1026.5, subds. (b)(1)-(2).) As noted, when the petition is filed, the court must advise the defendant of the

2. The commitment offense occurred on June 18, 1997. Defendant was visiting the home of a friend whose mother was babysitting. At one point, the mother heard a child scream in another room. The mother responded and found defendant in his underwear with his penis exposed standing over a four-year-old child whose pants and underwear had been pulled down. When defendant lay down on top of the child, the mother pushed him off and told him to leave. Later, overcome with guilt, defendant swallowed numerous sleeping pills and stabbed himself in the chest.

3. We take judicial notice of this court's unpublished opinions — *People v. Tran* (Jan. 28, 2009, H031976) and *People v. Tran* (July 26, 2010, H034743) — in which we affirmed the previous commitment extension orders. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal. App.4th 33, 37, fn. 2, citing Ev*id.*Code, § 452, subd. (d)(1); *Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 930, fn. 1.)

right to a jury trial and then conduct a jury trial unless both parties waive a jury. (§ 1026.5, subds. (b)(3) & (4).)

## V. THE PARTIES' CONTENTIONS

As noted, defendant contends that the court erred in failing to give the required jury advisement, accepting counsel's jury waiver, and conducting a bench trial without obtaining his own express personal waiver. The Attorney General argues that the failure to advise and failure to obtain a personal waiver were not errors because once counsel was appointed, he assumed responsibility to advise defendant and enjoyed exclusive control over whether to have a bench or jury trial. Alternatively, the Attorney General argues that any alleged errors were harmless.

## VI. FAILURE TO ADVISE[4]

As noted, subdivision (b)(3) provides, "When the petition is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial."

The record reflects that the court did not directly advise defendant at the first hearing after the petition was filed; nor did the court do so at any time thereafter. This is understandable because when the petition was filed, defendant was in NSH; thereafter, defense counsel waived defendant's presence at all of the pretrial proceedings; the court did not order defendant's appearance for the purpose of an advisement; and defendant did not appear until the day of the bench trial. However, as we shall explain, the court's failure to advise does not compel reversal.

Before any judgment can be reversed for error under state law, it must appear that the error complained of "has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801.) This means that reversal is justified "when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Clearly counsel knew that defendant had the right to a jury trial because he expressly waived it. Moreover, where, as here, counsel waives a defendant's presence at all pretrial hearings, effectively preventing a direct judicial advisement before trial, the court may reasonably expect counsel to discuss all pertinent matters that will arise or that have arisen in pretrial hearings, including the right to a jury trial and whether to have one. "Like all lawyers, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, *to advise the client of his rights*, and to vigorously advocate on his behalf. [Citations.] The attorney must also refrain from any act or representation that misleads the court. (Bus. & Prof.Code, § 6068, subd. (d); Rules Prof. Conduct, rule 5–200(B).)" (*In re Conservatorship of Person of John L.* (2010) 48 Cal.4th 131, 151–152 (*John L.*), italics added.) Absent a showing to the contrary, "[a] reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Conservatorship of Ivey* (1986) 186 Cal. App.3d 1559, 1566; *e.g.*, *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265, 272 (*Mary K.*) [where no evidence to the contrary, court may presume counsel discussed jury waiver with client before waiving on client's behalf].)

Next, the record does not show that defendant was unaware of his right. On the contrary, it suggests otherwise. This was defendant's fourth extension trial. In the appeal from his second extension order, defendant claimed that he was denied his right to a jury trial because he did not personally waive it. (*People v. Tran, supra,* H031976.) Moreover, he had a jury trial on his third extension. (*People v. Tran, supra,* H034743.)

The record also does not show that defendant wanted a jury trial on the instant petition or that he did not authorize or agree to counsel's waiver or that he opposed or would have opposed counsel's waiver. "As a general rule, a stipulation of the attorney will be presumed to have been authorized by the client, as well in order to uphold the action of the court, as for the protection of the other party to the stipulation; but when the adverse party, as well as the court, is aware the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof." (*Knowlton v. Mackenzie* (1895) 110 Cal. 183, 188.)

Here, despite claiming the denial of a jury trial in a previous appeal and having a jury trial on a previous extension petition, defendant appeared in court and participated in the bench trial without objection or complaint. Under the circumstances, the record before us provides no basis to infer that defendant was unaware of his right to a jury trial or wanted a jury trial or that counsel overrode defendant's wish for a jury trial. Any such inferences would be pure speculation on our part.[5]

4. Hereafter, all unspecified subdivision references are to section 1026.5.

5. However, if, in fact, defendant was unaware of his right to a jury trial and would have opposed or did oppose counsel's waiver, but the evidence to establish these facts lay outside the record on appeal, defendant had an alternative a remedy.

As a general rule, claims grounded in facts outside the record can be raised by *habeas* petition. (See *People v. Gray* (2005) 37 Cal.4th 168, 211; *In re Bower* (1985) 38 Cal.3d 865, 872.) A person improperly committed may resort to *habeas corpus* to challenge an involuntary civil commitment. (See Pen. Code, § 1473, subd. (a) ["Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause of such imprisonment or restraint"]; see also *In re Michael E.* (1975) 15 Cal.3d 183.)

We observe that here defendant has not sought *habeas* relief.

Last, we note that a single opinion by a psychiatric expert that the defendant is currently dangerous due to a mental disorder can constitute substantial evidence to support the extension of a commitment. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165; *People v. Bowers* (2006) 145 Cal. App.4th 870, 879.)

Dr. Khoury's testimony constituted strong evidence supporting the court's order, and defendant presented no opposing expert testimony. Nor did he impeach Dr. Khoury in any respect. Moreover, defendant does not now claim that Dr. Khoury's opinion was speculative or that his testimony does not constitute substantial evidence. Under the circumstances, we do not find it reasonably probable defendant would have obtained a more favorable result had the court ordered his presence at a pretrial hearing and directly advised him on the record of his right to a jury trial on the record. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *cf. People v. McClellan* (1993) 6 Cal.4th 367, 377, 378 [failure to advise about sex registration requirement harmless].)[6]

## VII. VALIDITY OF THE BENCH TRIAL

As noted, defendant contends that the bench trial was invalid because the court erred in accepting counsel's waiver. He argues that subdivision (b)(4) requires an NGI's express, personal waiver. According to the Attorney General, however, the court properly accepted counsel's waiver because he had exclusive control over whether to have a bench or jury trial.

### *A. Personal Waiver*

The federal and state Constitutions guarantee the right to a jury trial in criminal cases, and that right can be waived only by the defendant personally. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *People v. Collins* (2001) 26 Cal.4th 297, 304–308; *People v. Ernst* (1994) 8 Cal.4th 441, 446.) However, the right and the personal-waiver rule do not directly apply in NGI proceedings because such they are fundamentally civil, not criminal. (*People v. Powell* (2004) 114 Cal.App.4th 1153, 1157 (*Powell*); *People v. Superior Court* (*Williams*) (1991) 233 Cal.App.3d 477, 485 (*Williams*); *cf. People v. Rowell* (2005) 133 Cal.App.4th 447, 451 (*Rowell*) [constitutional right not applicable in civil proceedings to commit defendant as an sexually violent predator (SVP)]; *People v. Montoya* (2001) 86 Cal.App.4th 825 829–830 (*Montoya*) [same re proceeding to commit mentally disordered offender (MDO)]; *People v. Otis* (1999) 70 Cal.App.4th 1174, 1176 (*Otis*) [same].)

The federal Constitution also guarantees the right to a jury trial in civil cases, but that guarantee is not applicable to the states. (U.S. Const., 7th Amend. [right to a jury trial]; *McDonald v. City of Chicago* (2010) ___ U .S. ___, 130 S.Ct. 3020, 3034–3035, fn. 13 [not applicable to states]; *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 827 [same]; *Hung v. Wang* (1992) 8 Cal.App.4th 908, 927 [same].)

Likewise, the state Constitution guarantees the right to a jury trial in civil actions but only if the right existed at common law in 1850, when the Constitution was first adopted. (Cal. Const., art. I, § 16; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8.) Civil commitment trials, such as an NGI trial, are "initiated by a petition independently of a pending action and are of a character unknown at common law." (*Rowell, supra,* 133 Cal.App.4th at p. 451; *In re Raner* (1963) 59 Cal.2d 635, 639.) Moreover, they are neither actions at law nor suits in equity and are instead considered "special proceedings." (*Montoya, supra,* 86 Cal. App.4th at p. 829; see *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, 822; *Le Louis v. Superior Court* (1989) 209 Cal.App.3d 669, 678; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 65, subd. 20, pp. 139–140; Code Civ. Proc., §§ 21–23.)[7]

In a "special proceeding," the right to a jury trial is generally a matter of legislative grant, and not constitutional right. (*Corder v. Corder* (2007) 41 Cal.4th 644, 656, fn. 7 [state constitutional right not applicable in special proceedings]; *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 76; *Agricultural Labor Relations Bd. V. Tex-Cal. Land Management, Inc.* (1987) 43 Cal.3d 696, 707; *Rowell, supra,* 133 Cal. App.4th at p. 452; *People v. Williams* (2003) 110 Cal.App.4th 1577, 1590 [no constitutional right to trial in civil commitment proceedings].)[8]

Generally, in special proceedings, the statutory right to jury trial may be waived by either a party or counsel *unless*

6. We do not intend to suggest that it was improper or inappropriate for counsel to waive defendant's presence or that the court had a duty to order defendant's presence in order to directly advise him. However, a direct advisement is not the only way for the court to ensure that an NGI is made aware of the right to a jury trial. In our view, the practical difficulty in advising an NGI committed to a state hospital could easily be solved with an advisement and waiver form for the NGI read and sign. (See *People v. Ramirez* (1999) 71 Cal.App.4th 519, 521–522 [waiver form proper substitute for judicial advisement].)

7. Special proceedings include SVP commitment trials (*People v. Yartz* (2005) 37 Cal.4th 529, 535); competence trials (*People v. Masterson* (1994) 8 Cal.4th 965, 974 (*Masterson*)); trials extending a juvenile commitment (*In re Gary W.* (1971) 5 Cal.3d 296, 309); narcotics addict commitment trials (*In re De La O* (1963) 59 Cal.2d 128, 150; mentally retarded commitment trials (*Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1685).

8. Even if the state Constitution did guarantee the right to a jury trial in an NGI commitment proceeding, defendant's claim would fail because the constitutional right "may be waived by the consent of the parties expressed as prescribed by statute," and the general rule is that where the constitutional right exists, it can be waived by either a party *or the party's attorney.* (Cal. Const., art. I, § 16 [right to jury trial]; see Code of Civ. Proc, § 631 [prescribing types of waiver]; *Zurich General Acc. & Liability Ins. Co. v. Kinsler* (1938) 12 Cal.2d 98, 105 (*Zurich*), overruled on other grounds in *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792; [waiver by party or counsel]; *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 510; *Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 148; see also Code Civ. Proc., § 283, subd. (1) [counsel has authority to bind client in any of the steps of an action].)

*otherwise provided by statute.* (See *John L., supra,* 48 Cal.4th at p. 148.) Thus, we turn to the statutory language to see whether it clearly limits waivers to NGIs or excludes waivers by counsel. Subdivision (b)(4) requires the court to conduct a jury trial "unless waived by both the person and the prosecuting attorney." The question before us turns on the meaning of the term "the person." Does it refer literally and exclusively to "the person"; or does it more broadly include the person's attorney? That question is not new and has arisen in a number of cases under this and nearly identical commitment statutes. In every case, the court has adopted the broader view.

In *Otis, supra,* 70 Cal.App.4th 1174, the court dealt with section 2966, subdivision (b), which requires a jury trial when a person challenges his or her MDO status unless the jury is "waived by both the person and the district attorney." There, counsel waived a jury trial. The defendant objected and requested a jury trial, but at the time, he was delusional and said he was being sexually assaulted by invisible police. The court denied the request. (*Id.* at pp. 1175–1176.)

In upholding counsel's waiver, the court found that "nothing in the requirement that the waiver must be by 'the person' precludes the person's attorney from acting on his behalf" and noted that "[t]he Legislature did not say the waiver had to be made 'personally.' " (*Otis*, *supra*, 70 Cal.App.4th at p. 1176.) The court opined that if the Legislature had intended to require a personal waiver, it would have made its intent clear and unambiguous. (*Ibid.*)

The court further explained that "[s]ection 2966 concerns persons who have been found by the Board of Prison Terms to be mentally disordered. The Legislature must have contemplated that many persons, *such as Otis*, might not be sufficiently competent to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of *such a person*." (*Otis, supra*, 70 Cal. App.4th at p. 1177, italics added.)

In *Montoya, supra,* 86 Cal.App.4th 825, the court reached the same conclusion concerning identical language in section 2972, subdivision (a), which requires a jury trial on an MDO commitment extension unless waived "by the person and the district attorney." There too, counsel waived a jury. (*Id.* at pp. 828–829.)

The court concluded, as we have, that the constitutional waiver requirements in criminal cases were inapplicable because a commitment trial is fundamentally a civil proceeding. (*Montoya, supra,* 86 Cal.App.4th at pp. 829–830.) The court further observed that in civil actions, where there is a state constitutional right to a jury trial, and in ancillary criminal proceedings, where the right to a jury trial is statutory, not constitutional, a jury trial can be waived by either the client or counsel. (*Id.* at pp. 829–830.) Accordingly, the court looked to the waiver provision to see if it permitted or prohibited counsel to waive. (*Id.* at p. 830.)

In upholding counsel's waiver, the court followed *Otis.* It too noted that the statutory language did not expressly require a personal waiver or clearly preclude a waiver by counsel and agreed that the Legislature could not have intended to require a personal waiver and thereby deny counsel the authority to act on behalf of an incompetent MDO such as the MDO in *Otis.* (*Montoya, supra*, 86 Cal.App.4th at pp. 830–831.)

The court acknowledged that "a person could be mentally disordered for some purposes and not for others." (*Montoya, supra*, 86 Cal.App.4th at p. 831.) However, it noted that the defendant's mind was not functioning normally, and he had repeatedly and recently demonstrated poor judgment and aberrant behavior. In upholding counsel's waiver, the court found "no reason to believe that defendant was capable of making a reasoned decision about the relative benefits of a civil jury trial compared to a civil bench trial." (*Ibid.*)

This brings us to *Powell, supra,* 114 Cal.App.4th 1153, which is directly on point. There, the NGI objected to counsel's waiver and requested a jury. When the court denied the request, the defendant became so argumentative, belligerent, and disruptive that he had to be removed from the courtroom. On appeal, the defendant claimed that counsel's waiver was ineffective because section 1026.5, subdivision (b)(4) required his personal waiver. (*Id.* at pp. 1157–1158.)

In rejecting this claim, the court cited *Otis* and noted that "[t]he Legislature, in enacting section 1026.5, did not say that the jury waiver must be 'personally' made by the NGI committee." (*Powell, supra,* 114 Cal.App.4th at p. 1159.) Moreover, mirroring the *Otis* court's view concerning incompetent persons, the court opined generally that "[a]n insane person who is 'a substantial danger of physical harm to others' [citation] should not be able to veto the informed tactical decision of counsel." (*Id.* at p. 1158.) The court pointed out that the defendant had been found insane twice, medical staff had diagnosed him with paranoid schizophrenia, and there was no evidence he had regained his sanity. The court further noted that the defendant had a history of violence, believed certain people should be killed, and sought release to do so. (*Id.* at p. 1158.) The court asked, "Can such a person intelligently invoke or waive the right to a jury trial? Is such a person competent to meaningfully understand who should make the determination of whether his commitment should be extended?" (*Ibid.*) The court answered, "Common sense *dicta*tes that appellant should not be able to veto his attorney's decision to waive a jury. The record demonstrates that appellant was suffering from a severe mental disorder. On the day of the purported demand for jury, appellant was medicated, experiencing mood swings, and was so belligerent and disruptive that he had to be removed from the courtroom." (*Ibid.*)

In support of its analysis, the *Powell* court cited *People v. Angeletakis* (1992) 5 Cal.App.4th 963 (*Angeletakis*). There, the defendant faced a trial to extend his NGI commitment and sought a preliminary determination of his competence. (See § 1368.) The court noted that section 1368 did not apply in civil proceedings and opined that an NGI did not have to be competent at a trial to extend his or her commitment. (*Id.* at pp. 967–968; *Juarez v. Superior Court* (1987) 196 Cal.

App.3d 828, 931–932 [same]; *cf. People v. Moore* (2010) 50 Cal.4th 802, 829 [same re trial on SVP commitment].) As the court explained, "Angeletakis will be confined and receive treatment for his mental condition whether his commitment is extended under section 1026.5 or such proceedings are suspended under section 1368. While we appreciate the distinction between mental competence to stand trial and dangerousness to others due to a mental disease, defect, or disorder, we think the interests of a person facing a commitment extension are adequately protected by competent counsel and the other procedural safeguards afforded him. Requiring the court to suspend proceedings until the committee is able to understand the nature of the proceedings and assist in the conduct of his 'defense' adds minimal protection in this context, especially when balanced against the administrative burdens involved." (*Angeletakis, supra,* 5 Cal.App.4th at pp. 970–971, fn. omitted.)

The *Powell* court read *Angeletakis* "for the principle that an NGI committee who is not mentally competent must act through counsel. If the person is not competent to waive jury at the extension trial, his or her attorney may waive jury on his or her behalf. *That is the case here*." (*Powell, supra,* 114 Cal.App.4th at p. 1158, italics added.)

Sections 1026.5, 2966, and 2972 use the same language to address the same subject. The unanimity of interpretation in *Otis*, *Montoya*, and *Powell* reflects the established rule that ordinarily "[w]ords or phrases common to two statutes dealing with the same subject matter must be construed in *pari materia* to have the same meaning." (*Housing Authority v. Van de Kamp* (1990) 223 Cal.App.3d 109, 116; *People v. Lamas* (2007) 42 Cal.4th 516, 525.)

We agree with those courts' view of the statutory language. It does not expressly require a "personal" waiver by the NGI. The term "the person" in the phrase "unless waived by both the person and the prosecuting attorney" (§ 1026.5, subd. (b)(4)) does not automatically or necessarily convey the notion that the only valid waiver is one "personally" made by the NGI. Nor does the waiver provision clearly reflect a legislative intent to impose such a limitation or preclude waivers by counsel on behalf of an NGI. Finally, we too observe that the Legislature knows how to require a personal waiver, and in doing so, it has used clear and unambiguous language. (E.g., § 861, subd. (a)(1) [requiring personal waiver of statutory right to continuous preliminary examination]; § 997, subd. (b)(1) [same re waiver of presence at arraignment]; Welf. & Inst. Code, § 1801.5 [same re right to a jury in trial to extend juvenile detention].)

Furthermore, interpreting the language to exclude waivers by counsel results in consequences that, in our view, are illogical and anomalous and therefore, to be avoided. (*People v. Martinez* (1995) 11 Cal.4th 434.)

First, we note that for a variety of reasons, NGIs being treated for mental illness in state hospitals often choose not to appear until the day of trial, courts do not automatically order them transported to court for every pretrial hearing, and counsel routinely waive the NGIs' presence at those hearings which often involve technical, procedural, and scheduling matters. Such was the case here. Given these practical and logistical issues, counsel must be able to act on the NGI's behalf in his or her absence. We cannot conceive of a logical reason to prohibit counsel from waiving a statutory right to a jury trial at the NGI's direction or with the NGI's express authorization but in his or her absence. Doing so would compel the court to order the NGI's transportation and presence solely to secure a personal waiver. This is absurd, because, as noted, with a client's authorization, counsel can waive the more fundamental state *constitutional* right to a jury trial in civil actions.

We further note that competency to stand trial is not a prerequisite in a civil proceeding to commit a person who is dangerous due to mental illness. (E.g., *People v. Angeletakis, supra,* 5 Cal.App.4th at pp. 967–968 [NGI commitment]; *People v. Moore, supra,* 50 Cal.4th at p. 829 [SVP commitment].) However, a waiver "is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 733; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 521.) To be valid, the waiver of a statutory right must be knowing, intelligent, and voluntary. (*In re Hannie* (1970) 3 Cal.3d 520, 526–527; *People v. Charles* (1985) 171 Cal.App.3d 552, 559.) As *Otis, Montoya, and Powell* observe, some defendants, like the defendants in those cases, may be so delusional or otherwise affected by their mental disorders that they lack the capacity to know what is in their own best interests and make rational decisions. Under such circumstances, an NGI may not be able to knowingly and intelligently waive the right to a jury trial. If an NGI is incompetent and in a particular case counsel believes that a jury waiver is in the NGI's best interests, requiring that defendant's personal waiver would prevent a waiver by counsel and thereby undermine counsel's ability to protect the NGI's interests. Rather, it would mechanically require the court to conduct a jury trial or give the incompetent NGI veto power over counsel's informed determination.[9]

In our view, preventing counsel from waiving a jury at an NGI's direction or with an NGI's consent and preventing counsel from doing so on behalf of an incompetent NGI are anomalous consequences that would flow from interpreting the waiver provision literally to require a personal waiver. For that reason, we consider it unreasonable to infer such a restrictive legislative intent from the statutory language. (*Cf. Mary K., supra,* 234 Cal.App.3d at p. 271 [rejecting claim that counsel's waiver at conservatee's direction was ineffective because personal waiver was required].)

9. The anomaly of forcing an incompetent person face a jury trial even when counsel concludes that it would be against the person's best interests would not arise from the personal waiver requirement in criminal cases because an incompetent defendant cannot be tried at all. (§ 1368; see also *Drope v. Missouri* (1975) 420 U.S. 162, 172.)

Defendant suggests that subdivision (b)(7) implicitly incorporates the constitutional personal waiver requirement in criminal cases. We disagree.

That subdivision provides, in relevant part, that the defendant "shall be entitled to the rights guaranteed under the federal and state Constitutions for criminal proceedings." (§ 1026.5, subd. (b)(7).) Every court that has analyzed the scope of this provision has concluded that it does not incorporate all federal and state constitutional procedural rights. (*Williams, supra*, 233 Cal.App.3d at pp. 485–488; *Powell, supra*, 114 Cal.App.4th at pp. 1157–1158; *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1229–1230 (*Haynie*); *People v. Lopez* (2006) 137 Cal.App.4th 1099, 1008–1116 (*Lopez*); see *People v. Henderson* (1981) 117 Cal.App.3d 740, 746–748 (*Henderson*) [same conclusion re identical language in former Welf. & Inst. Code, § 6316.2, subd. (e)]; *cf.* with *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 550–561 [distinguishing § 1026.5, subd. (b)(7) from Welf. & Inst. Code, § 1801.5, which grants juveniles "*all* the rights guaranteed under the federal and State Constitutions for criminal proceedings" in commitment extension trials (italics added)].)

In *Williams, supra*, 233 Cal.App.3d 477, the court opined that the subdivision simply "codifies the application of constitutional protections to extension hearings mandated by judicial decision. It does not extend the protection of constitutional provisions which bear no relevant relationship to the proceedings. [Citation.] Thus, for example, ex post facto principles are not applicable to extension proceedings. [Citation.] Neither is the privilege against self-incrimination applicable to court-ordered psychiatric examinations. [Citations.]." (*Id.* at p. 488; accord, *Lopez, supra,* 137 Cal.App.4th at pp. 1111–1115; *cf. Henderson, supra,* 117 Cal.App.3d at pp. 746–748.) The court held that the provision also did not incorporate constitutional protection against double jeopardy. The court reasoned that double jeopardy prohibitions were inapplicable because they are designed to protect a person from being criminally prosecuted more than once for the same offense. "Recommitment proceedings do not adjudicate an offense, thus the bar of double jeopardy has no meaningful application to extension proceedings." (*Williams, supra*, 233 Cal.App.3d at pp. 485–486, 488.)[10]

In *Powell, supra*, 114 Cal.App.4th 1153, the court agreed with *Williams* that subdivision (b)(7) does not incorporate all constitutional procedural safeguards and held that the subdivision did not incorporate the constitutional personal waiver requirement in criminal cases. As discussed above, the court opined that an incompetent NGI must act through counsel, who may then waive a jury on his or her behalf. (*Powell, supra,* 114 Cal.App.4th at pp. 1158–1159.)

We agree with *Powell.* The absurd and anomalous consequences that would result from interpreting subdivision (b)(4) to require a personal waiver and exclude waivers by counsel would likewise result from interpreting subdivision (b)(7) to do so. Indeed, subdivision (b)(3) provides the right to counsel, a jury trial, and criminal discovery. Subdivision (b)(7) reflects an intent to protect a defendant's interests by providing additional procedural safeguards relevant to the proceedings. Simply put, it makes no sense to interpret a provision designed to provide *additional* protection in a way that reduces counsel's ability to protect the interests of an incompetent NGI when, in counsel's view, waiving a jury trial would do so. With this in mind, we do not find that subdivision (b)(7) clearly reflects a legislative intent to incorporate the personal waiver requirement applicable in criminal cases.

We agree with *Powell* for two other reasons. Even in a criminal prosecution, where a defendant must personally waive the state and federal constitutional rights to a jury trial, there is no requirement that a *statutory* right to a jury determination of certain issues be personally waived. (*People v. French* (2008) 43 Cal.4th 36, 46–47; see *Montoya, supra,* 86 Cal.App.4th at p. 829.) Thus, for example, a defendant need not personally waive the statutory right to a jury on prior prison term allegations (*People v. Vera* (1997) 15 Cal.4th 269, 278, abrogated on another point in *Apprendi v. New Jersey* (2000) 15 Cal.4th 269, 278); the statutory right to have jury determine sentence enhancement allegations (*People v. Wims* (1995) 10 Cal.4th 293, 309, overruled on another point in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326); the statutory right to have jury determine competence to stand trial on criminal charges (*Masterson, supra*, 8 Cal.4th at p. 972); or the statutory right to have same jury determine current charges and prior allegations (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5). (See also *People v. Hinton* (2006) 37 Cal.4th at 839, 874–875 [statutory right to a separate proceeding on the prior-murder-conviction special-circumstance allegation].)

Second, subdivision (b)(4) specifically deals with the waiver of a jury trial and it does not expressly require a personal waiver or prohibit waiver through counsel. Subdivision (b)(7), on the other hand, is a general statute and does

10. In *Williams*, the court explained that "Penal Code section 1026.5 was enacted in 1979, as emergency legislation in response to the California Supreme Courts decision of *In re Moye* [(1978) 22 Cal.3d 457]. Prior to *In re Moye*, individuals committed to state hospitals after having been acquitted by reason of insanity were committed for an indefinite period of time. *In re Moye* concluded that equal protection principles mandated that such individuals be released after they had been committed for a period of time equal to the maximum state prison sentence which they could have received for the underlying offense. Faced with the imminent release of many potentially dangerous individuals, the legislature adopted Penal Code section 1026.5 to provide for a maximum term of commitment, together with the possibility of successive two-year recommitments for dangerous individuals. At the same time, the statutes relating to mentally disordered sex offenders ('MDSO') were amended to provide for virtually identical procedures." (*Williams, supra*, 233 Cal.App.3d at p. 487–488, fn. omitted.)

We have taken judicial notice of the legislative history of section 1026.5, which confirms *Williams'* summary. (See Evid. Code, § 452, subd. (c).)

We further note that in *Lopez, supra*, 137 Cal.App.3d 1099, the court expanded on the legislative history of section 1026.5 as well as *Williams'* view that it merely codified judicial decisions.

not specifically refer to any particular rights or the waiver of rights.

It is a settled rule that "[a] specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. [Citation.]" (*People v. Tanner* (1979) 24 Cal.3d 514, 521.) Under the circumstances, we doubt the Legislature intended the general subdivision (b)(7) to add by implication a personal waiver requirement that it did not expressly include in the specific subdivision dealing with the waiver of a jury trial.[11]

In sum, when construing statutes, "we may not under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349, quoting *Manufacturers Life Ins. Company v. Superior Court* (1995) 10 Cal.4th 257, 274; accord *Estate of Griswold* (2001) 25 Cal.4th 904, 917.) Nor may we insert requirements or limitations that would cause the statute to conform to a presumed intent that is not otherwise manifest in the existing statutory language. (*Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 747–748, *Tain v. State Bd. of Chiropractic Examiners* (2005) 130 Cal.App.4th 609, 617.)

Given our analysis of the statutory language, policy considerations, and potential consequences, we must decline to insert a personal waiver requirement into section 1026.5 Rather, we conclude that under subdivision (b)(4), counsel may waive a jury at an NGI's direction, with an NGI's knowledge and consent, or, as in *Powell*, on behalf of an incompetent NGI.[12]

Although we conclude that the waiver provision is broad enough to permit waivers by counsel, it does not necessarily follow, as the Attorney General claims, that the waiver provision gives counsel exclusive control over whether to have a bench or jury trial.[13] To determine it does, we return to subdivision (b)(4).

### *B. Scope of Counsel's Control*

The statutory language "unless waived by both the person and the prosecuting attorney" does not expressly confer exclusive control; nor does it expressly or implicitly bar NGI's from controlling the decision. Moreover, the waiver provision must be read together with the advisement provision (see *Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106–1107), and together, they do not reasonably suggest a legislative intent to confer exclusive control or bar NGIs from making the decision. On the contrary, the two provisions contemplate that NGIs can make the decision and expressly provides for them to do so.

Specifically, subdivision (b)(3) requires the court to advise "the person named in the petition… of the right to a jury trial." This language imposes a mandatory duty on the court.[14] (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542 ["shall" typically construed as mandatory; *e.g.*, *People v. Tindall* (2000) 24 Cal.4th 767, 772.) It reflects a legislative intent to judicially ensure that "the person" knows that he or she has the right to a jury trial.

We must presume that the Legislature intended the advisement to perform a meaningful and useful function. (See *Clements v. T.R. Bechtel Co.* (1954) 43 Cal.2d 227, 233.) The purpose and function appear in the waiver provision, which requires jury trial unless waived by "the person." Although, subdivision (b)(4) must be construed to permit a waiver by "the person's" attorney, the phrase unambiguously refers to a waiver by the NGI. Thus, the purpose and function of the required advisement are self-evident: to inform the NGI of the right to a jury trial so that he or she can decide whether to waive it. (See *People v. Barrett* (2012) 54 Cal.4th 1081, 1109 (*Barrett*) [a jury advisement enables person to comprehend and control decision to "request a jury trial"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1071 [purpose of standardized *Faretta* advisements is "to ensure a clear record of a knowing and voluntary waiver of counsel"]; § 1016.5, subd. (d) [required advisement of potential immigration consequences intended to inform decision of whether to waive rights and enter plea].)

We observe that if the Legislature had intended to give counsel exclusive control, it could have done so easily and clearly by requiring a jury trial unless waived by "the person's *attorney*" just as it specified a waiver by the "district *attorney*." (*Cf.* § 2966, subd. (b) [requiring hearing within specified time unless waived by "petitioner or his or her counsel"].) Conversely, we doubt the Legislature would have clouded such an intent by requiring the court to advise "the person" and further requiring a jury trial unless waived by "the person." Moreover, if that had been the Legislature's intent, an advisement would serve no practical or meaning-

11. Even if subdivision (b)(7) incorporated the personal waiver requirement applicable in criminal cases, the requirement, it would still represent only a statutory requirement, not a constitutionally compelled requirement, and therefore, any statutory violation would be subject to review under the *Watson* test for harmless error.

12. In the latter situation, we believe that counsel may do so even over the objection of an incompetent defendant. (E.g., *Powell, supra*, 114 Cal.App.4th at pp. 1156, 1158–1159; *cf. Otis, supra*, 70 Cal.App.4th at pp. 1176–1177 [waiver over objection of incompetent MDO]; *Masterson, supra,* 8 Cal.4th 965, 972 [waiver over objection of defendant whose competence has been called into question].)

13. The court's custom and practice of obtaining waivers from counsel in chambers off the record may well be based on the view that in every commitment proceeding, counsel has such exclusive control. Indeed, if that were the case, then the court's practice represents practical, efficient, and convenient way to resolve the jury issue. However, as we shall explain, that is not the case.

14. We mean "mandatory" in its obligatory, rather than jurisdictional, sense as in a required, rather than discretionary, action. (See *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908 [discussing distinction].)

ful function, and there would have been no need to make the advisement mandatory. For this reason, it is not reasonable to interpret the provision to confer exclusive control because it would effectively render the advisement provision meaningless, statutory surplusage. (See *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 [courts should avoid interpretation rendering part of the instrument surplusage].)

In short, just as we decline to limit the phrase "unless waived by the person" by inferring that only an NGI can waive a jury trial, so too we decline to limit the phrase by inferring that counsel has exclusive control over the decision.

We acknowledge the nonstatutory, judicially recognized rule that "in both civil and criminal matters, a party's attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters"; in other words, "counsel is captain of the ship." (*In re Horton* (1991) 54 Cal.3d 82, 94, 95; *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403–404.) We further note that in upholding counsel's waiver in *Otis,* the court cited *Zurich, supra,* 12 Cal.2d 98 for the general proposition that "in civil cases, an attorney has 'complete charge and supervision' to waive a jury." (*Otis*, *supra*, 70 Cal.App.4th at p. 1176.) However, we conclude that the "captain of the ship" rule in civil litigation does not govern whether counsel has exclusive authority to waive a jury in NGI proceedings.

In *Zurich, supra*, 12 Cal.2d 98, the court held that counsel's insistence on a jury trial did not constitute good cause for firing him and thus bar him from later seeking a share of her judgment. Citing the general rule, the court concluded that the attorney had the right and authority to insist on a jury trial. (*Id.* at pp. 105–106.)

Although *Zurich* did not involve a jury waiver, the court cited a number of cases and authorities, including *Shores Co. v. Iowa Chemical Co.* (1936) 222 Iowa 347 [268 N.W. 581] (*Iowa*). There, the defendant claimed that counsel lacked the authority to waive a jury by stipulation. However, the court explained that ordinarily counsel has implicit authority to enter binding stipulations on procedural matters. It then noted that the defendant was aware of counsel's waiver at the time, he had made no effort to set it aside, and he did not seek a jury trial until long after the stipulation had been entered. Given these circumstances, the court held that the defendant had failed to show that counsel lacked authority to waive a jury trial. (*Id.* at p. 583.)

Although *Zurich* and the *Iowa* case recognized counsel's authority to request or waive a jury in typical civil litigation, neither case involved a "special proceeding" in which the state seeks to involuntarily commit a person to a mental hospital for treatment. Moreover, neither case addressed whether counsel had such authority in a "special proceeding"; and neither case involved a statute that expressly required a jury advisement and jury trial unless waived by the person.

" 'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.' (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) Thus, these cases do not support a conclusion that in NGI proceedings, the "captain of the ship" rule gives counsel exclusive control over whether to waive a jury trial.

*Masterson, supra,* 8 Cal.4th 965 is a pertinent case on the issue because it involved a special proceeding to determine whether the defendant was competent to stand trial on criminal charges. (§§ 1368–1370.) There, counsel stipulated to an 11-person jury over the defendant's objection. In upholding counsel's authority to do so, the court more broadly concluded that in competency trials, counsel has exclusive control over the jury issue. The court noted the "captain of the ship" rule but did not base its conclusion on it. (*Masterson, supra,* 8 Cal.4th at pp. 969–970.) Rather, the court expressly based its conclusion on "an examination of the nature of competency proceedings as well as the jury trial right at issue." (*Id.* at p. 971.)

The court explained, "The sole purpose of a competency proceeding is to determine the defendant's present mental competence, i.e., whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner. [Citations.] Because of this, the defendant necessarily plays a lesser personal role in the proceeding than in a trial of guilt. How can a person whose competence is in doubt make basic decisions regarding the conduct of a proceeding to determine that very question?" (*Masterson, supra*, 8 Cal.4th at p. 971.)

The court concluded that when doubt is raised about a defendant's competence, the defendant is assumed to be unable to act in his or her own best interests. For that reason, the defendant must act through counsel, and counsel has exclusive control over the conduct of the proceedings, including whether to request a jury trial. (*Masterson, supra*, 8 Cal.4th at pp. 971, 973; see *People v. Hill* (1967) 67 Cal.2d 105, 114, fn. 4 [no error in failing to advise defendant of right to jury in competence trial because counsel decides whether to have a jury trial].)

Under *Masterson*, therefore, if counsel has exclusive control, counsel derives it not so much from the "captain of the ship" rule but from the nature of NGI proceedings and the jury right at issue.

More recently, in *Barrett, supra,* 54 Cal.4th 1081, the Supreme Court provided further guidance when it decided whether counsel had exclusive control in a proceeding to commit a mentally retarded person who is dangerous. (Welf. & Inst. Code, § 6500.)[15]

15. The *Barrett* court noted that at all pertinent times, the statutory scheme had used the terms "mentally retarded" and "mental retardation." The court acknowledged that subsequent "legislative enactments and proposed amendments replace references to 'mental retardation' under section 6500 *et seq.* with such terms as 'developmental disability' and 'intellectual disability.' [Citation.]" (*Barrett, supra*, 54 Cal.4th at p. 1088, fn. 2.) However, to avoid confusion, the court used the original terminology.

To avoid confusion when discussing *Barrett* and its application, we shall also use that outmoded terminology.

In *Barrett*, the court conducted a bench trial and committed the defendant. (*Barrett, supra,* 54 Cal.4th at pp. 1088–1092.) On appeal, she claimed that the Constitution provided the right to a jury trial and required a jury advisement and personal waiver. (*Id.* at p. 1093.) Although the statute did not provide the right to a jury trial, the Supreme Court agreed that constitutional considerations warranted recognizing an implied statutory right to a jury trial. (*Id.* at pp. 1097, 1100.) However, the court rejected advisement and waiver requirements because it found that counsel had exclusive control over whether to waive a jury trial. In reaching this conclusion, the court relied primarily on *Masterson.*

The court explained that mental retardation is a developmental disability that originates when an individual is a minor and continues, or can be expected to continue, indefinitely, and constitutes a " 'substantial disability for that individual.' " (*Barrett, supra*, 54 Cal.4th at p. 1103.) Moreover, for purposes of a commitment under section 6500, mental retardation involves " ' " '*significantly subaverage general intellectual functioning* existing concurrently with deficits in adaptive behavior,'and appearing in the 'developmental period.' " ' [Citations.]" (*Ibid.*, italics in *Barrett*) The court opined that "the significant cognitive and intellectual deficits that the condition entails, which appear early in life and never recede, affect the ability to 'make basic decisions' regarding the conduct of the section 6500 proceeding. [Citation.] Such an individual thus plays a limited 'personal role' in the case, and must rely on counsel to decide all tactical and procedural matters, such as whether to exercise the jury trial right." (*Id.* at pp. 1103–1104.)

The court rejected a claim that this approach "improperly 'presumes' that a person is mentally retarded before the fact finder has decided the issue." (*Barrett, supra*, 54 Cal.4th at p. 1104.) The court noted that a commitment petition is filed at the request of "a responsible and interested party (e.g., parent, conservator, correctional or probation official, or regional center director), who presents specific information (reasons) for supposing that the person is mentally retarded and dangerous, in need of treatment, and eligible for commitment. The significance of this request, and its role in providing a foundation for the petition and commitment process, is underscored by the verification requirement. (§ 6502.) … [¶] Second, where a section 6500 petition is filed, the trial court is entitled to a written report prepared by, or at the behest of, the director of the regional center, following an examination of the alleged mentally retarded person. (§ 6504.5.) Regional centers specialize in assessing and assisting mentally retarded and other developmentally disabled persons on an individual basis. [Citation.] Thus, the regional center report obviously serves as a professional pretrial evaluation of the person's history, condition, and behavior, and includes informed recommendations on treatment and placement, including any interim placement pending the hearing… . . [¶] In light of these principles and authorities, we conclude that someone like Barrett, who is alleged to be mentally retarded and dangerous under section 6500, is not in a position to personally assert or waive the right to jury trial, to sufficiently comprehend the jury trial advisement, or to override the views of counsel on the subject. Sole control over such tactical and procedural decisions rests with counsel, whether or not the client has been consulted or objects." (*Barrett, supra*, 54 Cal.4th at pp. 1104–1105.)

*Masterson* and *Barrett* establish that in certain types of commitment proceedings, the defendant's alleged mental state — *e.g.*, incompetency and mental retardation — disables him or her from making reasoned decisions about what is in his or her best interests, including whether to request or waive a jury trial. In other words, it is reasonable to categorically assume that such defendants lack the capacity to make a rational decision about a jury trial. For that reason, they must act through counsel, and counsel has exclusive control over the jury issue.

The Attorney General cites *Masterson* to support the claim that counsel has exclusive control in NGI proceedings. Presumably, the argument is that, like defendants whose competence has been questioned or persons diagnosed with mental retardation, NGIs are categorically unable to make reasoned decisions, and therefore counsel must be able to decide the jury issue. We reject this argument and find the Attorney General's reliance on *Masterson* to be misplaced.

First, there are significant differences between an NGI extension trial and the proceedings in *Masterson* and *Barrett.* The purpose of a competency trial is to resolve actual doubt concerning the defendant's mental capacity to understand the proceedings and cooperate with and assist counsel. (*People v. Lewis* (2008) 43 Cal.4th 415, 524.) Thus, as *Masterson* holds, once a defendant's competency is doubted, counsel has control over whether to request a jury for the competency trial.

The proceeding in *Barrett* did not involve a determination of competency but whether a mentally retarded person is dangerous. However, as *Barrett* explains, mental retardation in this context represents a permanent developmental disability involving significant cognitive and intellectual deficits. For this reason, the court treated the allegations and supporting documentation that person is mentally retarded like doubt concerning a defendant's competency to stand trial. In other words, the mentality of persons in both contexts is comparable, both may be assumed to be incapable of determining their own best interests, and therefore the scope of counsel's authority should be the same.

Unlike a competency trial, an NGI extension trial does not involve a determination of competency. Its purpose is to determine whether an NGI is currently dangerous due to a severe mental disorder that is not in remission. (§ 2970.) To be sure, that is the same purpose of a trial to commit a dangerous mentally retarded person. However, the similarity of purpose does not mean that the scope of counsel's authority should be the same because the mental capacity of the persons in

At our request, the parties briefed the impact of *Barrett*, if any, on the issues raised in this case.

each context is different. More specifically, although it may be reasonable to categorically assume that mentally retarded persons lack the capacity to determine their own best interests, it is not reasonable to make that categorical assumption about NGIs. *Barrett* makes this precise point.

Concerning the capacity to function in a competent manner, and specifically to comprehend a jury advisement and rationally control the jury decision, the *Barrett* court distinguished those diagnosed with a mental disease, defect, or disorder from those diagnosed with mental retardation.

In *Barrett*, the defendant claimed that the Constitution required a jury advisement and personal waiver under principles of equal protection. She noted that patients facing an extended commitment under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code, § 5000 *et seq.*) because they posed a danger due to their mental disease, defect, or disorder rendered were statutorily entitled to such procedural safeguards. (*Barrett, supra*, 54 Cal.4th at p. 1106; see Welf. & Inst. Code, § 5302.) Because she and LPS patients were similarly situated, she claimed the right to those safeguards.

In rejecting her claim, the court explained that persons subject to commitment under the two schemes are not "similarly situated as to the ancillary purpose that an express jury trial advisement, and an express personal waiver, purportedly serve," namely enabling the person to comprehend and control the decision to waive a jury trial. (*Barrett, supra*, 54 Cal.4th at p. 1108.) What distinguished persons under the two schemes was their "distinct 'mentality' " — i.e., mental retardation versus mental illness. (*Ibid.*) The court explained that "[m]ental illness and related disorders are said to be conditions that may arise suddenly and, for the first time, in adulthood. [Citation.] The LPS Act process itself assumes that the need for treatment may be temporary, and that disabling mental disorders may be intermittent or short-lived. [Citation.] [¶] In addition, because of the complexity of human behavior, and the lack of a long history in every case, mental illness and related disorders may be difficult to diagnose. [Citations.] Where present, however, ' "mental illness 'often strikes only limited areas of functioning, leaving other areas unimpaired, and consequently… *many mentally ill persons retain the capacity to function in a competent manner.*' " ' [Citation.] [¶] These characteristics suggest that the mental conditions that create eligibility for an extended 180-day LPS Act commitment, though they include imminent dangerousness, *do not necessarily imply incompetence or a reduced ability to understand, and make decisions about, the conduct of the proceedings.* Hence, nothing compels the conclusion that such LPS Act patients will not benefit by the statutory right to a jury trial advisement set forth in section 5302. By contrast, in the case of persons alleged to be mentally retarded and dangerous under section 6500, the commitment process itself raises substantial doubts about their cognitive and intellectual functioning sufficient to limit the personal and procedural role they play. It follows that the two groups are not similarly situated as to the function that Barrett implies an advisement like section 5302 serves — *comprehending and controlling the decision whether to request a jury trial.* Thus, any disparate statutory treatment with respect to jury trial advisements does not deprive persons like Barrett of equal protection of the law." (*Barrett, supra*, 54 Cal.4th at pp. 1108–1109, first italics in *Barrett,* second italics added.)[16]

The court's discussion recognizes that unlike defendants whose competence is questioned or persons diagnosed with mental retardation, those suffering from a mental illness can comprehend and control the decision to waive a jury trial. In this regard, *Barrett's* view mirrors the implicit legislative findings underlying the statutory requirements of an advisement and jury trial unless waived that an NGI can decide whether to waive a jury trial. Moreover, these requirements further distinguish *Masterson* and *Barrett* because the statutes in those cases do not mandate an advisement or jury trial unless waived; rather, a jury trial must be demanded. (*Barrett, supra,* 54 Cal.4th at p. 1097; *People v. Rojas* (1981) 118 Cal.App.3d 278, 287; *People v. Hill*, *supra*, 67 Cal.2d at p. 114 [under former § 1368]; *e.g.*, *People v. Superior Court* (*McPeters*) (1985) 169 Cal.App.3d 796, 798.)

Finally, *Barrett's* view that having a mental disorder does not categorically render one incapable of determining what is in his or her own best interests is not particularly unique or unprecedented. In *John L., supra,* 48 Cal.4th 131, the court observed that despite having mental disorders, conservatees are not, by reason of their conservatorship, automatically considered incompetent to waive their rights. (*Id.* at p. 153.) In *In re Qawi* (2004) 32 Cal.4th 1, the court opined that "[a]lthough an MDO must be determined to have a 'severe mental disorder,' commitment for a mental disorder does not by itself mean that individuals are incompetent to participate in their own medical decisions. [Citations.]" (*Id.* at p. 24.) In *People v. Wolozon* (1982) 138 Cal.App.3d 456, the court held that despite a finding of NGI and evidence of a mental disorder that rendered the defendant dangerous, the defendant had the right to waive counsel and represent himself. (*Id.* at pp. 460–461.) Similarly, in *People v. Williams, supra,* 110 Cal.App.4th 1577, the court recognized that a defendant has the statutory right to waive counsel and represent himself in a trial to extend his MDO commitment. (*Id.* at pp. 1587–1592.)

In addition to *Masterson*, the Attorney General relies on *Otis, Montoya,* and *Powell* as well as *People v. Givan* (2007) 156 Cal.App.4th 405 (*Givan*) to support her claim that counsel has exclusive control.

*Otis, Montoya,* and *Powell* must be viewed in light of their particular facts and the issues raised in them. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["[l]anguage used in any opinion is of course to be understood in the light of the

16. In 1981, the court in *Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380 similarly held that because mental illness and mental retardation are separate and distinct conditions which require different treatment and/or habilitation," their differing statutory schemes did not violate the guarantee of equal protection. (*Id.* at pp. 387–388; accord, *People v. Quinn* (2001) 86 Cal.App.4th 1290, 1294–1295.)

facts and the issue then before the court"].) As noted, in *Otis*, the defendant was delusional, and the court upheld counsel's jury waiver over the defendant's objection, opining that the defendant was not capable of making a reasoned decision. (*Otis*, *supra*, 70 Cal.App.4th at pp. 1175–1176.) In *Montoya,* the court also upheld counsel's waiver, noting that the defendant's mind was not functioning normally, and he, like the defendant in *Otis*, was not capable of making a reasoned decision. (*Montoya, supra*, 86 Cal.App.4th at p. 831.) Likewise, the court in *Powell* upheld counsel's waiver over the defendant's objection because the defendant was medicated and his disruptive conduct demonstrated his incompetence. (*Powell, supra,* 114 Cal.App.4th at p. 1158.)

Given the particular facts concerning the mental state of these defendants, we read these cases for the proposition that when it reasonably appears that an MDO or NGI reasonably is incapable of determining whether a bench or jury trial is in his or her best interests, he or she must act through counsel, and counsel has exclusive authority to decide even over an objection. In this regard, the cases reflect the *Masterson-Barrett* rationale for recognizing counsel's exclusive authority in proceedings to determine competency and the dangerousness of a mentally retarded person. In our view, these cases should not be read more broadly to hold that counsel controls the jury issue regardless of whether the MDO or NGI is competent. This is especially so because none of these cases discussed the purpose and function of the mandatory jury advisement.

The Attorney General's reliance on *Givan*, *supra*, 156 Cal. App.4th 405 is also misplaced. There, the NGI instructed his attorney to make sure he did not have to attend the extension proceedings, and to this end, the NGI signed a declaration stating that he had discussed his rights and had agreed to an extension of his commitment. He also requested that his attorney be permitted to appear and present this waiver. Counsel did so, and the court accepted it. On appeal, the defendant claimed he was denied a jury trial because the statute required his express, personal waiver. The court held that a personal waiver was not required and that the defendant's express instructions to his attorney implicitly incorporated a jury waiver. (*Givan, supra*, 156 Cal.App.4th at pp. 409–411.) *Givan* does not suggest that counsel exclusively controls the jury decision in every case; nor does it undermine our statutory analysis or reading of *Powell*.[17]

### *C. Validity of Counsel's Waiver*

We consider it helpful at this point to summarize our resolution of the parties' interlocking but opposing claims and our conclusion concerning the meaning of the waiver provision and the scope of counsel's authority. Section 1026.5 does not require an NGI's personal waiver or give counsel exclusive control over the jury decision. Rather, counsel can waive a jury trial at the NGI's direction or with his or her knowledge and consent; and counsel can also do so when the circumstances even over an NGI's objection when the circumstances give counsel reason to doubt the NGI's competence to determine what is in his or her best interests.

With this in mind, we note the "well established rule in this state that 'an appellate court will never indulge in presumptions to defeat a judgment. It will never presume that an error was committed, or that something was done or omitted to be done which constitutes error. On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts.' [Citation.]" (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373, italics added; accord, *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 261; *People v. Giordano* (2007) 42 Cal.4th 644, 666; see Code Civ. Proc. § 475.) Accordingly, the appellant bears the burden to affirmatively establish error and then demonstrate that it resulted in a miscarriage of justice that requires reversal. (*Cu-*

17. The Attorney General also cites *People v. Fisher* (2006) 136 Cal.App.4th 76. In *Fisher*, the MDO's counsel waived a jury trial, but the MDO objected and then moved to discharge counsel and represent himself. The court granted the request. After a jury trial, the MDO's commitment was extended. On appeal, he claimed that in honoring counsel's jury waiver, the court forced him to waive his right to have *counsel* represent him at a jury trial. In rejecting this claim, the court first asserted that in *Otis, supra*, 70 Cal.App.4th 1174, "we held that counsel for a person challenging an MDO certification may waive jury trial without the consent of his client." (*Fisher, supra*, 136 Cal.App.4th at p. 81.) The court then opined that the MDO "was not 'forced' to do anything and the trial court went to great lengths to be fair to him. First, it was not required to allow appellant to represent himself. [Citation.] Second, it was not required to allow appellant to successfully reassert the right to jury trial after a valid waiver by counsel. Third, the record shows that the trial court assisted appellant in the cross-examination of the People's witnesses and in the presentation of his case." (*Ibid.*) Last, the court stated, "We decline the invitation to overrule *Otis* and continue to believe that it was correctly decided. The instant case could serve as a paradigm for why a person with a severe mental disorder should not be allowed to veto his attorney's decision to waive jury, waive the right to counsel, and insist on self-representation. As indicated, appellant has made some poor choices but his perceived dilemma is self-created." (*Ibid.*)

We agree that *Otis* was properly decided. However, insofar as *Fisher* suggests that counsel can waive a jury over a defendant's objection in *every* case, regardless of whether the MDO is competent, *Fisher's* view of *Otis* ignores the facts in *Otis* and is overbroad. Moreover, although the result in *Fisher* is reasonable because any error would have been harmless under *Watson* — i.e., it is not reasonably probably the jury would have returned a more favorable verdict had counsel represented the MDO — we question the *Fisher* court's brief and summary analysis. Simply put, if, as the trial court implicitly found, the MDO was sufficiently competent to waive his statutory right to counsel and represent himself (*People v. Williams, supra,* 110 Cal.App.4th at p. 1591 [right of self-representation in MDO proceeding is statutory]; see *Indiana v. Edwards* (2008) 554 U.S. 164, 175–176, 178 [court may deny request for self-representation where defendant unable to "to carry out the basic tasks needed to present [one's] own defense without the help of counsel" or "suffer[s] from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"]), he certainly would have been sufficiently competent to decide whether he wanted to waive his right to a jury trial. That being the case, we fail to see why the *Fisher* court opined that the case represented a "paradigm" for why an MDO should *not* be able to decide between a bench and jury trial. In our view, the court's opinion suggests that MDOs are categorically incompetent to do so. As noted, however, the Supreme Court in *Barrett* rejected that simplistic view.

*cinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82; *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 528; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105–106; *Thompson v. Thames* (1997) 57 Cal.App.4th 1296, 1308; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409 [presumption of correctness; "error must be affirmatively shown"].)

Here, the record is silent concerning whether defendant was in fact aware of his right to a jury trial in this proceeding and whether he knew about, directed, authorized, or objected to counsel's waiver. Under the circumstances, defendant cannot possibly satisfy his burden to show that counsel's waiver was invalid and therefore that the court erred in conducting a bench trial.

Nor could defendant establish that the court's alleged errors in accepting counsel's waiver and conducting a bench trial were prejudicial. It is settled that the denial of the statutory right to a jury trial is subject to harmless-error review under the *Watson* test. (*People v. Epps* (2001) 25 Cal.4th 19, 29.) Thus, even if the record established that counsel's waiver was invalid, our previous analysis and conclusion that the failure to advise was harmless would apply with equal force to the denial of a jury trial. Simply put, given testimony at defendant's trial, we do not find it reasonably probable a jury would have returned a more favorable verdict. (E.g., *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1276 [given evidence, denial of statutory right to MDO trial harmless].)

## VIII. PROTECTING THE RIGHT TO A JURY TRIAL

Given the defendant's burden on appeal, the appellate rules and presumptions, and our *Watson* harmless-error analysis, one could argue that it was unnecessary for us to address the merits of the parties' competing claims of personal waiver and exclusive control. (*Cf. Strickland v. Washington* (1984) 466 U.S. 668, 697 [where defendant cannot show that counsel's allegedly deficient conduct was prejudicial, court need not determine if it was deficient]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241 [same].) However, we consider it important to address and resolve them.

First, we continually see appeals from MDO and NGI commitment orders where, as here, there was a bench trial; and where, because of the court's custom and practice of obtaining jury waivers during an unreported discussion in chambers, the record does not reflect counsel's express waiver and is silent concerning whether the defendant knew of the right to jury, and if so, whether the defendant knew about, directed, consented to, or objected to counsel's waiver. Moreover, in these appeals, the defendants and the Attorney General assert the same claims.

Next, we note that the United States Supreme Court has repeatedly recognized that civil "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 79.) "Moreover, it is indisputable that involuntary commitment to a [psychiatric] hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomen[on] 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual." (*Addington v. Texas* (1979) 441 U.S. 418, 425–426; *People v. Allen* (2007) 42 Cal.4th 91, 98.)

Given the similar liberty and dignity interests implicated in an involuntary commitment, the right to choose the trier of fact is no less valuable to an NGI than it is to a criminal defendant. Moreover, although no constitutional provision guarantees an NGI the right to a jury trial, the Legislature nevertheless considered the right important enough to require a judicial advisement and a jury trial unless validly waived.

In our view, the purpose of these mandates is frustrated and the statutory right to a jury trial is undermined when together, an opaque record, the procedural rules and presumptions on appeal, and the harmless-error test not only permit a reviewing court to say, in essence, that we need not know and it does not matter, whether the NGI was aware of the right to a jury trial or whether the right was validly waived.

We have addressed and resolved the parties' competing claims because we believe that compliance with the statutory mandates matters even where, as here, the alleged failure to comply with the statute and denial of a jury trial can be deemed harmless. Moreover, in our view, the best assurance of compliance is a record that reflects it. Accordingly, we hold that if the court conducts a bench trial and the NGI did not personally waive the right to a jury, the record must show that the court advised the defendant of the right to a jury or, if the court was unable to do so, that the defendant was made aware of the right *before* counsel waived it. The record must also show that in waiving a jury trial, counsel acted at the defendant's direction or with the his or her knowledge and consent or that there were circumstances supporting counsel's doubt concerning the defendant's capacity to determine what was in his or her own best interests.

Demanding a clear and explicit record concerning the statutory advisement and waiver requirements imposes little, if any, additional burden on the court and parties. What slight burden it might impose is clearly outweighed by the importance the Legislature has attached to an NGI's right to a jury trial and the statutory requirements designed to protect it. In this regard we note that the court may still resolve the jury issue in accordance with its custom and practice. At some point, however, the court and parties must state on the record the facts establishing the NGI's awareness of the right to a jury and the validity of counsel's waiver. Alternatively, the record must contain an advisement and waiver form signed by the NGI.

## VIII. DISPOSITION

The order extending defendant's NGI commitment is affirmed.

**RUSHING, P.J.**

**I CONCUR: Grover, J.**

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**ELIA, J., Concurring**

I respectfully concur in the judgment on the ground that no reversible error has been shown. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We must presume for purposes of this appeal that appellant's counsel waived appellant's right to a jury in accordance with appellant's informed consent (see maj. opn., *ante*, p. 2). (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [all presumptions are indulged to support a lower court judgment or order regarding matters as to which the record is silent; error must be affirmatively shown]; see also *Conservatorship of John L.* (2010) 48 Cal.4th 131, 151–152 [attorney is obligated to keep client fully informed of proceedings, to advise client of his rights, and to refrain from any act or representation that misleads the court].)

It is unnecessary in this case to decide the exact extent of a counsel's authority to waive a jury for trial on a petition for extended commitment pursuant to Penal Code section 1026.5, subdivision (b). As the U.S. Supreme Court stated: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653 [16 S.Ct. 132]; see *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

"It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court." (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.) "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) "[O]nly the ratio decidendi of an appellate opinion has precedential effect [citation.] … ." (*Trope v. Katz* (1995) 11 Cal.4th 274, 287.) Since the full scope of counsel's control over waiver of jury trial was not at issue in this case, the majority's opinion is largely *dicta*.

The majority in effect attempts to impose new rules of procedure regarding jury trial waiver on the lower courts. (*Cf. People v. Blackburn* (2013) ___ Cal.App.4th ___ [2013 WL 1736497] (opn. of Rushing, P.J.).) It is not apparent that appellate courts enjoy general supervisory authority over superior courts' practice and procedure. "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) The California Constitution makes the Judicial Council, which is chaired by the Supreme Court's Chief Justice, responsible for adopting "rules for court administration, practice and procedure… " not "inconsistent with statute." (Cal. Const., art. VI, § 6, subd. (d); see Cal. Rules of Court, rule 10.1.)

By statute, "[e]very court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." (Gov. Code, § 68070; see Code Civ. Proc., § 575.1 [promulgation of local court rules].) The Legislature has encouraged the "Judicial Council… to adopt rules to provide for uniformity in rules and procedures throughout all courts in a county and statewide." (Gov. Code, § 68070, subd. (b).)

Some of the powers of courts are set out by statute. (See *e.g.* Code Civ. Proc., §§ 128, subd. (a) [courts' powers], 177 [judicial officers' powers].) Code of Civil Procedure section 187 provides: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

"Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure, to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*Tide Water Associated Oil Co. v. Superior Court of Los Angeles County* (1955) 43 Cal.2d 815, 825, fn. omitted.) " 'In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority. [Citations.]… ' [Citation.]" (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.)

The majority has cited no cases indicating that a Court of Appeal has inherent authority to impose procedural rules on inferior courts. Moreover, this court is bound by the constitutional standard of reversible error regardless whether the majority's judicially-imposed rules are followed in future cases. I can endorse the majority's new rules as nonbinding, recommended practices to the extent they avoid unnecessary appeals but not as procedural rules controlling local courts.

**ELIA, J.**