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SUMMARIES

Alternative Dispute Resolution

Incorporation of United Nations Commission on International Trade Law arbitration rules into commercial contract constituted clear and unmistakable evidence of agreement to arbitrate arbitrability (Christen, J.)

Oracle America, Inc. v. Myriad Group, A.G.

9th Cir.; July 26, 2013; 11-17186

The court of appeals reversed a district court order. The court held that incorporation of the United Nations Commission on International Trade Law arbitration rules into a commercial contract constituted clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Oracle America, Inc. sued Swiss software developer Myriad Group, A.G. for breach of contract, violation of the Lanham Act, copyright infringement, and unfair competition under California law. The claims were based on Myriad's alleged failure to pay agreed upon royalties for its use of the computer programming language Java, which Oracle developed.

Myriad moved in the Northern District of California to compel arbitration based on an arbitration clause in its license. The clause stated that any dispute arising out of or relating to the license would be settled by arbitration. Such arbitration was to be administered "(i) by the American Arbitration Association (AAA), (ii) in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) ..."

The district court granted Myriad's motion to compel arbitration with respect to Oracle's breach of contract claim but denied the motion with respect to all other claims. The court concluded that incorporation of the UNCITRAL arbitration rules did not constitute clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator. The court reasoned that the relevant provision of the 2010 UNCITRAL rules states only that the arbitrator has authority, but not exclusive authority, to decide its own jurisdiction.

The court of appeals reversed, holding that incorporation of the UNCITRAL arbitration rules into the arbitration provision in the parties' contract constituted clear and unmistakable evidence that they intended to delegate questions of arbitrability to the arbitrator.

In so holding, the court agreed with the Second and D.C. circuits, which had already considered this question. Both circuits had concluded that the UNCITRAL rules granted the arbitrator the power to determine issues of arbitrability.

The court found further that virtually every circuit to have considered the analogous issue of the incorporation of the American Arbitration Association's (AAA) arbitration rules into a contract had also reached the same conclusion: incorporation of the AAA rules constituted clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

The court rejected Oracle's arguments to the contrary as without merit, finding that incorporation of the UNCITRAL arbitration rules into the parties' commercial contract constituted clear and unmistakable evidence that they agreed to arbitrate arbitrability.

Criminal Law

Arizona capital defendant prejudiced by *Ring* error where rational jury could have found mitigating factor regarding defendant's ability to apprehend wrongfulness of conduct or conform conduct to law (Nelson, J.)

Murdaugh v. Ryan

9th Cir.; July 26, 2013; 10-99020

The court of appeals reversed in part and affirmed in part a district court's denial of a habeas corpus petition. The court held that an Arizona capital defendant suffered prejudicial *Ring* error where a trial court imposed a death sentence after failing to find a mitigating factor regarding the defendant's capacity to appreciate the wrongfulness of his conduct or conform it to the requirements of the law, where it was impossible to conclude in light of all the evidence that no rational jury could have found the factor.

Michael Murdaugh was charged in Arizona with first degree murder and related crimes in connection with the deaths of David Reynolds and Douglas Eggert. Murdaugh had been tracked down by police and interviewed after a witness linked him to the murder of Reynolds. During the interview, Murdaugh waived his *Miranda* rights and confessed to the grisly killing, in which Reynolds's body was cut apart and the pieces scattered to prevent his identification. Murdaugh also admitted to killing Eggert when an investigator realized that Reynolds's murder was similar to Eggert's previous murder.

After initial competency proceedings, Murdaugh pled guilty to both indictments. The plea agreement provided that the state would not seek the death penalty for Eggert's murder, but that the conviction for that crime still could constitute an aggravating factor at sentencing for Reynolds's murder.

At sentencing, Murdaugh instructed his counsel that he did not wish to put on any mitigation case. The district court responded by directing the state to do so. Murdaugh's counsel filed a short sentencing memorandum limited to evidence filed with the court.

The court sentenced Murdaugh to death, finding that Reynolds's murder was especially cruel, heinous or depraved under Arizona Revised Statute §13-703(F)(6). The court also found Eggert's murder to be an aggravating circumstance

under §13-703(F)1). The court considered but rejected the state's five statutory mitigating factors, but it found eight non-statutory mitigating factors. Affording the mitigating factors little weight and the aggravating factors great weight, the court concluded that the nonstatutory factors were insufficient to warrant leniency.

The Arizona Supreme Court upheld Murdaugh's convictions and death sentence on direct appeal. Among other issues, the state supreme court addressed Murdaugh's claim, pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*), that he was improperly sentenced by a judge rather than a jury. Reviewing Murdaugh's sentence for harmless error, the state supreme court found that the (F)(1) aggravating factor fell outside the *Ring* rule and that the state had proven the (F)(6) aggravating factor beyond a reasonable doubt. As to the mitigating evidence offered during sentencing, the court held no reasonable jury could find the evidence was sufficiently substantial to call for leniency.

Murdaugh exhausted his claims for state court post-conviction relief and filed a federal habeas petition, which the district court denied.

The court of appeals reversed in part, holding that the absence of a jury at sentencing was prejudicial *Ring* error.

In *Ring II*, the Supreme Court held that a defendant is entitled to have a jury determine the presence or absence of aggravating factors required by Arizona law for imposition of the death penalty. In response, the Arizona Supreme Court held, regarding all capital cases then pending on direct appeal, that failing to submit capital aggravating factors to a jury did not require reversing a defendant's sentence if the error was harmless. In Murdaugh's case, the court found the *Ring* error harmless.

The court rejected the state's contention that *Ring II* should be read narrowly to apply no further than a defendant's right to have a jury determine *aggravating* factors. The Arizona sentencing scheme required consideration of both aggravating and mitigating factors, and case authority demonstrated that the existence or absence of a mitigating factor was a finding of fact upon which an increase in authorized punishment could turn. In short, findings concerning aggravating and mitigating factors were so intertwined that it would be impossible for a jury to consider only the aggravating evidence to determine whether aggravating factors had been shown. The court declared that the right to have a jury determine aggravating factors is also a de facto right to have a jury determine mitigating facts.

Thus, because the existence or absence of mitigating circumstances directly affected whether Murdaugh was death eligible under Arizona law, he had a right to have a jury decide those facts.

The court likewise rejected Murdaugh's argument that *Ring* error is structural and therefore not subject to harmless error review. In an opinion after *Ring II*, the Arizona Supreme Court rejected a challenge to application of the harmless error test in *Ring* error cases, and the Supreme Court denied certiorari. Therefore it was well-settled that *Ring* error is subject to the harmless error test set out by the state supreme court.

The court applied the harmless error test, inquiring whether the absence of a jury as a factfinder at the penalty stage substantially and injuriously affected or influenced the outcome. That is, the question was whether a rational jury could have found that the facts called for leniency.

Murdaugh did not challenge the state supreme court's determination that the (F)(1) aggravating factor, which asks whether a defendant had been convicted of another offense under which Arizona law could impose a death sentence or life imprisonment, fell outside the *Ring* rule.

As to the (F)(6) factor, which is established where a murder was committed in an especially cruel, heinous or depraved manner," Murdaugh argued that the Arizona Supreme Court's conclusion that any rational jury would have found the aggravating factor hinged upon Murdaugh's mutilation of the body after the crime, which the court further found needed to be motivated by debasement. Because he mutilated Reynolds's body to avoid detection, Murdaugh maintained that a rational jury might not have found the (F)(6) factor. The court admonished that the state supreme court did not "hinge" its determination that the state had proven the factor solely upon Murdaugh's mutilation of the body. The court found other factors that supported a finding that the act was heinous or depraved, including that Murdaugh relished the murder, the murder was senseless, and the victim was helpless. Where the Arizona Supreme Court had repeatedly held that needless mutilation of a body is the kind of action that shows depravity without regard to the actor's purpose, no rational jury could have found that the evidence failed to establish the (F)(6) factor.

Murdaugh was correct, however, that a rational jury could have found that his evidence established the (G)(1) mitigating factor, which exists if the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired but not so impaired as to constitute a defense. This reflected that the *Ring* error had a substantial and injurious effect on the trial court's failure to find the mitigating factor, and thus the trial court's imposition of a death sentence. The court cited in particular expert reports that, although not drafted for the purpose of mitigation, provided details about Murdaugh's chronic drug use, which a jury might have found established drug impairment. The evidence could have resulted in a jury vote for lenience on that basis, so that the *Ring* error was prejudicial, and the court had to grant the habeas petition.

The court disagreed with Murdaugh's contention that, in reviewing his sentence for harmless error, the Arizona Supreme Court applied an unconstitutional causal nexus test to mitigating evidence of his drug use and delusions. Because the court only raised the issue of a causal nexus to "determine the weight" that a hypothetical jury would have "given relevant mitigating evidence," the court did not violate Murdaugh's constitutional rights.

Nor did the prosecution's presentation of mitigation evidence at the direction of the trial court violate Murdaugh's constitutional right to conflict-free representation. The prosecution did not simultaneously act as counsel for the prosecution and the defense in doing as the trial court instructed; the prosecution never represented Murdaugh.

Criminal Law

District court properly denied dismissal of indictment for illegal reentry following deportation order without regard to whether deportation proceeding was fundamentally unfair (Paez, J.)

United States v. Gonzalez-Villalobos

9th Cir.; July 26, 2013; 12-30150

The court of appeals affirmed a judgment of the district court. The court held that the district court properly denied a motion for dismissal of an indictment charging illegal reentry following a deportation order without addressing the alien's claim that the deportation hearing was fundamentally unfair.

In 1986, Encarnacion Gonzalez-Villalobos was convicted in state court of a drug offense. Subsequently, Gonzalez-Villalobos served a federal prison term for being an alien in possession of a firearm. The Immigration and Naturalization Service (INS) arrested Gonzalez-Villalobos when he was released from prison. However, the INS later released Gonzalez-Villalobos because he was a class member in a pending class action. The agency then cancelled the pending order to show cause as to deportation.

Subsequently, Gonzalez-Villalobos applied for legal status through the special-agricultural-worker (SAW) program. In 1989, the INS denied Gonzalez-Villalobos' application for the SAW program because his state drug conviction made him ineligible. Gonzalez-Villalobos appealed, but the agency appeals unit affirmed the denial in 1991. Later, the INS detained Gonzalez-Villalobos. The INS issued another order to show cause that alleged that Gonzalez-Villalobos was deportable as an alien who had been convicted of a drug offense.

At a 1992 deportation hearing, Gonzalez-Villalobos argued that the INS wrongfully discovered his drug conviction by looking through the SAW file. Gonzalez-Villalobos requested a suppression hearing so that he could question how the INS obtained his criminal history. At the request of the immigration judge (IJ), the government informed the court that it was not offering any evidence that came from the appeals unit's SAW file. The IJ then denied a suppression hearing. The IJ also denied relief and ordered Gonzalez-Villalobos deported. In 1999, Gonzalez-Villalobos' appeal to the Board of Immigration Appeals (BIA) was dismissed based on a finding that he had not met his burden to justify a suppression hearing.

Gonzalez-Villalobos was deported, subsequently re-entered, and was arrested and charged under 8 U.S.C. §1326 with being an alien present after deportation. Gonzalez-Villalobos moved to dismiss the indictment, contending that the 1992 deportation order was invalid because the IJ erred in denying a suppression hearing. The district court denied the motion, finding that even had the IJ had erred, Gonzalez-Villalobos could not show prejudice. Gonzalez-Villalobos then entered a conditional guilty plea and was convicted and sentenced to prison. Gonzalez-Villalobos appealed.

The court of appeals affirmed, holding that Gonzalez-Villalobos failed to show that his deportation proceedings improperly deprived him of the opportunity for judicial review.

Gonzalez-Villalobos had to show among other things that pursuant to §1326(d)(2), the deportation proceedings at which the deportation order was issued improperly deprived him of the opportunity for judicial review. The court found that Gonzalez-Villalobos failed to meet his burden under §1326(d)(2). Rather, Gonzalez-Villalobos did seek judicial review. After he administratively appealed to the BIA, Gonzalez-Villalobos petitioned the district court for writ of habeas corpus, which petition he later voluntarily dismissed.

The court rejected Gonzalez-Villalobos' argument that he was deprived of judicial review based on his right to review of the underlying deportation and that in the absence of prior judicial review, he was entitled to it presently. To the contrary, the court admonished, under *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987), where the defendant has failed to identify any obstacle that prevented him from obtaining judicial review of a deportation order, he is not entitled to such review as part of a collateral attack under §1326(d).

Criminal Law

Substantial evidence supported realtor's conviction for role in fraud scheme (Ikuta, J.)

United States v. Grasso

9th Cir.; July 26, 2013; 10-50116

The court of appeals affirmed a judgment of conviction. The court held that substantial evidence supported a realtor's conviction for his role in a fraud scheme.

Mortgage broker Mark Abrams and real estate developer Charles Fitzgerald crafted a scheme to defraud mortgage lenders. They would enter into a purchase agreement for a home in an affluent neighborhood and then obtain a loan for significantly more than the sale price, pocketing the extra money. In order for the scheme to work, the sellers and agents had to keep the true purchase price of the home confidential; the appraisal reports had to show the falsely inflated values of the homes; the title and escrow companies had to prepare two sets of documents, one showing the actual pur-

chase price (for the seller) and one showing the inflated purchase price (for the lender); and finally the Multiple Listing Service (MLS) had to show the falsely inflated sales price of the homes. Abrams and Fitzgerald coordinated the efforts of a range of colleagues to make this conspiracy work.

Real estate agent Kyle Grasso was one of Abrams and Fitzgerald's recruits for this scheme. Grasso was later charged with money laundering, bank fraud, loan fraud, and conspiracy to commit loan and bank fraud based on his role in the scheme.

At trial, the government presented evidence to prove that Grasso became involved in the Abrams-Fitzgerald scheme some time in 2000 and worked with them through at least late 2002. According to the government, Grasso participated primarily by identifying houses to be included in the scheme, ensuring that the seller would keep the sales price confidential, managing the information reported in the MLS listings, and obtaining the title insurance and escrow documents needed for the conspiracy through his access to Cal Title. The government identified nine transactions in which Grasso was involved.

Grasso was convicted on all conspiracy, bank fraud, and money laundering charges, and on the loan fraud charges relating to four of the nine transactions.

The court of appeals affirmed, holding that the evidence was sufficient to support the judgment of conviction.

To convict Grasso of conspiracy, the government had to prove that a conspiracy existed and that Grasso had some connection to that conspiracy. Here, it was undisputed that the government sufficiently proved the existence of a conspiracy to commit bank fraud and loan fraud. Further, Grasso did not contest that he participated in the conspiracy; rather, the disputed issue was whether he did so knowingly. Viewing the facts in the light most favorable to the prosecution, the court found the government presented more than sufficient evidence that Grasso knew the objectives of the fraudulent scheme. The evidence showed that Grasso assisted his co-conspirators in convincing lenders that various properties were sold for more than their actual sales prices. Grasso personally benefitted from falsely inflating the purchase price for one property, and he personally inflated the MLS listing for another. He was aware of the role the title company played in creating two different title insurance policies, one showing the inflated purchase price and one showing the true purchase price. Finally, the evidence showed that Grasso was an expert in his field, so the jury could reasonably conclude that he was not duped into innocently carrying out these acts.

Grasso's challenges to his convictions for loan and bank fraud were similarly unavailing.

Turning to Gasso's conviction for money laundering, the court explained that they were based on his receipt of "referral fees" for two of the transactions. According to Grasso, Abrams gave him referral fees for access to the title company, Cal Title, and that the loan fraud and bank fraud scheme could not have occurred without such access. Therefore, according to Grasso, the money laundering offense merged into the underlying loan fraud and bank fraud offenses and could not be separately punished. The court disagreed.

Under the money laundering statute, 18 U.S.C. § 1956(a)(1), the government must prove that a defendant: [1] knew that money being used in a financial transaction was the "proceeds of some form of unlawful activity," and [2] then conducted or attempted to conduct a financial transaction with such proceeds; [3] for the purpose of either promoting an unlawful activity or for concealment.

The court found Grasso's argument turned on whether the government provided sufficient evidence that the referral fees were "proceeds" of loan fraud and bank fraud. The court found that it did. Accordingly, the court rejected Grasso's contention that there was insufficient evidence that his money laundering charges were based on "separate and distinct" activity from the two transactions at issue. There was no merger issue.

Judge Berzon concurred in part and dissented in part, finding that there was a merger problem and, for that reason, Grasso's convictions for money laundering could not stand.

Environmental Law

Environmental impact report deficient for failure to explore use of agricultural conservation easements to mitigate loss of farmland (Siggins, J.)

Masonite Corporation v. County of Mendocino (Granite Construction Company)

C.A. 1st; July 25, 2013; A134896

The First Appellate District reversed a judgment denying a petition for writ of mandate. In the published portion of its opinion, the court held that an environmental impact report was deficient for failing to explore the use of agricultural conservation easements to mitigate the loss of prime farmland that would result from a proposed project.

The County of Mendocino approved Granite Construction Company's proposal to build a sand and gravel quarry.

Masonite Corporation filed a petition for writ of mandate challenging the county's approval of the project, arguing, among other things, that the county erroneously determined that agricultural conservation easements (ACEs) and in-lieu fees were not feasible ways to mitigate the loss of prime farmland due to the project.

The trial court denied the petition.

The court of appeal reversed, holding that the county erred in concluding that offsite agricultural conservation easements (ACEs) were legally infeasible.

The county determined that ACEs were not feasible because they would "not replace the on-site resources." The county based this conclusion on the presumption that ACEs were useful only to mitigate a project's indirect and cumulative effects on agricultural resources, but would not mitigate its direct effect on those resources. This was error, the court found. ACEs could appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. This conclusion was reinforced by the CEQA Guidelines, case law on offsite mitigation for loss of biological resources, case law on ACEs, prevailing practice, and California public policy.

The court explained that ACEs preserve land for agricultural use in perpetuity. By thus preserving substitute resources, ACE's compensate for the loss of farmland within the Guidelines' definition of mitigation. For this purpose, the court found, ACE's were indistinguishable from the offsite preservation of habitats for endangered species, an accepted means of mitigating impacts on biological resources. Moreover, the court found, it appeared that ACEs were commonly used for that purpose. Accordingly, the EIR's determination that ACEs were legally infeasible could not be sustained. The economic feasibility of off-site ACEs to mitigate the project's impact on the loss of 45 acres of prime farmland had to be explored.

The court found the EIR was also deficient for failure to explore the suggested alternative of "the donation of mitigation fees to a local, regional or statewide organization or agency whose purpose includes the acquisition and stewardship of [ACEs]." The county maintained it was legally precluded from accepting in-lieu fees because it did not have a comprehensive farmland mitigation program. The suggestion was not advocating payment of in-lieu fees to a county program, but rather to third parties involved in acquiring and overseeing ACEs. Whether the county lacked a comprehensive farmland mitigation program was thus immaterial.

Environmental Law

County did not act contrary to established law in determining that ban on plastic bags constituted environmentally beneficial regulatory action exempt from California Environmental Quality Act (McGuiness, P.J.)

Save the Plastic Bag Coalition v. County of Marin

C.A. 1st; June 25, 2013; A133868

The First Appellate District affirmed a judgment. In the published portion of its opinion, the court held that the County of Marin did not violate established law when it determined that an ordinance banning single-use plastic bags was categorically exempt from the California Environmental Quality Act.

The County of Marin enacted an ordinance intended to encourage the use of reusable bags by banning single-use plastic bags and imposing a fee on single-use paper bags. The county determined the ordinance was categorically exempt from the California Environmental Quality Act (CEQA) because it was a regulatory action designed to assure the maintenance, restoration, enhancement, or protection of natural resources and the environment.

The Save the Plastic Bag Coalition filed a petition for writ of mandate challenging the county's alleged failure to comply with CEQA.

The coalition's reliance on *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 was as perplexing as it was unavailing, the court wrote. The *Manhattan Beach* court acknowledged that there might be circumstances when a more comprehensive environmental review of a ban on plastic bags would be required, but only if it could be shown that the ban would result in a significant increase in paper bag use. That was simply not the case here. Marin County's ordinance applied to roughly 40 stores, compared to over 200 stores affected by Manhattan Beach's ordinance. Noting the *Manhattan Beach* court's description of the broader impacts of increased paper bag use in that case as insubstantial, the court found it was even more trivial in this case. Here, there were significantly fewer retailers and a fee would be charged for paper bags, thereby increasing the incentive for consumers to bring reusable bags when shopping. No such fee was required by the Manhattan Beach ordinance.

The court emphasized that it was not endorsing a blanket exemption from CEQA for plastic bag bans. Rather it was merely stating that a categorical exemption may apply to plastic bag bans depending upon the unique facts and circumstances presented. Nothing in *Manhattan Beach* precluded such a result. Indeed, the *Manhattan Beach* court itself stated that a determination that the ordinance in that case was exempt from CEQA would have been a viable alternative to conducting an initial study. If the Supreme Court had intended to preclude public agencies from relying on a categorical exemption from CEQA when considering plastic bag bans, it would not have suggested the exemption process as an alternative to conducting an initial study.

The court found further that the administrative record in this case contained substantial evidence to support the conclusion that the ordinance was an action that would maintain, enhance, and protect natural resources as well as the environment generally.

Environmental Law

Commerce Clause did not preclude application of CERCLA where defendants' conduct resulted in groundwater contamination solely in one state (Schroeder, J.)

Voggenthaler v. Maryland Square LLC

9th Cir.; July 26, 2013; 10-17520

The court of appeals affirmed a district court judgment in part, reversed in part, and remanded the action for further proceedings. The court held that application of the Comprehensive Environmental Response, Compensation, and Liability Act did not violate the Commerce Clause where the conduct at issue resulted in groundwater contamination that occurred solely in Nevada.

The Maryland Square Shopping Center (Site), in Las Vegas, was home to a dry cleaning facility from 1969 to 2000. The facility caused environmental contamination in the form of toxic spills of dry cleaning chemicals that seeped into the ground. The Herman Kishner Trust owned the Site during the contamination period, in which two companies, Shapiro Bros. Investment Co. (SBIC) and a predecessor of DCI USA, Inc. (DCI), leased the Site and operated the dry cleaning facility. Maryland Square LLC bought the site in 2005 with knowledge of the contamination. It demolished the dry cleaning facility the following year, with no efforts to remove contamination.

Two suits were filed against the owners and operators of the Site in Nevada federal district court. In one, the Nevada Division of Environmental Protection (NDEP) sued to recover cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Nevada state law. In the other, Peter Voggenthaler and other area neighborhood homeowners sued under the Resource Conservation and Recovery Act (RCRA), seeking an injunction forcing all of the Site's owners to clean up the contamination.

The district court ultimately granted summary judgment for NDEP on all of its claims. In pertinent part, the court rejected the argument proffered by several defendants that the application of CERCLA to conduct solely within Nevada violated the Commerce Clause.

In response to the homeowners' RCRA claims, the Site's owners maintained that they were not responsible for the actual spills, despite knowingly leasing the Site to a dry cleaning business and profiting from the business's operation. The court granted summary judgment for the homeowners against all of the Site's owners.

The court of appeals affirmed in part, holding that district court properly rejected Maryland Square's constitutional challenge to the application of CERCLA.

The court of appeals considered the principal legal contention raised on appeal, namely whether application of CERCLA violated the Commerce Clause where the conduct at issue occurred solely in Nevada. The court concluded that it did not.

The commerce power permits Congress to regulate certain broad categories of activities. Here, the application of CERCLA to contaminated soil and groundwater was proper under the categories authorizing regulation of articles in commerce and activities affecting commerce.

Groundwater may be regulated as an article of commerce, the court explained, because any item that may be bought or sold is an article of commerce. In particular, the Supreme Court has established that groundwater is an article of commerce because it can be traded. The Court has expressly rejected the argument made by Maryland Square, namely that groundwater found within a state cannot be an article of interstate commerce. Congress acted on a significant federal interest in groundwater by making its protection, and protection of surface water, a main priority of CERCLA.

The court noted, too, that application of CERCLA was supported by the facts that a dry cleaning establishment created the contamination as part of its commercial operation, and the resulting cleanup costs burdened commerce. Further, the Supreme Court has consistently held that Congress, under its Commerce Clause authority, may regulate commercial activities even where the economic impact of the individual's actions were very small, much smaller than the individual defendants' actions here.

The court went on to conclude that Maryland Square failed to demonstrate that it qualified as a bona fide prospective purchaser who fell within CERCLA's exception to liability for those who in good faith purchased a property they did not contaminate. The statutory exception requires that a defendant meet eight separate criteria to qualify. Maryland Square's evidentiary submission on the exception was woefully insufficient, with the result that the district court had rejected the defense.

However, the court noted that the district court rejected Maryland Square's evidence on the basis of its form rather than its substance, and it did not allow Maryland Square a chance to make an additional showing. The court therefore vacated the grant of summary judgment against Maryland Square to allow it the chance to cure its prior submission.

Maryland Square was liable to the state under state law, though, because it owned the property and failed to remove the contaminated soil. The state statute contained no exceptions in that regard, so that the district court correctly granted summary judgment on NDEP's claim for cleanup cost liability and for injunctive relief.

The court reversed on procedural grounds the grant of summary judgment under RCRA against Maryland Square and the Site operators because those defendants did not have an adequate opportunity to respond to the homeowners' claims.

Finally, the court reversed the grant of summary judgment against one guarantor, because there was no evidence

of spills during the term of his personal guaranty, which he executed when SBIC transferred the dry cleaning business to DCI.

Health Law

Medical marijuana users' rights not violated by county's seizure and destruction of marijuana exceeding their reasonable needs (Siggins, J.)

Littlefield v. County of Humboldt

C.A. 1st; June 28, 2013; A135628

The First Appellate District affirmed a judgment. The court held that the rights of property owners who claimed to be legal users of marijuana under the Compassionate Use Act were not violated by the county's seizure and destruction of marijuana that vastly exceeded the owners reasonable daily needs.

Humboldt County sheriff's deputies seized and destroyed approximately 1,500 pounds of marijuana under cultivation on property belonging to Sylvia, Timothy, and Roscoe Littlefield and Jeffrey Libertini. All of the gardens from which the marijuana was seized had posted medical marijuana recommendations belonging to one of more of the property owners. Each of the recommendations was executed by Dr. Norman Bensky, indicated the use of up to two ounces of cannabis per day, and identified ailments of degenerative joint disease, glaucoma, and or lower back pain. The sheriff retained 10 pounds of marijuana.

The Littlefields and Libertini sued the county for conversion and violation of their constitutional and statutory rights to be free from unreasonable search and seizure and deprivation of property without due process. They contended the replacement value of the cannabis that was destroyed was between $683,724 and $1,367,448.

The trial court granted summary judgment for the county, finding that, despite the posted medical marijuana recommendations, "[t]he amounts possessed were of such a quantity to lead a person of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. The amounts possessed were so well beyond the standards promulgated by state and local authorities to lead a reasonable person to believe that the marijuana was possessed for unlawful purposes."

The court of appeal affirmed, holding that the seizure was supported by probable cause.

The court explained that the property owners' purported status as medical marijuana users did not immunize them for criminal liability for their possession of marijuana in amounts exceeding reasonable amounts. The Compassionate Use Act protects the possession of marijuana only in an amount reasonably related to the user's current medical needs. Here, the sheer quantity of marijuana under cultivation could lead a reasonably prudent officer to conclude that the plaintiffs' production far exceeded their medical needs.

Dr. Bensky's recommendations supplied further reason for skepticism, the court found. Each purported to authorize the use of up to two ounces per person per day, or 45.6 pounds of cannabis per person per year—15 times the three pounds per year deemed reasonable under the county's ordinance. Officers could also reasonably question the likelihood that all five of Dr. Bensky's patients, including four members of the Littlefield family, suffered from degenerative bone disease and/or low back pain. The court was not surprised that that the sergeant who authorized the seizure doubted the validity of Dr. Bensky's recommendations.

The county's undisputed evidence established that the officers had probable cause, based on the amount of marijuana under cultivation and plaintiffs' extremely generous medical marijuana recommendations, to believe the seized marijuana was unlawfully possessed.

The court held further that the destruction of the marijuana was lawful. Health & Saf. Code §11479 states that a law enforcement agency that seizes a suspected controlled substance may, at any time after the seizure, destroy "that amount in excess of 10 pounds in gross weight," provided the agency satisfies specified requirements. Notwithstanding the plaintiffs' arguments to the contrary, the court found the sheriff's department satisfied those requirements.

In order to prevail on summary judgment, the court concluded, the plaintiffs would have had to submit evidence supporting their claim that the amount of marijuana they possessed was reasonably related to their current medical needs. They failed to make such a showing. The medical marijuana recommendations themselves were hearsay, and thus inadmissible to prove legal possession. And, although the plaintiffs offered an expert's declaration that the quantity of cannabis taken from the Littlefields' property was "reasonable and within the limits of the parties' medical cannabis recommendations," the declaration failed to show that the plaintiffs' expert possessed the expertise needed to render a medical opinion as to their specific needs.

Immigration Law

Harm to alien's infant daughter on account of alien's race and religion was proper evidence of alien's past persecution in country of origin (Watford, J.)

Sumolang v. Holder

9th Cir.; July 25, 2013; 08-73164

The court of appeals granted in part, denied in part, and dismissed in part a petition for review of an order of the Board of Immigration Appeals and remanded. The court

held that harm to an alien's infant daughter that was directed against the alien on account of the alien's race and religion was proper evidence of the alien's past persecution in her country of origin.

Berawati Notoredjo was a native and citizen of Indonesia who was ethnic Chinese and a Christian. Notoredjo and her husband, who was also a Christian, brought their seriously ill baby daughter Monicha to a public hospital for treatment. The nurse who registered them noted that they were Christian and told them they would have to wait because the doctor was busy. A muslim doctor asked Notoredjo for a bribe and threatened not to treat Monicha as a "priority." When his request was rebuffed, the doctor left Monicha unattended. By the time a doctor finally saw Monicha, it was too late to save her and she died.

Subsequently, Notoredjo and her husband entered the U.S. on a tourist visa, overstayed that visa, and remained without lawful status. Later, Notoredjo and her husband both applied for asylum, withholding of removal, and other relief. After a hearing at which both testified, an immigration judge (IJ) denied relief and ordered removal. In ruling that Notoredjo had not shown past persecution, the IJ refused to give any weight to the evidence of Monicha's death. The Board of Immigration Appeals (BIA) dismissed Notoredjo's appeal. Notoredjo petitioned for review.

The court of appeals granted in part, denied in part, dismissed in part the petition and remanded, holding that the evidence of harm to Monicha was proper evidence of Notoredjo's past persecution.

The court noted that Notoredjo applied for asylum more than a year after her entry. However, the court found that it lacked jurisdiction to hear Notoredjo's appeal of the BIA's denial of asylum based on Notoredjo's untimeliness because disputed factual question made it impossible on the record to resolve whether extraordinary circumstances excused that untimeliness.

As to the BIA's rejection of Notoredjo's claim for withholding of removal, the BIA adopted the IJ's view that, even had Monicha been the victim of persecution, that did not mean that Notoredjo herself had been persecuted. The BIA and the IJ thus erred as a matter of law. Cases supported Notoredjo's reliance on the harm inflicted on her infant daughter as evidence of her own past persecution. Further, under 8 U.S.C. §§1101(a)(42)(A) and 1231(b)(3)(A), harm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent "on account of" or "because of" the parent's race, religion, nationality, membership in a particular social group, or political opinion.

Here, Notoredjo's account of what transpired at the hospital made clear that the doctors and nurses deliberately ignored Monicha's medical needs because her parents were Christian and her mother was Chinese. The delay of the hospital staff in caring for Monicha was, at least in part, directed against Notoredjo and her husband because of her race and their religion. There was thus no basis for the BIA to not consider Notoredjo's testimony about deliberate delay at the hospital, given that the BIA treated Notoredjo as credible.

Notoredjo's evidence was directly relevant to whether Notoredjo suffered past persecution and could also be relevant to whether she had shown an individualized likelihood of future persecution.

Insurance Law

California Insurance Guarantee Association should not have been allowed to pursue reimbursement claim against insurer after claim had been rejected and CIGA had failed to timely seek judicial review of rejection (Perren, J.)

State Farm General Insurance Company v. Workers' Compensation Appeals Board

C.A. 2nd; July 1, 2013; B240742

The Second Appellate District annulled a decision of the Workers' Compensation Appeals Board and remanded. The court held that the California Insurance Guarantee Association was was improperly allowed to pursue a reimbursement claim against an insurer after the claim had been administratively rejected and the association had failed to timely seek judicial review of that rejection.

In 2000, Joanne Lutz was injured while working for Roto Rooter as a personal assistant to its president, Linda McDonald. In the relevant years, Roto Rooter was insured for workers' compensation by Fremont Compensation Insurance Company and Paula Insurance Company. McDonald and her homeowner's insurer, State Farm General Insurance Company, were joined as additional parties to Lutz's claim. In 2002, those parties stipulated among other things that Lutz was jointly employed by Roto Rooter and McDonald and sustained a work-related injury during that employment.

State Farm agreed to contribute a specified portion of the benefits paid to Lutz for her injuries of 1999 and 2000. On the same day, a workers' compensation judge (WCJ) approved an award that allocated liability as stipulated. No party sought reconsideration of the award and it thus became final between those parties.

By mid-2003, however, both Paula and Fremont were liquidated and the California Insurance Guarantee Association (CIGA) assumed administration of Lutz's claim. After that time, State Farm reimbursed CIGA for its stipulated portion of all benefits paid to Lutz. Nonetheless, for several years, CIGA litigated its participation as administrator and its liability with respect to the availability of other solvent insurance pursuant to Ins. Code §1063.1 and its dispute as to whether Lutz was employed by McDonald or by Roto Rooter.

Finally, in December 2011, the Workers' Compensation Appeals Board (WCAB) granted reconsideration of a CIGA petition for reimbursement, noting that CIGA was not a party to the 2002 stipulation and was not seeking to amend the 2002 award. Rather, the WCAB reasoned that CIGA was seeking to enforce its §1063.1 right to obtain reimbursement from a solvent insurer that was "available" to provide benefits to Lutz within the meaning of the statute.

Further, the WCAB concluded that there had been no earlier final decision on CIGA's petition to obtain reimbursement from State Farm. Thus, there was no basis for denying that on grounds of res judicata or collateral estoppel as the WCJ had found in August 2011. Accordingly, the WCAB rescinded the WCJ's decision and returned the case to the trial level for further proceedings on CIGA's petition for reimbursement. State Farm unsuccessfully petitioned the WCAB for reconsideration. State Farm then petitioned for review.

The court of appeal annulled and remanded, holding that CIGA should not have been allowed to pursue a reimbursement claim against State Farm.

The claim of CIGA was barred by res judicata. It is well-settled that appellate review is limited to final orders of the WCAB that affect a substantial right or liability of a party. Further, the failure of an aggrieved party to seek judicial review pursuant to Lab. Code §5950 of a final order of the WCAB bars later challenge to the propriety of the order or decision before either the WCAB or the courts.

Here, the WCAB granted reconsideration in December 2011 in spite of its contrary decision against CIGA in January 2011 as to whether it could pursue a reimbursement claim under §1063.1(c)(9). The court rejected CIGA's argument that its right to reimbursement was not consciously raised or litigated prior to the December 2011 WCAB decision. Rather, CIGA's reimbursement right was expressly raised in 2008, 2009, and 2011 and determined adversely to CIGA each time.

In 2008, CIGA formally petitioned for reimbursement to resolve whether Lutz's homeowner's policy qualified as "other insurance" to make the claim against CIGA a non-covered claim under §1063.1. The WCJ found that the WCAB lacked jurisdiction to rescind or alter the 2002 stipulated settlement and that CIGA was bound by it. In 2009, CIGA again asked the WCJ to resolve whether it should be dismissed under §1063.1 because "other solvent insurance" was available, whether joint and several liability existed for State Farm, and whether administration of Lutz's claim should be changed. The WCAB adopted the WCJ's findings that CIGA was bound by the 2002 stipulated settlement and barred by laches from attempting to avoid it. Finally, in January 2011, the WCAB rejected CIGA's contention that liability should be re-allocated to State Farm because State Farm was jointly and severally liable for Lutz's injuries. CIGA did not seek judicial review of any of these decisions. Consequently, the decisions became final and conclusive.

Accordingly, CIGA was barred by res judicata from relitigating its right to reimbursement.

Labor and Employment Law

Under longshore workers' compensation law, injury "occasioned solely by" intoxication means that legal cause of injury was intoxication, without regard to nature of surface material on landing where intoxicated worker fell (N.R. Smith, J.)

Schwirse v. Director, Office of Workers' Compensation Program

9th Cir.; July 26, 2013; 11-73172

The court of appeals denied a petition for review. The court held that under the Longshore and Harbor Workers' Compensation Act, an injury "occasioned solely by" intoxication means that the legal cause of the injury was intoxication, regardless of the surface material of the landing on which the intoxicated worker fell.

Gary Schwirse was a longshoreman employed by Marine Terminals Corporation (MTC). In early 2006, Schwirse consumed numerous beers and some whiskey throughout the course of his workday. Schwirse fell over a dock rail and landed on a concrete and steel ledge some six feet below. At the hospital, he was confirmed to have acute alcohol intoxication.

Schwirse sought compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA). MTC refused to pay, asserting that Schwirse was ineligible for compensation pursuant to 33 U.S.C. §903(c) because his intoxication was the sole cause of his injury.

At a hearing before an administrative law judge (ALJ), Schwirse maintained that he fell over a traffic cone at the rail's edge. The ALJ initially awarded benefits, reasoning that the injury was not caused solely by intoxication because there was no direct proof that intoxication – and not something else – caused Schwirse to fall.

After intervening proceedings before the Benefits Review Board, the ALJ took the action up again on remand and found that MTC had established that that intoxication was the sole cause of Schwirse's fall. In pertinent part, the ALJ rejected Schwirse's argument that the concrete and metal slab onto which he fell caused the injury rather than his intoxication.

The BRB affirmed. Schwirse petitioned for review.

The court of appeals denied the petition, holding that the BRB did not err in affirming the ALJ's denial of Schwirse's compensation claim.

Under §903(c), no compensation is payable where a worker's injury was *occasioned solely by* the intoxication of the employee. Against this bar, the LHWCA provides in §920(c) that "a claim for compensation ... shall be presumed, in the

absence of substantial evidence to the contrary ... [t]hat the injury was not occasioned solely by the intoxication of the injured employee." The employer may rebut the statutory presumption with substantial evidence negating any connection between the injury and the employee's work environment.

Here, the court of appeals had to interpret the phrase "occasioned solely by," which required the court to determine whether intoxication was the "legal cause" of the injury. That is, the question was whether the injury would not have happened "but for" intoxication.

The court proceeded by analogy from admiralty cases, determining proximate cause by looking at the act that caused the accident and determining whether there were any superseding or intervening causes that contributed to the injury. In that regard, the court held that an injury "occasioned solely by" intoxication means that the legal cause of the injury was intoxication, regardless of the surface material of the landing on which the intoxicated person fell.

The court rejected Schwirse's all-encompassing definition of "injury," which would include all the harmful physical consequences of an event. According to Schwirse's position, his injury was not occasioned solely by intoxication because he landed on a concrete and metal slab, and not on a non-injurious surface, such as the river or a featherbed. To the contrary, the court said, the phrase "occasioned solely by" in §§903(c) and 920(c) limits the analysis to the sole causal factor of the injury.

Turning to the specifics of Schwirse's accident, the court held that the BRB did not err in affirming the ALJ's finding that MTC produced sufficient evidence to rebut the statutory presumption that Schwirse's injury was not solely caused by intoxication. There was no evidence of any superseding or intervening cause of the injury. In addition, it was a foreseeable consequence of falling that one might hit the existing surface material below. Absent evidence that the surface on which Schwirse landed was defective in some way, the "legal cause" analysis was limited to the reason for his fall and its foreseeable consequences. The only known cause for the injury here was the fall from the rail attributable solely to Schwirse's drunkenness.

The court noted that MTC did not have to "rule out" all other possible causes of injury to rebut the presumption under §920(c).

Ultimately, then, the BRB correctly concluded that the ALJ's decision to deny disability benefits, based on the record as a whole, was proper.

FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 13 C.D.O.S. 7937

JOHAN JOHNY SUMOLANG; BERAWATI NOTOREDJO, Petitioners,

v.

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

No. 08-73164
United States Court of Appeals for the Ninth Circuit
Agency Nos. A095-295-985; A095-295-986

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted March 5, 2013—Pasadena, California

Filed July 25, 2013

Before: Richard A. Paez and Paul J. Watford, Circuit Judges, and Matthew F. Kennelly, District Judge.*

Opinion by Judge Watford

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

COUNSEL

Gihan L. Thomas (argued) and Kelley L. Costello (argued), Law Offices of Gihan Thomas, Los Angeles, California, for Petitioners.

Jessica E. Sherman (argued), Trial Attorney; Tony West, Assistant Attorney General; Richard M. Evans, Assistant Director; Marshall T. Golding, Attorney, United States Department of Justice, Civil Division, Washington, D.C., for Respondent.

OPINION

WATFORD, Circuit Judge:

Can a parent applying for asylum or withholding of removal show that she has been persecuted based on suffering or harm inflicted on her child? That question arises here because the strongest evidence supporting the claims of the petitioner, Berawati Notoredjo, involved the death of her three-month-old daughter. In ruling that Ms. Notoredjo had not shown past persecution, the immigration judge (IJ) refused to give any weight to that evidence. The IJ framed the legal principle guiding his decision in these terms: "the alien cannot claim persecution as to a relative and, by virtue of that persecution, assert that he himself was persecuted thereby." We believe this legal principle was misapplied in Ms. Notoredjo's case and grant in part her petition for review.

I

Ms. Notoredjo is a native and citizen of Indonesia who is Christian and of Chinese descent, a minority group that has faced a long history of violence and discrimination in Indonesia. *See Sael v. Ashcroft*, 386 F.3d 922, 925–27 (9th Cir. 2004). Because of her race and religion, Ms. Notoredjo was repeatedly discriminated against at school, heckled with anti-Chinese slurs as she walked to school, and harassed and groped by Muslim men when she rode public transportation. On one occasion two Muslim men accosted her on the street and robbed her; when she attempted to report the incident to the police, the officers were rude and refused to help solely because she is Chinese.

In December 1996, Ms. Notoredjo and her husband, Johan Sumolang, who is also Christian, brought their seriously ill baby daughter Monicha to a public hospital for treatment. Upon arrival, the nurse who registered them said, "Oh, you are Christians," and told them they would have to wait because the doctor was busy. A Muslim doctor later asked Ms. Notoredjo for a bribe and threatened not to treat Monicha as a "priority." His request rebuffed, the doctor left Monicha unattended. When Monicha's condition deteriorated due to the long wait, Ms. Notoredjo's husband confronted one of the doctors and told him they wanted to know what was wrong with Monicha right away. The doctor replied, "You Chinese don't know your place. You will have to wait until I'm free." He further warned, "If you don't behave yourself, I'll call the police and throw you out." By the time a doctor finally saw Monicha, it was too late to save her. The doctor refused to give any explanation for the cause of death, but Ms. Notoredjo believes Monicha died because she failed to receive prompt medical attention. Because the IJ did not make an adverse credibility determination, we accept Ms. Notoredjo's account of these events as true. *See Benyamin v. Holder*, 579 F.3d 970, 974 (9th Cir. 2009).

In May 1997, Ms. Notoredjo and her husband came to the United States as tourists. Although they intended to return to Indonesia, they decided to extend their stay in the United States after family members warned them that it might not be safe to return. Those warnings proved accurate, for in May 1998 widespread anti-Chinese violence erupted in Indonesia, leaving more than one thousand people dead. *Sael*, 386 F.3d at 925–26. After their visas expired in May 1998, Ms. Notoredjo and her husband remained in the United States without lawful status.

In 2002, Ms. Notoredjo's husband, Mr. Sumolang, filed an application for asylum, withholding of removal, and protection under the Convention Against Torture, listing Ms. Notoredjo as a derivative beneficiary. Ms. Notoredjo later filed her own application requesting the same relief. After a hearing at which both Ms. Notoredjo and Mr. Sumolang

testified, the IJ denied relief and ordered them removed to Indonesia unless they voluntarily departed within sixty days. The Board of Immigration Appeals (BIA) dismissed their appeal. This opinion addresses only Ms. Notoredjo's claims; we address Mr. Sumolang's claims in a separate unpublished memorandum.

II

We begin with the BIA's rejection of Ms. Notoredjo's asylum claim, which requires only brief discussion. Because Ms. Notoredjo filed her application more than one year after her arrival in the United States, she had to show either "changed circumstances" materially affecting her eligibility for asylum or "extraordinary circumstances" excusing her failure to file within the one-year deadline. 8 U.S.C. § 1158(a)(2)(B), (D). The BIA adopted the IJ's determination that neither of these exceptions applies. As to the extraordinary-circumstances exception, we lack jurisdiction to review the BIA's ruling because it rests on the IJ's resolution of an underlying factual dispute. *See Gasparyan v. Holder*, 707 F.3d 1130, 1133–34 (9th Cir. 2013). The IJ determined that Ms. Notoredjo's filing delay was caused by her ignorance of the one-year filing deadline, not—as Ms. Notoredjo claimed—by the psychological trauma she experienced in the wake of Monicha's death.

As to the changed-circumstances exception, we have jurisdiction to review the BIA's ruling because it turns on undisputed facts—the outbreak of anti-Chinese violence in May 1998. *See Vahora v. Holder*, 641 F.3d 1038, 1042 (9th Cir. 2011). Ms. Notoredjo argues that this outbreak of violence constitutes "changed circumstances" that materially affected her and her husband's eligibility for asylum, and thus excused their late filing in 2002. *See Vahora*, 641 F.3d at 1043–44. While those events may have allowed Ms. Notoredjo to file an application within a "reasonable period" after learning of the violence in May 1998, *see* 8 C.F.R. § 1208.4(a)(4)(ii), they do not excuse her failure to file the application until several years had passed. *See Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010). Ms. Notoredjo also argues that anti-Chinese violence in Indonesia between 1999 and 2002 constitutes changed circumstances, but substantial evidence supports the IJ's conclusion that such violence was at most no different in degree from the violence that had been ongoing when Ms. Notoredjo left Indonesia in 1997.

III

We turn next to the BIA's rejection of Ms. Notoredjo's claim for withholding of removal. To succeed on this claim, Ms. Notoredjo had to prove that her life or freedom would be threatened in Indonesia because of her race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3). She could meet that burden by proving that she suffered past persecution in Indonesia on account of one of the five protected grounds, which would give rise to a rebuttable presumption that she is entitled to withholding of removal. 8 C.F.R. § 1208.16(b)(1)(i). Or Ms. Notoredjo could prove that it is more likely than not that she would face such persecution in the future if she were removed to Indonesia. 8 C.F.R. § 1208.16(b)(2); *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

The BIA held that Ms. Notoredjo failed to prove entitlement to withholding of removal on either ground. The BIA concluded that the incidents of discrimination and harassment Ms. Notoredjo experienced did not rise to the level of past persecution, and that she had not demonstrated an individualized risk of future persecution as required by *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc). In reaching these conclusions, the BIA accorded no weight to the events surrounding Monicha's death, adopting the IJ's view that, even if Monicha had been the victim of persecution, that did not mean Ms. Notoredjo herself had been persecuted. The BIA stated: "[T]he fact that the respondent's daughter was a victim of poor medical attention, whether due to ethnicity or religion, does not establish persecution to the respondent herself."

The BIA and the IJ erred as a legal matter in refusing to consider the evidence concerning Monicha's death. It is true, as the IJ observed, that withholding of removal is a purely personal remedy, in contrast to asylum. Under the asylum statute, spouses and children can claim asylum as derivative beneficiaries of the principal alien's application. 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 1208.21. The withholding of removal statute makes no such allowance for derivative beneficiaries. *See* 8 U.S.C. § 1231(b)(3); *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005). But Ms. Notoredjo was not seeking derivative relief here. She sought withholding of removal based on her own persecution, not the persecution of someone else.

Our precedent, as well as precedent from other circuits, supports Ms. Notoredjo's reliance on the harm inflicted on her infant daughter as evidence of past persecution. Harm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent "on account of" or "because of" *the parent's* race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3)(A). Thus, we have held that parents proved past persecution based in part on physical attacks against their half-Sikh, half-Hindu child, when the attacks were part of a campaign of persecution directed against the parents because of their inter-faith marriage. *See Maini v. INS*, 212 F.3d 1167, 1175–76 (9th Cir. 2000); *see also Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996). The First Circuit has similarly held that the kidnapping, beating, and rape of a father's children, which were "specifically designed to send a message" to the father on account of the father's political opinions, "were clearly part of the persecution of him." *Precetaj v. Holder*, 649 F.3d 72, 76 (1st Cir. 2011); *see also Flores v. Holder*, 699 F.3d 998, 1003 (8th Cir. 2012); *Jiang v. Gonzales*, 500 F.3d 137,

141 (2d Cir. 2007); *Tamas-Mercea v. Reno*, 222 F.3d 417, 425 (7th Cir. 2000).

Ms. Notoredjo's case fits comfortably within this line of precedent. Her account of what transpired at the hospital makes clear that the doctors and nurses deliberately ignored Monicha's medical needs because her parents were Christian and her mother was Chinese. The hospital staff's delay in administering medical care to Monicha was, at least in part, directed against Ms. Notoredjo and her husband because of *her* race and *their* religion. Indeed, the anti-Christian motivation for the hospital staff's actions can only be understood as directed against Monicha's parents, since a three-month-old infant lacks the capacity to adopt a religious faith of her own. It is fair to say that although the hospital staff's actions inflicted harm most immediately on Monicha, those actions were "designed to send a message" to Monicha's parents, *Precetaj*, 649 F.3d at 76, and were calculated to inflict suffering on them through their child.

Because the BIA treated Ms. Notoredjo as credible, there is no basis to exclude from consideration her testimony that the staff of a public hospital deliberately delayed administering medical treatment to Monicha on account of Ms. Notoredjo's race and religion. This evidence is directly relevant to whether Ms. Notoredjo suffered past persecution, and may also be relevant to whether she has shown an individualized likelihood of future persecution. *See Sael*, 386 F.3d at 927. We remand for the BIA to reconsider Ms. Notoredjo's request for withholding of removal giving full weight to the evidence concerning Monicha's death.

IV

Finally, we uphold the BIA's determination that Ms. Notoredjo is not entitled to protection under the Convention Against Torture, as that determination is supported by substantial evidence. The events described in Ms. Notoredjo's declaration and testimony do not establish that she is more likely than not to be tortured if she returns to Indonesia. *See* 8 C.F.R. § 208.16(c)(2); *Nuru v. Gonzales*, 404 F.3d 1207, 1216, 1221 (9th Cir. 2005).

PETITION FOR REVIEW GRANTED in part, DENIED in part, DISMISSED in part, and REMANDED.

Costs awarded to the petitioners.

Cite as 13 C.D.O.S. 7939

PETER J. VOGGENTHALER; WILLIAM MONTERO; BARBARA MONTERO; CLIFFORD ROGERS; SHARON ROGERS; HERMANN ROSNER; MARCUS ROTHKRANZ; DANIEL SOLDINI; CHARLES WALKER; VERNA WALKER; JACK YENCHECK; OFELIA YENCHECK; RICHARD MALM; ROGER ELLSWORTH; JO ANN ELLSWORTH; MARGARET RUDELICH-HOPPE; PATRICIA MAHONEY; RICHARD FALEN; PETER LEARNED; KRISTIAN MEIER; ELIZA ACOSTA; MIRHA ELIAS; AIKO BERGE; VICTOR BECERRA; ARTHUR BODENDORFER; BRENDA C. CHAFFIN; MICHAEL J. SOLMI; JASON COWLES; JANE GAUTHIER; HONORE GAUTHIER; NIKOLAS KONSTANTINOU; DRAGAN KURAJICA; KENNETH LOWTHER; JAMES LUEHMANN; JACQUELINE LUEHMANN; RUTH MANNHEIMER; STATE OF NEVADA, on behalf of Department of Conservation & Natural Resources, Division of Environmental Protection, Plaintiffs-Appellees,

v.

Maryland Square LLC, Defendant-Appellant,

and

MARYLAND SQUARE SHOPPING CENTER LLC; HERMAN KISHNER TRUST, DBA Maryland Square Shopping Center; IRWIN KISHNER; JERRY ENGEL; BANK OF AMERICA, NA, Trustee on behalf of Herman Kishner Trust; CLARK COUNTY SCHOOL DISTRICT; MELVIN SHAPIRO; SHAPIRO BROTHERS INVESTMENT COMPANY, Defendants.

No. 10-17520
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:08-cv-01618-RCJ-GWF

PETER J. VOGGENTHALER; WILLIAM MONTERO; BARBARA MONTERO; CLIFFORD ROGERS; SHARON ROGERS; HERMANN ROSNER; MARCUS ROTHKRANZ; DANIEL SOLDINI; CHARLES WALKER; VERNA WALKER; JACK YENCHECK; OFELIA YENCHECK; RICHARD MALM; ROGER ELLSWORTH; JO ANN ELLSWORTH; MARGARET RUDELICH-HOPPE; PATRICIA MAHONEY; RICHARD FALEN; PETER LEARNED; KRISTIAN MEIER; ELIZA ACOSTA; MIRHA ELIAS; AIKO BERGE; VICTOR BECERRA; ARTHUR BODENDORFER; BRENDA C. CHAFFIN; MICHAEL J. SOLMI; JASON COWLES; JANE GAUTHIER; HONORE GAUTHIER; NIKOLAS KONSTANTINOU; DRAGAN KURAJICA; KENNETH LOWTHER; JAMES LUEHMANN; JACQUELINE LUEHMANN; RUTH MANNHEIMER, Plaintiffs-Appellees,

MARYLAND SQUARE SHOPPING CENTER LLC, Trustee on behalf of Herman Kishner Trust, Defendant-Intervenor,

STATE OF NEVADA, on behalf of Department of Conservation & Natural Resources, Division of Environmental Protection, Plaintiff-Intervenor,

BANK OF AMERICA, NA, Trustee on behalf of Herman Kishner Trust; JERRY ENGEL, Trustee on behalf of Herman Kishner Trust; HERMAN KISHNER TRUST, Trustee on behalf of Herman Kishner Trust, DBA Maryland Square Shopping Center; IRWIN KISHNER, Trustee on behalf of Herman Kishner Trust, Defendants-Intervenors,

v.

SHAPIRO BROTHERS INVESTMENT COMPANY, Defendant-Appellant,

and

CLARK COUNTY SCHOOL DISTRICT; MELVIN SHAPIRO; MARYLAND SQUARE LLC, Trustee on behalf of Herman Kishner Trust, Defendants.

No. 11-15174
United States Court of Appeals for the Ninth Circuit
D.C. Nos. 2:08-cv-01618-RCJ-GWF, 3:09-cv-00231-RCJ-GWF

PETER J. VOGGENTHALER; WILLIAM MONTERO; BARBARA MONTERO; CLIFFORD ROGERS; SHARON ROGERS; HERMANN ROSNER; MARCUS ROTHKRANZ; DANIEL SOLDINI; CHARLES WALKER; VERNA WALKER; JACK YENCHECK; OFELIA YENCHECK; RICHARD MALM; ROGER ELLSWORTH; JO ANN ELLSWORTH; MARGARET RUDELICH-HOPPE; PATRICIA MAHONEY; RICHARD FALEN; PETER LEARNED; KRISTIAN MEIER; ELIZA ACOSTA; MIRHA ELIAS; AIKO BERGE; VICTOR BECERRA; ARTHUR BODENDORFER; BRENDA C. CHAFFIN; MICHAEL J. SOLMI; JASON COWLES; JANE GAUTHIER; HONORE GAUTHIER; NIKOLAS KONSTANTINOU; DRAGAN KURAJICA; KENNETH LOWTHER; JAMES LUEHMANN; JACQUELINE LUEHMANN; RUTH MANNHEIMER; STATE OF NEVADA, on behalf of Department of Conservation & Natural Resources, Division of Environmental Protection, Plaintiffs,

v.

MARYLAND SQUARE SHOPPING CENTER LLC; HERMAN

KISHNER TRUST, DBA Maryland Square Shopping Center; IRWIN KISHNER; JERRY ENGEL; BANK OF AMERICA, Trustee on behalf of Herman Kishner Trust, Defendants-Appellees,

v.

MELVIN SHAPIRO; SHAPIRO BROTHERS INVESTMENT COMPANY, Defendants-Appellants,

and

MARYLAND SQUARE LLC; CLARK COUNTY SCHOOL DISTRICT, Defendants.

No. 11-15176
United States Court of Appeals for the Ninth Circuit
D.C. Nos. 2:08-cv-01618-RCJ-GWF, 3:09-cv-00231-RCJ-GWF

PETER J. VOGGENTHALER; WILLIAM MONTERO; BARBARA MONTERO; CLIFFORD ROGERS; SHARON ROGERS; HERMANN ROSNER; MARCUS ROTHKRANZ; DANIEL SOLDINI; CHARLES WALKER; VERNA WALKER; JACK YENCHECK; OFELIA YENCHECK; RICHARD MALM; ROGER ELLSWORTH; JO ANN ELLSWORTH; MARGARET RUDELICH-HOPPE; PATRICIA MAHONEY; RICHARD FALEN; PETER LEARNED; KRISTIAN MEIER; ELIZA ACOSTA; MIRHA ELIAS; AIKO BERGE; VICTOR BECERRA; ARTHUR BODENDORFER; BRENDA C. CHAFFIN; MICHAEL J. SOLMI; JASON COWLES; JANE GAUTHIER; HONORE GAUTHIER; NIKOLAS KONSTANTINOU; DRAGAN KURAJICA; KENNETH LOWTHER; JAMES LUEHMANN; JACQUELINE LUEHMANN; RUTH MANNHEIMER, Plaintiffs,

and

STATE OF NEVADA, on behalf of Department of Conservation & Natural Resources, Division of Environmental Protection, Plaintiff-Appellee,

v.

MARYLAND SQUARE LLC; MARYLAND SQUARE SHOPPING CENTER LLC; HERMAN KISHNER TRUST, DBA Maryland Square Shopping Center; IRWIN KISHNER; JERRY ENGEL; BANK OF AMERICA, NA, Trustee on behalf of Herman Kishner Trust; CLARK COUNTY SCHOOL DISTRICT; MELVIN SHAPIRO, Defendants,

and

SHAPIRO BROTHERS INVESTMENT COMPANY, Defendant-Appellant.

No. 12-16409
United States Court of Appeals for the Ninth Circuit
D.C. Nos. 2:08-cv-01618-RCJ-GWF, 3:09-cv-00231-RCJ-GWF

PETER J. VOGGENTHALER; WILLIAM MONTERO; BARBARA MONTERO; CLIFFORD ROGERS; SHARON ROGERS; HERMANN ROSNER; MARCUS ROTHKRANZ; DANIEL SOLDINI; CHARLES WALKER; VERNA WALKER; JACK YENCHECK; OFELIA YENCHECK; RICHARD MALM; ROGER ELLSWORTH; JO ANN ELLSWORTH; MARGARET RUDELICH-HOPPE; PATRICIA MAHONEY; RICHARD FALEN; PETER LEARNED; KRISTIAN MEIER; ELIZA ACOSTA; MIRHA ELIAS; AIKO BERGE; VICTOR BECERRA; ARTHUR BODENDORFER; BRENDA C. CHAFFIN; MICHAEL J. SOLMI; JASON COWLES; JANE GAUTHIER; HONORE GAUTHIER; NIKOLAS KONSTANTINOU; DRAGAN KURAJICA; KENNETH LOWTHER; JAMES LUEHMANN; JACQUELINE LUEHMANN; RUTH

MANNHEIMER, Plaintiffs,

and

STATE OF NEVADA, on behalf of Department of Conservation & Natural Resources, Division of Environmental Protection, Plaintiff-Appellee,

v.

MARYLAND SQUARE LLC, Defendant-Appellant,

and

MARYLAND SQUARE SHOPPING CENTER LLC; HERMAN KISHNER TRUST, DBA Maryland Square Shopping Center; IRWIN KISHNER; JERRY ENGEL; BANK OF AMERICA, NA, Trustee on behalf of Herman Kishner Trust; CLARK COUNTY SCHOOL DISTRICT; MELVIN SHAPIRO; SHAPIRO BROTHERS INVESTMENT COMPANY, Defendants.

No. 12-16412
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:08-cv-01618-RCJ-GWF

Appeal from the United States District Court for the District of Nevada

Robert Clive Jones, Chief District Judge, Presiding

Argued and Submitted April 17, 2013—San Francisco, California

Filed July 26, 2013

Before: Mary M. Schroeder, Sidney R. Thomas, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

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Thomas Vandenburg, Joshua Levine, Christopher Smith and John A. Lawrence (argued), Dongell Lawrence Finney, LLP, Los Angeles, California, for Defendants-Iintervenors-Appellees Maryland Square Shopping Center, LLC, et al.

Jeremy Gilman and Gregory J. Lucht (argued), Benesch, Friedlander, Coplan & Aronoff, LLP, Cleveland, Ohio; Jeffrey T. Oberman, Levin & Oberman, Beverly Hills, California, for Defendants-Appellants Melvin Shapiro and Shapiro Brothers Investment Co.

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OPINION

SCHROEDER, Circuit Judge:

Two environmental statutes everyone loves to hate are the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). In combination, they make owners of contaminated property and contributors to contamination responsible for cleaning up toxic waste, and, if someone else cleans up the waste, liable for the costs of that clean up. This litigation illustrates the point. It involves seepage over several decades of a toxic dry cleaning chemical into the ground under a Las Vegas shopping center. There have been two district court actions leading to multiple appeals.

Neighboring homeowners brought the first action, seeking injunctive relief against the property owners of the shopping center and operators of the dry cleaning facility. The Nevada Division of Environmental Protection ("NDEP") brought the other action to recover its clean up costs. The district court granted summary judgment for both sets of plaintiffs on all claims. The current owner and the former operators of the dry cleaning facility appeal. There are numerous procedural issues, but the principal legal contention is that application of CERCLA to this conduct that occurred solely in Nevada violates the Commerce Clause.

We largely affirm the district court, including its rejection of that constitutional challenge. We vacate the grant of summary judgment under CERCLA against the current owner and remand so the owner may have an opportunity to make the additional showing that would be necessary to establish that it meets an exception to CERCLA liability. We reverse on procedural grounds the grant of summary judgment under RCRA against the current owner and the operators because those defendants did not have an adequate opportunity to respond to plaintiffs' claims. We also reverse the grant of summary judgment against one guarantor, because there is no evidence of spills during the term of his guaranty.

THE STATUTES

CERCLA and RCRA, passed by Congress within a few years of each other, both address the problem of environmental contamination from hazardous waste disposal, but they employ different means. Congress passed CERCLA in 1980, motivated by several environmental catastrophes, especially the infamous Love Canal disaster in Niagra Falls, New York.

S. Rep. No. 96-848, at 8–10 (1980). The statute authorizes governments or private parties to clean up polluted sites and seek compensation from the polluters. 42 U.S.C. § 9607. It is designed to ensure that the cost of clean up is "borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). In this case, NDEP began a clean up of the contaminated site due to the inaction of the owners and operators, and then sued for the funds it had expended and those that it would need to expend in the future.

RCRA, passed in 1976, focuses on limiting waste production and ensuring that when waste is produced, it is treated and disposed of properly. It plugged a then-existing loophole in environmental law. Before its passage, disposing pollutants into the water and air was regulated, but the land disposal of hazardous substances was not. H.R. Rep. No. 94-1491, at 4 (1976). RCRA's primary purpose was "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). RCRA, in 42 U.S.C. § 6972, authorizes citizen suits for two types of injunctive relief—an injunction ordering the responsible parties to clean up the contamination and an injunction ordering them to stop any further violations. *See Meghrig*, 516 U.S. at 484. At the time of the homeowners' suit, the toxic spills had already occurred and the dry cleaning operations had ceased. The homeowners therefore sought an injunction ordering the owners and operators to clean up, test, and monitor the contaminated site.

FACTS AND PROCEDURAL BACKGROUND

I. HISTORY OF THE SITE AND ITS CONTAMINATION

Maryland Square Shopping Center ("the Site"), a Las Vegas shopping center, was from 1969 to 2000 home to a dry cleaning facility responsible for environmental contamination. Maryland Square LLC ("Maryland Square"), the current owner of the Site, has owned it since 2005. The Site has had many prior owners, but only the Herman Kishner Trust, a non-appealing defendant, owned the Site during the contamination period. During that period two companies leased the Site and operated the dry cleaning facility. Shapiro Bros. Investment Co. ("SBIC") operated it from 1969 until 1984. Johnson Group, Inc., the predecessor of DCI USA, Inc., (collectively "DCI") purchased the dry cleaning business in 1984 and operated it until 2000.

The history is summarized in the following chart showing the owners, operators, and known or alleged chemical spills:

Year	Owners	Operators	Known/Alleged Incidents
1968	Herman Kishner	N/A	N/A
1969-1984	Herman Kishner Trust (w/ Maryland Square Shopping Center LLC as successor-in-interest)	Shapiro Bros. Investment Co.	Spill of ~100 gallons of PCE in 1982. Occasional spills from a clogged button trap between 1969–1984.
1984-2000	Herman Kishner Trust (w/ Maryland Square Shopping Center LLC as successor-in-interest)	DCI	Alleged to have used PCE in its operations. No confirmed spills.
2000-2002	Herman Kishner Trust (w/ Maryland Square Shopping Center LLC as successor-in-interest)	N/A	N/A
2002-2005	Clark County School District	N/A	N/A
2005-Present	Maryland Square LLC	N/A	Demolition of Site in 2006 allegedly spread PCE.

Herman Kishner constructed the Site in 1968 and transferred ownership to the Herman Kishner Trust the following year. Beginning in 1969, the Trust leased the dry cleaning facility to SBIC, and SBIC agreed in the lease to indemnify the Trust for all claims arising from SBIC's actions, omissions, or negligence. SBIC signed a replacement lease in 1982 in which it agreed to indemnify the Trust for violations of law. SBIC sold the dry cleaning business to DCI in 1984. As part of the sale, Melvin Shapiro, who formed and controlled SBIC with his brother Philip Shapiro, personally guaranteed DCI's performance of the lease obligations, including the obligation to indemnify the Site's owner for any future violations of law.

The contamination at the Site was produced by a chemical commonly used in the dry cleaning industry and called tetrachloroethylene ("PCE"). PCE is a hazardous substance as defined by CERCLA and the Nevada Administrative Code. 42 U.S.C. § 9601(14); Nev. Admin. Code § 445A.3454. During its operation of the dry cleaning facility, SBIC used, and spilled, PCE. According to former SBIC employees, from time to time "a button trap would clog and amounts of PCE would spill onto the concrete floor." SBIC also admitted that a spill of roughly 100 gallons of PCE occurred during a filter change in 1982. When PCE spilled, it fell onto a concrete floor equipped with a "trench style floor drain." The PCE then went down the drain through the pipes beneath the floor and into the ground and groundwater.

II. ENTRY OF THE STATE OF NEVADA AND ITS CLEAN UP EFFORTS

The PCE discharge was first reported to NDEP on November 29, 2000, during a pre-purchase investigation by Clark County School District. When Maryland Square purchased the property from the School District in 2005, Maryland Square was aware of the contamination. Maryland Square demolished the building in 2006, including the contaminated floor, but made no efforts to remove any contaminant beneath it.

After the initial discovery, NDEP, on July 21, 2001, received a report from the environmental consultant performing Clark County's pre-purchase investigation. NDEP oversaw further investigation of the Site that revealed the presence of PCE in the soil and groundwater. The highest PCE concentrations were found in and around the floor drain and drain pipes beneath the former dry cleaning facility. The investigation also revealed a plume of PCE-contaminated groundwater emanating from the Site and extending eastward into a nearby residential Las Vegas neighborhood. NDEP then began its lengthy clean up of the soil.

The contaminated plume was a cause for concern. On the basis of a soil gas report submitted to NDEP in 2007, NDEP determined that there was a potential for PCE vapor intrusion into the neighborhood homes at concentrations that could materially increase the probability of cancer in exposed individuals. To address the risks posed by PCE evaporating into the air, NDEP offered to install subslab depressurization systems in the homes. NDEP recognized, however, that it also needed to reduce the PCE concentrations in the groundwater in order to prevent potential future exposures, because the plume was moving away from the Site. NDEP informed residents, property owners, and government officials of the PCE contamination in the groundwater and the possible health effects.

NDEP also notified the current and former owners and operators of the Site that NDEP considered them to be potentially responsible parties under CERCLA for clean up costs. NDEP stated in those notices in 2008 that it already had expended approximately $160,000, that it intended to spend more funds to address human exposure to PCE, and that it planned to seek recovery of its expenses. NDEP has continued its clean up efforts over the following years, and removed the contaminated soil in 2011.

III. HISTORY OF THE LITIGATION

In late 2008 and early 2009 two suits were filed in the United States District Court for the District of Nevada against the owners and operators of the Site. NDEP sued them under both CERCLA and Nevada state law. Peter Voggenthaler, with other neighborhood homeowners, sued under RCRA. In the homeowners' RCRA suit, the owners filed cross-claims against the operators for indemnity.

NDEP's action under CERCLA sought to recover the costs of cleaning up the Site and a declaratory judgment entitling NDEP to future clean up costs. NDEP contended that all of the defendants, as owners or operators of a facility that had released toxic chemicals, were liable under CERCLA. Each of the defendants offered a separate reason for why it was not liable, and several of the defendants contended that the application of CERCLA to conduct solely within Nevada violates the Commerce Clause. NDEP, under Nevada state law, also sought recovery of clean up costs and injunctive relief to prevent further violations. The district court eventually granted summary judgment for NDEP on all of its claims on May 17, 2012.

The homeowners filed their complaint under RCRA seeking an injunction forcing all of the Site's owners to clean up the contamination, and contending that the owners were contributors under RCRA. The homeowners did not seek relief under state law. The Site's owners all took the position that they were not responsible for the actual spills, even though they knowingly leased the Site to a dry cleaning business and profited from the operation of that business. The district court granted summary judgment for the plaintiffs and against all of the owners on July 22, 2010.

The current owner, Maryland Square, however, moved for rehearing after the entry of summary judgment on its RCRA liability, contending that it was in a different position from the other owners because its ownership of the property did not begin until after the dry cleaning facility had closed down. The homeowners responded to the motion for rehearing, contending that Maryland Square nevertheless should be considered a contributor under RCRA because its demolition of the building in 2006 had exacerbated the situation by exposing and disseminating the contamination. The homeowners relied on the expert report that had been attached to their summary judgment reply.

The district court, however, did not resolve the issue of Maryland Square's liability raised in the reconsideration motion. Instead, the court concluded in an October 20, 2010 order that it lacked jurisdiction because the motion involved the merits of the owners' RCRA liability, and the other owners had already filed a notice of appeal from the summary judgment order on RCRA liability. (That premature appeal was later consolidated by our court with the owners' appeal of the RCRA permanent injunction after the district court proceedings became final.)

The district court then did enter a permanent injunction under RCRA on December 27, 2010, ordering a clean up of the Site. Although the plaintiffs had moved for summary judgment on RCRA liability against only the owners, the district court not only granted that motion, but, sua sponte, also entered judgment and ordered injunctive relief against operator SBIC as well, even though plaintiffs had not moved for such relief.

The owners' leases to the operators contained indemnification provisions. The owners therefore moved for judgment

in the RCRA litigation on their cross-claims for indemnity against SBIC and Melvin Shapiro as operators. The district court granted the motion as to both on October 20, 2010. Although only SBIC actually operated the business, the court held Melvin Shapiro liable on the basis of the guaranty he signed on the 1984 transfer of the business from SBIC to DCI. The court rejected his position that the guaranty acted only prospectively and did not take effect until after the spills occurred.

We consider multiple appeals in each action.

DISCUSSION

I. APPLICATION OF CERCLA TO SOIL AND GROUNDWATER CONTAMINATION IN NEVADA DOES NOT OFFEND THE COMMERCE CLAUSE

Maryland Square's appeal challenges the application of CERCLA to the contamination of the Site as violating the Commerce Clause, because the PCE disposal physically affected the Site and a nearby neighborhood within the state of Nevada. The district court summarily rejected this claim. Maryland Square relies primarily on the Supreme Court's opinions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the two Commerce Clause decisions of the last twenty years invalidating Congressional enactments. Neither involved environmental issues. *Lopez* concerned regulation of conduct near a school and *Morrison* involved violence against an individual.

The Constitution states that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. This grant of authority has been separated into three broad categories. *Perez v. United States*, 402 U.S. 146, 150 (1971). Under its commerce power, Congress may regulate (1) "the use of the channels of interstate or foreign commerce," (2) "the instrumentalities of interstate commerce . . . or persons or things in commerce," and (3) "those activities affecting commerce." *Id.* These categories were recognized in both *Lopez* and *Morrison*. Maryland Square contends that none of the three categories apply, but two of them do.

The application of CERCLA to contaminated soil and groundwater is proper under the second and third categories as regulation of articles in commerce and activities affecting commerce. Groundwater may be regulated as an article of commerce, because any item that may be bought or sold, indeed all objects of trade, are articles of commerce. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 359 (1992). The Supreme Court has expressly held that groundwater is an article of commerce, because it can be traded. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 953–54 (1982). There, the state of Nebraska, in defending a state law limiting the interstate sale of Nebraska groundwater, tried to contend that groundwater was not an article of commerce. *Id.* at 951–52. According to Nebraska, groundwater was not an article of commerce because Nebraska's residents did not enjoy an unlimited ownership interest in the groundwater they withdrew and because groundwater was essential to its citizens' survival. *Id.* at 951–53. The Supreme Court rejected this argument, citing Nebraska's efforts to limit the sale of groundwater within the state as proof that groundwater is an object of trade. *Id.* at 953–54 ("[The] claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burdenon-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation [of groundwater].").

Maryland Square's position in this case, that groundwater found within a state cannot be an article of interstate commerce, is the same as the position the Court rejected in *Sporhase*. Indeed, the Supreme Court emphasized that the federal government has a significant interest in groundwater because groundwater is found in multistate aquifers and facilitates irrigated farming that supplies markets worldwide. *Id.* at 953. Congress, by making the protection of groundwater and surface water a main priority of CERCLA, acted on that federal interest. *See* 42 U.S.C. §§ 9605(c)(2), 9618.

In addition, we deal with a dry cleaning establishment that created the contamination as part of its commercial operation, and resulted in clean up costs that burdened commerce. The clean up, as well as the business itself, substantially affect interstate commerce. Application of CERCLA is supported for those reasons as well. The Eleventh Circuit in *United States v. Olin Corporation*, 107 F.3d 1506 (11th Cir. 1997), recognized the economic burden of clean up costs in rejecting a challenge to CERCLA very similar to the one in this case. The chemical manufacturer in *Olin* contended that its on-site disposal of hazardous substances did not affect interstate commerce because the substances never left the site. *Id.* at 1511. The court rejected that contention, stating that Congress, in passing CERCLA, recognized the growing economic costs of handling and disposing hazardous substances and that these costs were associated with both off-site and on-site disposal. *Id.* Also recognizing that hazardous substance clean up affects interstate commerce, the Second Circuit in *Freier v. Westinghouse Electric Corporation*, 303 F.3d 176 (2d Cir. 2002), rejected a Commerce Clause challenge to an amendment to CERCLA affecting the statute of limitations for claims resulting from exposure to hazardous substances. In upholding this amendment as an integral part of CERCLA's regulatory scheme, the court stated that the generation and disposal of waste in connection with the operation of a business are economic activities properly regulated under the Commerce Clause. *Id.* at 202.

The Supreme Court's decisions in *Lopez* and *Morrison* concerning non-economic activity are not relevant here, for the Court's holding in both depended upon the conclusion that the activities sought to be regulated were not com-

mercial activities. *See Lopez*, 514 U.S. at 561 (the criminal statute prohibiting the knowing possession of a firearm in a school zone had "nothing do with 'commerce' or any sort of economic enterprise"); *Morrison*, 529 U.S. at 613 (gender-motivated violent crimes "are not . . . economic activity").

The Supreme Court has consistently held that Congress, under the Commerce Clause, can regulate commercial activities, even where the economic impact of the individual defendant's actions were far smaller than in this case, as with home cultivation of medical marijuana. *Gonzales v. Raich*, 545 U.S. 1, 26–27 (2005). The Court has made no de minimus exception. Courts will not "excise, as trivial, individual instances" of a class of activities that is within the federal power. *Id.* (internal quotations and citations omitted).

II. MARYLAND SQUARE HAS NOT SHOWN THAT IT QUALIFIES FOR AN EXCEPTION TO CERCLA LIABILITY, AND IT IS CLEARLY RESPONSIBLE FOR REIMBURSEMENT UNDER NEVADA STATE LAW

Maryland Square contends that even if CERCLA may be constitutionally applied, Maryland Square nevertheless should not be liable because it qualifies as a bona fide prospective purchaser under CERCLA. It also challenges its liability under the Nevada state law requiring the owners of a contaminated site and those responsible for the hazardous spill to reimburse the State after it cleans up the contamination. We deal with each contention in turn.

A. Maryland Square Did Not Establish That It Qualifies as a Bona Fide Prospective Purchaser Under CERCLA

CERCLA is a strict liability statute in that it does not require a party to act culpably in order to be liable for clean up. *Cal. Dept. of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 912 (9th Cir. 2010). Our court has described the four elements that create liability. *3550 Stevens Creek Associates v. Barclays Bank of Cal.*, 915 F.2d 1355, 1358 (9th Cir. 1990). A plaintiff must establish: (1) the site containing the hazardous substances is a facility under CERCLA; (2) a release or threatened release of a hazardous substance has occurred from that facility; (3) the plaintiff incurred response costs as a result of that release or threatened release and those costs were necessary and consistent with the national contingency plan; and (4) the defendant is in one of the categories of entities subject to the liability provisions of CERCLA § 107(a). *Id.*

Maryland Square does not contest the first three elements. The Site is a facility under CERCLA because hazardous substances were disposed there. 42 U.S.C. § 9601(9). A hazardous substance was released when the operators spilled PCE down the drain, through the pipes and into the environment. 42 U.S.C. § 9601(22). NDEP's response was necessary because no party had taken responsibility for the clean up. 42 U.S.C. § 9607(a).

Maryland Square contends it falls within 42 U.S.C. § 9607(r)(1), the bona fide prospective purchaser exception to liability. This provision exempts from liability those who in good faith purchased a property they did not contaminate, but only provided they meet certain conditions. It states that:

> a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

Id.

The statute further provides, however, that a defendant must meet eight separate criteria to qualify as a bona fide prospective purchaser. 42 U.S.C. § 9601(40)(A)–(H). An owner seeking to qualify as a bona fide prospective purchaser must establish, among other things, that it purchased the property after the hazardous substances were spilled, 42 U.S.C. § 9601(40)(A), made all appropriate inquiries before it purchased the property, 42 U.S.C. § 9601(40)(B), provided all legally required notices about the hazardous substances, 42 U.S.C. § 9601(40)(C), and took steps to stop any ongoing spill, prevent future spills, and limit the exposure from past spills, 42 U.S.C. § 9601(40)(D).

Regulations further spell out the steps an owner must take to qualify. An owner seeking to establish that it made "all appropriate inquiries," for example, must show that the examination was performed by an environmental professional, as defined in 40 C.F.R. § 312.10, that particular kinds of information about the property, its history and its value were collected, 40 C.F.R. § 312.22, and that various sources were consulted, 40 C.F.R. § 312.30. All of these steps must be taken prior to the purchase, but no more than a year before the purchase date. 40 C.F.R. § 312.20. The owner, furthermore, must interview past owners and operators, search for environmental cleanup liens, review government records, inspect the property, and obtain a declaration by the environmental professional no more than 180 days before the purchase date. *Id.*

Maryland Square attempted to establish it satisfied these requirements by submitting the "Supplemental Affidavit" of Paul G. Roberts, Maryland Square's manager. The district court did not consider this submission because it was not notarized, and for that reason concluded that Maryland Square had failed to meet its burden.

The "affidavit" should have been notarized, but the district court did not give Maryland Square an opportunity to correct that deficiency. Nor did the court consider the contents of the submission to determine whether they would have been sufficient if notarized. The parties on appeal assume the truth of the statements and address the merits of Maryland Square's

contention that the facts stated would show it qualifies as a bona fide prospective purchaser.

Roberts's submission stated that the seller, Clark County School District, disclosed the PCE contamination during the sale negotiations and that Maryland Square then retained counsel and hired Entrix, Inc., an environmental consulting firm, to review and report on the NDEP files concerning the Site. After purchasing the Site, Maryland Square hired an environmental contractor to demolish the building. The submission does not indicate that Maryland Square took any remedial steps, such as removing the soil after demolishing the building, but says only that Maryland Square followed the progress of the previous owners in drafting and submitting plans to clean up the Site, and that Maryland Square had some (mainly undescribed) correspondence with NDEP.

The statements in the submission are insufficient to establish Maryland Square satisfied the requirements for bona fide prospective purchaser status. They do not establish Maryland Square met requirements of 42 U.S.C. § 9601(40)(D) to prevent further harm, because Maryland Square failed to limit human and environmental exposure to a contamination already present. The submission acknowledges Maryland Square purchased the Site with knowledge of the contamination, and subsequently demolished the building, an action that exposed the contaminated soil to the elements, but identifies no steps that it took to remove the contaminated soil or limit the spread of PCE. NDEP was then forced to remove the contaminated soil six years after the building was destroyed, thereby creating a situation contemplated by Congress when enacting CERCLA—reimbursement of a government entity forced to clean up a site because the owner refused to take action. *See* 42 U.S.C. § 9607(a)(4)(A).

In addition, Maryland Square's submission does not discuss the numerous regulatory requirements for making appropriate inquiries. *See* 42 U.S.C. § 9601(40)(B); 40 C.F.R. §§ 312.10, 312.20 *et seq.* The submission, without providing necessary supporting information, merely states that Maryland Square retained Entrix, Inc. to review files and prepare a report. It does not indicate if Entrix employed a qualified environmental professional, the substance of the report, or any description of the assessment conducted. *See* 40 C.F.R. §§ 312.10, 312.20 *et seq.* Maryland Square's submission was woefully insufficient to establish it was a bona fide prospective purchaser within the meaning of CERCLA.

The district court, however, rejected the submission on the basis of its form rather than its substance, and did not give Maryland Square a chance to make any additional showing. We therefore vacate the district court's grant of summary judgment against Maryland Square so that it may have an opportunity to cure the formal and substantive deficiencies of its prior submission and establish that it has met the statutory and regulatory requirements to qualify as a bona fide prospective purchaser.

B. Maryland Square is Liable to the State under Nevada Law Because It Owned the Property and Failed to Remove the Contaminated Soil

Pursuant to Nevada law, Nevada has established an account from which it may spend money to respond to a hazardous spill, manage the clean up of a contaminated site, and remove the hazardous substance. Nev. Rev. Stat. § 459.537. Under the statute, money from the "Account for the Management of Hazardous Waste" may be spent to pay the costs of responding to a leak or spill if the person responsible did not promptly clean it up. *Id.* Once this money has been spent, the statute instructs NDEP to demand reimbursement from various people, including "any person . . . who owns or controls . . . the area used for the disposal of the waste, material or substance." *Id.* This must include the current owner.

Maryland Square, as the current owner, tries to maintain it is not responsible under the statute because it did not own the Site at the time of the PCE disposal. However, the state statute contains no exceptions, nor does it limit the reimbursement obligation to those responsible for the spill.

Maryland Square also challenges the grant of injunctive relief under Nevada Revised Statutes § 445A.695, on the ground that it was not responsible for any discharges of PCE. Under this statute, NDEP may seek an injunction "to prevent the continuance or occurrence of any act or practice which violates any provision of NRS 445A.300 to 445A.730 . . . . " *Id.* NDEP contends that Maryland Square violated Nev. Rev. Stat. § 445A.465, a state statute that encompasses not only discharges, but also the failure to clean up a spilled contaminant that may enter the State's waters. The statute makes it unlawful to "[a]llow a pollutant discharged from a point source or fluids injected through a well to remain in a place where the pollutant or fluids could be carried into the waters of the State by any means." Nev. Rev. Stat. § 445A.465(1)(d). Maryland Square allowed PCE to remain in the soil for six years, and the PCE did enter the waters of the State. The district court, therefore, correctly granted summary judgment on NDEP's claim for injunctive relief as well.

III. NDEP WAS ENTITLED TO SUMMARY JUDGMENT AGAINST THE OPERATOR, SBIC, ON THE CERCLA AND STATE LAW CLAIMS

NDEP sued SBIC under CERCLA because SBIC operated the dry cleaning facility and disposed of the PCE. Among the categories of entities that CERCLA holds liable are operators of a facility where there was a "disposal" of hazardous substances. CERCLA liability may be assessed against "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). "Disposal" means the "discharge, . . . spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste

or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). SBIC's principal challenge to its CERCLA liability is that it did not operate the facility "at the time of disposal" because it leaked the contaminant onto the floor, not into the natural environment.

SBIC does not dispute the facts. It operated the dry cleaning facility at the Site between 1969 and August 31,

1984. SBIC's lease agreement for the facility called for it to be built with a trench style "sewage drain adequate for [SBIC's] business." SBIC admits that it used PCE in its operations and that it regularly spilled PCE on the concrete floor, and once spilled roughly 100 gallons of PCE during a filter change in 1982.

SBIC argues that spilling PCE onto the floor, rather than directly onto the land or water, does not count as a "disposal." SBIC's argument, therefore, is that the statute must be interpreted to require a disposal directly into the groundwater or onto the land. This interpretation is contrary to the language of the statute. A "disposal" under the statute includes any discharge or spill of waste "into or on any land or water *so that* [the waste] *may* enter the environment . . . . " 42 U.S.C. § 6903(3) (emphasis added). Because the phrase "enter the environment" is qualified by the word "may" in the definition of "disposal," the statute cannot be interpreted to cover only spills that go directly and immediately into the groundwater. The statute contemplates that some spills may never enter the environment. The definition covers more than direct spills. SBIC's interpretation conflicts with our practice of construing CERCLA liberally to achieve the goals of cleaning up hazardous waste sites promptly and ensuring that the responsible parties pay the costs of the clean up. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001).

The only other courts to consider an interpretation like SBIC's requiring "disposal" to be directly onto the land or into the water have rejected it. *See Amland Props. Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 791–92 (D.N.J. 1989) (concluding that a disposal inside a plant was a disposal "on any land"); *Lincoln Properties, Ltd. v. Higgins*, No. S-91-760DFL/GGH, 1993 WL 217429, at *19–20 (E.D. Cal. Jan. 21, 1993) (stating that a release into the environment need not be direct). Their reasoning is sound. SBIC cites no contrary authority on point.

Because we conclude that NDEP has established SBIC's liability for past costs under CERCLA, NDEP is also entitled to a declaratory judgment for future costs. *City of Colton v. Am. Promotional Events, Inc.–W.*, 614 F.3d 998, 1007 (9th Cir. 2010). In *City of Colton*, we held that a plaintiff who establishes liability for past response costs under CERCLA is entitled to a declaratory judgment on liability for future costs. *Id.* (citing 42 U.S.C. § 9613(g)(2)).

SBIC also, and on a similar basis, challenges the district court's grant of summary judgment on NDEP's state law claim under Nev. Rev. Stat. § 445A.695, which authorizes injunctive relief to prevent the continuation or reoccurrence of other statutory violations. SBIC contends that it did not operate the facility at the time the PCE actually touched the soil or groundwater. This fact is not relevant. NDEP has charged that SBIC violated Nev. Rev. Stat. § 445A.465, which makes it unlawful to "[d]ischarge from any point source any pollutant into any waters of the State . . . . " Nev. Rev. Stat. § 445A.465(a), (d). A drain pipe is a point source. Nev. Rev. Stat. § 445A.395. SBIC spilled PCE into the drain of the facility. The PCE was thus discharged through the drains as the point sources. SBIC is therefore liable for the resulting contamination of the groundwater.

IV. THE DISTRICT COURT DID NOT DECIDE THE ISSUE RAISED BY MARYLAND SQUARE'S MOTION FOR RECONSIDERATION, SO REMAND IS REQUIRED TO DETERMINE WHETHER MARYLAND SQUARE HAS RCRA LIABILITY FOR EXPOSING THE CONTAMINATION TO THE ELEMENTS

The homeowners sought an injunction under RCRA to require all of the owners of the Site, including Maryland Square, to clean up the contamination. An entity may be held liable under RCRA if it is an active contributor to the contamination on the site. Liability may be assessed against:

> any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). Maryland Square's original position was the same as the other owners of the Site: ownership of the Site was insufficient to establish liability. The district court rejected the Site owners' contention and granted summary judgment for the homeowners.

Maryland Square then moved for rehearing and advanced a new theory. It contended that it was in a different position from the other owners because it acquired the property after the dry cleaning facility had closed down. The homeowners opposed the motion for rehearing on the ground that even if Maryland Square did not own the Site when the spills happened, Maryland Square's demolition of the building in 2006 exposed the contaminated soil, exacerbating the problem and making Maryland Square a contributor. The homeowners relied on the expert report that they had attached to their summary judgment reply and that explained the effects of the demolition.

The district court did not resolve this issue, however. Instead, the district court ruled that it was divested of jurisdiction to decide the motion for reconsideration when the other Site owners appealed the earlier order granting summary

judgment on the merits of the owners' RCRA liability. The court was incorrect because the earlier order determined only liability, not relief, and was not a final judgment. Thus, the appeal was taken prematurely from an interlocutory order. *See State of Cal., on Behalf of California Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 776–77 (9th Cir. 1998). Because the district court effectively denied the motion on jurisdictional grounds, Maryland Square never had the opportunity to respond to the merits of the homeowners' alternative theory of liability. We therefore reverse the district court's denial of Maryland Square's motion for reconsideration, and remand so the issue of Maryland Square's RCRA liability may be fully considered.

V. THE DISTRICT COURT ERRED IN ENTERING AN INJUNCTION AGAINST SBIC FOR CLEAN UP RESPONSIBILITIES UNDER RCRA IN THE ABSENCE OF ANY REQUEST FOR JUDGMENT ON THE UNDERLYING CLAIM

The district court granted summary judgment against the operator, SBIC, sua sponte, followed by a RCRA permanent injunction. This was error, because the homeowner plaintiffs in the RCRA suit never moved for summary judgment against SBIC.

There are only two general situations where a district court may sua sponte enter summary judgment; neither applies to this case. A district court may enter summary judgment against a party that has moved for summary judgment when the court determines the moving party cannot prove its case at trial. *See Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982). Here, SBIC did not ask for summary judgment in the homeowners' RCRA case. The second situation is when a Fed. R. Civ. P. 12(b)(6) motion is converted into a motion for summary judgment under Rule 56 by consideration of materials outside the pleadings. Fed. R. Civ. P. 12(d). That did not occur here either.

The homeowner plaintiffs in the action have not tried to defend the district court's sua sponte order that SBIC now appeals. The defendant owners argue the result is fair since they are happy to have SBIC share their liability. Such determinations of liability and injunctive remedy are appropriate only after a court has considered the positions of all the parties. *Portsmouth Square Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985). Here, the district court's sua sponte orders were entered without such consideration and must be vacated.

VI. SBIC IS LIABLE TO THE PREVIOUS OWNERS UNDER THE INDEMNIFICATION PROVISIONS OF THE 1968 AND 1982 LEASES

Both of the lease agreements that SBIC reached with the Site owners contained indemnification provisions. Under Nevada law, indemnification provisions are interpreted like any other contract provision, according to normal contract rules. *George L. Brown Ins. v. Star Ins. Co.*, 237 P.3d 92, 96–97 (Nev. 2010). The 1968 indemnification provision covered all claims arising from SBIC's actions as operator of the business. It stated as follows:

> Lessee agrees to indemnify and save harmless lessor from and against all claims arising from any act, omission or negligence of lessee . . . or employees or arising from any accident, injury or damage whatsoever caused to any person, or to the property of any person during the demised term, in or about the demised premises . . . and will indemnify and hold harmless Lessor from and against all costs, expenses and liabilities incurred in or in connection with any such claim or proceeding brought thereon.

The provision covers the homeowners' claims for SBIC's spills. SBIC admitted that from time to time during its operation of the dry cleaning facility "a button trap would clog and amounts of PCE would spill onto the concrete floor." SBIC also stated that a spill of roughly 100 gallons of PCE occurred in 1982 during a filter change. The RCRA claims from the homeowners arose from these spills, and the Site's previous owners claim they are entitled to indemnity from SBIC pursuant to the lease.

SBIC contends it is not liable because the previous owners have not proved that the contamination of the soil and groundwater happened "during the demised term" of its lease. The basis for liability under the guaranty, however, is the RCRA claim that arose from conduct of SBIC's employees during the lease. Their PCE spills occurred during the lease term.

SBIC also contends that the 1982 lease terminated any liability it might have had from the 1968 lease. The provision it points to in the 1982 lease stated in relevant part as follows:

> TRANSITION AND TERMINATION OF PRIOR LEASE – As has been aforestated herein, LANDLORD and TENANT have heretofore held and been in a Landlord-Tenant relationship, the same being under a lease dated April 29, 1968 and addendum thereto dated February 27, 1969. With respect thereto, upon the commencement of the lease term hereunder, said prior lease, addendum, and any rights and obligations of the respective parties arising out of the same shall be deemed terminated as if said lease as amended had expired by its term, i.e., lapse of time . . . .

The 1982 lease terminated the provisions of the prior lease, but did not extinguish the obligations SBIC incurred during its term.

SBIC also challenges its liability under the 1982 lease. The indemnification provision in that lease covered all obligations that were the result of SBIC violating a law. The provision read as follows:

> INDEMNIFICATION – TENANT hereby covenants to indemnify, save and hold LANDLORD and the leased property free, clear and harmless from each liability, loss, cost, charge, penalty, obligation, expense, attorney's fee, litigation, judgment, damage, claim or demand of any kind whatsoever in connection with, arising out of, or by reason of any violation of law, ordinance or regulation by TENANT or of any independent contractor, agent, or employee of TENANT while in, upon, about or in any way connected with the leased property or any portion thereof during the term of this Lease.

SBIC contends that a claim for relief under RCRA does not arise out of a "violation of law" within the meaning of the provision. RCRA, however, imposes liability for failure to clean up contamination, and one who has not paid has violated the law. SBIC thus must indemnify the owners for the obligations they incurred as a result of SBIC's RCRA violations.

VII. THE DISTRICT COURT ERRED IN HOLDING MELVIN SHAPIRO LIABLE ON HIS PERSONAL GUARANTY BECAUSE THE GUARANTY OPERATED ONLY PROSPECTIVELY AND THERE WAS NO EVIDENCE OF SPILLS OCCURRING AFTER HE SIGNED THE GUARANTY

Melvin Shapiro, a co-founder and officer of SBIC, signed a guaranty when SBIC transferred the dry cleaning business to DCI. Under Nevada law, guaranty agreements are interpreted according to general contract interpretation principles. *Dobron v. Bunch*, 215 P.3d 35, 37 (Nev. 2009). By signing the guaranty at issue in this case, Melvin Shapiro personally guaranteed that DCI would perform all of SBIC's obligations, including the obligation to indemnify. The personal guaranty at issue here read as follows:

> The undersigned, jointly and severally, unconditionally guarantees performance by Assignee of each and every one of the obligations of tenant under the lease herein assigned . . .

The date of the Assignment was August 31, 1984. A guaranty agreement is prospective unless it expressly states otherwise. 38A C.J.S. Guaranty § 59; *Bank of Am. Nat. Trust & Sav. Ass'n v. Kelsey*, 44 P.2d 617, 619 (Cal. Ct. App. 1935) ("It is a rule of very general application that all guaranties are prospective and not retrospective in operation, unless the contrary appears by express words or by necessary implication."). Because this principle has not been addressed by the Nevada Supreme Court, we must predict how the Nevada Supreme Court would rule. *Arizona Elec. Power Co-op., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995). Counsel for the previous owners commendably conceded at oral argument that such guarantees are generally only prospective. There is no reason to believe that Nevada would deviate from this widely-recognized rule for interpreting a guaranty.

The previous owners did not identify any violation of the 1982 lease that occurred after the effective date of the Assignment. The only spills the previous owners referenced were those that occurred during SBIC's operation of the facility. Because the violations occurred before Melvin Shapiro signed the guaranty, and it did not apply retroactively, the judgment against him must be reversed.

CONCLUSION

The district court properly rejected Maryland Square's constitutional challenge to the application of CERCLA in this case, and correctly granted judgment against Maryland Square and in favor of NDEP on its state law claims.

The district court's judgment in favor of NDEP and against SBIC on both the CERCLA and the state law claims must be affirmed. The judgment against SBIC on the claims of the prior Site owners for indemnity was in accordance with the provisions of the leases and must be affirmed.

The district court erred, however, in entering judgment against Maryland Square on NDEP's CERCLA claim without giving Maryland Square an opportunity to correct the deficiencies in its "bona fide prospective purchaser" submission. The district court also erred in denying for lack of jurisdiction Maryland Square's motion for reconsideration of the RCRA judgment, and we remand for consideration on the merits.

In the homeowners' RCRA action, the district court erred in entering judgment against SBIC sua sponte and the judgment, as well as the ensuing injunction, must be vacated.

Although the district court properly held that the prior Site owners were entitled to indemnification from SBIC, the court erred in holding Melvin Shapiro was individually liable for indemnification on the basis of his personal guaranty that operated only prospectively.

Our decision may be summarized with reference to each of the five appeals before us as follows:

The district court's judgment in favor of NDEP on the CERCLA and Nevada state law claims against SBIC is **AFFIRMED** (12-16409).

The district court's judgment against Maryland Square on the CERCLA claim is **REVERSED** and **REMANDED**. The

judgment against Maryland Square on the Nevada state law claims is **AFFIRMED** (12-16412).

The RCRA judgment against Maryland Square is **REVERSED** and **REMANDED** with instructions to consider Maryland Square's motion for reconsideration (10-17520). The sua sponte entry of summary judgment against SBIC under RCRA is **VACATED** and **REMANDED**, and the permanent injunction entered under RCRA is **VACATED** as to SBIC (11-15174).

The judgment for indemnity against SBIC is **AFFIRMED**, and the judgment for indemnity against Melvin Shapiro is **REVERSED** and **REMANDED** with instructions to enter judgment in favor of Melvin Shapiro (11-15176).

AFFIRMED in part, **REVERSED** in part, **VACATED** in part, and **REMANDED** in part.

Costs are awarded to NDEP in No. 12-16409 and No. 12-16412, and to Melvin Shapiro in No. 11-15176. In Nos. 11-15174 and 10-17520, each party is to bear its own costs.

Cite as 13 C.D.O.S. 7951

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KYLE JOHN GRASSO, Defendant-Appellant.

No. 10-50116
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:07-cr-00755-DDP-2

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

Dean D. Pregerson, District Judge, Presiding

Argued and Submitted December 6, 2012—Pasadena, California

Filed July 26, 2013

Before: Marsha S. Berzon, Sandra S. Ikuta, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Ikuta;

Partial Concurrence and Partial Dissent by Judge Berzon

COUNSEL

Karen H. Bucur (argued), Laguna Hills, California, for Defendant-Appellant.

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OPINION

IKUTA, Circuit Judge:

Kyle Grasso appeals his convictions for money laundering, bank fraud, loan fraud, and conspiracy to commit loan and bank fraud, stemming from a Los Angeles-based scheme to defraud mortgage lenders. We conclude that the evidence adduced at trial, taken in the light most favorable to the government, was adequate to enable a rational trier of fact to find the essential elements of each conviction. *See United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc). Accordingly, we affirm on all counts.

I

We have already explained how this scheme operated in *United States v. Rizk*, 660 F.3d 1125 (9th Cir. 2011) (affirming conviction of Lila Rizk, a real estate appraiser in the scheme and one of Grasso's co-defendants). Therefore, we provide only a brief overview of the scheme before detailing the particular aspects relevant to Grasso's appeal.

A

The scheme, as crafted by Mark Abrams, a mortgage broker, and Charles Elliott Fitzgerald, a real estate developer, took advantage of the real estate frenzy of the early 2000s. The conspirators would enter into a purchase agreement for a home in an exclusive Westside Los Angeles community, and then obtain a loan for significantly more than the sale price, pocketing the extra money. For this scheme to work, the conspirators had to exert control over multiple aspects of each real estate transaction. Among other things, the sellers and agents had to keep the true purchase price of the home confidential; the appraisal reports had to show the falsely inflated values of the homes; the title and escrow companies had to prepare two sets of documents, one showing the actual purchase price (for the seller) and one showing the inflated purchase price (for the lender); and finally the Multiple Listing Service (MLS) had to show the falsely inflated sales price of the homes. Abrams and Fitzgerald coordinated the efforts of a range of colleagues to make this conspiracy work. Abrams relied on Jamieson Matykowski, one of his employees, and Richard Maize, who controlled Americorp Funding, among others. Americorp, a mortgage broker, would send loan packages to lending agents for review and approval. The conspirators generally targeted banks that did not require their lending agents to use rigorous documentation and approval standards. Over the course of the scheme, the conspirators conducted roughly 80 fraudulent transactions. The banks that ultimately financed the loans that their lending agents approved, including Lehman Brothers (through its lending agent, Aurora Loan Services), GreenPoint Bank (through its lending agent, GreenPoint Mortgage), and RBC Mortgage Company, together lost at least $46 million in the Abrams-Fitzgerald conspiracy.

Grasso was one of Abrams and Fitzgerald's recruits for this scheme. Grasso and his partner Joseph Babajian were successful real estate agents in the same affluent area that Abrams and Fitzgerald targeted, Westside Los Angeles. From 2000 to January 2001, Grasso and Babajian were the top-producing real estate agents at Fred Sands Realtors in Beverly Hills. Grasso and Babajian subsequently left Fred Sands and became affiliated with Prudential California Realty. Prudential compensated Grasso and Babajian for their move by conveying an ownership interest in several of Prudential's subsidiaries to Grasso and Babajian's wholly owned company, FSC Ventures. One of these subsidiaries was Cal Title, a title insurance company whose lax approval process would become instrumental to the co-conspirators' operation.

At trial, the government presented evidence to prove that Grasso became involved in the Abrams-Fitzgerald scheme some time in 2000 and worked with them through at least late 2002. According to the government, Grasso participated primarily by identifying houses to be included in the scheme, ensuring that the seller would keep the sales price confidential, managing the information reported in the MLS listings, and obtaining the title insurance and escrow documents needed for the conspiracy through his access to Cal Title. The government's case against Grasso rested heavily on evidence relating to six real estate transactions, which we describe in the order they occurred.

1

We begin with Grasso's purchase of a property on Claridge Drive, Beverly Hills for his personal use. In July 2000, after Grasso separated from his wife, he was in the market for his own home, and focused on the Claridge Drive property. According to the evidence adduced at trial, Abrams thought that Grasso's skills and contacts were useful in furthering the scheme and wanted to "ingratiate" himself with Grasso to induce him to continue helping with the fraud. Therefore, Abrams offered to help Grasso purchase the Claridge Drive property by following the same basic blueprint used for other transactions in the scheme. Under the plan, Abrams would front Grasso the money for a down payment, Grasso would obtain an inflated loan, and then use the extra funds to pay Abrams back. According to Abrams, Grasso knew how the scheme worked and was a willing participant. Matykowski confirmed that Grasso acknowledged he was "going to do one of our deals" by inflating the purchase price of the Claridge Drive property "to forego putting a large down payment down."

The plan moved forward over the summer. Grasso entered into a purchase agreement with Jose Menendez, the owner of the Claridge Drive property, to purchase the house for $890,000.[1] In early September 2000, Grasso submitted two fraudulent loan applications to Americorp Funding, one seeking a first mortgage of $746,250, and the second seeking a home equity credit line of $149,200. Both applications stated that the purchase price of the home was $995,000, and the first application stated that Grasso was making a down payment of some $120,000. Americorp submitted Grasso's application to GreenPoint Mortgage. In reviewing the applications, GreenPoint Mortgage identified a red flag: Grasso already owned a home that had a higher value than the Claridge Drive property, which raised the inference that Grasso planned to use the Claridge Drive property as a rental. In response to GreenPoint Mortgage's inquiry on this point, Grasso falsely stated that he and his wife intended to move into the home. Satisfied with that explanation, GreenPoint Mortgage approved Grasso's loans. As was the standard procedure for all loans that GreenPoint Mortgage originated at that time, GreenPoint Bank funded the loan.

At closing, Abrams's in-house escrow company prepared fraudulent documents reflecting a purchase price of $995,000, but sent a settlement statement to Menendez stating the correct $890,000 sales price.

1. One version of the purchase agreement showed an inflated $990,000 sales price, but Menendez testified at trial that his initials on this agreement were fabricated.

2

At the same time he was purchasing the Claridge Drive property, from August to September 2000, Grasso sought Abrams and Fitzgerald's help with a client's property on Alta Drive in Beverly Hills. The property had been on the market for nearly a year, and the seller, Vigen Shaghzo, was putting pressure on Grasso to sell it. Abrams and Fitzgerald agreed to buy the Alta Drive property if they could work one of their fraudulent deals.

The Alta Drive transaction unfolded as follows. In early August 2000, Abrams offered $2,000,000 to Shaghzo in the name of Abrams's father, a straw purchaser. According to Abrams, Grasso knew that Abrams's father was not actually purchasing the home. After Shaghzo accepted the $2,000,000 offer, Grasso withdrew the $2,050,000 MLS listing for the house and relisted it for $4,495,000. This false relisting caused a problem, however: when Shaghzo found out about it, he ordered Grasso to correct the misinformation, and Grasso agreed to do so. Abrams and Fitzgerald then submitted a fraudulent loan application for an inflated purchase price of $4,395,000 to Aurora Loan Services for approval. A loan for the full amount was funded by Lehman Brothers. After the sale closed in September 2000, and the escrow company disbursed the loan proceeds from Lehman Brothers, Abrams paid Grasso's firm $46,436 in commissions. Several months later, MLS reported the property sold at its true price of $2,000,000. To prevent Aurora Loan Services and Lehman Brothers from seeing this accurate listing, Grasso again arranged to change the MLS listing to show a sales price of $4,495,000.

3

In January 2001, after Grasso became affiliated with Prudential and obtained an indirect interest in Cal Title, Abrams and Fitzgerald began using Cal Title to provide title insurance for their purchases. Cal Title was willing to prepare two title insurance policies, one with the inflated purchase price (which would be provided to the lender) and the second with the actual purchase price (that the seller could review). Although Abrams and Fitzgerald attempted to use other title companies for their transactions, these companies soon declined to work with them, and Abrams and Fitzgerald began using Cal Title exclusively, whether or not Grasso or Babajian was acting as the agent for the transaction.

Sometime in 2001, Grasso called Matykowski to complain that Abrams and Fitzgerald had been using Cal Title for transactions where he was not the agent. Grasso was agitated about this development, and forbade the AbramsFitzgerald team from using Cal Title unless Grasso and Babajian were in the deal. Abrams later told Matkyowski that he agreed to pay Grasso and Babajian—via Prudential—a commission on transactions where Cal Title was involved, even when they were not serving as agents.

4

From approximately February 2001 through summer 2002, Grasso represented Abrams and Fitzgerald in their acquisition of four additional properties relevant to this appeal. For a property on Mandeville Canyon Road, Beverly Hills, Grasso submitted several unsuccessful purchase offers using the names of different straw buyers, before submitting a third, successful offer on behalf of "Jamieson Matykowski and/or assignee." While the transaction was in escrow, Matykowski purportedly assigned the purchase agreement to yet another straw buyer. As in the Alta Drive transaction, the straw buyer was not the true purchaser and in fact did not know the conspirators had used his name. In addition to multiple straw purchasers, the conspirators also used two different escrow companies: the original escrow company resigned after determining it was uncomfortable with the transaction, and was replaced by Cal Title. FSC Ventures (Grasso and Babajian's wholly owned company) earned $19,231 in commissions for the deal.

Grasso also assisted the conspirators in purchasing a property on Claircrest Drive in Beverly Hills. According to Matykowski, Grasso was aware that the conspirators were using a straw purchaser for this property, as well. At one point, Matykowski testified, he was in Grasso's office, and jokingly told Grasso, "Turn your back for a second I'm going to sign this contract." Matykowski then forged the name "Hugo Wendt" on the purchase offer. Grasso treated this forgery as "just normal." Once the seller accepted the offer for the Claircrest Drive property, Grasso asked the escrow officer to assign the purchase agreement to a different straw purchaser. Abrams and Fitzgerald paid FSC Ventures $21,490 in commissions for this transaction when it closed.

In summer 2002, Abrams and Fitzgerald purchased two more Beverly Hills properties, one on Yoakum Drive and the other on Benedict Canyon Drive. Although they did not use either Grasso or Babajian as their real estate agent, they did use Cal Title. Consistent with Abrams's prior agreement, Abrams paid Prudential (which in turn paid Grasso and Babajian through FSC Ventures) a three percent commission for each transaction, which together amounted to $50,833. Abrams made these payments separately after the deals closed and the bank had already wire transferred the loan proceeds; the payments did not go through escrow or show up on the settlement statements for the transactions. Abrams and Grasso characterized these payments as "referral fees."

B

In August 2007, a grand jury indicted Grasso for one count of conspiracy to commit bank fraud and loan fraud, in violation of 18 U.S.C. § 371.[2] This charge named Grasso and three

2. 18 U.S.C. § 371, as relevant here, provides that "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy," each shall be subject to criminal

co-defendants, including Rizk and Babajian, along with six other co-conspirators, including Abrams and Fitzgerald. Listing nine transactions as overt acts, the government alleged that the co-conspirators devised and executed a scheme to commit bank fraud against Lehman Brothers, GreenPoint Bank, and other federally-insured institutions between 2000 and 2003, and to commit loan fraud by submitting false statements, reports, and valuations in connection with the listed transactions.[3]

The indictment also charged Grasso with one count of bank fraud and aiding and abetting, in violation of 18 U.S.C. §§ 2,[4] 1344(1);[5] seventeen counts of loan fraud and aiding and abetting, in violation of 18 U.S.C. §§ 2, 1014;[6] and three counts of money laundering and aiding and abetting, in violation of 18 U.S.C. §§ 2, 1956(a)(1).[7] The bank fraud charge named all four defendants and rested on the same allegations as the conspiracy charge. The money laundering and loan fraud charges related to specific real estate transactions.[8] The three money laundering charges related to individual "referral" payments that Abrams made to Prudential after the Yoakum Drive and Benedict Canyon Drive transactions.

After a jury trial, Grasso was convicted on all conspiracy, bank fraud, and money laundering charges, and on the loan fraud charges relating to the Claridge Drive, Alta Drive, Mandeville Canyon Road, and Claircrest Drive transactions. Grasso moved for acquittal on all charges or in the alternative for a new trial. The district court denied these motions, rejecting his sufficiency of the evidence claims. The court sentenced Grasso to twelve months and one day in prison and $13 million in restitution.

II

On appeal, Grasso argues that the district court erred in denying his motion for acquittal, *see* Fed. R. Crim. P. 29, because the evidence was insufficient to support a guilty verdict on the conspiracy, bank fraud, loan fraud, and money laundering counts for which he was convicted.[9]

We have jurisdiction under 28 U.S.C. § 1291. We review denials of Rule 29 motions for acquittal de novo. *United States v. Gonzalez-Diaz*, 630 F.3d 1239, 1242 (9th Cir. 2011). In considering a claim that the evidence adduced at trial was insufficient to sustain a conviction, "[a] reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This means that "a reviewing court 'must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Id.* (quoting *Jackson*, 443 U.S. at 326). Second, the court must determine whether the evidence, viewed in that manner, "is adequate to allow any rational trier of fact to find the essential elements of a crime beyond a reasonable doubt." *Id.* (internal quotation marks and alterations omitted).

A

We begin with Grasso's appeal of his conviction for conspiracy to commit loan fraud and bank fraud. To convict Grasso of conspiracy, the government must first prove that a conspiracy existed. "To prove a conspiracy under 18 U.S.C. § 371, the government must first establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *Rizk*, 660 F.3d at 1134 (quoting *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008)). "Once the existence of the conspiracy is shown, evidence establishing beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection is slight, is sufficient to convict him of knowing participation in the conspiracy." *United States v. Meyers*, 847 F.2d 1408, 1413 (9th Cir. 1988). We have explained that a defendant may have a "slight connection" to a conspiracy even if the defendant did not know all the conspirators, did

penalties.

3. These include the Claridge Drive, Alta Drive, Mandeville Canyon Road, Claircrest Drive, Yoakum Drive, and Benedict Canyon Drive transactions, as discussed in detail above, as well as three additional transactions involving properties at Anacapa View Drive in Malibu, Stradella Road in Los Angeles, and Roscomare Road, also in Los Angeles.

4. 18 U.S.C. § 2 provides that "(a) [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal [, and] (b) [w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

5. 18 U.S.C. § 1344(1), as relevant here, provides criminal penalties for "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice – (1) to defraud a financial institution."

6. 18 U.S.C. § 1014, as relevant here, provides criminal penalties for "knowingly mak[ing] any false statement or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation."

7. 18 U.S.C. § 1956(a)(1), as relevant here, provides criminal penalties for "[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity – . . . (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . [or] (B) knowing that the transaction is designed in whole or part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."

8. The loan fraud charges arose from five separate transactions: Claridge Drive, Alta Drive, Mandeville Canyon Road, and Claircrest Drive, as discussed above, as well as a fifth property that Abrams and Fitzgerald purchased on Roscomare Road in Los Angeles. Grasso was acquitted on the loan fraud counts relating to the Roscomare Road transaction, which are therefore not part of this appeal.

9. Grasso also argues that the district court violated his Sixth Amendment right to confrontation by admitting a statement from Tim Holland, a coconspirator who controlled one of Abrams's in-house escrow companies. Although the Sixth Amendment limits the admissibility of testimonial evidence, *see Crawford v. Washington*, 541 U.S. 36 (2004), co-conspirator statements in furtherance of a conspiracy are not testimonial, *United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005), and therefore we reject this argument.

not participate in the conspiracy from its beginning or participate in all its enterprises, or otherwise know all its details. *See United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009). However, "[i]t is not a crime to be acquainted with criminals or to be physically present when they are committing crimes." *United States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001).

Where the defendant has a connection (even if slight) to the conspiracy, the government must also show that the defendant's connection to the conspiracy is knowledgeable; "that is, the government must prove beyond a reasonable doubt that the defendant knew of his connection to the charged conspiracy." *Meyers*, 847 F.2d at 1413. To establish a knowing connection, "[t]here need not, of course, be proof that the conspirators were aware of the criminality of their objective," *Ingram v. United States*, 360 U.S. 672, 678 (1959). Instead, the government must show that the defendant was aware of "the unlawful object toward which the agreement [was] directed," *United States v. Krasovich*, 819 F.2d 253, 255 (9th Cir. 1987); *see also id.* ("[k]nowledge of the objective of the conspiracy is an essential element of any conspiracy conviction.") (citing *Ingram*, 360 U.S. at 678). The government may rely on circumstantial evidence and inferences drawn from that evidence in order to prove the defendant's knowing connection to the conspiracy. *See United States v. Johnson*, 297 F.3d 845, 868–69 (9th Cir. 2002).

Here, it is undisputed that the government sufficiently proved the existence of a conspiracy to commit bank fraud and loan fraud. As we explained in *Rizk*, "Abrams, Fitzgerald, and others associated with them initiated and carried out a scheme to defraud mortgage lenders." *Rizk*, 660 F.3d at 1128. Nor does Grasso contest that he participated in the conspiracy; rather, the disputed issue is whether he did so knowingly.

To that end, Grasso argues that the government failed to adduce sufficient evidence to prove he had "knowledge of the objective of the conspiracy," *id.* at 1134. According to Grasso, Abrams and Fitzgerald targeted and manipulated him because of his "highly respected and extremely successful" real estate practice in Los Angeles. Grasso claims that the evidence showed that his involvement in the conspiracy was limited to the legitimate aspects of the real estate transactions, and he was unaware of the fraudulent steps in Abrams and Fitzgerald's scheme.

Viewing the facts in the light most favorable to the prosecution, *Nevils*, 598 F.3d at 1164, we conclude that the government presented more than sufficient evidence that Grasso knew the objectives of the fraudulent scheme. A rational jury could determine beyond a reasonable doubt that as early as July 2000, Grasso knew that the real estate transactions were structured to deceive Lehman Brothers, GreenPoint Bank, and other federally insured banks, and that he assisted in this deception. The evidence showed that Grasso assisted his co-conspirators in convincing lenders that various properties were sold for more than their actual sales prices. Grasso personally benefitted from falsely inflating the purchase price for his Claridge Drive property, and he personally inflated the MLS listing in the Alta Drive transaction. He was aware of the role Cal Title played in creating two different title insurance policies, one showing the inflated purchase price and one showing the true purchase price. Matykowski's testimony that he joked with Grasso about forging the signature of a straw purchaser, along with other evidence, indicated that Grasso knew that the conspirators furthered the scheme by using the names of straw purchasers who might not even be aware of the transaction. Finally, the evidence showed that Grasso was an expert in his field, so the jury could reasonably conclude that he was not duped by Abrams and Matykowski into innocently carrying out the acts described above.

We reached a similar conclusion in *Rizk*. Like Grasso, Rizk argued that the evidence was insufficient to establish that she knew of the objective of the conspiracy. *Rizk*, 660 F.3d at 1134. We disagreed, holding that a rational jury could have found beyond a reasonable doubt that Rizk intended to defraud the victim lenders in light of evidence that Rizk significantly overvalued the properties in preparing her appraisals, requested that the MLS database be manipulated to show higher sales prices, and knew her appraisals were being used to get loans on the properties. *Id.* at 1134–35. Like Grasso, Rizk also raised the defense that she was "duped and used" by Abrams and Fitzgerald, but we held that the government had introduced sufficient evidence to overcome this defense by showing that Rizk was an "experienced appraiser," "knew that her appraisals were being used to finance the purchase of properties," and "was unduly influenced by the values put forth by Abrams and Fitzgerald." *Rizk*, 660 F.3d at 1135. Here, too, the government's evidence, taken in the light most favorable to the prosecution, *see Nevils*, 598 F.3d at 1164, was sufficient for the jury to reject Grasso's exculpatory theory and to find beyond a reasonable doubt that he had "knowledge of the objective of the conspiracy." *Rizk*, 660 F.3d at 1135.

B

Next, we consider Grasso's appeal of his convictions for loan fraud associated with the Claridge Drive, Alta Drive, Mandeville Canyon Road, and Claircrest Drive transactions. To obtain a loan fraud conviction, the government must prove that the defendant "[1] knowingly [made] any false statement or report . . . for the purpose of influencing in any way [2] the action of . . . a bank insured by the Federal Deposit Insurance Corporation." 18 U.S.C. § 1014.

1

Grasso begins by challenging his loan fraud conviction for the Claridge Drive transaction. Grasso claims that the government did not prove that he had sufficient knowledge that the false statements he made to obtain loans to buy the Claridge Drive property would influence a federally insured

bank, and so failed to prove that he made his false statements for that purpose.

We disagree with this argument. Contrary to Grasso's claims, the government can prove the knowledge element of § 1014 by showing that Grasso made false statements for the purpose of obtaining a loan, knowing that those statements would be submitted to federally insured banks.[10] *See United States v. Bellucci*, 995 F.2d 157, 159 (9th Cir. 1993) (per curiam) ("Section 1014's proscription of knowing misrepresentation reach[es] a defendant's knowledge of the statement's presentation to banks generally[,] as distinguished from a particular bank.") (internal quotations omitted) (quoting *United States v. Lentz*, 524 F.3d 69, 71 (5th Cir. 1975)). In *Bellucci*, the defendant submitted a loan application with false statements through his mortgage broker, who eventually conveyed them to a bank. 995 F.3d at 159. Because Bellucci had a long career as a developer and builder and thus "was familiar with the manner in which the lending process operates," and even testified that he understood his broker "would use the loan applications to go shop for loans," the court concluded that "a rational jury could easily infer beyond a reasonable doubt that Bellucci knew [that his broker] would present his loan application to a variety of financial institutions, including banks." *Id.* Here, evidence at trial showed that Grasso was an experienced real estate agent who, like Bellucci, was well-versed in the mortgage lending process. For instance, Grasso and his partner Babajian, as a team, were the top-grossing real estate agents at Prudential in California in 2002. The evidence also showed Grasso's understanding that the Claridge Drive deal would operate on the scheme's basic blueprint, which was generally to obtain funding from banks that did not impose rigorous standards on their lending agents. Taking this evidence together, a jury could reasonably conclude that Grasso knew that his false statements made to obtain a loan would ultimately influence an insured bank. *See Bellucci*, 995 F.3d at 159.[11]

2

Grasso next argues that there was insufficient evidence to convict him of loan fraud because he was involved only in the legitimate first step of the real estate transactions, had no knowledge of the scheme to defraud banks, and did not make any false statements to a federally insured financial institution in the Alta Drive, Claircrest Drive, and Mandeville Drive transactions.[12]

This argument also fails. Under *Pinkerton v. United States*, a defendant charged with participating in a conspiracy may be subject to liability for offenses committed as part of that conspiracy, even if the defendant did not directly participate in each offense. 328 U.S. 640, 647 (1946); *see also United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008). *Pinkerton* "renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined, whether they were aware of them or not." *Hernandez-Orellana*, 539 F.3d at 1007. Although we have noted there may be due process limitations to imposing *Pinkerton* liability on defendants "with extremely minor roles in the conspiracy," *United States v. Bingham*, 653 F.3d 983, 997 (9th Cir. 2011), or where "the relationship between the defendant and the substantive offense is slight," *United States v. Castaneda*, 9 F.3d 761, 766 (9th Cir. 2003), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), such concerns are not present in this case.

Taking the evidence adduced at trial in the light most favorable to the government, a reasonable juror could find all the necessary elements to impose *Pinkerton* liability, contrary to Grasso's contention that he had nothing to do with the fraud. Abrams and Matykowski testified that Grasso was well aware of the conspiracy's fraudulent purpose and had a substantial role in it by the time the Alta Drive, Mandeville Canyon Road, and Claircrest Drive transactions occurred. Moreover, Abrams admitted that he committed loan fraud in each of these transactions, which took place according to the scheme's basic blueprint. Because Grasso was aware of this blueprint, he could reasonably have foreseen Abrams's loan fraud in those transactions. Thus, there is no due process problem in holding him liable for Abrams's acts under *Pinkerton*. Because there is sufficient evidence to uphold Grasso's convictions for loan fraud under *Pinkerton*, it does not matter whether Grasso was aware of when or whether Abrams committed the acts constituting loan fraud in each transaction. *Hernandez-Orellana*, 539 F.3d at 1007.

C

We now turn to Grasso's appeal of his conviction for bank fraud, based on his role in the scheme to defraud Lehman Brothers and GreenPoint Bank. The bank fraud statute, 18 U.S.C. § 1344(1), provides criminal penalties for anyone who "knowingly executes, or attempts to execute, a scheme or artifice – . . . (1) to defraud a financial institution."[13] Grasso

10. Congress amended § 1014 in 2009 to cover "mortgage lending businesses," but this expanded definition applies only prospectively and therefore does not cover the events in this case. Fraud Enforcement and Recovery Act of 2009 (FERA), Pub.L. No. 111–21, §§ 2(c)(2), 4(f).

11. Grasso also argues that the government failed to demonstrate a nexus between GreenPoint Mortgage and GreenPoint Bank that was sufficient to satisfy § 1014's federal jurisdictional element for the Claridge Drive transaction. Because we have already concluded that Grasso knew his false statements would ultimately influence a bank under *Bellucci*, we reject this argument. *Bellucci*, 995 F.3d 159; *cf. United States v. McDow*, 27 F.3d 132, 136 (5th Cir. 1994).

12. Although Grasso addresses this argument to all four of his loan fraud convictions (for the Claridge Drive, Alta Drive, Mandeville Canyon Road, and Claircrest Drive transactions), it is inapplicable to Grasso's Claridge Drive loan fraud conviction, because Grasso personally made false statements in his loan application and related documents for Claridge Drive. We affirm that count for the reasons discussed above.

13. In 2009, Congress amended 18 U.S.C. § 20(1), which supplies

argues that the government failed to adduce sufficient evidence that he had knowledge of the object of the scheme to defraud banks or that he had the requisite intent to defraud. *See Rizk*, 660 F.3d at 1135 (stating that one of the "essential elements" of bank fraud under § 1344(1) is that the defendant executed or attempted to execute the fraudulent scheme "with the intent to defraud").

In making its case that Grasso was guilty of bank fraud, the government relied on the same evidence of Grasso's knowledge that supported his conviction for conspiracy to commit bank fraud. Accordingly, Grasso's argument that the evidence was insufficient fails for the same reason that his challenge to his conspiracy conviction fails: viewing the facts in the light most favorable to the prosecution, there was ample evidence that Grasso was well aware of the scheme's fraudulent objective and that he intentionally furthered the fraud. *See supra* at 16–18.[14]

D

Finally, we address Grasso's argument that the government presented insufficient evidence to convict him of money laundering when he received two "referral fees" for the Yoakum Drive and Benedict Canyon Drive transactions. Grasso argues that Abrams gave him referral fees for access to Cal Title, that the loan fraud and bank fraud scheme could not have occurred without such access, and, therefore, that the money laundering offense merged into the underlying loan fraud and bank fraud offenses and cannot be separately punished.

1

To address this argument, we first consider the relevant legal framework. Under the money laundering statute, 18 U.S.C. § 1956(a)(1), the government must prove that a defendant: [1] knew that money being used in a financial transaction was the "*proceeds* of some form of unlawful activity," and [2] then conducted or attempted to conduct a financial transaction with such proceeds; [3] for the purpose of either promoting an unlawful activity or for concealment. *See* 18 U.S.C. § 1956(a)(1) (emphasis added).

In *United States v. Santos*, the Supreme Court attempted to define the term "proceeds" but could not reach a five-justice majority to do so. 553 U.S. 507 (2008). In *Santos*, the defendant was convicted of running an illegal lottery, in which "runners" took bets from gamblers and delivered the money to "collectors." 553 U.S. at 509. Those collectors, in turn, passed the money along to defendant Santos, who then paid the runners and collectors for their services and disbursed awards to the lottery winners. *Id.* The government charged Santos with money laundering under § 1956(a) on the theory that the money used to pay the runners, collectors, and lottery winners was the proceeds of his illegal lottery and that Santos was using that money to promote the carrying on of the lottery activity. *Id.* at 509–10.

On appeal, the Court considered whether the word "proceeds" in § 1956 meant the gross receipts of an illegal activity, or only the net receipts, i.e., the profits of that activity. Writing for a four-justice plurality, Justice Scalia concluded that both definitions of "proceeds" were plausible, and that "because the 'profits' definition of proceeds is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *Id.* at 513. In supporting this conclusion, the plurality noted that defining "proceeds" to mean "receipts" would frequently lead to a "merger problem": "nearly every violation of the illegal-lottery statute would also be a violation of the money laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." *Id.* at 515. The plurality noted that Congress would not have "wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime" by application of the money-laundering statute. *Id.* at 517. Because Santos's payments to the runners, collectors and lottery winners were a normal part of the cost of doing business (and not pure profit), the plurality concluded the payments did not constitute "proceeds" for purposes of the statute. *Id.*

Four justices rejected this analysis and dissented. The dissent contended that "proceeds" should be defined as "gross receipts," and would leave any "merger problems" to district judges' discretion at sentencing. *Id.* at 547 (Alito, J., dissenting). Under this analysis, Santos's payments to the runners, collectors and lottery winners were made out of the gross receipts of the lottery business and thus constituted "proceeds" for purposes of the statute.

Justice Stevens, in a concurrence, rejected both definitions of "proceeds," and adopted a case-by-case approach. He was particularly troubled by the fact that the dissenting opinion allowed "the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense." *Id.* at 527 (Stevens, J., concurring). Considering both "common sense" and the "rule of lenity," Justice Stevens agreed with Justice Scalia that there was no reason to think Congress intended that "revenue generated by a gambling business that is used to pay the essential expenses of operating that business," which is "a normal part

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the definition of "financial institution" for § 1344, to cover "mortgage lending businesses" such as GreenPoint Mortgage and Aurora. *See United States v. Bennett*, 621 F.3d 1131, 1138 (9th Cir. 2010). This amendment applies prospectively, however, and with respect to the events in this case, the only definition of "financial institution" in § 20(1) relevant here was "insured financial institution." FERA §§ 2(a)(3), 4(f).

14. As he argued with respect to his loan fraud convictions, Grasso also contends here that there was an insufficiently close connection between GreenPoint Mortgage and GreenPoint Bank to satisfy § 1344's federal jurisdictional element. Because we have already concluded that the government adduced sufficient evidence to establish that Grasso knew that the scheme was aimed at federally insured banks, we again reject this argument. *Cf. United States v. Edelkind*, 467 F.3d 791, 797–98 (1st Cir. 2006).

of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code," should also be punished as money laundering. *Id.* at 528. Justice Stevens explained that this result was "particularly unfair in [*Santos*] because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business." *Id.* at 527. Congress had capped the maximum sentence for engaging in an illegal lottery to five years, an "important limitation" that would be "eviscerated" if a court could impose a sentence of up to twenty years, the statutory maximum for money laundering. *Id.* Justice Stevens concluded that Congress could not have intended such a "perverse result." *Id.* at 528.

Although Justice Stevens agreed that proceeds meant "profits" in the lottery scheme, he agreed with the four justices in dissent that proceeds did not mean profits in every case. Among other things, he explained, "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 526–27.

Santos quickly caught the attention of Congress, which amended § 1956 in 2009 to define "proceeds" as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." FERA § 2(f). The amendments effectively endorsed Justice Alito's dissent and overruled any interpretation of "proceeds" based on Justice Scalia's and Justice Stevens' opinions. *See* S. Rep. 111-10, at 432 (2009) (explaining that the plurality decision in *Santos* was "erroneous" and "contrary to Congressional intent."). Under the current version of § 1956, there could be no debate that Grasso's "referral fees" for the Yoakum Drive and Benedict Canyon Road transactions would be separately punishable as money laundering. The 2009 amendments are not retroactive, however, *see* FERA § 4(f), and so we must apply *Santos* in assessing Grasso's merger argument.

In analyzing the three opinions produced by the *Santos* court, we have derived the controlling rule that "'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos*." *See United States v. Van Alstyne*, 584 F.3d 803, 814 (2009). Our subsequent case law has identified three factors we consider in determining when such a "merger problem" arises.

First, we look to whether a given transaction was a "central component" of the underlying scheme. *Van Alstyne*, 584 F.3d at 815. In *Van Alstyne*, a defendant was charged with 19 counts of mail fraud for running a Ponzi scheme and three money laundering convictions. *Id.* at 809. In considering the defendant's challenge to the money laundering convictions, we struck down the two based on regular distributions to individual investors in the Ponzi scheme. Because "issuing distribution checks that supposedly represented generous returns on his victims' investment was a central component of the 'scheme to defraud,'" we held that convicting the defendant of money laundering "for the bank transfers inherent in the 'scheme' central to the mail fraud charges" would raise a merger problem. *Id.* at 815. On the other hand, we held that the money laundering conviction based on the refund of an investor's entire investment after the scheme began to unravel did not raise such a merger problem. *Id.* We reasoned that the refund check was not part of the "core scheme" because the payment "undermined rather than advanced" the Ponzi scheme. *Id.* at 815–16; *see also United States v. Bush*, 626 F.3d 527, 538 (9th Cir. 2010) (reasoning that transfers of proceeds from a four-year, $36 million Ponzi scheme were not central to "carrying out the scheme's objective[s]" in part because the defendant had "operated his scheme for several years" before transferring funds to his account, and concluding that the transfers did not raise a merger problem); *United States v. Phillips*, 704 F.3d 754, 766 n.11 (9th Cir. 2012) (looking to whether the money laundering transaction was a "central component" of the underlying scheme); *United States v. Moreland*, 622 F.3d 1147, 1166 (9th Cir. 2010) (same).

Second, we consider whether the inclusion of the money laundering charges leads to "'a radical increase in the statutory maximum sentence' for the underlying offense," because five justices in *Santos* also expressed this concern. *Bush*, 626 F.3d at 538 (quoting *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009)).[15] In other words, when Congress caps a defendant's maximum sentence for the underlying offense at something radically less than the maximum sentence for money laundering, we may infer that Congress did not intend the "important limitation" on the penalty for the underlying offense to be "eviscerated" by the penalty for a money laundering conviction. *Santos*, 553 U.S. at 527. By contrast, where a defendant's underlying mail and wire-fraud convictions carried a statutory maximum sentence of thirty years, Congress's choice of penalty would not be "eviscerated" by the ten-year statutory maximum sentence for money laundering. *See Bush*, 626 F.3d at 538; *see also Phillips*, 704 F.3d at 766 n.11 (9th Cir. 2012) (holding that *Santos*'s concern regarding the evisceration of Congress's choice of a low statutory maximum penalty for an underlying offense did not apply where the underlying offenses carried maximum sentences of twenty years, and the money laundering offense carried a lower maximum sentence of ten years).

Third, we generally consider the money used in co-conspirator transfers in crimes such as the sale of contraband, fraud, or bribery as constituting the "proceeds" of such crimes for purposes of the money laundering statute. In *United States v. Webster*, we concluded that when "a money laundering count is based on transfers among co-conspirators

15. Although the dissent questions our reliance on *Bush* and *Phillips* because they followed the Sixth Circuit's approach, *see* dis. op. at 45–46, we see no irreconcilable conflict between these cases and *Van Alstyne*, which did not consider this issue in conducting its merger analysis. Therefore, we are bound by our precedent.

of money from the sale of drugs, 'proceeds' includes all 'receipts' from such sales." 623 F.3d 901, 906 (9th Cir. 2010). We acknowledged that Justice Scalia's plurality opinion stated that the merger problem might exist for certain payments among conspirators, but concluded that this was a minority view that was not controlling. *Id.* Rather, we relied on the four justices in dissent, plus Justice Stevens, who agreed that "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.*

In *United States v. Wilkes*, we extended *Webster*'s rationale beyond drug cases and into the context of fraud and bribery. 662 F.3d 524 (9th Cir. 2011). In *Wilkes*, the ringleader of a scheme involving kickbacks to a Congressman in exchange for lucrative government contracts challenged his conviction of concealment money laundering.[16] The defendant challenged his conviction on two grounds. He first argued that his use of multiple transfers to indirectly pay off the Congressman did not constitute "concealment," *id.* at 545–47. Second, relying on *Santos*, Wilkes argued that his transfer of funds to pay off the Congressman "was merely an expense associated with the bribery, and, thus, not 'proceeds'" under the money laundering statute. *Id.* at 548–49. We rejected both arguments. We first held that the government had proven concealment because "the effort to disguise the source of the money was an additional act that is separately punishable." *Id.* at 547. With respect to defendant's *Santos* argument that there was insufficient evidence that the bribes constituted "proceeds," we concluded that "[u]nder *Webster*, [the defendant's] money laundering count was based on a transfer to a co-conspirator of money from honest services fraud and bribery such that 'proceeds' would include all 'receipts' from the fraud." *Id.* at 549. Accordingly, we rejected defendant's argument that because the kickback payments were an inherent part of the scheme to defraud, they could not constitute proceeds for purposes of the money laundering statute, and concluded that defendant's transfers to the Congressman "constituted 'proceeds' of the scheme to defraud," *id.*

We disagree with the dissent's argument that *Wilkes*'s determination that kickback payments to the Congressman were "proceeds" is inconsistent with *Van Alstyne*. Dis. op. at 45. *Van Alstyne* did not have occasion to address co-conspirator transfers, while *Webster* and *Wilkes* appropriately relied on five justices' views in *Santos* in concluding that such transfers did not raise a merger problem. *Van Alstyne*'s statement that a merger problem may be triggered when confederates in a scheme shared profits was based on a summary of Justice Scalia's plurality opinion, 584 F.3d at 815, and does not necessarily extend beyond the situation identified by Justice Stevens, that of illegal gambling operations. Accordingly, we are bound by our precedent in *Webster* and *Wilkes*.[17]

2

We now apply these principles to Grasso's argument that the government's money laundering charges for the Yoakum Drive and Benedict Canyon Road transactions raise a merger problem. Under the applicable case law, Grasso's argument turns on whether the government has provided sufficient evidence that the referral fees are "proceeds" of loan fraud and bank fraud. We first consider whether viewing "proceeds" as "receipts" in this context would raise a merger problem "of the kind that troubled the plurality and concurrence in *Santos*." *Van Alstyne*, 584 F.3d at 814.

On their face, the loan fraud counts do not raise such a merger problem. The loan fraud statute, § 1014, criminalizes knowingly "mak[ing] any false statement or report" to defraud an insured institution, while § 1956 criminalizes knowingly "conduct[ing] a financial transaction" involving proceeds of an unlawful activity for specified purposes. Because these statutes criminalize different types of behavior, the money laundering counts did not increase Grasso's sentence for the same behavior underlying the loan fraud counts.

Unlike the loan fraud counts, the bank fraud count charged Grasso with the entire Abrams-Fitzgerald "scheme to defraud," and so encompasses the Yoakum Drive and Benedict Canyon Drive transactions. But we reject Grasso's merger argument here as well. First, Abrams's two kickbacks to Grasso were not a "central component" of the underlying scheme. *Van Alstyne*, 584 F.3d at 815. Given that the Abrams and Fitzgerald scheme lasted three years and involved roughly 80 fraudulent transactions, and that Abrams and Fitzgerald generally secured access to Cal Title through Grasso's par-

16. To establish the sort of concealment money laundering involved in *Wilkes*, the government was required to prove that the defendant: [1] knew that money being used in a financial transaction was the "*proceeds* of some form of unlawful activity," and [2] then conducted a financial transaction with such proceeds; [3] "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." 18 U.S.C. § 1956(a)(B)(i) (emphasis added). Because both promotional and concealment money laundering require the government to prove that the defendant knowingly used the "proceeds" of an unlawful activity, *Wilkes*'s analysis of *Santos* is applicable here. *Cf.* Dis. op. at 44.

17. The dissent's reliance on the Fourth Circuit's opinion in *United States v. Cloud*, 680 F.3d 396, 407 (4th Cir. 2012) is also misplaced. In defining and applying "essential expenses," *Cloud* relies on the *Santos* plurality's reasoning that the term "proceeds" excludes any payout to a co-conspirator. *Id.* at 403–09. We have not interpreted *Santos* so broadly, relying instead on Justice Stevens's case-by-case approach. *See, e.g.*, *Wilkes*, 662 F.3d at 549. Other circuits have likewise refused to interpret *Santos* as broadly as the Fourth Circuit. *See Kratt*, 579 F.3d at 562 (holding that "proceeds" means "profits" only when imposing a money laundering count "leads to a radical increase in the statutory maximum sentence, and only when nothing in the legislative history suggests that Congress intended such an increase"); *Garland v. Roy*, 615 F.3d 391, 402 (5th Cir. 2010) (applying the presumption that "proceeds" means "gross receipts" unless there is adequate legislative history to rebut the presumption); *United States v. Fishman*, 645 F.3d 1175, 1193–94 (10th Cir. 2011) (holding, in light of the fractured nature of *Santos*, that the opinion is confined to its factual setting so that "proceeds" means "profits" only where an illegal gambling operation is involved); *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009) (same).

ticipation in their real estate transactions, the two isolated referral payments to Grasso at the end of the scheme were not "central" to the scheme's success. *See Bush*, 626 F.3d at 537. The fact that the scheme operated successfully for several years before Abrams and Fitzgerald ever gave Grasso a kickback is powerful evidence of the kickbacks' "irrelevance to the overarching fraud scheme." *Id.* Moreover, Abrams's kickbacks to Grasso drained off funds that Abrams could have reinvested in purchasing another property to extract fraudulent loan proceeds, thus hindering the scheme in the same way the returned investment in *Van Alstyne* hindered the defendant's Ponzi scheme. *Van Alstyne*, 584 F.3d at 815–16.

Second, the inclusion of the money laundering charges did not threaten "'a radical increase in the statutory maximum sentence' for the underlying offense." *Bush*, 626 F.3d at 538 (quoting *Kratt*, 579 F.3d at 562). Here, the underlying bank fraud count has a 30-year statutory maximum, while the money laundering count has a 20-year statutory maximum. As in *Bush* and *Phillips*, the statutory cap on the penalty for bank fraud is not "eviscerated" by the maximum penalty for money laundering, and thus raises no inference regarding Congressional intent.[18] Finally, we have declined to define "proceeds" to mean "profits" when a money laundering conviction is based on kickbacks and transfers to co-conspirators in schemes to defraud such as Abrams's. *See Wilkes*, 662 F.3d at 547.

Because the money laundering convictions in this case do not raise a merger problem with respect to either the loan fraud or bank fraud convictions, we define "proceeds" to mean "gross receipts," and conclude that these referral fees may be viewed as "proceeds" of the loan and bank fraud. On that basis, we reject Grasso's argument that the government presented insufficient evidence that his money laundering charges were based on "separate and distinct" activity from the Yoakum Drive and Benedict Canyon Drive transactions.

It is undisputed that the remaining elements of promotion money laundering, under § 1956(a)(1)(A)(i), were fulfilled here. The government adduced evidence that Grasso knew that the referral fees were derived from the Benedict Canyon and Yoakum Drive transactions, and that Grasso knew these activities involved bank and loan fraud. Further, the testimony of Abrams and Matykowski sufficiently demonstrates that Grasso had the requisite intent to promote the carrying on of loan fraud, as his demands for money were intended to ensure the conspirators' ongoing access to Cal Title. We therefore affirm Grasso's money laundering conviction under § 1956(a)(1)(A)(i), and need not consider whether it could be alternatively upheld under § 1956(a)(1)(B)(i).

18. As noted above, the *Santos* plurality and Justice Stevens focused on how a money laundering charge could affect the statutory maximum chosen by Congress for the underlying offense. This question of Congressional intent is distinct from a district court's exercise of discretion in fashioning an appropriate sentence, which is inherently limited by the Sentencing Guidelines and the parsimony principle of 18 U.S.C. § 3553(a). Here, for instance, Grasso's guidelines range was 97 to 121 months, but he received just twelve months and one day of imprisonment for his crimes. *See Phillips*, 704 F.3d at 766 n.11; *see also Bush*, 626 F.3d at 538.

III

We conclude that there was sufficient evidence to support Grasso's convictions for conspiracy, loan fraud, bank fraud, and money laundering, and that the district court therefore did not err in denying Grasso's motion for acquittal.

AFFIRMED.

BERZON, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I and II.A–C of the panel's opinion but write separately with regard to Part II.A and respectfully dissent from Part II.D.

I.

The *Reed* case relied on in Part II.A of the panel's opinion says the following: "Once a conspiracy is established, only a slight connection to the conspiracy is necessary to support a conviction. The term 'slight connection' means that a defendant need not have known all the conspirators, participated in the conspiracy from its beginning, participated in all its enterprises, or known all its details. A connection to the conspiracy may be inferred from circumstantial evidence. Innocent association, even if it is knowing, does not amount to a 'slight connection.'" *United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009) (internal citations, quotation marks, and alterations omitted); *see* Maj. Op. at 15–16. The majority relies on *Reed*, and, although it slightly paraphrases the language of the opinion, I understand the majority opinion to incorporate *Reed*'s holding concerning the limited import of the "slight connection" locution. I therefore concur in Part II.A of the opinion.

I nonetheless write separately, to express my concern that some of the quotations in Part II.A could be read, in isolation, to suggest that a defendant may be convicted without in any way participating in a conspiracy, if he simply has knowledge of the conspiracy and a "connection" to its participants. *See* Maj. Op. at 15–16. That, of course, is not the law. *See, e.g.*, *United States v. Tran*, 568 F.3d 1156, 1164–65 (9th Cir. 2009) (reversing a conspiracy conviction because there was no "evidence . . . from which it could be inferred — much less proved beyond a reasonable doubt — that [the defendant] *participated* in the conspiracy in any manner") (emphasis added).

More than thirty-five years ago, a panel of this court endeavored to provide greater clarity regarding one aspect of the law of conspiracy, and in so doing, emphasized the risk of "proliferat[ing]" "statement[s]" of law that are "highly misleading if taken out of the context of the particular cases in which . . . made." *See United States v. Dunn*, 564 F.2d

348, 356 (9th Cir. 1977).[19] In the process, the court stated that "evidence establishing beyond a reasonable doubt a *connection* of a defendant with [a] conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy." *Id.* at 357 (emphasis added). At the same time, the panel noted that "after much reflection, [it was] of the mind that" that statement of law "may be of doubtful appellate application when the issue for review concerns whether the defendant was connected with the conspiracy at all." *Id.* at 357 n.21. The court quoted with approval a decision of the Fifth Circuit, explaining that this rule "'finds its proper application where persons are clearly connected to the conspiring group or are found acting in such a manner as unmistakably to forward its purposes.'" *Id.* at 357 n.21 (quoting *United States v. Alvarez*, 548 F.2d 542, 544 (5th Cir. 1977)).

Despite the doubts expressed by the *Dunn* court, in the intervening years, we have "repeatedly proliferated . . . th[e] statement" that a defendant may be convicted of "knowing participation in [a] conspiracy" based on evidence of a "slight" "connection" with the conspiracy. *See id.* at 356–57. As other judges have noted, this is a misleading, or at least ambiguous, standard. It could be read to "mean that once A and B conspire, . . . [a] 'slight connection' is enough to convict C of the same crime, an intolerable proposition." *See United States v. de Ortiz*, 883 F.2d 515, 524 (7th Cir. 1989) (Easterbrook, J., concurring), *reh'g granted and judgment vacated on other grounds*, 897 F.2d 220 (7th Cir. 1990). It also could be read to "mean that an appellate court must keep in mind the possibility that evidence may be slight quantitatively although substantial qualitatively — that a single piece of evidence may be enough in context, an unexceptionable proposition." *Id.* On the other hand, "[m]ere casual association with conspiring people is not enough," *see United States v. Bautista-Avila*, 6 F.3d 1360, 1362 (9th Cir. 1993), though on its face, "casual association" certainly sounds like a "slight connection."

As Judge Easterbrook has observed, the phrase "slight connection" is ultimately best understood to mean that "if someone joins the conspiracy, 'slight' activity to accomplish its objectives is enough, that peripheral conspirators commit the crime no less than the mastermind." *See de Ortiz*, 883 F.2d at 524. "This interpretation follows the definition of the crime (agreement plus one overt act) and is not troubling. That we have to tease it out of a formula with dubious alternative meanings, though, is a mark against its use." *Id.* A panel of the Second Circuit has agreed. *See United States v. Huezo*, 546 F.3d 174, 184–85 (2d Cir. 2008) (Newman, J., concurring, joined by Walker, J., and Sotomayor, J., in relevant part).

Here, there is no doubt that Grasso committed overt acts in furtherance of the conspiracy. As the panel opinion explains, Grasso "assisted his co-conspirators in convincing lenders that various properties were sold for more than their actual sales prices." Maj. Op. at 16–17. He also "personally inflated the MLS listings in the Claridge Drive and Alta Drive transactions." Maj. Op. at 17. We therefore have no occasion to consider whether our case law repeating the "slight connection" standard is a useful statement of the law "when the issue for review concerns whether the defendant was connected with the conspiracy at all," *see Dunn*, 564 F.2d at 357 n.21, or whether, instead, the use of the phrase "slight connection" should be abandoned as ambiguous and misleading.

II.

I respectfully dissent from Part II.D. Under our case law, Grasso's convictions for money laundering cannot stand.

A.

As the majority recognizes, under the statute here applicable, 18 U.S.C. § 1956 (2006), now superseded,[20] a defendant ordinarily could not be charged with both a criminal offense and a separate money laundering offense for the same conduct, when the "very nature of the scheme require[d] . . . [the] payment[]" that is charged as money laundering. *See United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009). Such double charging — which we have denominated the "merger problem" — was only permissible if the government proved that the payment charged as money laundering was made with the "profits (as opposed to gross proceeds)" of the underlying scheme. *See United States v. Ali*, 620 F.3d 1062, 1072 (9th Cir. 2010). To determine whether a money laundering charge triggered the "merger problem," we "must focus on the concrete details of the particular scheme" underlying the separate criminal charges against the defendant. *See Van Alstyne*, 584 F.3d at 815 (internal quotation marks omitted).

As is clear from the majority's own explanation of the intricacies of the scheme in which Grasso was involved, the money laundering counts charged Grasso with conducting payment of "essential expenses of" the bank fraud with which Grasso was also charged. *See United States v. Santos*, 553 U.S. 507, 528 (2008) (Stevens, J., concurring). The bank fraud count charged Grasso with carrying out a "scheme and artifice to defraud the victim lenders," including Lehman Brothers, GreenPoint Bank, and RBC Mortgage Company. *See* 18 U.S.C. § 1344. "[I]nstrumental to the co-conspirators' operation" was their use of Cal Title — in which Grasso held an "ownership interest" — "to prepare . . . title insurance policies . . . with [an] inflated purchase price." *See* Maj. Op. at 6, 9. The co-conspirators then "provided" the falsified title reports "to the lender[s]," to obtain inflated loans. *See id.* at 9.

19. In *Dunn*, the government argued that "'[o]nce the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it,' quoting from *United States v. Knight*, 416 F.2d 1181, 1184 (9th Cir. 1969)." *Id.* at 356 (some internal quotation marks omitted). We observed that the quoted statement from *Knight* "obviously was [not] intended to state . . . the law regarding evidence," *id.*, and clarified that the evidence must be "establish[ed] beyond a reasonable doubt," *id.* at 357.

20. *See* 18 U.S.C. § 1956(c)(9) (2009).

"Although Abrams and Fitzgerald [initially] attempted to use other title companies for their transactions, these companies soon declined to work with them, and Abrams and Fitzgerald began using Cal Title exclusively, whether or not Grasso . . . was acting as the agent for the transaction." *See id.* Relevant here, Abrams and Fitzgerald used Cal Title to submit lenders with false title reports for the Benedict Canyon and Yoakum Drive transactions.

The money laundering counts, in turn, charged Grasso with successfully demanding that his co-conspirators — Abrams and Fitzgerald — pay him commissions for their use of Cal Title in carrying out the Benedict Canyon and Yoakum Drive transactions. *See* 18 U.S.C. § 1956(a)(1)(A)(i). Without Cal Title, the scheme could not have generated the false title reports necessary to obtain inflated loans from the defrauded lenders. Grasso "forbade" his co-conspirators from using Cal Title unless they paid him a commission. *See* Maj. Op. at 9. "The very nature of the scheme thus required" the co-conspirators to make regular commission payments to Grasso. *See Van Alstyne*, 584 F.3d at 815.

Nor is it of any moment that, as the government argues, the payments to Grasso for services provided also "promote[d] future fraud." The Fourth Circuit recently rejected a similar argument in a case reversing a defendant's money laundering convictions arising out of an "extensive mortgage fraud conspiracy." *See United States v. Cloud*, 680 F.3d 396, 399 (4th Cir. 2012). The scheme there at issue "involved convincing people to invest in real estate properties that, unbeknownst to the buyers, Cloud had recently purchased for a lesser amount. The scheme also involved falsification of loan applications . . . . " *See United States v. Abdulwahab*, 715 F.3d 521, 530 (4th Cir. 2013) (discussing *Cloud*, 680 F.3d at 399–400) (internal citation omitted). Cloud "lured his coconspirators with promises of payment," including commissions for recruiting buyers to the scheme. *See Cloud*, 680 F.3d at 405, 407. In response to the government's contention that the payments were designed only "to perpetuate the scheme," and therefore constituted promotional money laundering, *see* 18 U.S.C. § 1956(a)(1)(A)(i), the court emphasized that the payments were also for "services performed," namely for "past and essential expenses of [the] mortgage fraud conspiracy," *Cloud*, 680 F.3d at 407–08.

Indeed, *any* payment for services already rendered in the context of a fraud scheme also promotes future fraudulent activity by the person paid, by creating an expectation that the person will be paid again. In any case involving ongoing fraud, the government's approach — which, I note, the majority does not endorse — would obliterate the limitations our cases have set forth regarding the merger problem.

Because the government introduced no evidence that the Benedict- and Yoakum-related commission payments were made with profits, as opposed to gross revenues, of the overall bank fraud scheme, Grasso's convictions for money laundering must be reversed. *See Van Alstyne*, 584 F.3d at 815.

B.

To avoid the straightforward result compelled by our precedents, the majority points to four reasons why the transactions charged as money laundering, despite being necessary to the fraud scheme, supposedly pose no merger problem. None of the majority's theories works.

1.

First, contrary to the majority's assertion, the payments to Grasso for the Benedict and Yoakum transactions did not "hinder[] the scheme." *See* Maj. Op. at 33. For that dubious proposition, the majority relies on our decision in *Van Alstyne*, in which we construed a "Ponzi scheme [that] depended on attracting new investments and using some but not all of the amount collected to pay returns to earlier investors." *See Van Alstyne*, 584 F.3d at 815. We held that "distribution checks" periodically issued to individual investors pursuant to the scheme were not chargeable as both mail fraud and money laundering. *Id.* The checks were funded not by any investment returns, "but by the investors' own principal," and were issued to cause investors to "believe[] they had invested wisely," and to encourage them to invest additional funds. *See id.* at 808–09, 815. Because issuance of the checks was necessary to inspire investor confidence in the Ponzi scheme and to attract additional investment, the distribution checks were "a central component of the scheme to defraud," and therefore ran squarely into the merger problem. *See id.* at 815 (internal quotation marks omitted).

With regard to a separate transaction — on which the majority focuses — we held that there was no merger problem. *See id.* at 815–16. That transaction was a "full[] refund[]" of "one investor's [initial] outlay," pursuant to that investor's demand. *See id.* at 815. "Returning the entire amount of th[at] . . . investment," we explained, "undermined rather than advanced the core scheme, as the funds returned . . . would not be available to lull other investors into maintaining their investment." *Id.* at 815–16.

Unlike the full refund in *Van Alstyne*, Grasso's commission payments for use of Cal Title were "essential expenses" of the underlying fraudulent scheme. *See Santos*, 553 U.S. at 528 (Stevens, J., concurring). As explained, after some time, Cal Title was the only title company that Grasso's co-conspirators could use to generate the necessary false reports. To use Cal Title, the conspirators had to pay Grasso a commission. Like the periodic distribution payments that presented a merger problem in *Van Alstyne*, the commission payments to Grasso prevented the scheme from using some amount of funds to expand the scheme even further, but that is always the case when a scheme pays its "*essential*" "operating" "expenses," such as the commissions paid to the "runners" who "gathered bets from gamblers" in the lottery scheme in *Santos. See id.* (emphasis added); *id.* at 509 (plurality opinion). By construing a necessary payment as somehow undermining the fraud, the majority's strained analogy to the money

laundering count upheld in *Van Alstyne* threatens to eviscerate *Santos*'s core holding.

2.

The majority fares no better by contending that the merger problem vanishes because Abrams paid Grasso commissions only for the Benedict and Yoakum transactions, and not for other fraudulent transactions carried out earlier. *See* Maj. Op. at 32. Abrams's commission payments to Grasso were in fact an integral part of each instance of bank fraud once title companies other than Cal Title refused to participate in the conspirators' scheme.

In support of its pronouncement that the payments to Grasso for services rendered were "irrelevan[t] to the overarching fraud[ulent] scheme," Maj. Op. at 33, the majority relies on a case which, on plain error review, construed eighteen monetary transactions to the defendant's personal bank account as not "central to carrying out the scheme's objective[s]," *United States v. Bush*, 626 F.3d 527, 533, 537–38 (9th Cir. 2010). Again, "the concrete details of the particular scheme" must be examined to understand the context for the court's analysis. *See Van Alstyne*, 584 F.3d at 815 (internal quotation marks omitted).

In *Bush*, the transactions charged as money laundering were complete *before* some of the conduct separately charged as fraud was even carried out. *See Bush*, 626 F.3d at 537–38. There was no merger problem with regard to separate wire-fraud charges — related to a Ponzi scheme — because the "necessity of the transfers . . . was limited to Bush's personal interest in veiling the sources of his income from public authorities." *Id.* at 538. The court explained that the transactions were made only after authorities began investigating his business associates; "[r]ather than risk investors sending money directly to his [business] account, Bush deflected attention by steering the investments overseas first." *Id.* As the court appropriately recognized, "[t]aking additional steps to hide completed criminal activity is not central to the solicitations necessary for a Ponzi scheme to continue operating." *Id.*

Here, Grasso's demands that his co-conspirators pay him commissions essential to the *ongoing* fraudulent scheme cannot fairly be analogized to the transactions in *Bush*. The commissions were not simply payments for participation in the conspiracy but for providing an essential *service*, once the service was not otherwise obtainable.

3.

Nor is the merger problem mitigated by the fact that the money laundering count exposed Grasso "only" to "an additional 20 years of imprisonment," beyond the 30-year "statutory maximum for the underlying bank fraud charge." *See Bush*, 626 F.3d at 538; Maj Op. at 33.

As an initial matter, it is far from clear that under our case law, the extent of the increase in the statutory maximum sentence is a relevant consideration in determining whether the merger problem exists. In *Van Alstyne*, we noted that the Sixth Circuit held that proceeds "'means profits *only* when the § 1956 predicate offense creates a merger problem that leads to a *radical increase in the statutory maximum sentence* and only when nothing in the legislative history suggests that Congress intended such an increase.'" *Van Alstyne*, 584 F.3d at 814 (quoting *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009)) (emphasis added). We nonetheless construed the *Santos* plurality and concurrence differently from the Sixth Circuit, holding that there was a merger problem based on the defendant's conviction for both mail fraud and money laundering, without regard to the applicable statutory maximums — 30 years for mail fraud and 20 years for money laundering. *See id.*; 18 U.S.C. §§ 1341, 1956. Indeed, *Van Alstyne* nowhere mentioned the statutory maximum for mail fraud in its consideration of the merger problem. The case on which the majority relies, *Bush* — again decided on plain error review, *see* 626 F.3d at 533 — followed the Sixth Circuit's approach, rather than our own.[21]

In any event, the extent of the "additional" sentencing exposure that Grasso "face[d]" as a result of the money laundering charge, *see Santos*, 553 U.S. at 516, was identical to what Van Alstyne faced, *see Van Alstyne*, 584 F.3d at 809 (noting that Van Alstyne was convicted of mail fraud in violation of 18 U.S.C § 1341); 18 U.S.C § 1341 (providing a statutory maximum of 30 years). As we are bound by precedents involving "nearly identical facts," *see United States v. Vasquez-Ramos*, 531 F.3d 987, 989 (9th Cir. 2008) (per curiam), the statutory maximums at issue are simply not a basis for treating Grasso's case differently than Van Alstyne's. Nor, were we considering the issue ab initio, could it fairly be said that a 20-year increase of a 30-year sentence is not "radical[]," *see Santos*, 553 U.S. at 517, in the ordinary sense of being "marked by a considerable departure from the usual or traditional," *see* Webster's Collegiate Dictionary 1025 (11th ed. 2003) (defining "radical").

4.

The majority's final rationale for resisting the merger problem here is that there is ostensibly no such problem when a "money laundering conviction is based on . . . transfers to co-conspirators." *See* Maj. Op. at 34. To be sure, some transfers of funds among co-conspirators raise no merger problem. But while some such transfers merely involve co-conspirators "reaping the fruits of their crimes," others represent payments of essential expenses of a fraud scheme. *See Cloud*, 680 F.3d at 406 n.4. In the latter instance, a merger problem plainly exists.

Again, the Fourth Circuit's cogent analysis is instructive. In *Cloud*, several of the money laundering convictions reversed on appeal involved payments to co-conspirators; "it

21. *United States v. Phillips*, 704 F.3d 754 (9th Cir. 2012), also cited by the majority, also reviewed a money laundering conviction only for plain error, *id.* at 762, and followed *Bush*, rather than *Van Alstyne*, in assessing the relevance of the increase in the defendant's sentence, *see id.* at 766 n.11.

was only through the promise of these payments that Cloud was able to persuade his coconspirators to do business with him." *Abdulwahab*, 715 F.3d at 531. In so concluding, the Fourth Circuit carefully examined the "nature of the payment" and its relevance to the scheme. *Cloud*, 680 F.3d at 406 n.4; *accord Van Alstyne*, 584 F.3d at 815. The court distinguished the scheme that Cloud perpetuated from the scheme in an earlier case, *United States v. Halstead*, 634 F.3d 270 (4th Cir. 2011), in which co-conspirators orchestrated insurance fraud. The *Halstead* defendants were charged with money laundering only because ill-gotten funds were ultimately transferred to their checking accounts. *Cloud*, 680 F.3d at 406 n.4 (citing *Halstead*, 634 F.3d at 273, 279). In *Halstead*, the fact that the defendants ultimately paid themselves posed no merger problem, as they "were not paying the expenses of the fraud, but rather were reaping the fruits of their crimes." *Cloud*, 680 F.3d at 406 n.4.

The majority misconstrues our own case law in concluding that we have foreclosed all *Santos*-based challenges to money laundering convictions simply because predicated on payments to co-conspirators. In *Van Alstyne*, for instance, we noted that a "'merger' problem may . . . be triggered when multiple participants share profits." 584 F.3d at 815. The two cases on which the majority relies — *United States v. Webster*, 623 F.3d 901 (9th Cir. 2010), and *United States v. Wilkes*, 662 F.3d 524 (9th Cir. 2011) — are not to the contrary.

Webster involved a conspiracy to distribute methamphetamine. *See Webster*, 623 F.3d at 905. Webster argued on appeal that given the charges for conspiracy to possess with intent to distribute methamphetamine, 21 U.S.C. § 846, and possession with intent to distribute methamphetamine, 21 U.S.C. § 841(a)(1), *Santos* barred an additional charge for money laundering, without proof that the "proceeds" involved in the relevant transactions represented "profits." *Webster*, 623 F.3d at 905. *Webster* did not specify the transactions that gave rise to the money laundering charge, and nothing in the opinion indicates that the charge was for transactions involving "essential expenses" of the underlying drug conspiracy. *See Santos*, 553 U.S. at 528 (Stevens, J., concurring).[22] We rejected Webster's challenge to his money laundering conviction, explaining that under the relevant statutes, the drug crimes with which Webster was charged "need not involve the exchange of money"; there was accordingly no merger problem. *See Webster*, 623 F.3d at 906. We also noted that Justice Stevens's concurrence in *Santos* took the position that the legislative history of the money laundering statute, 18 U.S.C. § 1956, indicated that no merger problem exists in the particular case in which a money laundering charge is based on a transaction involving "'gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.'" *Id.* (quoting *Santos*, 553 U.S. at 526 (Stevens, J., concurring)). Because the four dissenting Justices in *Santos* agreed with Justice Stevens in that regard, *see Santos*, 553 U.S. at 531–32 (Alito, J., dissenting), we concluded that a majority of the Supreme Court had held that no merger problem existed where "a money laundering count is based on transfers among co-conspirators of money from the sale of drugs." *Webster*, 623 F.3d at 906. As the majority recognizes, *see* Maj Op. at 29, *Webster* alone does not stand for the broad proposition that payments to co-conspirators more generally present no merger problem.

Turning to *Wilkes*, the defendant was charged with honest services wire fraud, bribery, and money laundering, in connection with a scheme to bribe a member of Congress, Randall "Duke" Cunningham. *See* 662 F.3d at 530. Cunningham secured "millions of dollars in appropriations for . . . [the] benefit" of Wilkes and another co-conspirator. *Id.* at 531. "[T]hrough a complicated series of financial transactions among multiple companies, Wilkes paid off $525,000 on Cunningham's second mortgage." *Id.* Wilkes was charged with money laundering for making a wire transfer in the course of those transactions. On appeal, Wilkes argued that the wire transfer at issue was "merely an expense associated with the bribery, and, thus, not 'proceeds.'" *Id.* at 549. *Wilkes* explained that unlike the defendant in *Santos*, who was charged with *promotional* money laundering, Wilkes was charged with *concealment* money laundering. *Id.* Rather than using funds associated with the bribery scheme to remit payment directly to Cunningham, "Wilkes transferred the $525,000" from one of his companies, to "another of his accounts, WBR Equities." *Id.* at 547. The panel emphasized the measures that Wilkes took to disguise the source of the funds:

> Wilkes could have sent the $525,000 from WBR Equities to Cunningham or Coastal Capital directly. Again, he did not. Instead, he wired $525,000 from WBR Equities to Parkview Financial, Inc. In the meantime, Parkview Financial and Coastal had engaged in a series of transactions of their own, which provided additional buffers between the corrupt contract and the payoff of Cunningham's mortgage. Concealing this connection appears to be the dominant, if not the only, purpose of these multi-layered transactions.

Id. Because of the extensive steps Wilkes took to conceal the source of the funds, Wilkes's conduct was separately chargeable as concealment money laundering, rather than just as a transaction "that involve[d] nothing but the initial crime," namely bribery. *See id.* at 547, 549. No merger problem therefore existed.

Wilkes also noted that as in "*Webster*, Wilkes's money laundering count was based on a transfer to a co-conspirator of money" from a scheme "such that 'proceeds' would include all 'receipts' from" that scheme. *See id.* at 549. But the opinion contained no analysis in support of that conclusion. *See id.* Unlike the majority, I do not read *Wilkes* for

22. My review of Webster's briefs on appeal, and his letter pursuant to Rule 28(j) in which he initially raised the merger argument, confirms that Webster never argued that the transactions were for expenses necessary to consummate the charged drug crimes.

the expansive proposition that whenever a "transfer to a co-conspirator" occurred, there could, ipso facto, be no merger problem.

First, as a three judge panel, absent intervening controlling authority — of which there has been none — *Wilkes* could not have overruled *Van Alstyne*, in which we noted that a "'merger' problem may . . . be triggered when multiple participants share profits." 584 F.3d at 815; *see Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Second, as noted, *Wilkes* expressly rejected the defendant's characterization of the "multi-layered transactions" as essential elements of the overall bribery scheme. *Wilkes*, 662 F.3d at 547. Instead, the court held that the wire transfers were "additional act[s]" separately chargeable as concealment money laundering. *Id.* at 547, 549. The majority's broader reading of *Wilkes* is foreclosed by the fact that unlike in Grasso's case, *Wilkes* involved no payments "necessary" to the scheme.[23] *See Van Alstyne*, 584 F.3d at 815.

In short, neither *Webster* nor *Wilkes* — individually or collectively — can sustain the weight that the majority places on them. Neither case dealt with a payment to a co-conspirator involving essential expenses of the underlying scheme. *Webster* was, in the Fourth Circuit's useful parlance, a case in which the defendant merely "reap[ed] the fruits of [his] crimes." *See Cloud*, 680 F.3d at 406 n.4. *Wilkes* involved a money laundering charge that did not merge with the bribery count because it was separately chargeable as concealment money laundering. *See Wilkes*, 584 F.3d at 815.

C.

Only by reading a series of heretofore nonexistent rules into our case law does the majority avoid the conclusion that Grasso's money laundering convictions are barred by *Santos* and its progeny. Because a proper analysis of "the concrete details of the particular scheme" with which Grasso was charged reveals that the additional money laundering charges pose an unequivocal merger problem, I would reverse Grasso's money laundering convictions. *See Van Alstyne*, 584 F.3d at 815 (internal quotation marks omitted).

23. Notably, the government has not defended Grasso's money laundering convictions on the ground that they were "additional acts" separately chargeable as concealment money laundering.

Cite as 13 C.D.O.S. 7965

MICHAEL JOE MURDAUGH, Petitioner-Appellant,

v.

CHARLES L. RYAN , Respondent-Appellee.

No. 10-99020
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:09-CV-00831-FJM
Appeal from the United States District Court for the District of Arizona
Frederick J. Martone, District Judge, Presiding
Argued and Submitted February 13, 2013—San Francisco, California
Filed July 26, 2013
Before: Dorothy W. Nelson, Stephen Reinhardt, and Milan D. Smith, Jr., Circuit Judges.
Opinion by Judge Nelson

COUNSEL

Paula K. Harms (argued) and Therese M. Day, Federal Public Defender's Office, Phoenix, Arizona, for Petitioner-Appellant.

Jeffrey A. Zick (argued), Arizona Attorney General's Office, Phoenix, Arizona, for Respondent-Appellee.

OPINION

NELSON, Senior Circuit Judge:

Petitioner Michael Joe Murdaugh appeals the denial of his federal habeas petition, which challenges his murder conviction and death sentence. Murdaugh claims that the district court erred in denying claims brought pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), and *Tennard v. Dretke*, 542 U.S. 274 (2004), as well as claims raising other errors by the state court and the ineffective assistance of counsel. Murdaugh also argues that the district court erred in deeming various claims procedurally defaulted. We grant relief on Murdaugh's *Ring* claim and reserve judgment on Murdaugh's claims about his competence to waive the presentation of mitigating evidence. We otherwise affirm the district court.

I. BACKGROUND

1. The Murders of David Reynolds and Douglas Eggert

On June 26, 1995, Murdaugh's girlfriend, Rebecca Rohrs, met David Reynolds at a gas station[1] She told him she was

1. These facts are drawn from the Arizona Supreme Court's summary of the evidence supporting Murdaugh's convictions, which are "presumed to be correct," unless Murdaugh rebuts that presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Murdaugh does not challenge any of these facts in his petition.

looking for a job, and they exchanged phone numbers. The conversation took a sordid turn when Reynolds offered to pay Rohrs to perform oral sex. Rohrs declined, returned home, and described the encounter to Murdaugh. Murdaugh decided "to teach Reynolds a lesson," and told Rohrs to invite him over. Murdaugh then left with his friend Jesse Dezarn to buy methamphetamine, instructing Rohrs to page them as soon as Reynolds arrived.

When they learned that Reynolds had arrived, Murdaugh and Dezarn quickly returned to the house, brandishing firearms. While Murdaugh confronted Reynolds, Rohrs and her friend Betty Gross looted Reynolds's plumbing van outside. Murdaugh eventually came out of the house and reprimanded them for not wearing gloves and leaving fingerprints on everything. He exclaimed, "Do you know what I am going to have to do now?"

Later that night, Murdaugh took Reynolds to his garage and ordered him into the trunk of his car. Murdaugh, Dezarn, Gross, and Rohrs all returned to the garage throughout the night to use methamphetamine.

In the early hours of the next morning, Murdaugh and Dezarn decided to abandon Reynolds's van near a cemetery. While stopping for gas on the way back to the house, they ran into an acquaintance, Ron Jesse. They asked Jesse for drugs, and he returned to the house with them. Dezarn and Jesse then left the house to buy more methamphetamine. Upon their return, Murdaugh, Dezarn, and Jesse began using methamphetamine in the garage. At around 8:30 AM, Gross and Rohrs joined them, and the group continued taking drugs.

While they were all in the garage, Murdaugh opened the trunk of his car to show Jesse that he was holding Reynolds inside. At this point, Reynolds asked to use the bathroom. Murdaugh led Reynolds to a corner of the garage to urinate, and while Reynolds's back was turned, Murdaugh struck him on the head with a meat tenderizer. Reynolds fell to the ground, and Murdaugh picked up a metal jackhammer spike and continued to hit him in the face and head. Three major crushing blows to Reynolds's skull killed him. Murdaugh then instructed Gross and Rohrs to sprinkle horse manure over the body and the surrounding blood.

At some point after the murder, Jesse attempted to leave Murdaugh's property but could not because the gate was locked. Murdaugh approached Jesse and threatened him, saying that if he told anyone what happened, Murdaugh would "kill [Jesse] last and peel the skin off his children."

That evening, Murdaugh and Dezarn loaded Reynolds's body into Murdaugh's horse trailer. Murdaugh told Rohrs to clean up the blood in the garage and then left to go camping. At the campsite, Murdaugh dismembered Reynolds's body in an effort to prevent identification of the remains. He cut off Reynolds's head and hands, sliced off Reynolds's finger pads, and pulled out Reynolds's teeth. As he was driving to a separate site to bury the body, he threw the teeth and finger pads from the window of his truck. He then buried the head and hands in one shallow grave and the torso in another.

Over the next several days, the police began investigating Reynolds's disappearance. The police found Reynolds's van, obtained copies of Reynolds's cell phone records, and then contacted Rohrs. The police also interviewed Jesse, who told them he had witnessed Reynolds's murder. The police obtained a search warrant for Murdaugh's home and garage and found the scene exactly as Murdaugh had left it. The Maricopa County Sheriff's Office put out an alert notifying law enforcement agencies that they were looking for Murdaugh.

Investigators ultimately tracked down Murdaugh after he checked himself into an emergency room for a knife wound he sustained while cleaning one of his horses's hooves. After waiving his *Miranda* rights, Murdaugh confessed to the murder and told the detectives where to find Reynolds's body. Because Reynolds's murder was similar to the previous murder of a victim named Douglas Eggert, the police asked Murdaugh if he had ever done anything like this before. Murdaugh then admitted to killing Eggert by beating him to death with a meat tenderizer.

2. Conviction

An Arizona grand jury charged Murdaugh with first degree murder, kidnapping, aggravated robbery, and aggravated assault in connection with Reynolds's death. It also charged Murdaugh with the first-degree murder and kidnapping of Eggert. The state appointed Jess Lorona to represent Murdaugh.

In November 1998, the trial court ordered a competency screening of Murdaugh. Dr. Jack Potts, a forensic psychologist, noted that Murdaugh held some fringe beliefs but expressed a desire to plead guilty to avoid putting his family and those of the victims through a trial. Dr. Potts concluded that Murdaugh was aware of the charges against him and understood both his constitutional rights and the consequences of pleading guilty.

The court then appointed Drs. Scialli and Sindelar to assess Murdaugh's competence. Both found Murdaugh competent to plead guilty. The parties stipulated that the court could determine Murdaugh's competency on the basis of these reports. The trial court then found Murdaugh competent.

Around this time, Murdaugh repeatedly requested a skull x-ray because he believed that a tracking device had been implanted in his head. The deputy district attorney, Mark Barry, asked the court to order the skull x-ray. He argued that the x-ray would reassure Murdaugh that no tracking device existed and that it would "alleviate any potential coercive allegations raised at any future plea proceedings." The trial court granted the request.

In May 1999, the trial court ordered a competency screening to reevaluate Murdaugh. Dr. Potts submitted a screening evaluation of Murdaugh in September 1999, in which he described Murdaugh as "continuing to experience paranoid beliefs and delusions secondary to his past amphetamine abuse." Dr. Potts recounted that Murdaugh had requested a skull x-ray but had received a CT scan instead. The scan

did not show an implant, but Murdaugh believed the results were doctored and requested an MRI. Dr. Potts concluded that Murdaugh "is an intelligent man who is simply expressing a very strong desire based on a clearly false belief. He is capable of weighing various options." Dr. Potts opined that Murdaugh "fully appreciates the necessary waiver of his rights by entering a plea of guilty," and "fully understands the consequences of entering the plea."

Murdaugh pled guilty to both indictments in January of 2000. The plea agreement provided that the state would not seek the death penalty for Eggert's murder, but that the conviction for that crime could still constitute an aggravating factor in sentencing Murdaugh for Reynolds's murder.

3. Sentencing

Over the course of the next year, the defense team prepared a mitigation case by retaining a psychiatrist and an addictionologist, seeking the release of Murdaugh's Rolodex from the state to contact character witnesses, and having the mitigation specialist prepare a mitigation report. The trial court ordered Murdaugh's mitigation experts, Dr. Demming and Dr. Shaw, and Lisa Christianson, to submit their reports to the state by August 24, 2001.

On August 27, 2001, Lorona notified the state that Murdaugh would not allow him to file with the court, or provide to the prosecution, any of the mitigation materials the defense had prepared. The state moved to compel and sought sanctions against Lorona.

The trial court held a hearing on September 7, 2001. Lorona told the court that Murdaugh feared that his life was in danger and believed that staying in the Arizona Department of Corrections would effectively be a death sentence whether or not he was sentenced to death. Lorona had asked the state to agree to an interstate compact to allow Murdaugh to serve his time outside Arizona, but the state refused. The court clarified that it did not have the authority to tell the Department of Corrections where to place an inmate.

Because he could not serve a life sentence outside of Arizona, Murdaugh instructed his counsel that he did not want to put on any mitigation case at all. The court informed Murdaugh that if he did not present mitigation, the court would seek mitigating evidence from any source legitimately available to the court and would put the burden on the state to provide mitigating evidence.

Three weeks later, the court held another hearing about Murdaugh's objection to the presentation of mitigating evidence. Lorona explained that though he thought Murdaugh was competent to waive mitigating evidence, the court was required to determine the competency issue before proceeding. The court considered whether it could compel either side to present mitigating evidence and asked for evidence regarding Murdaugh's competence.

The DA offered the testimony of the state's expert, Dr. Lang. Dr. Lang had experience conducting competency evaluations but did not do one in this case. She testified that during the time she spent with Murdaugh, she did not observe any indications that the petitioner was unable to understand the nature of the proceedings against him or that he was incompetent. Dr. Lang also testified that Murdaugh was able to state the charges against him, seemed to understand her questions, and appeared coherent, and that she had no reason to disagree with the prior competency determinations made before Murdaugh pled guilty. Lorona asked the court to take judicial notice of the earlier reports submitted by Drs. Scialli, Sindelar, and Potts regarding Murdaugh's competence to plead guilty. The court did so.

The court found Murdaugh competent to assist counsel, to understand the nature of the proceedings, and to waive his right to present mitigating evidence. The court went on to conclude that the petitioner had a Fifth Amendment right "not to testify directly or indirectly through other means." The court ruled that it would not compel the defense to present mitigation but that it would compel the state to do so.

The state then proceeded to present mitigating evidence. The state first moved to admit the materials Dr. Deming used in preparing his report, as well as a preliminary draft of Dr. Deming's report and a 1978 medical records evaluation of Murdaugh. Defense counsel objected, arguing that any information beyond what was contained in the Rule 11 competency reports was private. The trial court sustained the objection and declined to consider these materials, finding that to do so would moot Murdaugh's waiver of mitigation.

The state next called Dr. Lang to offer mitigating evidence. Dr. Lang testified that she had diagnosed Murdaugh with polysubstance dependence based on his history of drug abuse and with antisocial personality disorder based on his history of aggressive and violent behavior, disrespect for society, involvement in illegal activity, and personality testing. Dr. Lang also testified that she did not believe Murdaugh was paranoid or delusional at the time of the offense, that neither his capacity to appreciate the wrongfulness of his conduct nor to conform his conduct to the requirements of law were significantly impaired at the time of the offense, and that his cognitive functioning was unimpaired.

More than halfway through this testimony, Lorona asked, "Is there some mitigation here somewhere?" The court noted its concern that the state was using the presentation of mitigating evidence as a pretense to introduce additional aggravating evidence. The court then proceeded to question Dr. Lang directly about Murdaugh's drug use leading up to Reynolds's murder and how it affected Murdaugh's mental state. Dr. Lang testified that the psychological impact of methamphetamine ingestion varies but can include euphoria, a feeling of power, increased energy, and decreased need to sleep or eat; it also may aggravate aggression and paranoia. Defense counsel declined to cross-examine Dr. Lang.

Despite Murdaugh's decision to waive mitigation, Lorona filed a six-page sentencing memorandum that was limited to the evidence that had been filed with the court. It did not refer to any of the mitigation reports. Counsel argued that

Murdaugh's convictions for Eggert's death could establish either of two aggravating factors[2]: that Eggert's murder was a crime for which Murdaugh could be sentenced to life imprisonment or the death penalty, (F)(1), or that Eggert's murder was a prior violent felony, (F)(2). Ariz. Rev. Stat. §§ 13-703(F)(1), (F)(2) (2001). Counsel argued, though, that in accordance with the terms of the plea agreement, Eggert's murder could not establish both factors. Counsel also argued that the state had not established aggravating factor (F)(5), pecuniary gain. Finally, counsel argued that the state had not proved beyond a reasonable doubt factor (F)(6) or that the offense was committed in an especially heinous, cruel, or depraved manner. With respect to statutory mitigating circumstances,[3] counsel asserted that Murdaugh's methamphetamine use rendered him unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, but not so much as to constitute a defense. Counsel pointed to testimony offered at presentence hearings that Murdaugh was under the influence of methamphetamine at the time of the killing.

The trial court sentenced Murdaugh to death. The court found Reynolds's murder was especially cruel, heinous or depraved under Arizona Revised Statute § 13-703(F)(6), and found Eggert's murder to be an aggravating circumstance under Arizona Revised Statute § 13-703(F)(1). The court considered the five statutory mitigating factors. *Id.* §§ 13703(G)(1)–(5). The court found that there was some evidence to support factor (G)(1), that the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was significantly impaired. This evidence included the four reports prepared for Murdaugh's competency determinations before he pled guilty, his paranoid thoughts, and his long history of chronic drug abuse. The court also considered the testimony of Dr. Lang, but "only to the extent her testimony offered mitigating evidence." The court ultimately concluded that the evidence did not establish the (G)(1) mitigating factor.

The court next found eight non-statutory mitigating factors: (1) Murdaugh was under the influence of drugs at the time of the crime; (2) he was a chronic drug abuser; (3) he has a personality disorder; (4) he experiences paranoid thoughts; (5) the combination of these four circumstances may have impacted his mental abilities; (6) he cooperated with law enforcement; (7) he lacked a prior criminal record; and (8) he admitted guilt and expressed concern toward the families of his victims. The court afforded these factors little weight and the aggravating factors great weight. The court concluded that the nonstatutory factors were insufficient to warrant leniency.

4. Direct Appeal

The Arizona Supreme Court upheld Murdaugh's convictions and death sentence on direct appeal. *State v. Murdaugh*, 97 P.3d 844 (Ariz. 2004) (en banc). The court addressed four issues. First, it held that the delay in Murdaugh's case did not constitute cruel and unusual punishment. *Id.* at 851. Second, it held that reasonable evidence supported the trial court's finding that Murdaugh was competent to plead guilty. *Id.* at 852. Third, the court rejected Murdaugh's argument that his guilty plea was not knowingly made because he was not told he had a Sixth Amendment right to have a jury determine his sentence. *Id.* at 853–54. The court held that such a right did not exist at the time Murdaugh pled guilty. *Id.* at 853. Additionally, the court found nothing in the record that indicated that Murdaugh's decision to plead guilty was influenced by whether a judge or a jury would decide if he deserved to be sentenced to death. *Id.* at 854.

Finally, the court addressed Murdaugh's *Ring* claim that he was improperly sentenced by a judge rather than a jury. *Id.* at 854–62. The court began by reiterating that *Ring* error is procedural error subject to harmless error review, not structural error as Murdaugh argued. *Id.* at 854–55. Reviewing Murdaugh's sentence for harmless error, the court found that

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2. At the time of Murdaugh's sentencing, Arizona law required a sentencing judge to find one or more of fourteen enumerated aggravating circumstances before a capital defendant could be eligible for the death penalty. *See* Ariz. Rev. Stat. § 13-703(E). The four aggravating circumstances relevant to this appeal are:

> (F)(1). The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> (F)(2). The defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.
>
> (F)(5). The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
>
> (F)(6). The defendant committed the offense in an especially heinous, cruel or depraved manner.

See id. § 13-703(F).

3. Arizona law at the time required a sentencing judge to consider five "statutory" mitigating circumstances:

> (G)(1). The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> (G)(2). The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> (G)(3). The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> (G)(4). The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> (G)(5). The defendant's age.

Ariz. Rev. Stat. § 13-703(G). It also required the judge to consider any other "nonstatutory" mitigating circumstances that were "relevant in determining whether to impose a sentence less than death." *Id.*

the (F)(1) aggravating factor fell outside the *Ring* rule and that the state had proven the (F)(6) aggravating factor beyond a reasonable doubt. *Id.* at 855–58. Considering the mitigating evidence adduced during the penalty phase, including Murdaugh's sentencing memorandum, Dr. Lang's testimony during the sentencing hearing, the facts as recounted by the trial court, evidence that Murdaugh took steps to avoid detection, and the competency reports produced before the plea agreement, the court held that no reasonable jury could find that the evidence was "sufficiently substantial" to call for leniency. *Id.* at 859–60. The court further held that because no mental health professional found a causal nexus between Murdaugh's paranoid thoughts and delusions and the murders, no reasonable jury would have weighed these factors any differently than did the trial judge. *Id.* at 860. Finally, the court noted that the record did not support any mitigating circumstance not considered by the trial court. *Id.* at 861–62.

Justice Berch dissented on the *Ring* issue. *Id.* at 862–64. She argued that a jury could have found the evidence of Murdaugh's mental impairment from chronic drug abuse more important than the judge did in deciding the (F)(6) aggravating factor. *Id.* at 863–64. She also pointed out that the majority acknowledged that "some evidence support[ed] a finding of the statutory mitigating factor [of drug impairment] under [Ariz. Rev. Stat.] § 13-703(G)(1)" making it plausible that a reasonable jury could have found that the factor existed. *Id.* at 864. Finally, she noted that the aggravating factors here were similar to those in *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003), a case in which the court remanded for resentencing. *Id.*

5. Post-Conviction Review

Murdaugh raised twelve claims in his petition for post-conviction review, and the Arizona state court denied relief. Concerning his claim that the competency determination was inadequate, the court found that there was no need for the trial court to conduct a further competency determination, as the record was devoid of any evidence suggesting that Murdaugh's decision to plead guilty was not based on his desire to spare the victim's family and his family from trial.

The court held that Murdaugh's second claim for invalid waiver of mitigation was precluded because he failed to raise the claim on appeal. The court further found that Murdaugh was aware of the mitigation evidence that could be presented but nevertheless decided not to present it. The court also noted that the trial court "considered and found mitigation" despite Murdaugh's waiver.

The court found Murdaugh's third claim for mental competence was precluded.

The court dismissed Murdaugh's fourth claim that his guilty plea and decision to waive mitigation were involuntary because they were the products of false promises and threats, finding that the trial court carefully questioned Murdaugh during his plea colloquy and that Murdaugh told the trial court there were no other promises made to him.

The court set an evidentiary hearing to determine the merits of Murdaugh's sixth claim for ineffective assistance of trial counsel. The court rejected Murdaugh's claims about inadequate public financing of his trial and appellate counsel, finding that there was no legal basis to determine that the Office of Court Appointed Counsel's authorized pay scale was inadequate.

The court held the trial court's order that the prosecutor present mitigation evidence did not create a conflict of interest, and additionally that this claim was precluded.

Concerning Murdaugh's claim that the sentencing court used an unconstitutional nexus text, the court held that the court used the lack of a causal nexus to weigh the evidence, rather than to screen it out. The court pointed out that the trial court did in fact find Murdaugh's mental state and methamphetamine addiction at the time of the crime to be mitigating circumstances, and gave them little weight.

The court summarily dismissed Murdaugh's claim that the Arizona Supreme Court erroneously determined that the *Ring* violation was subject to harmless error analysis, and his claim that his appellate counsel was ineffective for failing to raise the issue of whether a *Ring* violation is subject to harmless error analysis and for failing to raise whether there was a proper determination that the *Ring* violation was harmless error.

The court also dismissed Murdaugh's claim that lethal injection is cruel and unusual punishment.

6. State Court Evidentiary Hearing

The post-conviction court held an evidentiary hearing to determine the merits of Murdaugh's alleged fifteen instances of ineffective assistance of trial counsel. Murdaugh claimed his counsel knew or should have known that he was not competent to waive mitigation and that counsel breached his duty to investigate Murdaugh's competency further. The court reviewed all of the doctors' reports that trial counsel had before Murdaugh waived mitigation and found that nothing in the record, or in the evidence presented during the evidentiary hearing, showed that Murdaugh's competence at the time he waived mitigation had deteriorated from the time he was deemed competent at his change of plea. Moreover, no evidence had been presented to undermine the trial court's finding of competence. The court also concluded that Murdaugh failed to show prejudice both because a competent defendant has the right to ignore the intelligent advice of his counsel, and because the mitigating evidence, if presented, would not have overcome the aggravating evidence. The court declined to consider trial counsel's performance.

The Arizona Supreme Court denied Murdaugh's petition for review of the denial of post-conviction relief.

7. District Court Decision

Murdaugh filed a federal habeas petition, which the district court denied in full. The court also denied Murdaugh's motions for evidentiary development. The court found that

many of the claims were record-based and did not require evidentiary development. For those that were not record-based, the court found that Murdaugh had not shown good cause for discovery or had failed to identify contested facts bearing on the merits of his petition. The court also denied an evidentiary hearing. The court granted a certificate of appealability with respect to eight claims. We expanded the certificate of appealability to include four additional claims briefed by Murdaugh on appeal.

II. STANDARD OF REVIEW

We review the denial of habeas relief de novo, *Doody v. Ryan*, 649 F.3d 986, 1001 (9th Cir. 2011) (en banc), and the district court's findings of fact for clear error, *Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). We review the denial of an evidentiary hearing for abuse of discretion. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs Murdaugh's petition because he filed it after the statute went into effect. *See Lindh v. Murphy*, 521 U.S. 320, 336–37 (1997). AEPDA circumscribes a federal court's power to grant habeas relief to a state prisoner. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). When a state court has adjudicated a claim on the merits, we may grant relief only if the state court's resolution of that claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Clearly established federal law "refers to the holdings, as opposed to the dicta, of th[e Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision can involve an unreasonable application of Supreme Court precedent in one of two ways: "[I]f the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. In considering whether the state court unreasonably applied clearly established federal law, review is limited to the factual record that was before the state court that adjudicated the claim on the merits. *Pinholster*, 131 S. Ct. at 1398.

In determining whether a state court made an unreasonable determination of the facts, "it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004).

III. DISCUSSION

1. Ring Claim

In *Ring v. Arizona (Ring II)*, 536 U.S. 584, 588–89 (2002), the Supreme Court held that a defendant is entitled to a jury determination of "the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." This holding followed from the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that a criminal defendant has a Sixth Amendment right to have a jury determine "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." In response to *Ring II*, Arizona amended its capital sentencing scheme. *See State v. Ring (Ring III)*, 65 P.3d 915, 926 (Ariz. 2003) (en banc) (describing Senate Bill 1001). The new procedure allowed the jury to find and consider the effect of aggravating and mitigating circumstances and to decide whether the defendant should be sentenced to death. Ariz. Rev. Stat. § 13-703.01(D) (2002).

On remand from the Supreme Court, the Arizona Supreme Court considered the impact of *Ring II* on all capital cases then pending on direct appeal. *Ring III*, 65 P.3d at 925. The court held that failing to submit capital aggravating factors to a jury did not require reversing the sentence if the error was harmless. *Id.* at 933–36. In reviewing *Ring* error for harmlessness, the court concluded that it was required to consider whether reversible *Ring* error occurred with respect to both the aggravating and mitigating circumstances. *See id.* at 942–43. In separate opinions, the court then individually reviewed for *Ring* error the death sentences of twenty-one defendants. In nineteen of these cases, the court found *Ring* error was not harmless and remanded for resentencing.[4] Here, obviously, the court did not.

4. *State v. Lamar*, 115 P.3d 611 (Ariz. 2005); *State v. Moody*, 94 P.3d 1119 (Ariz. 2004); *State v. Dann*, 79 P.3d 58 (Ariz. 2003); *State v. Montano*, 77 P.3d 1246 (Ariz. 2003); *State v. Nordstrom*, 77 P.3d 40 (Ariz. 2003); *State v. Rutledge*, 76 P.3d 443 (Ariz. 2003); *State v. Prasertphong*, 76 P.3d 438 (Ariz. 2003); *State v. Ring*, 76 P.3d 421 (Ariz. 2003); *State v. Cropper*, 76 P.3d 424 (Ariz. 2003); *State v. Prince*, 75 P.3d 114 (Ariz. 2003); *State v. Jones*, 72 P.3d 1264 (Ariz. 2003); *State v. Phillips*, 67 P.3d 1228 (Ariz. 2003); *State v. Finch*, 68 P.3d 123 (Ariz. 2003); *State v. Tucker*, 68 P.3d 110 (Ariz. 2003); *State v. Lehr*, 67 P.3d 703 (Ariz. 2003); *State v. Harrod*, 65 P.3d 948 (Ariz. 2003); *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003); *State v. Hoskins*, 65 P.3d 953 (Ariz. 2003); *State v. Canez*, 74 P.3d 932 (Ariz. 2003).

A) Scope of the Right

We must first determine the scope of the right articulated in *Ring II*. The state argues that our review for *Ring* error is limited by the express wording of *Ring II*, 536 U.S. at 588–89, which addressed only "the aggravating factors required by Arizona law for imposition of the death penalty."[5] A narrow reading of *Ring II* would extend the Sixth Amendment right no further than its express holding by concluding that a defendant only has a right to have a jury determine aggravating factors.

We are not convinced that *Ring II* should be read so narrowly. Echoing *Apprendi*, the *Ring II* Court held that a jury must find any fact upon which the "increase of a defendant's authorized punishment [is] contingent." *Ring II*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482–83). The Court stressed that "the inquiry is one not of form, but of effect." *Id.* (quoting *Apprendi*, 530 U.S. at 494) (internal quotation marks omitted). Because the penalty of death was contingent on the presence or absence of aggravating factors under Arizona law, the Court held that *Apprendi* required a jury to find them. *Id.* at 609.

But the existence of an aggravating factor was not the only death-qualifying element of Arizona's superseded capital sentencing statute. In *Ring II*, the Supreme Court described several determinations that had to occur under Arizona law before a defendant became death-eligible, including the judge's determination that "there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 593 (quoting Ariz. Rev. Stat. § 13-703(F) (2001)).[6] Arizona's sentencing scheme required a judge "to determine if there are any mitigating circumstances" and "weigh them against the aggravators and decide by 'special verdict' whether a death sentence is appropriate." *State v. Ring (Ring I)*, 25 P.3d 1139, 1151 (Ariz. 2001) (citations omitted). The statute required "more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." *Ring III*, 65 P.3d at 946. It also mandated that "a trier of fact . . . determine whether mitigating circumstances call[ed] for leniency." *Id.*

Under the superseded law, a defendant's eligibility for a death sentence was effectively contingent on the judge's findings regarding *both* aggravating and mitigating circumstances. The "ultimate element" qualifying the defendant for death was "at least one aggravating circumstance not outweighed by one or more mitigating factors." *Ring III*, 65 P.3d at 935 (citing Ariz. Rev. Stat. § 13-703(E)); *see also Ring II*, 536 U.S. at 593. A judge's determination that no mitigating circumstances existed therefore also served to establish a fact that qualified a defendant for the death sentence. Applying the rationale of *Apprendi* and *Ring II*, the existence or absence of a mitigating circumstance was thus a finding of fact upon which the "increase of a defendant's authorized punishment [was] contingent." *Ring II*, 536 U.S. at 602.

This reasoning makes sense given the nature of factfinding at the death-sentencing stage. A finding that certain facts establish an aggravating factor often necessarily implies that the same facts do not establish a mitigating factor. In this appeal, for instance, Murdaugh argues his dismemberment of Reynolds's body demonstrates his paranoia and delusions, and therefore helps establish a mitigating circumstance. The state argues, conversely, that the mutilation establishes that the murder was depraved. In finding that dismemberment supported the (F)(6) aggravating factor, then, the trial judge also implicitly found that this evidence did not establish any mitigating factors. The intertwined nature of the inquiry means that a factfinder's analysis of aggravating factors in isolation is conceptually untenable.

A jury's findings concerning aggravating factors are also necessarily intertwined with its findings about mitigating circumstances because of the process for hearing evidence at the sentencing stage. A jury does not hear the aggravating evidence in a void. Rather, a defendant presents mitigating evidence, following the state's presentation of aggravating evidence, in an attempt to establish some basis for leniency. *See* Ariz. Rev. State. §§ 13-752(E)–(G) (2012). It would be impossible for a jury to consider only the aggravating evidence in determining whether the aggravating factors were met without also implicitly considering contravening mitigating evidence. A jury that has listened to extensive mitigating evidence about the defendant's good character, for instance, may be much less likely to find the defendant acted heinously or cruelly in committing the offense. The right to have a jury determine aggravating factors is therefore also a de facto right to have a jury determine mitigating facts.[7]

5. The question presented in *Ring II* was: "whether [the] aggravating factor may be found by the judge . . . or whether the Sixth Amendment's jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury." 536 U.S. at 597.

6. Unless otherwise noted, subsequent citations to Arizona statutes refer to those statutes as they existed in 2001.

7. In practical effect, *Ring II* created a right to have the jury determine all the facts on which a sentence of death depended, both aggravating and mitigating, since capital sentencing statutes assigned this function to one factfinder. *See Ring III*, 65 P.3d at 943. The capital sentencing statutes in all states with the death penalty, with the sole exception of Nebraska, now require juries to consider mitigating evidence, determine the existence or absence of mitigating circumstances, and decide whether death is the appropriate sentence. *See* Ala. Stat. § 13A-5-46(e); Ark. Code §§ 5-4-602 (3)–(5), 603(a); Ariz. Rev. Stat. § 13-752; Cal. Penal Code § 190.3; Colo. Rev. Stat. § 18-1.3-1201(2)(a); Del. Code tit. 11, § 4209(c)(3); Fla. Stat. § 921.141(2); Ga. Code §§ 17-10-30(b), 31(a); Idaho Code § 19-2515(3)(b); Ind. Code § 35-50-2-9(l); Kan. Stat. § 216617(e); Ky. Rev. Stat. § 532.025(1)(b), (3); La. Code Crim. Proc. art. 905.3; Md. Crim. Law § 2-303(i)(1); Miss. Code § 99-19-101(3); Mo. Rev. Stat. §§ 565.030.4, 565.032; Nev. Rev. Stat. § 175.554; N.H. Rev. Stat. § 630:5(IV); N.C. Gen. Stat. § 15A-2000(b); N.Y. Crim. Proc. § 400.27; Ohio Rev. Code § 2929.03(D)(2); Okla. Stat., tit. 21, § 701.11; Or. Rev. Stat. § 163.150; 42 Pa. Cons. Stat. § 9711; S.C. Code § 16-3-20; S.D. Codified Laws § 23A-27A-3; Tenn. Code § 39-13-204; Tex. Code Crim. Proc. art. 37.071; Utah Code § 76-3-207; Va. Code § 19.2-264.4; Wash. Rev. Code § 10.95.060; Wyo. Stat. § 6-2-102. Although Montana has not revised its capital sentencing scheme since *Ring II*, *see* Mont. Code 46-18-301, the state also has not sentenced any defendant to death since 1996. *See* Death Penalty Information Center, Death Sentences in the United States from 1977 By State and By Year, http://www.death-

As the Supreme Court has stressed repeatedly, how a fact is labeled is irrelevant to the *Apprendi* analysis. *See Ring II*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 494. It is the effect of a fact that dictates whether a jury must determine it. *Apprendi*, 530 U.S. at 494; *see also Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (reiterating that any fact that has the effect of increasing the penalty for a crime must be submitted to the jury). Because the existence or absence of mitigating circumstances directly affected whether Murdaugh was death eligible under Arizona law, he had a right to have a jury decide those facts.[8]

B) Standard of Review

We next address Murdaugh's argument that, contrary to the holding of the Arizona Supreme Court, *Ring* error is structural and should not be subject to harmless error review.

In *Ring II*, the Supreme Court did not reach the question of whether the *Ring* error there was harmless, noting that "this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance." 536 U.S. at 609 n.7 (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)). The Court reiterated that it had left open the question of whether the error in *Ring II* was harmless in *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). The Court emphasized that where it has not set forth a standard of review for a constitutional error and the Court's precedent "is, at best, ambiguous," a federal court may not overrule a state court's decision to apply harmless error review. *Id.*

In *Ring III*, the Arizona Supreme Court definitively answered this question, applying the harmless error standard set forth in *Neder*. 65 P.3d at 935–36. As part of this review, the court asked whether it could conclude, "beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946. If, in future *Ring* error cases, the court could not answer this question in the affirmative, it would remand the case for resentencing by a jury. *Id.* The state challenged the Arizona Supreme Court's application of the harmless error test, arguing that this application of harmless error review, which included review of the mitigating factors for harmless error, was beyond the scope of the constitutional error articulated in *Ring II*. *See Nordstrom*, 77 P.3d at 46 n.5. The Arizona Supreme Court rejected this argument, and the Supreme Court denied certiorari. *See Pandeli*, 540 U.S. 962 (2003). Thus, it is now well-settled that *Ring* error is subject to the harmless error test articulated in *Ring III*, and we may not reconsider the issue here.

C) Harmless Error Review

Harmless error analysis requires federal courts to determine "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We "apply the *Brecht* test without regard for the state court's harmlessness determination." *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010) (citing *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007)). The *Brecht* standard has been described as follows:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos*, 328 U.S. at 765). "Where the record is so evenly balanced that a judge 'feels himself in virtual equipoise as to the harmlessness of the error' and has 'grave doubt about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so.'" *Id.* (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435, 437–38 (1995)) (alteration in original) (internal quotations omitted). Of course, here, the underlying error is the absence of a jury itself. Accordingly, the *Brecht* inquiry is whether the absence of a jury as factfinder at the penalty stage "substantially and injuriously" affected or influenced the outcome. In other words, we ask whether a rational jury could have found that the facts called for leniency. In order to determine whether Murdaugh has met the *Brecht* standard, we review the aggravating and mitigating factors.

a) Aggravating factors

The Arizona Supreme Court held that the (F)(1) aggravating factor fell outside the *Ring* rule and concluded that the government had proven the (F)(6) aggravating factor beyond a reasonable doubt.[9] Murdaugh does not challenge the court's

penaltyinfo.org/death-sentences-united-states-1977-2008 (last visited April 18, 2013).

The jury plays a similar role in the federal capital sentencing statute. *See* 18 U.S.C. § 3594. Even in those states where the ultimate jury recommendation of death remains nonbinding, the jury retains the role of first factfinder. *See* Ala. Stat. § 13A-5-46(e); Del. Code tit. 11, § 4209(c)(3); Fla. Stat. § 921.141(2); Ga. Code §§ 17-10-30(b), 31(a); Ky. Rev. Stat. § 532.025(1)(b), (3).

8. A narrow reading of *Ring II* is particularly problematic for an appellate court reviewing a *Ring* error for harmlessness. In many cases, the question of whether the judge's role in finding aggravating factors prejudiced the verdict will depend on the extant mitigating circumstances. Consider a judge who found two aggravating factors when a jury would have found only one. If there are no mitigating circumstances to counterbalance the unblemished aggravator, the error is inconsequentialbut if there are substantial mitigating circumstances, the error might make all the difference. *See State v. Lehr*, 67 P.3d 703, 705 (Ariz. 2003).

9. Recall that the (F)(1) aggravating factor is established when a defendant "has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." Ariz. Rev. Stat. § 13-703. The (F)(6) aggravating fac-

determination as to the (F)(1) aggravating factor. With respect to the (F)(6) factor, he argues that the Arizona Supreme Court's conclusion that any rational jury would have found the aggravating factor "hinged upon Murdaugh's mutilation of the body after the crime," which the court further found "needed to be motivated by debasement." Since he mutilated the body to avoid detection, Murdaugh contends a rational jury might not have found the F(6) factor.

But the court did not "hinge" its determination that the state had proven the (F)(6) factor on Murdaugh's mutilation of the body alone. *Murdaugh*, 97 P.3d at 856. The court correctly noted that the (F)(6) aggravating factor would have been established if the state had proven only one of the heinous, cruel, or depraved elements. *Id.* And, although the court concluded that "mutilation by itself will establish the elements of heinousness or depravity," *id.* at 858, the court nonetheless found that three other factors also supported a finding that the act was "heinous or depraved." According to the court, the state established beyond a reasonable doubt that (1) Murdaugh relished the murder, (2) the murder was senseless, and (3) the victim was helpless. *Id.* at 856.

Murdaugh is also incorrect in asserting that the Arizona Supreme Court found the mutilation "needed to be motivated by debasement." To the contrary, the court described how Murdaugh mutilated the body to prevent identification and cited *State v. James*, 685 P.2d 1293, 1299 (Ariz. 1984), for the proposition that "[t]he mode of disposing of the body itself demonstrates a certain callousness and depravity and disregard for the victim's family who might never have learned of the fate of [the victim]." *Id.* at 857. Thus, regardless of Murdaugh's ultimate purpose in mutilating the body, the court concluded the mutilation demonstrated depravity for purposes of finding the (F)(6) factor. *Id.*

Although Murdaugh is correct that "heinous and depraved" refers to the mental state of the defendant, it is the defendant's "words and actions" which demonstrate this mental state. *See State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983) (en banc). The Arizona Supreme Court has repeatedly held that needlessly mutilating a body is the kind of action that shows depravity, regardless of the mutilator's purpose. *See State v. Spencer*, 859 P.2d 146, 154 (Ariz. 1993); *James*, 685 P.2d at 1299. We conclude that no rational jury could have found that the evidence failed to establish the (F)(6) factor.

b) Mitigating factors

Murdaugh next argues that a rational jury could have found that his evidence established the (G)(1) mitigating factor and consequently imposed a sentence of life, not death. We agree. For the reasons discussed below, we hold that the *Ring* error had a "substantial and injurious effect or influence" on the trial court's failure to find the (G)(1) mitigating factor and thus the trial court's imposition of a death sentence.

The (G)(1) factor exists if the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired but not so impaired as to constitute a defense to prosecution." Ariz. Rev. Stat. § 13-703(G)(1). Drug impairment can be a mitigating circumstance under the (G)(1) factor, but only if the defendant can show a connection between the drug use and the offense. *See State v. Sansing*, 77 P.3d 30, 37 (Ariz. 2003). Typically, testimony by an expert witness can establish this causal nexus. *Id.* The claim of drug impairment is undermined, though, if the evidence shows "the defendant took steps to avoid prosecution shortly after the murder, or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior." *Id.* (quoting *State v. Rienhardt*, 951 P.2d 454, 466–67 (Ariz. 1997) (en banc)).

Even though Murdaugh did not present a mitigation case, the trial court considered the Rule 11 competency reports and Dr. Lang's testimony in determining whether the (G)(1) mitigating factor was established. This evidence included Dr. Potts's conclusion that "[t]he use of methamphetamine quite likely greatly contributed to the alleged offenses having occurred," as well as Dr. Sindelar's summary of Murdaugh's "long history of multiple substance abuse, including intravenous injection of methamphetamine." Based on this record, the trial court found that Murdaugh (1) evinced paranoid thoughts, including his paranoid belief that the CIA had placed a tracking device in his head; (2) had a long history of chronic drug abuse, which may have been a cause of his paranoid delusions; (3) was ingesting drugs and was under the influence of drugs when he murdered Reynolds; and (4) possibly suffered from a personality disorder amplified by methamphetamine abuse. In considering the totality of the circumstances, the trial court also found that Murdaugh arranged for Reynolds to be lured to his home, imprisoned him for an extended period of time, elaborately dismembered his body, and then was able to find medical care for himself when he injured his leg. The trial court concluded that "[t]he industry and thought, manifested over an extended period of time, which went into the murder of David Reynolds belies a finding that the Defendant was significantly impaired." On this basis, the trial court held that the record did not establish by a preponderance of the evidence that Murdaugh's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, and thus that the evidence did not establish the (G)(1) mitigating factor.

While it is certainly possible that a reasonable jury could have agreed with the trial judge and found that the facts surrounding the murder undermined the evidence of drug impairment in the Rule 11 reports, it is also entirely possible that a rational trier of fact could have drawn the opposite conclusion and found Murdaugh's actions did not evince a sober mind. *See, e.g.*, *Nordstrom*, 77 P.3d at 46. This is particularly true in light of the low burden of proof for finding a

tor is established if the murder was committed in an "especially cruel, heinous or depraved manner." *Id.*

statutory mitigating factor: a nonunanimous jury need only find the mitigating factor supported by a preponderance of the evidence. *See* Ariz. Rev. Stat. § 13-703(C). For instance, a reasonable jury might not have found that Murdaugh's actions to cover up the murder demonstrated any kind of sober sophistication. Instead of cleaning up the crime scene, Murdaugh asked Rohrs and Gross to sprinkle horse manure over Reynolds's body and on the surrounding blood, and then left the body there for the remainder of the day. It was not until that evening—probably at least eight to ten hours after the crime—that Murdaugh dismembered the body. Thus, a reasonable jury might not have found Murdaugh's attempt to thwart identification of the body to be inconsistent with a finding that Murdaugh was "significantly, but only partially, impaired" at the time of the offense. *Gretzler*, 659 P.2d at 17. That a rational jury might have found that the evidence established the (G)(1) mitigating factor is sufficient to establish prejudice under *Brecht.*

The Arizona Supreme Court's determination that any error was harmless casts no doubt on our conclusion, because that court clearly failed to consider evidence in the record—evidence that the trial court did consider in determining whether the (G)(1) mitigating factor was established. In reviewing the trial court's finding on the (G)(1) factor for harmless error, the Arizona Supreme Court stated that it considered the reasoning of the trial court, the testimony of Dr. Lang and "uncontroverted evidence in the record . . . that Murdaugh took steps to avoid detection." *Murdaugh*, 97 P.3d at 860. The court found that because Murdaugh did not present any mitigation, he did not present "*any expert testimony* to establish that his ability to control his behavior or appreciate the wrongfulness of his conduct was significantly impaired." *Id.* (emphasis added). Thus, "[b]ecause of the *complete lack* of evidence of a causal connection between Murdaugh's drug use and the murder," the court concluded "beyond a reasonable doubt that no rational jury would have found that Murdaugh established the (G)(1) mitigating circumstance." *Id.* at 860 (emphasis added).

Murdaugh correctly argues that the Arizona Supreme Court failed to consider the Rule 11 competency reports, which included expert testimony establishing a direct causal link between Murdaugh's drug use and the murder. Under then-existing Arizona case law, the Rule 11 reports were the kind of evidence that could have established drug impairment for purposes of the (G)(1) factor. *See Gretzler*, 659 P.2d at 16–17 (concluding the evidence supported trial judge's finding of the (G)(1) factor when the defendant "used drugs continuously for a period of over nine years" and "medical testimony [showed] that this continuous use of drugs likely impaired defendant's volitional capabilities"). Moreover, in applying harmless error analysis in other *Ring* error cases, the Arizona Supreme Court has found reversible error as to the (G)(1) factor based solely on the contradicted testimony of one expert. *See Pandeli*, 65 P.3d at 953; *see also Nordstrom*, 77 P.3d at 46 (finding *Ring* error where defendant presented evidence from one expert on the possible connection between defendant's alcohol and substance abuse and the murders even though the evidence "was not particularly compelling"). Thus, under the Arizona Supreme Court's own cases, we cannot see how the Arizona Supreme Court could have reasonably concluded that *no* rational jury could find the evidence here supported drug impairment by a preponderance of the evidence. Had the Arizona Supreme Court considered *all* the evidence in conducting its harmless error review, it would have been impossible to conclude that *no* rational jury could have found the (G)(1) factor.

We conclude that the absence of a jury at the sentencing stage had a "substantial and injurious effect or influence" on Murdaugh's sentence of death. *Brecht*, 507 U.S. at 637 (internal quotation marks and citations omitted). Although a jury would have found the (F)(6) aggravating factor beyond a reasonable doubt, some evidence supported the (G)(1) mitigating factor. The expert reports, though not drafted for the purpose of mitigation, provided some details about Murdaugh's chronic drug use, which a jury might have found established drug impairment. Because a jury could have found that a preponderance of the evidence supported the (G)(1) mitigating factor, and voted for leniency on that basis, the *Ring* error was prejudicial. We must grant the habeas petition.[10]

2. Unconstitutional Nexus Test Claim

Murdaugh next argues that, in reviewing his sentence for harmless error, the Arizona Supreme Court applied an unconstitutional causal nexus test to mitigating evidence of his drug use and delusions.

Because the state post-conviction court did not address this claim, we review de novo whether the Arizona Supreme Court applied an unconstitutional test. In his petition for post-conviction relief, Murdaugh argued that both the sentencing court and the Arizona Supreme Court applied an unconstitutional nexus test. The state post-conviction court did consider and reject Murdaugh's claim with respect to the sentencing court, a decision Murdaugh does not appeal. The state post-conviction court said nothing, however, regarding Murdaugh's claim about the Arizona Supreme Court. Given that this claim had arguable merit, and in light of the state post-conviction court's otherwise careful consideration and evaluation of every other claim in Murdaugh's petition, "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court," thus permitting de novo review. *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013).

A state court violates a capital defendant's Eighth and Fourteenth Amendment rights to an individualized sentencing when it excludes or refuses to consider in mitigation evidence that lacks a causal nexus to the crime. *See Smith*

10. Though not part of our prejudice analysis here, we note that of the nineteen *Ring* cases remanded for resentencing by a jury, eleven have resulted in a sentence other than death. *See* Justin F. Marceau, *Arizona's Ring Cycle*, 44 Ariz. St. L.J. 1061, 1077 (2012).

v. Texas, 543 U.S. 37, 45 (2004) (per curiam); *Tennard v. Dretke*, 542 U.S. 274, 282–88 (2004). A court may, however, consider the failure to establish a causal connection between the mitigating factors and the crime "in assessing the quality and strength of the mitigation evidence." *Towery v. Ryan*, 673 F.3d 933, 945 (9th Cir. 2012) (quoting *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011) (per curiam)).

Murdaugh argues that an unlawful nexus test was manifest in the Arizona Supreme Court's explanation of why a rational jury would not have weighed the nonstatutory mitigating circumstances differently than the sentencing court did:

> The trial court first found that the evidence proffered in support of the (G)(1) mitigating circumstance also supported a finding of [eight] non-statutory mitigating circumstances . . . . The reports prepared by Drs. Sindelar, Potts, and Scialli do reveal that Murdaugh experienced certain paranoid thoughts and delusions that were likely exacerbated by his history of chronic methamphetamine use. But because no mental health professional found a causal nexus between these conditions and the murders, we find beyond a reasonable doubt that no rational jury would have weighed these factors any differently than did the trial judge.

Murdaugh, 97 P.3d at 860 (citations omitted).

The court's discussion makes clear that it did not refuse to consider evidence that was not causally connected to the crime. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982). After observing that the sentencing court found eight nonstatutory mitigating circumstances—including impairment from chronic and concurrent drug abuse, a personality disorder, and paranoid thoughts—the court explained that its task was to "determine whether a jury could have weighed these mitigating factors differently than did the trial judge," who "did not give [them] much weight." *Murdaugh*, 97 P.3d at 860. The Arizona Supreme Court took no issue with the trial court's finding that the Sindelar, Potts, and Scialli reports did in fact establish various nonstatutory mitigating circumstances.[11] Rather, the court took the fact that no expert had drawn a causal link between those circumstances and Murdaugh's crime as compelling evidence that a rational jury would have afforded them little weight, as the trial court did.

Because the court only raised the issue of a causal nexus to "determine the weight" that a hypothetical jury would have "given relevant mitigating evidence," the Court did not violate Murdaugh's constitutional rights. *Eddings*, 455 U.S. at 115.

11. As we discussed in our analysis of Murdaugh's *Ring* claim, *supra* Section III(1)(C)(b), the court did neglect to consider relevant expert evidence in its discussion of the (G)(1) statutory mitigating factor. But nothing in the court's opinion suggests that omission was the result of applying a nexus test.

3. Conflict of Interest Claim

Murdaugh argues that the prosecutor's presentation of mitigation evidence at the behest of the trial court violated his Sixth and Fourteenth Amendment right to conflict-free representation. Murdaugh argues that the prosecutor acted simultaneously as counsel for the prosecution and the defense when he presented a mitigation case on Murdaugh's behalf.

A) Procedural Default

Murdaugh did not raise this claim in his direct appeal to the Arizona Supreme Court. The post-conviction review court subsequently held that the claim was precluded under Arizona Rule of Criminal Procedure 32.2(a)(3), which forecloses post-conviction relief on claims that are waived "at trial, on appeal, or in any previous collateral proceeding."

Murdaugh's claim is not procedurally defaulted because he did not violate a state procedural rule. Arizona courts treat conflict of interest claims as a species of ineffective assistance of counsel claims. *See, e.g.*, *State v. Jenkins*, 715 P.2d 716, 718–19 (Ariz. 1986) (en banc). And Arizona law only permits defendants to bring ineffective assistance of counsel claims in Rule 32 post-conviction review proceedings. *See, e.g.*, *State ex rel. Thomas v. Rayes*, 153 P.3d 1040, 1044 (Ariz. 2007) (en banc). Hence, Murdaugh's failure to raise this claim on direct appeal does not bar federal review. *See Lee v. Kemna*, 534 U.S. 362, 376 (2002).

B) Analysis

A defendant's Sixth Amendment right to effective assistance of counsel "includes the entitlement to representation that is free from conflicts of interest." *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005). To establish a violation of this right, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

Murdaugh cannot show that *his* counsel had a conflict of interest. Murdaugh's attorney did not present any evidence in mitigation, because Murdaugh did not let him. The prosecutor was not transmuted into defense counsel when, at the trial judge's request, he presented a mitigation case on Murdaugh's behalf, any more than a prosecutor becomes a defense attorney when he undertakes other acts favorable to the defendant's interests, such as disclosing material evidence or advocating a downward sentencing departure.

Arizona law does not require the prosecution to confine its presentation to matters inimical to the defendant: "At the penalty phase of the sentencing proceeding . . . the prosecution or the defendant may present any information that is relevant to any of the mitigating circumstances included in subsection G of this section . . . " Ariz. Rev. Stat. 13-703(C). In presenting a case in mitigation, then, Murdaugh's prosecutor was not even acting outside his remit—much less acting as *de jure* defense counsel.

Because the prosecutor never represented Murdaugh, the prosecutor's presentation of the mitigation case did not

violate Murduagh's right to conflict-free representation. Murdaugh's derivative claims that his trial and appellate counsel were ineffective for failing to raise the conflict of interest claim are equally meritless. *See Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985).

4. Claims Concerning Murdaugh's Guilty Pleas

Murdaugh contends that his guilty pleas were not knowing, intelligent, and voluntary because (1) counsel was ineffective in representing Murdaugh leading up to and during his guilty plea, and (2) the *Ring II* decision undermined the voluntariness of Murdaugh's guilty pleas. Neither of these claims has merit.

First, the record does not support Murdaugh's contention that counsel was deficient. Murdaugh argues counsel was ineffective because (1) counsel failed to provide "background information" to the evaluating doctors in preparation for the Rule 11 evaluation; (2) he had "excessively limited access" to his counsel; (3) trial counsel failed to explain the advantages, disadvantages, and potential consequences of the plea agreement and instead sent the fact investigator to discuss the terms of the plea with Murdaugh; and (4) counsel promised Murdaugh an x-ray to prove there was no tracking chip in Murdaugh's head in order to convince Murdaugh to plead guilty. The record does not show, however, that any deficiencies in counsel's performance were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Second, the Arizona Supreme Court did not unreasonably apply the law or the facts in denying Murdaugh's claim that the *Ring II* decision undermined the voluntariness of his guilty pleas. Nothing in the record indicates that Murdaugh's decision to plead guilty was influenced by whether a judge or a jury would decide his sentence. And while it is true that the Supreme Court held that the "new rule" of *Ring* applied to criminal cases still pending on direct review, *see Schriro v. Summerlin*, 542 U.S. 348, 351 (2004), the mere fact that a new rule may affect a defendant's trial rights does not necessarily undermine the voluntariness of the defendant's plea, *see Brady v. United States*, 397 U.S. 742, 756–57 (1970). Accordingly, the Arizona Supreme Court's denial of Murdaugh's claim was not unreasonable.

5. Competence Claims

Murdaugh also raises various claims concerning his competence to waive the presentation of mitigating evidence. Specifically, Murdaugh contends that he was incompetent to waive mitigation, that the trial court made an inadequate determination of his competence to waive mitigation, that trial counsel erred in handling the mitigation waiver, and that appellate counsel failed to raise all of the claims related to this issue on direct appeal. Having granted relief on Claim 1, we reserve any decision on these competence issues.

IV. CONCLUSION

Because we reverse the denial of relief on Murdaugh's *Ring* claim, we need not reach the claims concerning Murdaugh's competence to waive the presentation of mitigating evidence. We otherwise affirm the district court and remand with instructions to grant the petition unless the state conducts a new sentencing hearing within a reasonable period of time. *Cf. Jennings v. Woodford*, 290 F.3d 1006, 1020 (9th Cir. 2002).

REVERSED in part, AFFIRMED in part, and REMANDED.

Cite as 13 C.D.O.S. 7977

ORACLE AMERICA, INC ., Plaintiff-Appellee,

v.

MYRIAD GROUP A.G., Defendant-Appellant.

No. 11-17186
United States Court of Appeals for the Ninth Circuit
D.C. No. 4:10-cv-05604-SBA
Appeal from the United States District Court for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding
Argued and Submitted May 6, 2013—San Francisco, California
Filed July 26, 2013
Before: William A. Fletcher, Ronald M. Gould, and Morgan Christen, Circuit Judges.
Opinion by Judge Christen

COUNSEL

Jeffrey S. Bucholtz (argued), Kevin R. Sullivan, Shannon M. Kasley, Daniel S. Epps, and Timothy J. Sullivan, King & Spalding LLP, Washington, D.C.; Brian A. White, King & Spalding LLP, Atlanta, Georgia; Geoffrey M. Ezgar, King & Spalding LLP, San Francisco, California, for Defendant-Appellant.

Jeffrey M. Shohet (argued), Christopher J. Beal, and Amanda C. Fitzsimmons, DLA Piper LLP, San Diego, California; Elizabeth Rogers Brannen, Oracle America, Inc., Redwood City, California, for Plaintiff-Appellee.

OPINION

CHRISTEN, Circuit Judge:

Myriad Group A.G. appeals the district court's partial denial of its motion to compel arbitration. Myriad maintains that incorporation of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules into an arbitration provision in a commercial contract constitutes clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator. We agree, consistent with the other circuits to have considered the question. We therefore reverse the district court's partial denial of Myriad's motion to compel arbitration.

I. BACKGROUND

Myriad is a Swiss mobile software company. Oracle America, Inc. is a Delaware corporation that developed Java, a computer programming language, and the Java Runtime Environment. The Java Runtime Environment facilitates cross-platform computing compatibility.

Oracle has a community licensing program that allows access to the Java programming language and use of Java trademarks in exchange for royalties. Myriad entered into a Community Source License in 2002. The Source License encompasses several separate licenses, including the Technology Compatibility Kits (TCK) License. The TCK License allows a licensee to access Oracle's testing protocols; it is intended to ensure compatibility of the licensee's products. A licensee's right to use Java trademarks is contingent upon the licensee's product meeting applicable testing protocols.

Myriad maintains that a separate agreement, the Java Specification Participation Agreement (JSPA), gave it rights to the Java language and the testing protocols without payment of royalties. Oracle maintains that, based on Myriad's faulty interpretation of the JSPA, Myriad stopped paying royalties and breached the Source License. Oracle also alleges that Myriad failed to renew a separate agreement, the Master Support Agreement, which was a prerequisite to a valid TCK License, and that Myriad's continued use of the Java trademarks and the Java programming language infringed upon Oracle's intellectual property rights.

Oracle filed suit in the Northern District of California asserting claims for breach of contract, violation of the Lanham Act (15 U.S.C. § 1125(a)), copyright infringement (17 U.S.C. § 101 *et seq.*), and unfair competition under California law (Cal. Bus. & Prof. Code § 17200 *et seq.*). Myriad sued Oracle separately in the District of Delaware asserting that Oracle breached the JSPA.

Myriad moved in the Northern District of California to compel arbitration based on an arbitration clause in the Source License. The arbitration clause provides:

> Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive), with respect to any dispute relating to such party's Intellectual Property Rights or with respect to Your compliance with the TCK license. Arbitration shall be administered: (i) by the American Arbitration Association (AAA), (ii) in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) (the "Rules") in effect at the time of arbitration as modified herein; and (iii) the arbitrator will apply the substantive laws of California and United States. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction to enforce such award.

Myriad submitted a demand for arbitration with the arbitrator on August 15, 2011. Approximately two weeks later, the district court granted Myriad's motion to compel arbitration with respect to Oracle's breach of contract claim but

denied Myriad's motion with respect to all other claims. The district court concluded that incorporation of the UNCITRAL arbitration rules did not constitute clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator. The district court reasoned that the relevant provision of the 2010 UNCITRAL rules states only that the arbitrator has authority, but not exclusive authority, to decide its own jurisdiction.

In January 2012, the district court enjoined Myriad from proceeding with arbitration of its non-contract claims. In deciding Oracle's motion for preliminary injunction, the district court clarified that it had not ruled that it had concurrent jurisdiction with the arbitrator over questions of arbitrability. Rather, because the arbitration clause states that the court's jurisdiction is "exclusive" with respect to a party's intellectual property claims or claims arising out of the TCK License, the court determined that the parties intended for the court to decide questions of arbitrability.

Myriad appeals the district court's order partially denying its motion to compel arbitration. The parties stipulated to a stay of the district court proceedings pending the outcome of this appeal.

II. STANDARD OF REVIEW

We review an order denying a motion to compel arbitration de novo. *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1120 (9th Cir. 2011).

III. DISCUSSION

The only issue in this case is whether the parties agreed to arbitrate arbitrability. There is generally a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In accordance with that policy, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24–25. But the dispute in this case centers on *who* decides whether a claim is arbitrable.

"Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (internal citations omitted). But, unlike the arbitrability of claims in general, whether the court or the arbitrator decides arbitrability is "'an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise*.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis added) (alteration omitted) (quoting *AT & T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). In other words, there is a presumption that courts will decide which issues are arbitrable; the federal policy in favor of arbitration does not extend to deciding questions of arbitrability.

A. Whether Incorporation of the UNCITRAL Arbitration Rules Clearly and Unmistakably Delegates Arbitrability to the Arbitrator

As a preliminary matter, the parties disagree about which version of the UNCITRAL arbitration rules controls. Their agreement refers to the UNCITRAL rules "in effect at the time of arbitration as modified herein." The 2010 UNCITRAL rules were in effect at the time Myriad submitted its demand for arbitration, and some of Oracle's arguments hinge on application of the 2010 rules. But Myriad represents that the parties at one point agreed that the 1976 UNCITRAL rules govern. We conclude that it is ultimately unnecessary to decide which version of the UNCITRAL rules applies.

The 1976 UNCITRAL arbitration rules provide that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." UNCITRAL Arbitration Rules art. 21, para. 1, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). The 2010 UNCITRAL rules state that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." UNCITRAL Arbitration Rules art. 23, para. 1, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011).

By giving the arbitral tribunal the authority to decide its own jurisdiction, both the 1976 and 2010 UNCITRAL rules vest the arbitrator with the apparent authority to decide questions of arbitrability. The only difference is that, under the 1976 rules, the authority of the arbitral tribunal is described as ruling on objections to its jurisdiction and under the 2010 rules the tribunal has the authority to decide its jurisdiction. The 1976 rules are more narrowly phrased than the 2010 rules, but there is not a significant distinction between how these sets of rules treat questions of arbitrability. We conclude it is immaterial which version of the UNCITRAL rules is applied to the question presented by this appeal.

The parties' central dispute is whether incorporation of the UNCITRAL rules into the parties' arbitration provision constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability. This is an issue of first impression in the Ninth Circuit, but the Second Circuit and the D.C. Circuit have concluded that incorporation of the 1976 UNCITRAL arbitration rules constitutes clear and unmistakable evidence that the parties to an agreement intended to arbitrate questions of arbitrability.

1. Second Circuit

In *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), the Second Circuit held that whether Chevron had waived its right to arbitration under an investment treaty or was estopped from invoking arbitration under that treaty were issues for the arbitral panel. The treaty—to which Ec-

uador was a signatory—incorporated the 1976 UNCITRAL arbitration rules.

The court noted initially that waiver was presumptively an issue for the arbitrator. *Id.* at 394. But the court then ruled that, even if waiver and estoppel could be characterized as questions of arbitrability (and therefore, presumptively as issues for judicial determination), incorporation of the UNCITRAL rules was "clear and unmistakable" evidence that the parties delegated questions of arbitrability to the arbitrator. *Id.* Because Ecuador's waiver and estoppel claims challenged the validity of the arbitration agreement, and because the UNCITRAL rules gave the arbitrator authority to decide objections to the validity of the arbitration agreement, the Second Circuit concluded that the waiver and estoppel claims were for the arbitrator to decide. *Id.* at 394–95.

Oracle argues that *Republic of Ecuador* only addressed whether the arbitrator should decide waiver and estoppel issues in the first instance. But the Second Circuit has more recently confirmed that "*Republic of Ecuador* . . . held that a bilateral investment treaty's incorporation of the . . . UNCITRAL rules was clear and unmistakable evidence that the parties intended questions of arbitrability to be decided by the arbitral panel in the first instance." *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012) (internal quotation marks omitted).

2. D.C. Circuit

In *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012), the D.C. Circuit also concluded that incorporation of the 1976 UNCITRAL Rules provides clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Like *Republic of Ecuador*, the decision in *Republic of Argentina* involved a bilateral investment treaty. *Id.* at 1365. The treaty called for arbitration so long as a party first filed suit in the host country's courts and eighteen months passed without resolution. *Id.* If those preconditions were met and the parties did not separately agree on an arbitration forum or procedure, the treaty dictated that the UNCITRAL arbitration rules would govern. *Id.* at 1370–71.

The plaintiff in *Republic of Argentina* invoked the treaty's arbitration provision without first filing suit in an Argentine court. *Id.* at 1365. The D.C. Circuit ultimately held that because the preconditions to arbitration had not been met, "the question of arbitrability [was] an independent question of law for the court to decide." *Id.* at 1371. But the court also observed that if the plaintiff had first filed suit in an Argentine court and waited eighteen months, the result would have been different: "the Treaty's incorporation of the UNCITRAL Rules provides clear and unmistakable evidence that the parties intended for the arbitrator to decide questions of arbitrability." *Id.* (internal quotation marks, alterations, and citations omitted). The D.C. Circuit concluded succinctly that "the UNCITRAL Rules grant the arbitrator the power to determine issues of arbitrability." *Id.*

3. Incorporation of the American Arbitration Association Rules

Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005). Only one circuit has concluded otherwise. *See Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 & n.1, 780 (10th Cir. 1998). The AAA rules contain a jurisdictional provision similar to Article 21(1) of the 1976 UNCITRAL rules and almost identical to Article 23(1) of the 2010 UNCITRAL rules.[1] The Second and D.C. Circuits' conclusions with respect to incorporation of the UNCITRAL rules are consistent with the majority view regarding the effect of incorporating the AAA rules into an agreement.

We see no reason to deviate from the prevailing view that incorporation of the UNCITRAL arbitration rules is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability. We hold that as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator.[2]

B. Whether the Parties Intended a Court Would Decide Arbitrability or Whether the Parties' Intent is Ambiguous

Oracle advances several arguments in support of its position that the parties to this case intended for a court to decide arbitrability or that the parties' intent is at least ambiguous. We address each in turn.

1. Article 23(3) of the 2010 UNCITRAL rules does not create an ambiguity.

Oracle argues that Article 23(3) of the 2010 UNCITRAL rules renders the effect of the 2010 rules ambiguous. Article 23(3) states, "[t]he arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court." UNCITRAL Arbitration Rules art. 23, para. 3, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011). From this, Oracle argues that courts and arbitrators have concurrent authority to decide the

1. Commercial Arbitration Rule 7(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Commercial Arbitration Rule 7(a).

2. We express no view as to the effect of incorporating arbitration rules into consumer contracts.

arbitrator's jurisdiction. But even if the 2010 UNCITRAL rules apply, they do not, of themselves, create a path to challenging the arbitrator's jurisdiction in federal court. Article 23(3) assumes such a path. *See* U.N. Comm'n on Int'l Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session ¶¶ 99–101 (Vienna, Sept. 11–15, 2006) ("It was noted that a number of national laws provided parties with an irrevocable right to seek recourse from the courts."). By contrast, "the central . . . purpose of the [Federal Arbitration Act] is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks omitted). The UNCITRAL rules clearly and unmistakably delegate questions of arbitrability to an arbitrator—it is immaterial to the outcome of this dispute that the 2010 UNCITRAL rules also contemplate that in some countries the arbitrator's jurisdiction may be simultaneously challenged in court.

2. The carve-out clause in the parties' agreement does not negate incorporation of the UNCITRAL rules.

Oracle also argues that a carve-out provision in the parties' arbitration clause expresses their intent that a court would decide arbitrability. The arbitration clause states that any claim arising out of the Source License shall be settled by arbitration. But the carve-out clause states "that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive), with respect to any dispute relating to such party's Intellectual Property Rights or with respect to [Myriad's] compliance with the TCK license." Oracle maintains that whether a court or an arbitrator will determine the arbitrability of intellectual property claims or claims arising out of the TCK License are "disputes relating to" those claims, and therefore concludes that the district court had exclusive jurisdiction to decide the arbitrability of those claims.

Enforcement of Myriad's intellectual property rights is restricted by the Source License. And the TCK License is part of the Source License. Thus, by definition, the claims excepted from arbitration by the carve-out clause are claims "arising out of or relating to" the Source License. Oracle's argument conflates the *scope* of the arbitration clause, *i.e.*, which claims fall within the carve-out provision, with the question of *who* decides arbitrability. The decision that a claim relates to intellectual property rights or compliance with the TCK License constitutes an arbitrability determination, which the parties have clearly and unmistakably delegated to the arbitrator by incorporating the UNCITRAL rules.

Oracle cites a Sixth Circuit case in support of its position. In *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 511 (6th Cir. 2011), the Sixth Circuit held that even though an arbitration clause incorporated the AAA rules, the arbitration clause was so narrow that questions of arbitrability did not need to be decided by the arbitrator. The arbitration clause in *Turi* only contemplated arbitration of "claim[s] regarding fees" in excess of $5,000, *id.* at 506, but the plaintiffs in *Turi* also asserted claims for fraud, conspiracy, misrepresentation, intentional and negligent infliction of emotional distress, and RICO violations, *id.* at 500. The court stated that "even where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least *arguably* covered by the agreement." *Id.* at 511.

Turi did not involve a carve-out clause. It involved an extremely narrow arbitration provision interpreted in the context of a host of unrelated claims. Here, the excepted claims are by definition related to arbitrable claims because they all relate to the Source License. For this reason alone, *Turi* is distinguishable. Nor are we persuaded by the reasoning of *Turi* because as discussed above, when a tribunal decides that a claim falls within the scope of a carve-out provision, it necessarily decides arbitrability. *Turi*'s reasoning collapses two separate questions into one.

Oracle also relies on a case from the Delaware Supreme Court, *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006). There, the parties' arbitration agreement stated, "[a]ny controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration," but the agreement also allowed LLC members to pursue injunctive relief and specific performance in court. *Id.* at 79–80. The Delaware Supreme Court held that "[s]ince th[e] arbitration clause [did] not generally refer all controversies to arbitration, the federal majority rule does not apply, and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator." *Id.* at 81. In fact, the parties' agreement in *James & Jackson* did generally refer all controversies to arbitration, only excepting claims for injunctive relief and specific performance. *Id.* at 79–80. It is clear that the *James & Jackson* court relied on the arbitration agreement's carve-out provision to decide that questions of arbitrability would be decided by the court.

James & Jackson nominally supports Oracle's position, but the decision's suggestion that the federal majority rule only applies when an arbitration agreement lacks a carve-out provision does not follow from the cases the court cited, *see id.* at 80 n.9,[3] and we know of no other authority supporting this proposition.

3. The Source License does not modify the UNCITRAL rules' jurisdictional provisions.

Finally, Oracle argues that the parties' arbitration clause modified the UNCITRAL rules such that arbitrability must be determined by the court. The arbitration clause in the Source License states that arbitration is to be administered "in accordance with the [UNCITRAL] rules . . . in effect at the time

3. The court cited, among others, *Terminix Int'l*, 432 F.3d at 1329, and *Contec Corp.*, 398 F.3d at 208.

of arbitration *as modified herein*." The paragraph after the arbitration clause sets out specific rules regarding arbitration proceedings that differ from the UNCITRAL rules, but none of the modifications concern questions of arbitrability.

Similarly, Oracle maintains that vesting courts with "exclusive" authority to adjudicate claims relating to the parties' intellectual property rights and claims relating to Myriad's compliance with the TCK License constitutes modification of the UNCITRAL rules. Oracle argues that this modification requires that a court determine arbitrability. We disagree. This argument merely recasts Oracle's contention that the carve-out provision evidences the parties' intention for a court to decide the arbitrability of claims that fall within it. It is foreclosed by the discussion above.

IV. CONCLUSION

Incorporation of the UNCITRAL arbitration rules into the parties' commercial contract constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Accordingly, we **REVERSE** the district court's partial denial of Myriad's motion to compel arbitration and **REMAND** for proceedings consistent with this opinion.

Cite as 13 C.D.O.S. 7981

GARY D. SCHWIRSE, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM; MARINE TERMINALS CORPORATION; SIGNAL MUTUAL INDEMNITY ASSOCIATION; ILWU-PMA WELFARE PLAN, Respondents.

No. 11-73172
United States Court of Appeals for the Ninth Circuit
BRB No. 11-0119

On Petition for Review of an Order of the Benefits Review Board

Argued and Submitted October 9, 2012—Portland, Oregon

Filed July 26, 2013

Before: Barry G. Silverman, Richard R. Clifton, and N. Randy Smith, Circuit Judges.

Opinion by Judge N.R. Smith

COUNSEL

Meagan A. Flynn, Preston Bunnell & Flynn, LLP, Portland, Oregon, for Petitioner.

Robert E. Babcock, Holmes Weddle & Barcott, P.C., Lake Oswego, Oregon, for Respondents.

OPINION

N.R. SMITH, Circuit Judge:

33 U.S.C. § 903(c) precludes compensation to an injured employee if "the injury was occasioned solely by [his] intoxication." This language precludes recovery where the intoxication of the employee was the sole "legal cause" of the injury. "Legal cause" is the causal connection in fact, which extends not only to positive and active physical forces, but also to pre-existing passive conditions. *Cf. Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837–39 (1996); *White v. Roper*, 901 F.2d 1501, 1505–06 (9th Cir. 1990). The Benefits Review Board (BRB) did not err when it affirmed the administrative law judge's (ALJ) denial of Schwirse's claim for compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA) due to intoxication. We have jurisdiction to review the petition under 33 U.S.C. § 921(c); we deny the petition for review.

FACTS

Gary Schwirse was employed by Marine Terminals Corporation (MTC) as an A-registered longshoreman. On January 8, 2006, Schwirse drank two beers before going to work

at 8:00 a.m. Between 8:00 a.m. and 12:00 p.m., he drank an additional three beers. At lunch, Schwirse consumed four to five more beers. Between the end of lunch and the end of the day (approximately 4:00 p.m.), Schwirse also drank more than half a pint of whiskey.

At approximately 4:30 p.m., Schwirse decided to relieve himself near the bull rail of MTC's dock. While doing so, Schwirse fell over the bull rail onto a concrete and steel ledge (approximately six feet below the rail). After Schwirse's fall, he was taken by ambulance to the hospital where he was diagnosed with acute alcohol intoxication (.29 serum level or .25 blood alcohol level), cannabis ingestion, and a severe scalp laceration to his right temple.

Thereafter, Schwirse sought compensation for his injury under the LHWCA. However, MTC refused to pay the compensation, arguing that he had no claim for compensation under the LHWCA. MTC asserted that Schwirse was precluded from receiving compensation under 33 U.S.C. § 903(c), because his intoxication was the sole cause of his injury.

At the hearing before the ALJ on June 21, 2007, Schwirse stated that he could not remember the details of the incident. Instead, he asserted, based upon the statements of his coworkers (neither of whom testified), that the fall was due to tripping over a bright orange warning cone. However, in Schwirse's earlier deposition (taken on October 20, 2006), he recalled the facts differently. At that time, Schwirse stated that neither of his coworkers actually saw what happened; instead, he was the one, who specifically recalled seeing and tripping over a traffic cone at the bull rail's edge. The ALJ awarded Schwirse benefits. The ALJ determined that Schwirse's injury was not caused solely by intoxication, because there was no direct proof that intoxication (and not something else) caused him to fall. MTC appealed the ALJ's decision to the BRB. The BRB reversed the ALJ, finding that the employer rebutted the presumption that the injury was caused by something other than intoxication. The BRB noted that "[i]t is not [the] employer's burden to prove on the record as a whole that intoxication was the sole cause of claimant's injury."

Schwirse filed a motion for reconsideration, arguing that the BRB's ruling incorrectly stated the employer's burden of proof. After review of the motion, the BRB agreed with Schwirse's argument, correcting its prior opinion. Instead, the BRB stated that the burden of proof is on the employer and remanded the matter back to the ALJ to make further findings and weigh the relevant evidence.

On remand, the ALJ weighed the conflicting evidence and determined that MTC had established that intoxication was the sole cause of Schwirse's fall. Relying on the testimony of the marine manager, the ALJ concluded that the bull rail was free of tripping or slipping hazards. The ALJ also credited the testimony of Drs. Burton and Jacobsen, physicians testifying on behalf of MTC, that the sole cause of Schwirse's fall was due to intoxication. The ALJ thus concluded that there was "no other explanation for [Schwirse's] industrial injury than his intoxication." The ALJ also rejected Schwirse's alterative argument that the concrete and metal slab (on which he fell) caused the injury rather than his intoxication.[1]

The BRB affirmed the decision.

DISCUSSION

"The Longshore Act is a comprehensive scheme to provide compensation for the disability or death of employees resulting from injuries occurring upon the navigable waters of the United States." *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 823 (9th Cir. 2012) (internal quotation marks omitted); *see also* 33 U.S.C. § 903(a). However, "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee." 33 U.S.C. § 903(c). Despite this exclusion, the LHWCA provides that "a claim for compensation . . . shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the injury was *not* occasioned solely by the intoxication of the injured employee." 33 U.S.C. § 920(c) (emphasis added). "[T]he employer may rebut the presumption . . . by presenting substantial evidence that is specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010) (internal quotation marks omitted). The ALJ then "determines as a matter of law whether substantial rebuttal evidence has been presented." *Id.* If the ALJ determines that the employer rebutted the presumption, "the presumption in favor of the claimant 'falls out of the case' and the ALJ moves to the third and final step of weighing the evidence as a whole 'to determine whether the claimant has established the necessary causal link between the injury and employment.'" *Id.* (quoting *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 54–55 (1st Cir. 2010)). "This final determination is a question of fact." *Id.*

1. The BRB did not err in interpreting 33 U.S.C. § 903(c).

This case turns, in part, on an interpretation of the LHWCA. We have held that "[t]he Board's interpretation of the LHWCA is a question of law reviewed de novo and is not entitled to any special deference." *Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 883 (9th Cir. 2004) (citing *Stevedoring Servs. of Am. v. Dir., OWCP*, 297 F.3d 797, 801–02 (9th Cir. 2002)). However, we "respect the Board's interpretation . . . if it 'is reasonable and reflects the underlying policy of the statute.'" *Id.* at 883 (quoting *Kelaita v. Dir., OWCP*, 799 F.2d 1308, 1310 (9th Cir. 1986)).

Under 33 U.S.C. § 903(c), "[n]o compensation shall be payable if the injury was occasioned solely by the intoxication of the employee." Breaking the phrase into its parts, the LHWCA defines "injury" as:

1. We further note that Schwirse presented no argument or evidence that the concrete and metal slab (on which he fell) was defective, and that such defect caused his injury to any extent. He only argued that the fall (onto a concrete and metal slab) caused his injury.

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902(2). This definition does not fully address the language we must interpret here, whether the "injury was occasioned solely by" a cause, in this case intoxication. The term "injury" is modified by "occasioned solely by," which requires us to determine whether intoxication was the "legal cause" of the injury (a "but for" analysis).

The "occasioned solely by" phrase is not defined by the statute. In determining whether an employee's injury was "occasioned solely by" intoxication, we take guidance from those admiralty cases determining proximate cause. *See Exxon*, 517 U.S. at 839. By analogy, we determine whether intoxication was the only or "sole" cause by (1) looking at the act that caused the accident and (2) determining whether there were any superseding or intervening causes that contributed to the injury. *Id.* at 837–39.

This interpretation is consistent with the BRB's application of a two-part test for determining whether the employer met its burden in establishing that intoxication was the sole cause of the accident. *See Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57, *2 (1986). First, the employer must establish "that the employee was drunk at the time of the accident." *Id.* (quoting *Shearer v. Niagara Falls Power Co.*, 150 N.E. 604, 605 (N.Y. 1982)). Second, the employer must establish that the employee "fell *owing to his drunkenness* and was injured." *Id.* (emphasis added).

We therefore hold that an injury "occasioned solely by" intoxication means that the legal cause of the injury was intoxication, regardless of the surface material of the landing on which the intoxicated person fell. In other words, as aptly stated by the BRB, "[i]f intoxication was the sole cause of the claimant's fall, then intoxication also was the sole cause of the claimant's injury."

Instead, Schwirse argues an all-encompassing definition of the term injury. Relying on *Johnson v. Dir., Office of Workers Compensation Programs*, 911 F.2d 247, 250 (9th Cir. 1990), Schwirse argues that Congress used the term "accident," to mean the "event causing the harm," where it intended to limit compensation to the sole cause of the fall. In other words, by using the term "injury," Congress intended to incorporate the "harmful physical consequences of that event." Thus, Schwirse's definition would suggest that, because he hit the concrete surface rather than the river or a featherbed, his injury was not solely occasioned by intoxication. In other words, his "accident" may have been caused by intoxication, but harmful physical consequences of the fall (the injury) was caused by hitting the concrete and metal slab.

We reject Schwirse's interpretation. Accepting Schwirse's broad definition of the term "injury" would violate a "cardinal principle of statutory construction." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). In particular, if "we [were] to adopt [Schwirse's] construction of the statute, the express [intoxication] exception would be rendered insignificant, if not wholly superfluous." *Id.* (internal quotation marks and alternations omitted). Schwirse's interpretation of the term "injury" would read out the phrase "occasioned solely by" and preclude the application of § 903(c). Nearly every "harm" would not be "occasioned solely by the intoxication" but rather by some further cause, such as the ground. Further, as noted by the Supreme Court, "Life is too short to pursue every event to its most remote, 'but-for,' consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect." *Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 692 (2012). We therefore conclude that the most logical way to interpret § 903(c) and § 920(c) of the LHWCA is to interpret the phrase "occasioned solely by" to limit the analysis to the sole causal factor of the injury.

2. The BRB did not err in affirming the ALJ's finding that MTC produced sufficient evidence to rebut the statutory presumption that Schwirse's injury was not solely caused by intoxication.

In considering a claim for disability benefits under the LHWCA, the ALJ is required to follow a three part process. First, the claimant must show that he sustained an injury in the course and scope of his employment. *See Albina Engine & Machine v. Dir., OWCP*, 627 F.3d 1293, 1298 (9th Cir. 2010). If an injury is established, a presumption arises that the injury was not occasioned solely by intoxication. *See* 33 U.S.C. § 920(c); *see also Albina Engine*, 627 F.3d at 1298. Second, the employer must present "substantial evidence" to rebut that presumption. *See* 33 U.S.C. § 920; *see also Albina Engine*, 627 F.3d at 1298. Lastly, if the employer successfully rebuts the presumption, the ALJ must then evaluate whether the claimant met his burden of persuasion by a preponderance of the evidence that the record as a whole justifies awarding benefits.[2] *Albina Engine*, 627 F.3d at 1298.

The Board must accept the ALJ's findings of fact if they are supported by "substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3); *see also Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991). The Supreme Court has defined "substantial evi-

2. Having rebutted the presumption that the claimant's injury was not occasioned solely by intoxication under the substantial evidence standard, the employer does not further bear the burden of proving that the employee's injury was caused solely by intoxication under the preponderance of the evidence standard. *Albina Engine* clearly establishes that after the employer rebuts the presumption by substantial evidence, the burden shifts to the claimant to prove entitlement to benefits by a preponderance of the evidence. To the extent that it placed the burden at the latter stage on the employer, the BRB erred.

dence" as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). We conduct an independent review to determine if the Board adhered to this standard. *Bumble Bee Seafoods v. Dir., OWCP,* 629 F.2d 1327, 1329 (9th Cir. 1980).

Reviewing the BRB's decision, we conclude the BRB adhered to this standard and did not err in affirming the ALJ's denial of compensation under the LHWCA. First, there is no dispute that Schwirse sustained an injury while at work. Thus, a presumption arises that Schwirse's injury was not occasioned solely by intoxication. The BRB correctly concluded that substantial evidence in the record supported the ALJ's conclusion that Schwirse's employer rebutted the presumption that intoxication was not the sole cause of Schwirse's injury. The BRB stated the correct standard of review regarding the ALJ's findings of facts. The BRB noted that the ALJ "found sufficient evidence, in the form of the opinions of Drs. Burton and Jacobsen, the testimony of Mr. Yockey, and photographs of the accident site . . . " Based on this evidence, the ALJ ruled out any tripping hazards and then relied on the expertise of doctors to conclude intoxication was the sole cause. There was no evidence of any superseding or intervening cause of the injury. Further, there is no question that a foreseeable consequence of falling is that one may hit the pre-existing surface material. It is also foreseeable that the surface material surrounding the dock was hard and would cause significant injury. A preference that one may fall on more forgiving material (such as a featherbed or water) does not alter the "legal cause" of the injury. Thus, absent evidence of the surface material being unforeseeably defective, the "legal cause" is limited to the reason for his fall and the foreseeable consequences of that fall. Here, the ALJ found that the only known cause for Schwirse's injury was the fall off the bull rail attributable solely to his drunkenness. Thus the BRB did not err in concluding substantial evidence supported the ALJ's conclusions.

We further find no error in the BRB's conclusion that Schwirse's employer does not have to "rule out" all other possible causes of injury in order to rebut the presumption under 33 U.S.C. § 920(c). As noted by the BRB, the employer "need not negate every hypothetical cause." *Sheridon*, 18 BRBS 57, *3. To hold otherwise would contradict the statutory language, which only requires "substantial evidence" to rebut the presumption. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 288 (5th Cir. 2003) ("[T]he BRB *cannot* require employers to rebut a [33 U.S.C. § 920(a)] presumption by 'ruling out' every conceivable connection between the injury and the claimant's employment. The LHWCA requires a *lower* evidentiary standard than this—the employer must adduce only *substantial evidence* that the injury was not work-related.").

Lastly, BRB correctly concluded that the ALJ's decision to deny disability benefits, based on the record as a whole, was proper. As the Supreme Court stated in *Del Vecchio v. Bowers*,

> If the employer alone adduces evidence which tends to support the theory [contrary to the presumption], the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, . . . the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way upon the question . . . , the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court.

296 U.S. 280, 286–87 (1935) (footnotes omitted). The only alleged cause of Schwirse's injury that was supported by substantial evidence was Schwirse's intoxication. The ALJ properly "weigh[ed] the evidence as a whole 'to determine whether [Schwirse had] established the necessary causal link between the injury and employment.'" *Hawaii Stevedores*, 608 F.3d at 651 (citation omitted).

PETITION DENIED.

Cite as 13 C.D.O.S. 7985

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ENCARNACION GONZALEZ-VILLALOBOS, Defendant-Appellant.

No. 12-30150
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:11-cr-02095-RMP-1
Appeal from the United States District Court for the Eastern District of Washington
Rosanna Malouf Peterson, Chief District Judge, Presiding
Argued and Submitted February 8, 2013—Seattle, Washington
Filed July 26, 2013
Before: Raymond C. Fisher, Ronald M. Gould, and Richard A. Paez, Circuit Judges.
Opinion by Judge Paez

COUNSEL

Nicholas Marchi (argued), Carney & Marchi, P.S., Seattle, Washington, for Defendant-Appellant.

Alexander C. Ekstrom, Assistant United States Attorney (argued), and Michael C. Ormsby, United States Attorney, Yakima, Washington, for Plaintiff-Appellee.

OPINION

PAEZ, Circuit Judge:

Defendant Encarnacion Gonzalez-Villalobos appeals his conviction for illegal reentry after a prior deportation in violation of 8 U.S.C. § 1326. In the district court he moved to dismiss the indictment on the ground that the prior deportation order was fundamentally unfair. *See* 8 U.S.C. § 1326(d). After the district court denied his motion, Gonzalez-Villalobos entered a conditional guilty plea, preserving his right to appeal the denial of the motion. On appeal, he renews his challenge to the prior deportation order.

When a defendant collaterally attacks the validity of a prior deportation order in a § 1326 prosecution, he must show that he exhausted his administrative remedies, that the deportation proceedings improperly deprived him of the opportunity for judicial review, and that entry of the prior deportation order was fundamentally unfair. *See* 8 U.S.C. § 1326(d)(1)–(3). As we explain below, we have generally found that where an alien was deprived of the opportunity to exhaust his administrative remedies, satisfying § 1326(d)(1), he also has shown that he was deprived of the opportunity to seek judicial review, satisfying § 1326(d)(2). Here, Gonzalez-Villalobos has shown that he exhausted his administrative remedies by appealing the Immigration Judge ("IJ")'s adverse ruling to the Board of Immigration Appeals ("BIA"). However, he has failed to show that an error or obstacle related to his deportation proceedings improperly deprived him of the opportunity for judicial review, as required by 8 U.S.C. § 1326(d)(2). Because subsections (d)(1), (d)(2), and (d)(3) must all be satisfied either directly or constructively, we affirm the denial of Gonzalez-Villalobos's motion to dismiss and his conviction without addressing the merits of his argument that the alleged prior deportation proceeding was fundamentally unfair.

I.

FACTUAL AND PROCEDURAL HISTORY

A.

The events surrounding the underlying deportation in this case occurred more than twenty years ago.[1] In March 1986, Gonzalez-Villalobos was arrested in Yakima, Washington, for possession of a controlled substance (cocaine) with intent to deliver. He was eventually convicted of this offense in the Superior Court of Washington, County of Yakima, in July 1986. In connection with Gonzalez-Villalobos's arrest, agents from the Immigration and Naturalization Service ("INS") assisted the local police with the service and execution of a search warrant at his house.[2] A few days after the arrest, an INS agent prepared form I-213, "Record of Deportable Alien," in which he recorded Gonzalez-Villalobos's immigration status and the events surrounding his arrest. The I-213 contained an A-file number ending in "910." The next day, INS served Gonzalez-Villalobos with an order to show cause, alleging that he was deportable as an alien in the United States who entered without inspection. When INS could not locate Gonzalez-Villalobos, it administratively closed the deportation proceeding in January 1987. As it turned out, Gonzalez-Villalobos was incarcerated in federal prison, where he was serving a sentence for being an alien in possession of a firearm.[3] Gonzalez-Villalobos completed his federal sentence in December 1987 and upon his release he was taken into custody by INS. A few weeks later, INS released him from custody because it determined that he was a class member in

1. We have recognized that "the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ('IIRIRA') amended the immigration statutes so as to eliminate the previous legal distinction between deportation, removal and exclusion, merging all of these proceedings into a broader category entitled 'removal proceedings.'" *United States v. Lopez-Gonzalez*, 183 F.3d 933, 934 (9th Cir. 1999). We continue to use the term "deportation" in this opinion, however, to track the language of 8 U.S.C. § 1326. *See id.* at 935 (concluding that "any distinction between deportation and removal is legally insignificant for purposes of § 1326").

2. "As of March 2003, INS became United States Citizenship and Immigration Services, an agency within the Department of Homeland Security." *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1013 n.1 (9th Cir. 2008).

3. This conviction arose from the same incident as his state drug conviction.

a pending class action. The agency then cancelled the pending order to show cause.

After his release from INS custody, Gonzalez-Villalobos applied for legal status through the "special agricultural worker" ("SAW") program in May 1988. *See* 8 U.S.C. § 1160; 8 C.F.R. § 210.3.[4] INS assigned Gonzalez-Villalobos's SAW application a different A-file number, ending in "678." It denied his SAW application in November 1989 on the ground that his state drug conviction rendered him ineligible for the program. Gonzalez-Villalobos appealed, and the INS Legalization Appeals Unit affirmed the denial of his application in February 1991. Apparently unaware of the Appeals Unit's ruling, Gonzalez-Villalobos visited an INS office in November 1991 to inquire about the status of his SAW application. While there, he was detained by INS agents, who immediately completed a second I-213, reciting Gonzalez-Villalobos's conviction record and detention history. This I-213 had the same A-file number as the one prepared in 1986, ending in "910." The next day, INS issued an order to show cause, alleging that Gonzalez-Villalobos was deportable as an alien who had been convicted of a controlled substance offense.

At a deportation hearing in April 1992, Gonzalez-Villalobos argued that INS agents wrongfully discovered his conviction record by looking through the SAW file. He argued that "when he went to check on his legalization application and the current status of it, they reviewed the computer and the file and asked him to wait there. They made a phone call and subsequently, from across the hall, where the deportation section and the legalization office are in the same building across the hall, came the agent from INS."

Gonzalez-Villalobos requested a suppression hearing so that he could question the INS agents on how they obtained his criminal history record. In response, the IJ asked the government's attorney to "assure [him] as an officer of the Court that [the evidence] did not result from a sting operation being operated by the investigative arm of the Service in conjunction with the legalization office." The government's attorney informed the court that he was not offering any evidence that came from the SAW legalization file. The IJ then denied the request for a suppression hearing, stating that "the evidence submitted by the Service was totally independent of the legalization process." She further concluded that Gonzalez-Villalobos was not eligible for any relief and accordingly entered a deportation order. The IJ also informed Gonzalez-Villalobos and his attorney of the right to appeal her ruling to the BIA. Gonzalez-Villalobos timely appealed, primarily challenging the IJ's denial of his request for a suppression hearing.

The BIA subsequently dismissed Gonzalez-Villalobos's appeal, finding that he had not carried his burden of justifying the need for a suppression hearing. Gonzalez-Villalobos then applied for a stay of deportation, which INS denied in April 1999. The record does not reflect whether he filed a petition for review in the Ninth Circuit, but it does reflect that he filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington. Upon filing the petition, he sought a temporary restraining order enjoining his deportation. He was deported to Mexico, however, on April 13, 1999. Shortly afterwards, Gonzalez-Villalobos agreed to dismiss the petition and withdraw the motion.

B.

The events leading to Gonzalez-Villalobos's current prosecution are fairly straightforward. At some point after being deported, Gonzalez-Villalobos returned to the United States. He was located in Yakima County in July 2011, and a few weeks later, he was arrested and charged with being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326. The parties agree that the 1992 deportation order, affirmed by the BIA in 1999, was the alleged prior deportation. Gonzalez-Villalobos moved to dismiss the indictment on the ground that the 1992 deportation order was invalid because the IJ had erred in denying his motion for a suppression hearing. The district court denied the motion, finding that even if the IJ had erred in denying Gonzalez-Villalobos's motion, he could not establish prejudice. Gonzalez-Villalobos then entered a conditional guilty plea, preserving his right to appeal the district court's denial of his motion to dismiss. Following entry of the judgment and commitment order, Gonzalez-Villalobos timely appealed. He argues that the underlying deportation order was fundamentally unfair, and therefore invalid, because it was based on conviction records that the INS agents unlawfully discovered in his SAW file, and because the IJ did not grant an evidentiary hearing on how the agents obtained those records.[5]

4. The SAW program was a program through which certain aliens who had resided in the United States and "performed seasonal agricultural services in the United States for at least 90 man-days, during the 12-month period ending on May 1, 1986" could obtain temporary legal status, which would automatically adjust to permanent resident status after a period of time. 8 U.S.C. § 1160(a); *see also Soriano-Vino v. Holder*, 653 F.3d 1096, 1099 (9th Cir. 2011); 8 C.F.R. § 210.5(a).

5. Gonzalez-Villalobos argues that the conviction records should have been suppressed. Although the exclusionary rule generally does not apply in civil deportation proceedings, *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011), it does apply where the immigration agency violates its own rules if (1) "the regulation serves a purpose of benefit to the alien," and (2) "the violation prejudiced interests of the alien which were protected by the regulation," *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979); *see also Hong v. Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008). Here, Gonzalez-Villalobos argues that his conviction records should have been suppressed because the INS agents violated 8 U.S.C. § 1160(b)(6)(A), a statutory confidentiality guarantee for SAW applicants. At the time of the alleged violation, this provision prohibited officials from using information provided in a SAW application "for any purpose other than to make a determination on the application." 8 U.S.C. § 1160(b)(6)(A) (1991).

II.

STANDARD OF REVIEW

We review de novo the denial of a motion to dismiss an indictment alleging a violation of 8 U.S.C. § 1326 when the basis for the motion is an alleged due process violation in the underlying deportation proceeding. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004). We review for clear error the district court's factual findings. *United States v. Camacho-Lopez*, 450 F.3d 928, 929 (9th Cir. 2006).

III.

ANALYSIS

In a prosecution for illegal reentry under 8 U.S.C. § 1326(a), the government must prove, *inter alia*, that the defendant was previously "denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal [wa]s outstanding." 8 U.S.C. § 1326(a)(1); *see also* 9th Cir. Model Crim. Jury Instr. 9.8 (2010). The defendant, in turn, has a due process right to collaterally attack the underlying deportation order, because it serves as a predicate element of the crime for which he is charged. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987) ("Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding."). Thus, "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838; *see also United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998), *overruled on other grounds by United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2012) (en banc) ("In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation. If the defendant's deportation proceedings fail to provide this opportunity, the validity of the deportation may be collaterally attacked in the criminal proceeding." (citation omitted)).

A defendant who collaterally challenges the alleged deportation order must establish the following:

> (1) [he] exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d) (emphasis added); *see also United States v. Reyes-Bonilla*, 671 F.3d 1036, 1043 n.4 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 322 (2012) ("Through the addition of subsection (d) to [8 U.S.C. § 1326] in 1996, Congress partially codified the Court's decision in *Mendoza–Lopez*."). We conclude that Gonzalez-Villalobos has failed to show that the deportation proceeding at which his deportation order was issued improperly deprived him of the opportunity for judicial review, as required by 8 U.S.C. § 1326(d)(2), and therefore has not met his burden under § 1326(d).[6]

A.

Although 8 U.S.C. § 1326(d)(1) and (d)(2) are separate requirements, we have generally held that where an alien is deprived of his right to appeal to the BIA, he satisfies both (d)(1) and (d)(2). This makes sense, because an alien who fails to exhaust his administrative remedies due to an error in the underlying proceedings, satisfying (d)(1), will typically also be deprived of the opportunity for judicial review, satisfying (d)(2).[7] *See United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004) ("Effective deprivation of an alien's administrative appeal serves to deprive him of the opportunity for judicial review as well.").

The cases in which we have determined that § 1326(d)(1) and (d)(2) were satisfied can be divided into three overlapping categories. First, we have held that § 1326(d)(1) and (d)(2) are satisfied when the IJ failed to inform the alien that he had a right to appeal his deportation order to the BIA. *See Ubaldo-Figueroa*, 364 F.3d at 1050 ("Ubaldo-Figueroa was deprived of the opportunity for meaningful judicial review because the IJ did not inform him of his right to appeal his deportation order."); *Reyes-Bonilla*, 671 F.3d at 1045 (same).

Second, we have held that an IJ's failure to inform the alien that he is eligible for a certain type of relief also satisfies § 1326(d)(1) and (d)(2), because "an alien who is not made aware of 'his or her apparent eligibility' for relief has had no 'meaningful opportunity to appeal' the removal and seek such relief." *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015 (9th Cir. 2013) (citations omitted); *see also United States v. Lopez-Velasquez*, 629 F.3d 894, 901 (9th Cir. 2010) (en banc) (holding that an IJ must "inform the alien of a reasonable possibility that the petitioner may be eligible for relief" (internal quotation marks omitted)).[8] Thus, we held that

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6. Because we conclude that Gonzalez-Villalobos failed to carry his burden with respect to 8 U.S.C. § 1326(d)(2), we do not reach his argument that the IJ's denial of an evidentiary hearing and failure to suppress his conviction records resulted in the entry of an order that was "fundamentally unfair." *See* 8 U.S.C. § 1326(d)(3); *see also supra* note 5.

7. Put another way, in such cases the defendant is excused from satisfying (d)(1) and satisfies (d)(2). *See, e.g.*, *Ubaldo-Figueroa*, 364 F.3d at 1050 (concluding that "although Ubaldo-Figueroa did not exhaust his administrative remedies by appealing his removal order to the BIA in 1998, he is exempted from the exhaustion bar because his waiver of his right to appeal was not sufficiently considered and intelligent," and as a result, he was "deprived of the opportunity for meaningful judicial review" (internal quotation marks omitted)).

8. We also have held that § 1326(d)(1) and (d)(2) are satisfied when the government, rather than the IJ, misinforms an alien that he is ineligible for relief. *United States v. Arias-Ordonez*, 597 F.3d 972,

§ 1326(d)(1) and (d)(2) were satisfied when the IJ improperly characterized a prior conviction as an aggravated felony and erroneously informed the alien that he was ineligible for discretionary relief, *Camacho-Lopez*, 450 F.3d at 930; *Pallares-Galan*, 359 F.3d at 1103; *United States v. Leon-Paz*, 340 F.3d 1003, 1005–06 (9th Cir. 2003); when the IJ did not inform the alien that he was eligible for voluntary departure or failed to give him an opportunity to apply for such relief, *United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012); *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 n.2 (9th Cir. 2004); and when the IJ did not inform the alien that he was eligible for relief under INA § 212(c), *Ubaldo-Figueroa*, 364 F.3d at 1049–50, or INA § 212(h), *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (not discussing (d)(1) or (d)(2) specifically, but concluding that because Arrieta was not informed of his eligibility for a § 212(h) waiver, he was denied due process and a meaningful opportunity for judicial review).

Third, when an alien has waived his right to appeal to the BIA, he can nevertheless satisfy § 1326(d)(1) and (d)(2) by showing that his waiver was not "considered and intelligent." *Reyes-Bonilla*, 671 F.3d at 1043; *see also United States v. Ramos*, 623 F.3d 672, 682 (9th Cir. 2010) (concluding that alien's "waiver of his right to appeal . . . was procedurally defective and deprived him of the opportunity for meaningful judicial review," thereby meeting his burden under 8 U.S.C. § 1326(d)(1) and (d)(2)). This category of cases often overlaps with the prior two categories, since the IJ's failure to inform an alien of his right to appeal, or his eligibility for relief, can form the basis of an invalid waiver of the right to appeal. *See, e.g.*, *Ubaldo-Figueroa*, 364 F.3d at 1048 ("Ubaldo-Figueroa's waiver of his right to appeal his removal order was not sufficiently 'considered and intelligent' because the IJ presiding over the removal proceeding failed to inform him that he had the right to appeal his removal order to the BIA."); *Pallares-Galan*, 359 F.3d at 1096 (holding that an alien's waiver of his right to appeal was not "considered and intelligent" because the IJ erroneously told him that he was ineligible for relief); *Arrieta*, 224 F.3d at 1079 ("Mr. Arrieta argues persuasively that he could not make a considered and intelligent decision about his right to appeal because the IJ never informed him of his eligibility for a § 212(h) waiver.").[9]

B.

Against this legal backdrop, we turn to Gonzalez-Villalobos's challenge to the validity of the 1992 deportation order. Here, unlike in the cases discussed above, we cannot resolve 8 U.S.C. § 1326(d)(1) and (d)(2) in the same stroke. Gonzalez-Villalobos has clearly satisfied 8 U.S.C. § 1326(d)(1) by showing that he appealed the IJ's decision to the BIA. But he has failed to show that "the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," as required by 8 U.S.C. § 1326(d)(2). Unlike the errors discussed above, the error that Gonzalez-Villalobos alleges—the denial of an evidentiary hearing—is not an error that, by its nature, affected his awareness of or ability to seek judicial review.

Nor does Gonzalez-Villalobos allege an error so harmful or pervasive that it altered the course of his deportation proceedings such that he was effectively deprived of the opportunity for judicial review. This is perhaps unsurprising, given that Gonzalez-Villalobos *did*, in fact, seek judicial review. After appealing the IJ's decision to the BIA, he filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington, which he later dismissed. He does not argue that his ability to file the habeas petition was constrained by the alleged error at his deportation proceeding, nor does he argue that the error caused him to raise inapposite arguments in the petition or affected his decision to voluntarily withdraw the petition. Instead, Gonzalez-Villalobos asks the court to find that he was deprived of judicial review on the ground that he has a right to "meaningful review of the underlying deportation," and in the absence of prior judicial review, is entitled to it now.[10]

We decline to adopt Gonzalez-Villalobos's argument, which is based on a misreading of *Mendoza-Lopez* and 8 U.S.C. § 1326(d)(2). In *Mendoza-Lopez*, the Supreme Court held that "*where the defects in an administrative proceeding foreclose judicial review of that proceeding*, an alternative means of obtaining judicial review must be made available

977 (9th Cir. 2010) (considering an order to report for removal that erroneously informed the alien that "no administrative relief" was available to him, and noting that it is "well established that § 1326(d)'s requirements of exhaustion and deprivation of judicial review are satisfied when the government misinforms an alien that he is ineligible for relief").

9. We do not suggest that these are the only situations in which an alien can satisfy the requirements of 8 U.S.C. § 1326(d)(2). *See, e.g.*, *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) ("Deprivation of the opportunity for judicial review can be established by demonstrating ineffective assistance of counsel, and the failure of counsel to file a § 212(c) application can constitute ineffective assistance of counsel."). *Cf. United States v. Villavicencio-Burruel*, 608 F.3d 556, 560 n.2 (9th Cir. 2010) (finding that 8 U.S.C. § 1326(d)(1) was not satisfied, and distinguishing *Perez* on the ground that "counsel [in *Perez*] stated at the deportation hearing that he 'would file' an application for relief and then failed to do so in a timely fashion without informing his client, thus failing to act as competent counsel," whereas in *Villavicencio-Burruel*, the court could not "conclude that the attorney exceeded her authority or failed to act as competent counsel by not pursuing an appeal," because the alien's attorney "reserved a right of appeal on his client's behalf, but did not state that she would file an appeal" and the record was "silent on whether Villavicencio authorized or directed his attorney to file an appeal").

10. In response to the court's request for supplemental briefing on whether Gonzalez-Villalobos had satisfied 8 U.S.C. § 1326(d)(2), Gonzalez-Villalobos also argued that he "[h]ypothetically . . . might have been eligible for § 212(c) relief at the time of his immigration proceedings," and the IJ's failure to advise him of such relief "may have" improperly deprived him of the opportunity for judicial review. This argument was not raised in Gonzalez-Villalobos's opening brief and is therefore waived. Even if it were not waived, Gonzalez-Villalobos has failed to identify any facts that should have alerted the IJ to the possibility that he was eligible for such relief. *See Lopez-Velasquez*, 629 F.3d at 900 ("[T]he IJ is not required to advise an alien of possible relief when there is no factual basis for relief in the record.").

before the administrative order may be used to establish conclusively an element of a criminal offense." 481 U.S. at 838 (emphasis added). And the requirements of 8 U.S.C. § 1326(d) likewise make clear that it is not enough for the defendant to show that "the entry of the order was fundamentally unfair," as required by (d)(3), and that he exhausted his administrative remedies, as required by (d)(1); he must *also* show that "the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review." *See* 8 U.S.C. § 1326(d)(2).

In other words, where the defendant has failed to identify any obstacle that prevented him from obtaining judicial review of a deportation order, he is not entitled to such review as part of a collateral attack under 8 U.S.C. § 1326(d). *See United States v. Adame-Orozco*, 607 F.3d 647, 652 (10th Cir. 2010) ("There can be no genuine dispute that [the defendant] received what process § 1326(d)(2) promises. He freely admits that he was able to (and did) appeal the IJ's deportation order to the BIA, and he identifies no impediment to his ability to appeal the BIA's decision to a federal court."); *see also United States v. Hinojosa-Perez*, 206 F.3d 832, 836 (9th Cir. 2000) (holding that § 1326(d)(2) was not satisfied where the defendant alleged a failure to provide notice of his deportation hearing, because "the doors to the courts were open to [the defendant's] lack of notice due process argument").

Although we have "interpreted [the] narrow criteria [of § 1326(d)] broadly," *Vidal-Mendoza*, 705 F.3d at 1015, where a defendant has fully exhausted his administrative remedies, we conclude that the defendant must show an actual or constructive inability to seek judicial review, related to an alleged error or obstacle in the deportation proceedings, to satisfy § 1326(d)(2).[11] Gonzalez-Villalobos has failed to do so here, and therefore has not met his burden pursuant to 8 U.S.C. § 1326(d)(2).

IV.

CONCLUSION

We conclude that Gonzalez-Villalobos failed to carry his burden of showing that "the deportation proceedings at which the [deportation] order was issued improperly deprived [him] of the opportunity for judicial review," and therefore his collateral attack on the underlying deportation order cannot be sustained. 8 U.S.C. § 1326(d)(2).

AFFIRMED.

11. We do not suggest that the alleged error or obstacle in the deportation proceedings that deprived a defendant of judicial review must be the same as the alleged error or obstacle that made entry of the deportation order fundamentally unfair. A defendant could conceivably collaterally attack a prior deportation order by asserting that one defect in the prior deportation proceedings made entry of the deportation order unfair (e.g., that he was unfairly precluded from presenting evidence demonstrating his entitlement to relief) and a different obstacle or defect in the deportation proceedings deprived him of judicial review (e.g., ineffective assistance of counsel).

California Courts of Appeal

Cite as 13 C.D.O.S. 7990

ROSCOE LITTLEFIELD et al., Plaintiffs and Appellants,

v.

COUNTY OF HUMBOLDT, Defendant and Respondent.

No. A135628
In the Court of Appeal of the State of California
First Appellate District
Division Three
(Humboldt County) (Super. Ct. No. DR090888)
Filed June 28, 2013
Pub. order July 25, 2013

COUNSEL

Counsel for Plaintiffs and Appellants: Karen Diane Olson, Donna Bader

Counsel for Defendant and Respondent: William Forrest Mitchell, MITCHELL BRISSO DELANEY & VRIEZE

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on June 28, 2013, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

OPINION

Sheriff's deputies seized and destroyed approximately 1,500 pounds of marijuana under cultivation in a remote area of Humboldt County (the County). Plaintiffs Roscoe, Sylvia, Richard, Timothy and Jeffery Littlefield, each of whom has a written physician's recommendation for up to two ounces of marijuana per day, sued the County for conversion and violation of their constitutional and statutory rights to be free from unreasonable search and seizure and deprivation of property without due process. On cross-motions for summary judgment, the trial court found the deputies had probable cause for the seizure, that the County lawfully destroyed the cannabis, and that plaintiffs failed to proffer admissible evidence that their possession was lawful. It accordingly granted the County's motion and denied plaintiffs' motion. We agree, and affirm.

BACKGROUND

The facts are largely undisputed. Humboldt County Sheriff's deputies, assisted by CAMP (Campaign Against Marijuana Planting) agents, conducted open field marijuana eradication operations in a remote area of Humboldt County. Following aerial surveillance, deputies and CAMP agents entered a garden that contained 118 marijuana plants ranging from three to eight feet tall with an average diameter of six to seven feet. The flowering plants were heavily laden with buds. A loaded rifle with an attached 50 round "banana clip" was found in a small tent inside the garden.

Four medical marijuana recommendations written by Dr. Norman Bensky, for Sylvia Littlefield, Timothy Littlefield, Roscoe Littlefield, and Jeffrey Libertini, were posted on the front gate and inside the garden. The recommendations for Sylvia, Timothy and Roscoe Littlefield indicated the use of up to two ounces of cannabis per day, the equivalent of 45.6 pounds per year. The recommendation for Libertini was not issued by Dr. Bensky, and did not identify a dose or the ailment or symptoms to be treated with cannabis. Sylvia's recommendation specified it was for degenerative joint disease and glaucoma, Roscoe's specified degenerative joint disease and low back pain, and Timothy's specified low back pain and anxiety.

A well-worn footpath led from the site to a second plot on the Littlefield property, where deputies located an additional 96 flowering marijuana plants from three to eight feet tall and averaging four to six feet wide. Medical marijuana recommendations for Richard Littlefield and Summer Brown, each of which indicated up to two ounces daily for degenerative joint disease and low back pain, were posted in this garden. Deputies observed a number of other marijuana plots on the Littlefield property, but left them undisturbed.

Timothy Littlefield arrived during the search and told Deputy Fulton that the medical recommendations allowed each of the posted users to possess 45.6 pounds of marijuana per year. Deputy Fulton provided this information by radio to Sergeant Wayne Hanson, who responded that he believed the recommendations were invalid and the marijuana should be seized.

Hanson determined that the aggregated canopies of both gardens clearly exceeded the 100 square foot canopy per person limitation determined to be reasonable under County guidelines for medical marijuana prosecutions. The total canopy of the two gardens was approximately 5,862 square feet, or 977 square feet of canopy per person, nearly 10 times more than the 100 square foot canopy considered reasonable under the guidelines. The combined weight of the marijuana in both fields was approximately 1,508 pounds.[1]

Officers removed a 10-pound bulk cannabis sample and five subsamples. The remaining cannabis was removed from the two plots and destroyed pursuant to Health and Safety

1. This is approximately 24,128 ounces per person, or enough of a supply for two ounces of cannabis daily for six people for five and one-half years.

Code section 11479.[2] Deputy Cyrus Silva executed an affidavit on information and belief that the destruction complied with section 11479. It states: "The Sheriff of Humboldt County has determined that it is not reasonably possible to preserve the marijuana in place or at another location. This determination was based on the fact that Humboldt County does not have adequate storage facilities, or sufficient personnel to guard the marijuana. In addition, recently harvested marijuana gives off great volumes of heat and may erupt into fire. [¶] On 9:30, 2008, all of the marijuana [in] excess of ten pounds was destroyed. The remaining marijuana is retained by the Humboldt County Sheriff's Office at Eureka, California."

No arrests or criminal charges resulted from the raid, but the Littlefields sued the County for damages for, among other things, the replacement value of the confiscated cannabis, physical and mental suffering, emotional distress, and medical expenses. Plaintiffs estimate its replacement value between $683,724 and $1,367,448.

Plaintiffs and the County filed cross-motions for summary judgment. Following briefing and argument, the trial court issued an 12-page ruling granting the County's motion and denying appellants'. The court identified the critical question as "whether the officers engaged in the marijuana eradication operation possessed, at the time the marijuana here was seized, 'facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused.' " The probable cause inquiry, the court observed, "must include the officer's consideration of the individual's status as a qualified medical marijuana patient." The court concluded that, despite the posted medical marijuana recommendations, "[t]he amounts possessed were of such a quantity to lead a person of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. The amounts possessed were so well beyond the standards promulgated by state and local authorities to lead a reasonable person to believe that the marijuana was possessed for unlawful purposes."

The court rejected appellants' contention that the presentation of a medical marijuana recommendation immunizes a user from its seizure by law enforcement. "While plaintiffs assert that the mere presentation of a medical marijuana recommendation immunizes a qualified user from arrest, seizure or prosecution, independent of the quantity, the case law has not quite caught up with such an unequivocal assertion. The First District in *People v. Strasburg* (2007) 148 Cal.App.4th 1052… states: 'the status of [a] qualified patient does not confer an immunity from arrest. Law enforcement officers may arrest a qualified patient for marijuana offenses where they have probable cause, based on all of the surrounding facts including qualified patient status, when they have reason to believe, for instance, that the arrestee does not possess marijuana for his personal medical purposes.' "

The court also rejected plaintiffs' claim that they lawfully possessed the seized cannabis. "The reasonably possessed amount must be based upon the patients' current medical needs as determined by the trier of fact," but plaintiffs had not offered the opinion of a qualified medical expert to show the amount of cannabis seized was reasonably related to their medical needs. Instead, plaintiffs had submitted testimony from Jason Browne, an expert in the areas of medical cannabis quantification, value, and reasonable usage, that the quantity of cannabis taken from the Littlefields' property was "reasonable and within the limits of the parties' medical cannabis recommendations." The court found that while Browne could testify generally about the needs of average users, he lacked the expertise to render a medical opinion as to plaintiffs' specific needs. Plaintiffs' medical marijuana recommendations were also insufficient to establish that the amount of marijuana was reasonable because they were hearsay for that purpose. Therefore, the court noted, "the lack of such qualified medical testimony in a case involving such substantial quantities of marijuana leaves a gaping hole in plaintiffs' case." Plaintiffs' conversion claim failed because the seizure and destruction of the marijuana were lawful and because plaintiffs failed to produce evidence that their possession was lawful.

Based on its findings, the court found it unnecessary to address plaintiffs' additional constitutional and equitable claim, denied plaintiffs' summary judgment motion, and granted summary judgment for the County. Plaintiffs timely appealed.

DISCUSSION

A. Summary Judgment Standards

" 'To secure summary judgment, a moving defendant may prove an affirmative defense, disprove at least one essential element of the plaintiff's cause of action [citations] or show that an element of the cause of action cannot be established [citations]. [Citation.] The defendant "must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial." [Citation.] [¶] 'The moving defendant bears the burden of proving the absence of any triable issue of material fact, even though the burden of proof as to a particular issue may be on the plaintiff at trial. [Citation.]… Once the moving party has met its burden, the opposing party bears the burden of presenting evidence that there is any triable issue of fact as to any essential element of a cause of action.' " (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1485.)

"In reviewing the propriety of a summary judgment, the appellate court must resolve all doubts in favor of the party opposing the judgment. [Citation.] The reviewing court conducts a *de novo* examination to see whether there are any

2. All further statutory references are to the Health and Safety Code unless otherwise indicated.

genuine issues of material fact or whether the moving party is entitled to summary judgment as a matter of law. " (*M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 703–704.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ' "specific facts," ' and cannot rely upon the allegations of the pleadings. " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.)

B. The Seizure Was Supported by Probable Cause

1. The Limits of Marijuana Legalization

Over 15 years ago in *People v. Trippet* (1997) 56 Cal.App.4th 1532, Division Two of this district declined a criminal defendant's invitation to interpret California's medical marijuana statutes "as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state." (*Id.* at p. 1546.) We will do the same. To explain why, we revisit the interface between the Compassionate Use Act (CUA) and Medical Marijuana Program (MMP), which together enable the use and possession of medically indicated marijuana, and laws of considerably longer standing that more generally control the seizure and destruction of contraband.

In *People v. Kelly* (2010) 47 Cal.4th 1008, 1012–1013, our Supreme Court explained: "In 1996, the California electorate approved Proposition 215 and adopted the CUA, which provides: 'Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. [Citation.] By this and related provisions, the CUA provides an affirmative defense to *prosecution* for the crimes of possession and cultivation. [Citations.] The CUA does not grant immunity from *arrest* for those crimes, however. So long as the authorities have probable cause to believe that possession or cultivation has occurred, law enforcement officers may arrest a person for either crime regardless of the arrestee's having a physician's recommendation or approval. [Citation.] [¶] Nor does the CUA specify an amount of marijuana that a patient may possess or cultivate; it states instead that the marijuana possessed or cultivated must be for the patient's '*personal medical purposes.*' [Citation.] An early decision construed this provision of the CUA as establishing 'that the *quantity possessed* by the patient or the primary caregiver, and the form and manner in which it is possessed*, should be reasonably related to the patient's current medical needs.*" (*Ibid.*, fn. omitted; see also *People v. Mower* (2002) 28 Cal.4th 457, 467.)

In 2003 the Legislature enacted the MMP (§ 11362.7 *et seq.*) " 'to [c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.' " (*People v. Kelly, supra,* 47 Cal.4th at p. 1014, italics omitted.) *Kelly* invalidated the MMP's restrictions on the quantity of medical marijuana that may legally be possessed as an unconstitutional legislative amendment to a voter enacted initiative, but left its collateral provisions in place. (*Id.* at pp. 1043, 1046–1049.) Therefore, as the trial court in this case observed, in the post-*Kelly* world we are once again left with the "reasonable amount" standard that controlled before the Legislature enacted the MMP. Fortunately, we are not without guidance on its meaning and application.

People v. Trippet, supra, 56 Cal.App.4th 1532, cited with approval in *People v. Kelly, supra,* 47 Cal.4th at p. 1043, fn. 60 and 1047, sheds some light on the topic. The court said: "[W]e are not remotely suggesting that, even with a physician's 'recommendation or approval,' a patient may possess an unlimited quantity of marijuana. The ballot arguments of the proponents… are simply inconsistent with the proposition that either the patient or the primary caregiver may accumulate indefinite quantities of the drug. The statute certainly does not mean, for example, that a person who claims an occasional problem with arthritis may stockpile 100 pounds of marijuana just in case it suddenly gets cold. The rule should be that the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs. What precisely are the 'patient's current medical needs' must, of course, remain a factual question to be determined by the trier of fact. One (but not necessarily the only) type of evidence relevant to such a determination would be the recommending or approving physician's opinion regarding the frequency and amount of dosage the patient needs." (*Trippet, supra,* at p. 1549.)

Ten years later, after *Mower* but before *Kelly, City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 363, 388–389 held that Garden Grove was required to return less than a third of an ounce of lawfully possessed marijuana to the user from whom it had been seized. The analysis primarily concerned the interplay of state and federal law, but the Fourth District recognized, as in *Trippet*, that the CUA does not establish a right to possess unlimited amounts of marijuana. The court distinguished its earlier ruling in *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, as follows. "In [*Chavez*], the police seized over 10 pounds of marijuana and 46 marijuana plants from the defendant, but charges against him were dismissed in the furtherance of justice because he was already serving time on another case. [Citation.] The defendant sought the return of a 'reasonable amount' of marijuana for medicinal purposes, but it was clear — based on the amount of marijuana he had — he was not a qualified user under the CUA. [Citation.] That being the case, he was not in lawful possession of the marijuana for purposes of section 11473.5, and therefore the marijuana had to be

destroyed. [Citation.] In so holding, this court also noted that nothing in the CUA 'requires, or authorizes, the… return [of] confiscated marijuana.' [Citation.] However, even if it did, it would not have helped the defendant in *Chavez* because, given the amount of marijuana found in his possession, he was not entitled to the CUA's protections in the first place." (*Garden Grove, supra*, at pp. 387–388.) The *Garden Grove* court had no trouble distinguishing the small amount seized from the petitioner there with the unlawful (at least under the post-MMP, pre-*Kelly* scheme) quantity seized in *Chavez.*

2. Application

Here, the trial court distilled from these cases "[t]he principle… that while a reasonable amount is a flexible standard based upon the individual user, it is not without reasonable limits that include consideration of quantity." We agree. "[T]he status of qualified patient does not confer an immunity from arrest. Law enforcement officers may arrest a qualified patient for marijuana offenses where they have probable cause, based on all of the surrounding facts including qualified patient status, when they have reason to believe, for instance, that the arrestee does not possess marijuana for his personal medical purposes." (*People v. Strasburg, supra,* 148 Cal.App.4th at p. 1058; see *Giannis v. City and County of San Francisco* (1978) 78 Cal.App.3d 219, 225 [probable cause is properly decided on summary judgment].)

The most salient fact here is the vast quantity of marijuana found growing on the Littlefields' property. Even Browne, plaintiffs' medical marijuana expert, tacitly acknowledged that quantity can be considered in distinguishing between lawful and unlawful possession when he stated that "dispensaries generally do not provide 'pounds' of cannabis to their members at any given time… as it could rightly be perceived as diversion into the criminal market.' " On the undisputed facts, the trial court reasonably found that "[t]he amounts possessed were of such a quantity to lead a person of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. The amounts possessed were so well beyond the standards promulgated by state and local authorities to lead a reasonable person to believe that the marijuana was possessed for unlawful purposes."

There is no merit in plaintiffs' contention that any reasonable suspicion of unlawful possession the officers may have initially harbored was necessarily vitiated when they found the medical recommendations. The CUA protects the possession of marijuana only in an amount reasonably related to the user's current medical needs. (*People v. Kelly*, 47 Cal.4th at p. 1043.) To this end, when a user has a written recommendation from a physician, the Attorney General's 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Guidelines) direct that police officers "should use their sound professional judgment to assess the validity of the person's medical-use claim" based on the totality of the circumstances, including the quantity of marijuana present and the presence of weapons.[3]

Here, the sheer quantity of marijuana under cultivation could lead a reasonably prudent officer to conclude that plaintiffs' production far exceeded their medical needs. "Probable cause is a flexible commonsense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution to believe that certain items may be contraband. It does not require a showing that such a belief be correct or more likely true than false. A ' "practical, nontechnical" ' probability that incriminating evidence is involved is all that is required." (*People v. Holt* (1989) 212 Cal.App.3d 1200, 1204.) Dr. Bensky's recommendations supplied further reason for skepticism. Each purports to authorize the use of up to two ounces per person per day, or 45.6 pounds of cannabis per person per year — *15 times* the three pounds per year deemed reasonable under the County's Ordinance.[4] Officers could also reasonably question the likelihood that all five of Dr. Bensky's patients, including four members of the Littlefield family, suffered from degenerative bone disease and/or low back pain. We are not surprised that Sergeant Hansen doubted the validity of Dr. Bensky's recommendations.

It is not entirely clear from plaintiffs' briefs whether they also claim the search and seizure were illegal because the deputies did not obtain a warrant. If they do, they are wrong. The officers' entry onto the property was consistent with the "open fields" doctrine set forth in *Oliver v. United States* (1984) 466 U.S. 170, 176–179. " '[T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.' " (*Id.* at p. 176, quoting *Hester v. United States* (1924) 265 U.S. 57, 59, Holmes, J.)

We agree with the trial court that the County's undisputed evidence established that the officers had probable cause, based on the amount of marijuana under cultivation and plaintiffs' extremely generous medical marijuana recommendations, to believe the seized marijuana was unlawfully possessed.

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3. We grant plaintiffs' motion for judicial notice of the Guidelines and various Humboldt County ordinances.

4. Plaintiffs argue the County's Ordinance is unconstitutional for the reasons articulated in *People v. Kelly, supra,* 47 Cal.4th 1008, to the extent it sets limits on the amount of medical marijuana that may be legally possessed. They are precluded from raising this claim on appeal because they did not do so in their complaint or in the summary judgment proceedings. In any event, their claim, regardless of whatever merits it may or may not have, has no bearing on the question of probable cause. "An arrest made in good faith reliance on an ordinance (even though) subsequently declared to be unconstitutional is made with probable cause and is val*id*." (*In re Hector R.* (1984) 152 Cal.App.3d 1146, 1152; *Michigan v. DeFillippo* (1979) 443 U.S. 31, 37–38.)

C. The County Lawfully Destroyed the Seized Marijuana

Plaintiffs contend the County unlawfully converted their property and violated their constitutional and statutory property rights when it destroyed the seized marijuana. Here, too, we disagree.

Section 11479 addresses the destruction of controlled substances without court order, as follows: "Notwithstanding Sections 11473 and 11473.5, at any time after seizure by a law enforcement agency of a suspected controlled substance, that amount in excess of 10 pounds in gross weight may be destroyed without a court order" provided the agency satisfies specified requirements. (§ 11479 subds. (a)-(d).)[5] Among those requirements are that the agency make a determination that it is not reasonably possible to preserve the suspected controlled substance in place, or to relocate it to another location (§ 11479, subd. (d).) In addition, the agency must file an affidavit within 30 days after destroying the seized substance reciting the required information "together with information establishing the location of the suspected controlled substance" and the date and time of its destruction. (§ 11479, subd. (d).)

Here, plaintiffs complain the sheriff's department did not make the determination required by section 11479, subdivision (d). Plaintiffs are incorrect. The day after the raid, Deputy Cyrus Silva filed an affidavit stating "The Sheriff of Humboldt County has determined that it is not reasonably possible to preserve the marijuana in place or at another location. This determination was based on the fact that Humboldt County does not have adequate storage facilities, or sufficient personnel to guard the marijuana. In addition, recently harvested marijuana gives off great volume of heat and may erupt into fire." The affidavit satisfied the statutory requirement.

Plaintiffs' complaint that Deputy Silva's affidavit was not file-stamped is immaterial as Silva's declaration was the second page of a two-page document filed, and file-stamped, on October 8, 2008. Plaintiffs assert the County failed to produce the affidavit in response to a 2010 discovery request,[6] but they did not move to exclude it on that basis and so cannot now object that the court considered it. (Code Civ. Proc., § 437c, subd. (b)(5).) To the extent plaintiffs suggest the sheriff's department *fabricated* the Silva affidavit, citing both the County's failure to produce it in discovery and purported "stylistic differences" between the Silva and Fulton affidavits, we, like the trial court, find their suspicions far too speculative to approach a genuine and material question of fact.

Plaintiffs do, however, correctly observe that the deputies' affidavits fail to specify where the marijuana was seized and the precise date and time of its destruction, as called for in the last paragraph of section 11479. No matter. Section 11479, subdivision (d) requires that the law enforcement agency's affidavit provide "information establishing the location of the suspected controlled substance, and specifying the date and time of the destruction." Here, there is no question about where the marijuana was seized, and Silva's affidavit shows that it was destroyed before 11:00 the morning after the ra*id.* There could be no possible prejudice from the lack of more detailed or precise information. Nor is there any question but that the Department followed all of the procedures required as a precursor to destroying the suspected contraband. (See § 11479, subds. (a)-(d).) The County's compliance with section 11479 was sufficient. (See *People v. Eckstrom* (1986) 187 Cal.App.3d 323, 335 [substantial compliance required]; *People v. Superior Court (Calamaras)* (1986) 181 Cal.App.3d 901, 905 [substantial compliance]; see also *People v. Wilson* (1987) 191 Cal.App.3d 161 [requiring strict compliance, but finding standard satisfied because police photographs of plants were comparable to samples of growing plants].)

D. Plaintiffs Failed to Proffer Admissible Evidence of Lawful Possession

A plaintiff moving for summary judgment is required to "prove[] each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant… to show that a triable issue of one or more material facts exists as to that cause of action… ." (Code Civ. Proc., § 437(c)(p)(1).) Here, plaintiffs contend that they satisfied their burden by proving they lawfully possessed the seized marijuana, and that the trial court erred when it found that they failed to proffer sufficient competent evidence of such lawful possession. Not so.

The court explained its ruling as follows: "Under the Compassionate Use Act… , the amount of marijuana possessed must be 'reasonably related to the patient's current medical needs.' (*People v. Trippet* (1997) 56 Cal.App.4th

5. Those requirements are: "(a) At least five random and representative samples have been taken, for evidentiary purposes, from the total amount of suspected controlled substances to be destroyed. These samples shall be in addition to the 10 pounds required above. When the suspected controlled substance consists of growing or harvested marijuana plants, at least one 10 pound sample (which may include stalks, branches, or leaves) and five representative samples consisting of leaves or buds shall be retained for evidentiary purposes from the total amount of suspected controlled substances to be destroyed. [¶] (b) Photographs have been taken which reasonably demonstrate the total amount of the suspected controlled substance to be destroyed. [¶] (c) The gross weight of the suspected controlled substance has been determined, either by actually weighing the suspected controlled substance or by estimating that weight after dimensional measurement of the total suspected controlled substance. [¶] (d) The chief of the law enforcement agency has determined that it is not reasonably possible to preserve the suspected controlled substance in place, or to remove the suspected controlled substance to another location. In making this determination, the difficulty of transporting and storing the suspected controlled substance to another site and the storage facilities may be taken into consideration." The following and last paragraph requires a law enforcement agency that destroys suspected contraband pursuant to section 11479 to file an affidavit describing its compliance with subdivisions (a) through (d) and other specified information.

6. The County says that was due to a clerical copying error, but provides no factual support for that explanation. It proffered the Silva declaration with its opposition to Plaintiffs' summary judgment motion.

1532, 1549.) Conspicuously absent in the evidence adduced for the cross-motions for summary judgment/adjudication is any opinion by a qualified medical expert as to the amount of marijuana that the [plaintiffs] require for treatment of their ailments. There is nothing in the Declaration of plaintiffs' expert Jason Browne establishing that he possesses the requisite expertise to render a medical opinion as to the specific needs of the plaintiffs." The court considered Dr. Bensky's written medical marijuana recommendations for their effect on a reasonable officer assessing the existence of probable cause, but excluded their use as hearsay to prove legal possession.

The ruling is sound. "What precisely are the 'patient's current medical needs' must, of course, remain a factual question to be determined by the trier of fact." (*People v. Trippet, supra,* 56 Cal.App.4th at p. 1549.) Plaintiffs failed to adduce competent evidence of their medical needs or the quantity of marijuana reasonably needed for their treatment. Jason Browne apparently has considerable experience in the field of medical cannabis cultivation, use, and advocacy, but he is not qualified to give an expert opinion as to plaintiffs' medical conditions and medical needs. " '[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony.' [Citations.] Consequently, 'the field of expertise must be carefully distinguished and limited' [citation], and '[q]ualifications on related subject matter are insufficient.' " (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115; see also *Hayman v. Block* (1986) 176 Cal.App.3d 629, 642–644 [trial court must consider competency of evidence presented on summary judgment].) As the court observed, the lack of competent medical evidence that the quantity of marijuana was reasonably related to plaintiffs' current needs "leaves a gaping hole in plaintiffs' case." Neither their status as qualified patients nor Dr. Bensky's written recommendations sufficed to fill that gap.

Plaintiffs' failure to proffer competent evidence showing they had a legal right to possess the seized marijuana was fatal to their common law, statutory and constitutional claims for interference with their property rights. (See *Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1065 [conversion]; *cf. County of Butte v. Superior* Court (2009) 175 Cal.App.4th 729, 734, see *id.* at pp. 744–745 (dis. opn. of Morrison, J.) [basis for conversion and related property claims if plaintiff can show legal right to possession]; *People v. One 1941 Chevrolet* Coupe (1951) 37 Cal.2d 283, 286 [due process].) Accordingly, the trial court properly denied plaintiffs' motion for summary judgment and entered summary judgment in favor of the County.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur: McGuiness, P.J., Jenkins, J.

Cite as 13 C.D.O.S. 7995

MASONITE CORPORATION, Petitioner and Appellant,

v.

COUNTY OF MENDOCINO et al., Defendants and Respondents;

GRANITE CONSTRUCTION COMPANY, Real Party in Interest and Respondent.

No. A134896
In the Court of Appeal of the State of California
First Appellate District
Division Three
(Mendocino County Super. Ct. No. SCUK CVPT 1056883)
Filed July 25, 2013

COUNSEL

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CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.B., II.D., II.E., and II.F.

OPINION

Masonite Corporation (Masonite) appeals from a judgment denying its petition for writ of mandate to set aside approvals by Mendocino County (County) of the Kunzler Terrace Mine Project (Project) to be developed by Granite Construction Company (Granite; Granite and the County are hereafter referred to collectively as respondents), and the final environmental impact report (EIR) for its Project, for failure to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*).

Masonite argues the approval process and the EIR were deficient in several ways. The County was required to recirculate the EIR because the Project as approved had significantly greater impacts than the one originally proposed.

Recirculation was also required because the EIR disclosed a new significant impact on the Foothill Yellow-Tailed Frog (Frog) that was not adequately mitigated. The County erroneously determined that conservation easements and in-lieu fees were not feasible ways to mitigate the loss of prime farmland due to the Project. The EIR did not adequately analyze the Project's cumulative impacts on agricultural resources. The County failed to adopt adequate measures to mitigate significant impacts from truck traffic along a private road associated with the Project. And finally, that the EIR failed to adequately evaluate Project alternatives.

We agree with Masonite's contentions involving: recirculation for comment on possible mitigation measures that can protect the Frog; the infeasibility of agricultural conservation easements and in-lieu fees; discussion of cumulative impacts on farmland; and mitigation measures for truck traffic. Accordingly, we reverse the judgment denying the petition for writ of mandate, with directions that the County set aside its certification of the EIR, and prepare and circulate a supplemental EIR that addresses the errors we identify.

I. BACKGROUND

The Project is a sand and gravel quarry to be developed on 65.3 acres approximately one mile north of Ukiah. The site is bordered on the north by Ackerman Creek, on the east by the Russian River, on the south by property owned by Masonite, and on the west by Kunzler Ranch Road. Most of the site is cultivated as a vineyard, with an open space portion in the northeast and a truck maintenance shop at the northwest corner. Forty-five acres of the site's 65 acres are classified as "prime farmland," but the site has been zoned for industrial use since 1982. It is surrounded by a lumber mill to the north of Ackerman Creek, agricultural land to the east of the Russian River, Masonite's industrial property to the south (described as "vacant" on area maps), and industrial and commercial properties to the west.

Granite plans to extract 3.37 million tons of aggregate from 30.3 acres of the site over a 25-year period. The mine is designed to operate year-round, six days a week, 14 hours a day.[1] The mining will be done in phases to allow for concurrent site reclamation, and five years of reclamation are planned after the mining operations are complete. Following reclamation, the northwestern portion of the property will be available for future industrial uses, and the rest of the site will be "open space (ponds)."

Granite submitted an application to the County for approval of a conditional use permit and reclamation plan for the Project in February 2008. The County determined that an environmental impact report was required, solicited comments from government agencies in April 2008, and noticed preparation of a draft environmental impact report (Draft) in October. The Draft was released for public and agency review in September 2009. Among those who commented critically on the Draft and the Project were SCS Engineers on behalf of Masonite, and Russian Riverkeeper, an organization dedicated to protection of the Russian River environment.

The EIR was released for review on May 3, 2010. The EIR identified two significant and unavoidable Project impacts, the permanent loss of prime farmland, and traffic problems that would develop by the year 2030. The EIR came before the County Planning Commission on May 20, 2010. After considering public comments, including those on behalf of Masonite, the Planning Commission certified the EIR and approved the use permit and reclamation plan. The Planning Commission adopted a statement of overriding considerations noting, among other things, that the Project would provide "a reliable 20-year supply of construction aggregate in the Mendocino County area."

Masonite and Russian Riverkeeper appealed the planning commission decisions to the County Board of Supervisors. The appeals were heard by the board on July 27, 2010. The day of the hearing, Masonite filed a 49-page letter brief challenging the EIR on approximately 20 grounds. The board denied both appeals.

Masonite and Russian Riverkeeper filed petitions for writ of mandate seeking to overturn the County's approval of the Project due to violations of CEQA. The petitions were denied, and Masonite and Russian Riverkeeper appealed from the judgments. Russian Riverkeeper's appeal was dismissed after settlement.

II. DISCUSSION

A. Scope of Review

"In reviewing an agency's compliance with CEQA… the courts' inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' [Citation.] Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' [Citations.]

"An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case… is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is *de novo.* [Citations.] We therefore resolve the substantive CEQA issues… by independently determining whether the administrative record demonstrates any legal error by the County and whether it contains substantial evidence to support the County's factual determinations." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426–427, fn. omitted (*Vineyard*).)

[Parts II.B., *See* FOOTNOTE*, *Ante*]

1. Granite advised at the County board of supervisors hearing on the Project that, in response to comments from the Regional Water Board, it agreed to suspend mining during the wet season between November and March.

C. Mitigation for Loss of Prime Farmland

Forty-five acres of the Project site are prime farmland, meaning they are "designated by the Department of Conservation FMMP [Farmland Mapping and Monitoring Program] as prime farmland, farmland of statewide importance, or unique farmland." One of the significant unavoidable effects of the project identified in the Draft is the loss of these 45 acres of prime agricultural land. Masonite contends that the County erred when it determined that no mitigation was feasible for the loss of this prime farmland. Masonite argues that this impact could have been mitigated by acquisition of agricultural conservation easements on offsite properties, or payment of "in-lieu" fees to fund such acquisitions.

(1) Record

The Draft explained why this impact could not feasibly be mitigated: "Mitigation for agricultural resources may take the form of avoidance, minimization, restoration, preservation, or compensation (providing substitute resources off-site). These forms of mitigation correspond to CEQA *Guidelines* Section 15370.[2] For the proposed project, avoidance is not possible, as the location of the mineral resources corresponds to the prime farmland as identified in the FMMP. Minimization is incorporated into the project to an extent, as the project is phased, and agricultural activity will continue on a phase until it is mined, thus extending agricultural activity during the life of the project… . However, this will not reduce the impact to less than significant. Restoration is infeasible, as the mining will result in a finished grade below the groundwater level. Preservation in this instance, is similar to avoidance, and is infeasible for the same reason. Compensation generally takes the form of off-site acquisition of farmland, typically an Agricultural Conservation Easement (ACE). Acquisition of an ACE is considered infeasible for the proposed project for the reasons discussed below.

"An ACE does not replace the on-site resources, but rather, it addresses the indirect and cumulative effects of farmland conversion. Indirect effects include the pressure created to encourage additional conversions, as development pressure raises the speculative value of the land and increases the economic costs of farming due to land use incompatibilities (limitations on pesticide use, nuisance complaints due to dust and odor, vandalism, predation by domestic pets, increased traffic, etc.). Because the project site is surrounded by existing and vacant industrial uses, with the exception of the west side, it is unlikely that this project would affect neighboring agricultural uses. There are agricultural uses to the east, but they are separated by the natural barrier of the Russian River. In addition, the end use of the property is open space (including habitat), rather than urban developments. Open space is compatible with agriculture, and would not create indirect development pressure on agricultural lands.

"Therefore, feasible mitigation measures are not available, and this impact would be significant and unavoidable." (Italics and bold type deleted.)

The DOC expressed concerns about the loss of agricultural lands as an unavoidable impact of the Project in its comments on the Draft. According to the DOC, the loss should have been minimized through the acquisition of ACEs on comparable land of at least equal size. The DOC considered this means of mitigation to be a common and appropriate means of mitigating the loss of prime farmland. According to the DOC: "Mitigation via agricultural conservation easements can be implemented by at least two alternative approaches: the outright purchase of easements or the donation of mitigation fees to a local, regional or statewide organization or agency whose purpose includes the acquisition and stewardship of agricultural conservation easements. The conversion of agricultural land should be deemed an impact of at least regional significance. Hence, the search for replacement lands should be conducted regionally or statewide, and not limited strictly to land within the project's surrounding area."

The County did not respond to these comments except to note that no Williamson Act[3] contracts would be affected by the Project, and cite to the discussion of mitigation for lost farmland in the Draft. The Draft's discussion of the infeasibility of such mitigation was incorporated into the EIR without change.

When Masonite appealed the Planning Commission decisions to the Board of Supervisors, it said there was no "logical basis" for the conclusion that impacts to agricultural land could not be mitigated. At the hearing on the appeal, a County representative responded that "[t]he basic purpose of an agricultural conservation easement is to avoid the secondary impacts that are associated with conversion of agricultural land. You know, sometimes considered the so called domino effect. As you extinguish operations, now you're putting development pressure on the next farmer and you're causing nuisance issues that are going to make life difficult for him and make it more likely that that operation is going to want to sell… . So that's really what you're doing because you're not replacing the resources. We can put an easement somewhere else but it[']s not going to recreate those few acres of prime farmland that are present on that site now. So that's how we approach that analysis and you have to look at the circumstances of the project… . The nearest active agricul-

2. This Guideline provides: " 'Mitigation' includes: [¶] (a) Avoiding the impact altogether by not taking a certain action or parts of an action. [¶] (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. [¶] (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. [¶] (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. [¶] (e) Compensating for the impact by replacing or providing substitute resources or environments."

3. "A Williamson Act contract obligates the landowner to maintain the land as agricultural for 10 or more years, with resulting tax benefits. ([Gov. Code,] §§ 51240–51244.) Absent contrary action, each year the contract renews for an additional year, so that the use restrictions are always in place for the next nine to 10 years. (*Id.*, § 51244.)" (*Friends of East Willits Valley v. County of Mendocino* (2002) 101 Cal. App.4th 191, 195.)

tural operation is across the Russian River, which acts as a natural barrier in terms of what I would call these nuisance or domino effects… . [S]o given that, the conclusion of County Staff was that an agricultural easement was not the appropriate response in this case."

(2) Review

(a) Agricultural Conservation Easements

CEQA provides that "public agencies should not approve projects as proposed if there are… feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (Pub. Resources Code, § 21002; see also *id.* at § 21002.1, subd. (b) [agencies must mitigate significant effects of projects they approve "whenever it is feasible to do so"].) CEQA defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364.) Agency findings regarding whether mitigation measures are feasible are generally reviewed for substantial evidence. (See, *e.g.*, *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal. App.4th 316, 350–351 (*Beaumont*).) But not in this case.

Here, the determination that no mitigation was feasible for the loss of farmland rested on a conclusion that offsite agricultural conservation easements (ACEs) cannot mitigate for the land lost at the Project site because they would "not replace the on-site resources." The County presumed that ACEs were useful only to address "the indirect and cumulative effects of farmland conversion," and were not needed here because the Project would have no such effects. Thus, the finding of infeasibility in the EIR rested on the legal conclusion that while ACEs can be used to mitigate a project's indirect and cumulative effects on agricultural resources, they do not mitigate its direct effect on those resources. As respondents put it in the trial court: "Given the lack of indirect or cumulative agricultural impacts, the Draft EIR properly conclude[d] that agricultural conservation easements are legally infeasible." The legal feasibility of a mitigation measure is not a question of fact reviewed for substantial evidence but rather is an issue of law that we review *de novo.*

We disagree with respondents. We conclude that ACEs may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. Our conclusion is reinforced by the CEQA Guidelines, case law on offsite mitigation for loss of biological resources, case law on ACEs, prevailing practice, and the public policy of this state.

ACEs preserve land for agricultural use in perpetuity. (See Civ. Code, §§ 815.1, 815.2 [describing agricultural and other conservation easements]; Pub. Resources Code, § 10211 [defining "agricultural conservation easements"].) As the California Farm Bureau Federation (CFBF) observes in an amicus curiae brief advocating for the conclusion we reach: "The permanent protection of existing resources off-site is effective mitigation for [a project's direct, cumulative, or growth-inducing] impacts because it prevents the consumption of a resource to the point that it no longer exists… . If agricultural land is permanently protected off-site at, for example, a 1:1 replacement ratio, then at least half of the agricultural land in a region would remain after the region has developed its available open space." By thus preserving substitute resources, ACE's compensate for the loss of farmland within the Guidelines' definition of mitigation. (Guidelines, § 15370, subd. (e) [mitigation includes "[c]ompensating for the impact by replacing or providing substitute resources or environments"].)

There is no good reason to distinguish the use of offsite ACEs to mitigate the loss of agricultural lands from the offsite preservation of habitats for endangered species, an accepted means of mitigating impacts on biological resources. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 (*Santee*) [loss of habitat mitigated by conservation of other habitat at a 1:1 ratio]; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 610–611, 614–626 [mitigation by offsite preservation of two acres of existing habitat or creation of one acre of new habitat for each acre of habitat impacted by the project]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [mitigation by "off-site preservation of similar habitat"]; *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1038 [purchase of a half-acre for habitat reserves for every acre of development]; see also Kostka et al., Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. 2009) § 14.8, p. 692 (Kostka) [acquisition and enhancement of species habitat provide a substitute resource under Guidelines, § 15370, subd. (e)].) Indeed, the DOC's comments on the Draft recognized that the rationale for ACEs in this case parallels that of established mitigation for loss of wildlife habitat.

Our conclusion is also supported by the relatively sparse case law involving ACEs. The case most closely on point is *Citizens for Open Government v. City of Lodi* (2012) 205 Cal. App.4th 296 (*Lodi*), which involved a project that, similar to the one here, converted 40 acres of prime farmland to other uses. The EIR determined that the impact on agricultural resources was unavoidably significant, and the developer was nonetheless required to mitigate the impact by obtaining an ACE over 40 other acres of prime farmland. (*Id.* at pp. 322–323.) Although the EIR observed that " 'such off-site mitigation would not avoid the significant impact resulting from the permanent loss of prime agricultural lands at the project site' " (*id.* at p. 323), the court noted that acquisition of the offsite ACE "would minimize and substantially lessen" that impact (*id.* at p. 324). The *Lodi* court's reasoning refutes respondents' theory that mitigation through use of an offsite ACE is not legally feasible.

In *Beaumont*, *supra*, 190 Cal.App.4th 316, the EIR for a housing development on land long used for agricultural purposes noted that there was " 'no feasible long-term mitigation [for the impact on agricultural resources] other than placing large blocks of farmland into conservation easements, Williamson Act preserve status, or other temporary protection or preservation plans.' " (*Id.* at p. 349 [italics omitted].) But the EIR rejected those mitigation measures as economically infeasible because the pace of urban development made long-term farming no longer financially viable, a conclusion that was upheld as supported by substantial evidence. (*Id.* at pp. 350–351, citing *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1269–1271 [offsite preservation of agricultural land was infeasible because of "the negative economics of long-term agriculture" in Orange County].) There would have been no need for the EIR or the court in *Beaumont* to address the economic feasibility of ACEs if, as respondents argue, ACEs are not legally feasible. Nor does *Beaumont* support respondents' claim that we should review the infeasibility determination in this case for substantial evidence. Because the County decided that ACEs were not a legally feasible means to mitigate the loss of farmland at the Project site, it never investigated whether ACEs were economically feasible, and there is no evidence to review.

Building Industry Assn. of Central California v. County of Stanislaus (2010) 190 Cal.App.4th 582 (*Stanislaus*), involved a challenge to a county general plan that required developers of projects converting agricultural land to residential use to obtain ACEs on farmland of equal quality in the county at a 1:1 ratio, or pay "an in-lieu mitigation fee." (*Id.* at p. 588.) The court concluded that these mitigation requirements were reasonably related to the adverse public impact of such projects and thus an authorized use of the county's police power. The court observed that a residential project would not be approved "until the developer provides permanent protection of one acre of farmland for every acre of farmland converted to residential use. Agricultural conservation easements granted in perpetuity are the primary means of accomplishing this permanent protection requirement… . [¶]… [¶]… Although the developed farmland is not replaced, an equivalent area of comparable farmland is permanently protected from a similar fate." (*Id.* at p. 592.) *Stanislaus* teaches that ACEs are a reasonable means to mitigate the impact of a project that replaces agricultural land.

Moreover, it appears that ACEs are commonly used for that purpose. The DOC described ACEs in its comments as "accept[ed] and use[d] by lead agencies as an appropriate mitigation measure under CEQA," and the administrative record includes evidence that ACEs are so employed by a number of cities and counties. The EIR at issue in *Lodi* stated that acquisition of ACEs over acreage equal to the agricultural acreage lost due to a project is " 'standard for California communities.' " (*Lodi*, *supra*, 205 Cal.App.4th at p. 322.) " 'In addition to the City of Lodi, the following agencies in the surrounding area apply the 1:1 mitigation ratio: cities of Stockton and Elk Grove, counties of San Joaquin and Stanislaus, Tri-Valley Conservancy (Livermore/Alameda County).' " (*Ibid.*) This authority suggests that the County is an outlier in believing that ACEs cannot feasibly be used to mitigate the conversion of prime farmland to other uses.

We note finally that our Legislature has repeatedly stated the preservation of agricultural land is an important public policy. (Gov. Code, § 51220, subd. (a) ["the preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources, and is necessary not only to the maintenance of the agricultural economy of the state, but also for the assurance of adequate, healthful and nutritious food for future residents of this state and nation"]; Pub. Resources Code, § 10201, subd. (c) ["Agricultural lands near urban areas that are maintained in productive agricultural use are a significant part of California's agricultural heritage… . Conserving these lands is necessary due to increasing development pressures and the effects of urbanization on farmland close to cities."]; Civ. Code, § 815 ["the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California"].) The Legislature has also declared that CEQA is intended to effectuate this public policy. (Stats. 1993, ch. 812, § 1, p. 4428 ["(a) Agriculture is the state's leading industry… . [¶]… [¶] (c) The conversion of agricultural lands to nonagricultural uses threatens the long-term health of the state's agricultural industry. [¶] (d) The California Environmental Quality Act plays an important role in the preservation of agricultural lands."].) To categorically exclude ACEs as a means to mitigate the conversion of farmland would be contrary to one of CEQA's important purposes. We agree with the CFBF that ACEs should not "be removed from agencies' toolboxes as available mitigation" for this environmental impact.

For these reasons, the EIR's determination that ACEs are legally infeasible cannot be sustained. The economic feasibility of off-site ACEs to mitigate the Project's impact on the loss of 45 acres of prime farmland must be explored.

(b) In-Lieu Fees

As an alternative to the outright purchase of ACEs, the DOC comment letter recommended "the donation of mitigation fees to a local, regional or statewide organization or agency whose purpose includes the acquisition and stewardship of [ACEs]." Masonite argues that the EIR was deficient because it did not address this suggestion. The County responds, saying it was legally precluded from accepting in-lieu fees because it does not have a comprehensive farmland mitigation program.

We agree with Masonite that the EIR should have addressed the DOC comment and given reasons for rejecting the DOC's proposal. (Guidelines, § 15088, subds. (a) & (c) [responses with reasoned analysis are required.) Again, we are not persuaded by respondents' argument for legal infea-

sibility. The DOC was not advocating payment of in-lieu fees to a county program, but rather to third parties involved in acquiring and overseeing ACEs. Whether the County lacks a comprehensive farmland mitigation program is immaterial, and does not explain why in-lieu fees are not feasible mitigation. This issue requires further analysis in the EIR.

[Parts II.D., II.E., and II.F., *See* FOOTNOTE*, *Ante*]

III. DISPOSITION

The judgment denying the petition for writ of mandate is reversed, with directions to issue a writ requiring the County to set aside its certification of the EIR, set aside its approvals of the conditional use permit and reclamation plan for the Project, and prepare and circulate a supplemental EIR, which includes the EIR's provisions pertaining to the Frog, and addresses the deficiencies we have identified in the EIR concerning: the feasibility of ACEs and in-lieu fees as mitigation for the Project's conversion of farmland to nonagricultural use; the discussion of cumulative impacts on agricultural resources; and the efficacy of the mitigation measures for truck traffic on Kunzler Ranch Road. Costs on appeal to Masonite.

Siggins, J.

We concur: McGuiness, P.J., Pollak, J.

Cite as 13 C.D.O.S. 8000

SAVE THE PLASTIC BAG COALITION,
Plaintiff and Appellant,

v.

COUNTY OF MARIN et al., Defendants and Respondents.

No. A133868
In the Court of Appeal of the State of California
First Appellate District
Division Three
(Marin County) (Super. Ct. No. CV1100996)
Filed June 25, 2013
Part. pub. order July 25, 2013

COUNSEL

Counsel for Plaintiff and Appellant: Stephen L. Joseph

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Counsel for Californians Against Waste as Amicus Curiae on behalf of Defendants and Respondents: Rachel Z. Vida

ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on June 25, 2013, was not certified for publication in the Official Reports. Upon due consideration, the requests to publish the opinion, filed on July 8 and 15, 2013, are granted in part. Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, the opinion is certified for publication with the exception of parts four, five, six, and seven of the Discussion.

McGUINESS, P.J.

OPINION

County of Marin (Marin County or the county) enacted an ordinance intended to encourage the use of reusable bags by banning single-use plastic bags and imposing a fee on single-use paper bags. The ordinance applies to roughly 40 retailers in unincorporated parts of the county. The county determined the ordinance was categorically exempt from the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*) because it was a regulatory action designed to assure the maintenance, restoration, enhancement, or protection of natural resources and the environment.[1] Plaintiff Save the Plastic Bag Coalition (plaintiff) sought a writ of

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

mandate directing the county to set aside its ordinance for failure to comply with CEQA. On appeal from a judgment denying the writ, plaintiff raises various arguments supporting its view that the challenged ordinance is not categorically exempt from CEQA. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Marin County Board of Supervisors (board) enacted Ordinance No. 3553 (ordinance) in January 2011. Effective January 1, 2012, the ordinance prohibits certain retail establishments from dispensing single-use plastic bags and requires retailers to impose a reasonable charge of not less than five cents for dispensing a single-use, recycled-content paper bag.[2] (Marin County Code, tit. 5, § 5.46.020, subds. (a) & (b)(2)(D).) Retail customers who participate in certain government-sponsored food programs are exempt from the charge for single-use paper bags. (*Id.*, § 5.46.020, subd. (b)(2)(C).) The ordinance applies only in unincorporated portions of the county. (*Id.*, § 5.46.010, subd. (f).) As a general matter, grocery stores, pharmacies, convenience food stores, and other stores that sell food or perishable items are subject to the ordinance, although restaurants and similar establishments that sell prepared foods are excluded from the law's scope. (*Ibid.*) The ordinance establishes the criteria for a bag to qualify as reusable and specifies that reusable bags may not contain lead or other heavy metals in toxic amounts. (*Id.*, § 5.46.030.) A store must make reusable bags available for purchase. (*Id.*, § 5.46.020, subd. (b)(1).)

The county's effort to stem consumers' reliance on single-use bags began years before the county passed the ordinance. In 2007, a Marin County task force identified plastic bags as a major solid waste issue. The task force reported that plastic bags have no recycling markets, take 500 years to decompose, and pose a hazard to the environment. In the period from 2007 through 2010, the county held meetings to formulate a strategy to address the use of single-use bags. The "Marin Bag Ban Working Group" convened meetings in 2009 and 2010 to draft a local ordinance. The working group included representatives from government, environmental organizations, retail stores, and suppliers of bags.

In December 2010, the county's agricultural commissioner sent the board an analysis of a proposed ordinance regulating the provision of single-use carryout bags. As set forth in the commissioner's report, single-use plastic and paper carryout bags have adverse environmental impacts throughout the state. Litter cleanup alone requires public agencies to spend substantial sums to dispose of discarded single-use bags. In addition, a substantial amount of private and public money is spent removing plastic and paper bags from recycling equipment, storm water systems, streets, sidewalks, and waterways, including the San Francisco Bay. According to the commissioner's analysis, the ordinance would apply to approximately 40 retail stores in unincorporated areas of Marin County. If a similar ordinance were to be adopted throughout the county by all incorporated cities and towns, the law would apply to a total of 440 retailers.

As set forth in the agricultural commissioner's analysis, county residents use up to 138 million single-use bags each year that end up in the waste stream. Bags are sometimes baled together and "sent to distant lands for handling — often to be burned or buried." According to one estimate, California residents pay up to $200 per household annually in taxes and fees to clean up waste associated with single-use bags. The agricultural commissioner stated the ordinance would provide an incentive for consumers to shift from single-use bags to reusable bags. According to the analysis, a shift to reusable bags would conserve resources, reduce the amount of greenhouse gas emissions associated with the production of single-use bags, reduce waste and marine pollution, protect water resources and water quality, and enhance the quality of life for county residents, visitors, and wildlife.

At the time the county was considering the ordinance, state law prohibited local jurisdictions from imposing a fee for single-use plastic bags. (See former § 42254, subd. (b)(2), as added by Stats. 2006, ch. 845, § 2.) In light of this constraint, and in order to encourage consumers to bring reusable bags with them to stores, the county proposed banning single-use plastic bags. To discourage consumers from simply switching from plastic to paper, the county also proposed imposing a fee for single-use paper bags. The agricultural commissioner's analysis recognized that, while paper bags are recycled at a much higher rate than plastic bags, paper bags generate "significantly larger [greenhouse gas] emissions and result in greater atmospheric acidification, water consumption and ozone production than plastic bags." The analysis recited the experience in other parts of the nation and world supporting the conclusion that mandatory charges on single-use bags result in significant declines in the use and consumption of bags. Among other things, the commissioner relied on a master environmental assessment prepared by Green Cities California in which it was reported that a ban on single-use plastic bags combined with a five-cent charge for single-use paper bags in the District of Columbia had caused as many as two-thirds of consumers to shift from single-use to reusable bags. After the District of Columbia law went into effect, there was a 50 percent decrease in the number of plastic bags found during an annual cleanup of the Anacostia River watershed.

The agricultural commissioner concluded that "[b]y pursuing a ban on plastic with a mandatory charge on paper, the County can successfully rebut the plastic industry's challenge that simply banning plastic would shift people from one bad environmental impact (plastic) to another one (paper)." The commissioner also stated that the combination of the plastic bag ban with the charge on paper bags would allow the county to claim a categorical exemption under CEQA "by

2. When we use the terms "plastic bag" and "paper bag" throughout this opinion, we intend to refer to single-use bags unless otherwise specified.

demonstrating and achieving a result that is environmentally superior: moving people to reusable bags and reducing waste from all single-use products." The analysis did not specify the statute, regulation, or other basis on which a categorical exemption might be claimed.

After conducting a first reading of the ordinance at a public meeting in December 2010, the board set the matter for a second reading in early January 2011, to be combined with a hearing on the merits of the ordinance. The county published notice of the hearing and allowed the public to send written comments to the board in advance of the hearing.

Plaintiff submitted a lengthy set of objections to the board expressing its opposition to the proposed ordinance, along with over 90 documents that were either cited in the objections or were purportedly supportive of plaintiff's position. Plaintiff describes itself as a coalition of companies involved in the manufacture or distribution of plastic bags. The purpose of the coalition is to respond to "environmental myths, exaggerations, and misinformation about plastic bags." Fundamentally, plaintiff objected to the adoption of the proposed ordinance without the preparation or adoption of an environmental impact report (EIR). Plaintiff argued that banning plastic bags may have significant negative impacts on the environment because the alternatives — either paper bags or reusable bags — are worse for the environment. Among other things, plaintiff argued that banning plastic bags would not reduce the cost of litter collection, because there would still be a need to remove litter from streets, parks, and waterways even if there were no plastic bags in the litter stream. Plaintiff also stated that the plastic bag recycling rate had increased significantly since state law required stores to install plastic bag recycling bins. According to plaintiff, it is a "good thing" that plastic bags take many years to biodegrade, reasoning that alternatives such as paper bags emit significant amounts of greenhouse gases when they biodegrade in landfills. Additionally, Plaintiff disputed the claim that large numbers of seabirds and other sea animals are killed by plastic bags, and also challenged the assertion that there is a vast plastic garbage patch in the Pacific Ocean.

The thrust of plaintiff's objections focused on so-called "life cycle" assessments that evaluate the overall environmental impact of plastic bags compared to paper bags. Life cycle assessments evaluate the local and global environmental impacts of a product's manufacture and use from "cradle to grave" — i.e., from extraction of raw materials to final disposal of the product. For example, in the case of paper bag production and use, the assessments examine things such as forest decline, water consumed during production, atmospheric acidification from paper manufacturing, contribution to landfills, and generation of greenhouse gases. Plaintiff summarized four specific life cycle assessments that purportedly show paper bags are significantly more damaging to the environment than plastic bags. One such assessment concluded that papers bags have more adverse environmental impacts than plastic bags in that they use more energy and water, emit more greenhouse gases, produce more atmospheric acidification that results in acid rain, cause more ground level ozone to be formed, and generate more solid waste. Plaintiff also argued that the life cycle impacts of reusable bags are worse for the environment than the life cycle impacts of plastic bags, contending that reusable bags consume more raw materials and will likely be discarded in a landfill long before they have been used enough times to offset their greater negative life cycle impacts.

Plaintiff disputed the agricultural commissioner's conclusion that a five-cent fee for paper bags would provide sufficient incentive to encourage consumers to switch to reusable bags. As for the District of Columbia's favorable experience with a five-cent fee for paper bags, plaintiff suggested the results there were influenced by a massive reusable bag giveaway program. Plaintiff further argued it was too soon to know with certainty the long-term impact of the District of Columbia law. Citing an EIR completed by Los Angeles County, plaintiff claimed the EIR established that a 10-cent fee for paper bags combined with a plastic bag ban would not be sufficient to prevent significant negative environmental impacts. Plaintiff did not provide the Los Angeles County EIR to the board but instead recited a web address at which the EIR could be accessed.

Observing that the agricultural commissioner had referred to a categorical exemption from CEQA, plaintiff noted it was "not clear" whether the county intended to rely on a categorical exemption. Plaintiff proceeded to address categorical exemptions for projects undertaken to protect a natural resource or the environment, arguing that the county could not rely on a categorical exemption because plaintiff had made "a fair argument that the proposed ordinance may cause significant environmental impacts."

The board continued the hearing on the merits of the ordinance until January 25, 2011, following the receipt of plaintiff's lengthy objections to the proposed legislation. In a letter to the board dated January 25, 2011, the county counsel's office recommended proceeding with the second reading of the ordinance and a public hearing on the merits of the proposed legislation. County counsel conducted its review of the matter at the request of the board in order to address plaintiff's contention that the county had failed to comply with CEQA. County counsel stated: "In our opinion, exempting the ordinance from CEQA review based upon the categorical exemptions contained in CEQA Guidelines 15307 and 15308[3] (the so-called Class 7 and 8 exemptions), remains val*id.* There is substantial evidence to support your Board's conclusion the ordinance is a regulatory measure designed to protect both natural resources and the environment generally. Prohibiting

3. The regulations governing CEQA are found in title 14 of the California Code of Regulations. (Cal. Code Regs., tit. 14, § 15000 *et seq.*) Consistent with common usage, we hereafter refer to the regulations governing CEQA as the Guidelines. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319, fn. 4.)

the distribution of single use plastic carry-out bags at many retailers will undoubtedly have a positive environmental impact so long as customers do not merely shift from single-use plastic to single-use paper carry-out bags which also have adverse environmental impacts. And we believe the available evidence still shows that even at a 5 cent charge for paper bags, enough customers will convert to truly reuseable [sic] bags that the net effect of the ordinance will be to reduce the use of both plastic and paper single-use carry-out bags from their current levels in unincorporated Marin County."

Following the scheduled public hearing, the board adopted the ordinance. On March 2, 2011, the county filed a notice of exemption reflecting that the ordinance is exempt from CEQA under the categorical exemptions set forth in Guidelines sections 15307 and 15308.

Plaintiff filed a petition for a writ of mandate in the Marin County Superior Court, naming as respondents both the county and the Marin County Department of Agriculture, Weights & Measures. Plaintiff sought a peremptory writ of mandate directing the county to set aside the ordinance for failure to comply with CEQA. Plaintiff also sought a declaration that the ordinance is preempted by state law.

The trial court entered an order denying the writ of mandate and declaratory relief requested by plaintiff. The court found there is substantial evidence to support the county's action in relying on the categorical exemptions contained in Guidelines sections 15307 and 15308. The court noted: "While a clever lawyer can argue that it is a benefit that plastic bags take 500 years to decompose, it was reasonable for the County to conclude that it [is] more beneficial for the environment to avoid the litter and pollution from the plastic bag in the first instance, so that this indestructible trash is not added to the landfill at all."

Plaintiff appealed following entry of judgment in favor of the county. In its opening brief on appeal, plaintiff clarifies that the appeal is limited to the denial of the writ of mandate sought on the ground the county violated CEQA. Plaintiff does not appeal from the denial of declaratory relief concerning whether state law preempts the ordinance.

DISCUSSION

1. CEQA Principles

It is state policy in California that "the long-term protection of the environment… shall be the guiding criterion in public decisions." (§ 21001, subd. (d).) To achieve this goal, CEQA and the Guidelines implementing it provide for a three-step process. "In the first step, the public agency must determine whether the proposed development is a 'project,' that is, 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment' undertaken, supported, or approved by a public agency." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 286.) In this case, Marin County concedes the ordinance qualifies as a project under CEQA.

If the proposed activity is determined to be a project, the public agency must proceed to the second step of the process, which considers whether the project "is exempt from compliance with CEQA under either a statutory exemption [citation] or a categorical exemption set forth in the regulations [citations]. A categorically exempt project is not subject to CEQA, and no further environmental review is required. If the project is not exempt, the agency must determine whether the project may have a significant effect on the environment. If the agency decides the project will not have such an effect, it must 'adopt a negative declaration to that effect.' [Citations.] Otherwise, the agency must proceed to the third step, which entails preparation of an environmental impact report before approval of the project." (*Tomlinson v. County of Alameda, supra,* 54 Cal.4th at p. 286.)

Because the ordinance here constitutes a legislative or quasi-legislative action, our inquiry on appeal extends only to whether the county prejudicially abused its discretion. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) An agency abuses its discretion when it "has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) Our review is *de novo* in the sense that we perform the same function as the trial court in reviewing the administrative record for legal error and substantial evidence. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra,* at p. 427.) We review the agency's action and not the decision of the trial court. (*Ibid.*)

In this case, the county determined the ordinance was categorically exempt from CEQA. Although our review is still governed by the general standards we have outlined, case law has clarified how these standards are applied in categorical exemption cases. "A categorical exemption is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment. [Citations.] Thus an agency's finding that a particular proposed project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment. [Citation.] On review, an agency's categorical exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects." (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.)

"In categorical exemption cases, where the agency establishes that the project is within an exempt class, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2. The most commonly raised exception is subdivision (c) of section 15300.2, which provides that an activity which would otherwise be categorically exempt is not exempt if there are 'unusual circumstances' which create a 'reasonable possibility' that the activity will have a significant effect on the environment." (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at

p. 115.) As relevant here, the "cumulative impact" exception in subdivision (b) of Guidelines section 15300.2 provides that a public agency may not rely on a categorical exemption "when the cumulative impact of successive projects of the same type in the same place, over time is significant."

There is a split of authority on the appropriate standard of review to apply to a question of fact concerning whether an activity that would otherwise be categorically exempt is subject to one of the three main exceptions contained in subdivisions (a) through (c) of Guidelines section 15300.2. (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2013) § 5.127, pp. 298–302.) " 'Some courts have relied on cases involving review of a negative declaration, holding that a finding of categorical exemption cannot be sustained if there is a "fair argument" based on substantial evidence that the project will have significant environmental impacts, even where the agency is presented with substantial evidence to the contrary. [Citation.] Other courts apply an ordinary substantial evidence test… , deferring to the express or implied findings of the local agency that has found a categorical exemption applicable.' " (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 856.) As we explain, *post,* it is unnecessary for us to take a position on this split of authority because it would not alter the outcome of this appeal.

2. Save the Plastic Bag Coalition v. City of Manhattan Beach

At the outset, we consider plaintiff's contention that the outcome of this case is controlled by the California Supreme Court's decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 (*Manhattan Beach*). Because the case addresses the appropriate level of environmental review under CEQA for a plastic bag ban, it is plainly relevant to our analysis. We also point out something obvious from the caption of the case — the plaintiff in *Manhattan Beach* is the same as the plaintiff here. However, *Manhattan Beach* involved an entirely different CEQA process from the one pursued by the county. In *Manhattan Beach,* the city conducted an initial study followed by a negative declaration. (*Id.* at pp. 161–162.) By contrast, in this case Marin County determined the ordinance was exempt from CEQA and therefore did not proceed with an initial study. Nevertheless, even though *Manhattan Beach* focused on a CEQA process distinct from the one before us, the decision contains useful guidance in assessing plaintiff's claims that the ordinance will have significant environmental impacts.

In *Manhattan Beach,* the city proposed an ordinance banning the use of plastic bags at the point of sale. (*Manhattan Beach, supra,* 52 Cal.4th at p. 160.) The proposed ordinance included a finding that it was exempt from CEQA under the "common-sense" exemption (Guidelines, § 15061, subd. (b)(3)) and as a regulatory program designed to protect the environment (Guidelines, § 15308), the latter of which is one of the exemptions relied upon by the county in this case. (*Manhattan Beach, supra,* 52 Cal.4th at p. 160.) Just as the plaintiff did in this case, it threatened to sue the city unless it performed a full CEQA review. The city then conducted an initial study, which acknowledged that a switch from plastic to paper bags might have some negative environmental consequences but concluded the impacts would be less than significant. (*Ibid.*)

The initial study recited that the population of the city was 33,852, and that only 217 retail establishments would be affected by the plastic bag ban. (*Manhattan Beach, supra,* 52 Cal.4th at p. 161.) Although the proposed ordinance did not include a fee for paper bags, the study reached the conclusion that paper bags would not replace plastic bags on a one-to-one ratio because of the larger capacity of paper bags, and in any event some percentage of plastic bags would be replaced by reusable bags. (*Ibid.*) The study also noted that paper bags are recycled at a much higher rate than plastic bags, thus limiting the impact on landfill capacity. (*Id.* at p. 162.) The study recommended adopting a negative declaration finding the proposed ordinance would not have a significant effect on the environment. (*Ibid.*)

Plaintiff objected and relied on life cycle studies showing that paper bags have a greater environmental impact than plastic bags. (*Manhattan Beach, supra,* 52 Cal.4th at p. 162.) The city adopted a negative declaration and enacted the ordinance. (*Id.* at p. 164.) Plaintiff sued the city for failure to comply with CEQA and prepare an EIR. (*Ibid.*)

The Supreme Court in *Manhattan Beach* considered whether plaintiff had established a "fair argument the project may have significant adverse effects," thus requiring the city to prepare an EIR.[4] (*Manhattan Beach, supra,* 52 Cal.4th at p. 171.) The court focused on the distinction between local impacts and impacts in areas outside the public agency's geographical boundaries. (*Id.* at pp. 172–174.) CEQA specifies that a public agency must consider any significant effect on the environment in the area affected by the project.[5] Although the court stated that public agencies must consider effects a project will have beyond the boundaries of the project area, it clarified that CEQA does not require an exhaustive analysis "of all conceivable impacts a project may have in areas outside its geographical boundaries." (*Id.* at p. 173.) The court emphasized that broader environmental impacts without direct impact on the local agency's geographical area may be evaluated at a higher level of generality. (*Id.* at pp. 173–174.)

4. The other issue before the Supreme Court was whether plaintiff had standing to sue. (*Manhattan Beach, supra,* 52 Cal.4th at pp. 165–170.) Here, the county concedes that plaintiff has standing.

5. Section 21151, subdivision (b) specifies that "any significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in physical conditions which exist within the area as defined in Section 21060.5." Section 21060.5, in turn, provides that " '[e]nvironment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance."

In considering the local and broader impacts of the city's ban, the court stated that the "only strictly local impacts of the ban appear to be those related to the transportation of paper bags, and possibly their disposal." (*Manhattan Beach, supra,* 52 Cal.4th at p. 173.) The impacts in areas outside the city were "both indirect and difficult to predict." (*Id.* at p. 174.) The court held that the "city properly concluded that a ban on plastic bags in Manhattan Beach would have only a miniscule contributive effect on the broader environmental impacts detailed in the paper bag 'life cycle' studies relied on by plaintiff. Given the size of the city's population (well under 40,000) and retail sector (under 220 establishments, most of them small), the increase in paper bag production following a local change from plastic to paper bags can only be described as insubstantial." (*Ibid.*) The court concluded there was no substantial evidence to support a fair argument the plastic bag ordinance might significantly affect the environment, and consequently the city was not required to prepare an EIR. (*Id.* at p. 175.)

As relevant for our purposes, the court in *Manhattan Beach* focused on the "actual scale of the environmental impacts that might follow from increased paper bag use in Manhattan Beach, instead of comparing the global impacts of paper and plastic bags… ." (*Manhattan Beach, supra,* 52 Cal.4th at p. 172.) Further, while acknowledging that "CEQA review includes the impacts a project may have in areas outside the boundaries of the project itself," the court urged caution in considering broader and often uncertain impacts, stating: "[T]his case serves as a cautionary example of overreliance on generic studies of 'life cycle' impacts associated with a particular product. Such studies, when properly conducted, may well be a useful guide for the decision maker when a project entails substantial production or consumption of the product. When, however, increased use of the product is an indirect and uncertain consequence, and especially when the scale of the project is such that the increase is plainly insignificant, the product 'life cycle' must be kept in proper perspective and not allowed to swamp the evaluation of actual impacts attributable to the project at hand." (*Id.* at p. 175.) The court urged "common sense" in the CEQA domain, even when the "common sense" exemption (Guidelines, § 15061, subd. (b)(3)) is not specifically at issue. (*Manhattan Beach, supra,* at p. 175.) The court concluded by stating that "common sense leads us to the conclusion that the environmental impacts discernible from the 'life cycles' of plastic and paper bags are not significantly implicated by a plastic bag ban in Manhattan Beach." (*Ibid.*)

In light of our summary of the case, one might question why plaintiff would rely on *Manhattan Beach* or even suggest the analysis is supportive of its position. Plaintiff seizes upon two sentences in the opinion to argue that a governmental body larger than Manhattan Beach, such as Marin County, must prepare an EIR. First, plaintiff cites the statement that "the analysis would be different for a ban on plastic bags by a larger governmental body, which might precipitate a significant increase in paper bag consumption." (*Manhattan Beach, supra,* 52 Cal.4th at p. 174.) Second, plaintiff relies on a footnote in which the court stated as follows: "While cumulative impacts should not be allowed to escape review when they arise from a series of small-scale projects, that prospect does not appear in this case. According to plaintiff, the movement to ban plastic bags is a broad one, active at levels of government where an appropriately comprehensive environmental review will be required." (*Id.* at p. 174, fn. 10.) From these isolated passages, plaintiff draws the conclusion that an EIR is required for any plastic bag ban in (1) a city or county larger than Manhattan Beach, and (2) in smaller cities and counties based on cumulative impacts. Plaintiff then claims the population of Marin County in 2010 was 252,409, over seven times larger than Manhattan Beach.

The passages in *Manhattan Beach* upon which plaintiff relies do not support a conclusion that Marin County abused its discretion by relying on a categorical exemption from CEQA. The court simply recognized that there may be circumstances when more comprehensive environmental review will be required if it can be shown that a plastic bag ban will result in a significant increase in paper bag use. That is simply not the case here. Marin County's ordinance applies to roughly 40 stores, compared to over 200 stores affected by Manhattan Beach's ordinance. If the broader impacts of increased paper bag use could be described as insubstantial in *Manhattan Beach* — where there was no charge for paper bags — it is even more trivial in this case, which involves significantly fewer retailers, each of whom will charge fees for papers bags and thereby increase the incentive for consumers to bring reusable bags when shopping. Further, because our review of the facts is limited to the record before the public agency, we may not properly consider the population of Marin County, which is not part of the administrative record. (See *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977.) In any event, the relevant population figure for purposes of comparison is the population of the unincorporated areas of the county, where the ordinance applies. Given that the number of affected stores in unincorporated areas is substantially less than the number of stores that would be affected if the ordinance were applied county-wide (40 as compared to 440), it is also reasonable to assume the population in unincorporated areas is substantially less than the overall population of the county. Thus, the analysis in *Manhattan Beach* does not compel the conclusion that Marin County was required to perform a more comprehensive CEQA review. If anything, a comparative analysis involving stores and population figures in Manhattan Beach and the unincorporated parts of Marin County reinforces the conclusion that, just as in *Manhattan Beach,* the environmental impacts of the ordinance are insignificant.

Plaintiff also argues that the county's reliance on a categorical exemption flies in the face of *Manhattan Beach.* Citing the California Natural Resource Agency's website, plaintiff contends that categorical exemptions apply only to

types of projects from which the Legislature has provided a *blanket* exemption from CEQA. According to plaintiff, if comprehensive environmental review "will be required" for some plastic bag bans (*Manhattan Beach, supra,* 52 Cal.4th at p. 174, fn. 10), then it cannot be the case that there is a blanket exemption for plastic bag bans.

The holding and analysis in *Manhattan Beach* does not preclude a public agency from relying on a categorical exemption for a plastic bag ban. The authority plaintiff cites for the proposition that categorical exemptions are "blanket" exemptions actually refers to *statutory* exemptions. There is a critical difference between statutory and categorical exemptions. "[S]tatutory exemptions are absolute, which is to say that the exemption applies if the project fits within its terms. Categorical exemptions, on the other hand, are subject to exceptions that defeat the use of the exemption and the agency considers the possible application of an exception in the exemption determination." (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 966, fn. 8; see also 1 Kostka & Zischke, Practice under the Cal. Environmental Quality Act, *supra,* § 5.3, pp. 194–195.)

We do not suggest there is a blanket exemption from CEQA for plastic bag bans. A categorical exemption *may* apply to plastic bag bans depending upon the unique facts and circumstances presented. Nothing in *Manhattan Beach* precludes such a result. Indeed, the court in *Manhattan Beach* stated that an alternative to conducting an initial study would have been to determine the project is exempt from CEQA, an alternative that Manhattan Beach abandoned when threatened with litigation. (*Manhattan Beach, supra,* 52 Cal.4th at p. 171, fn. 8.) If the Supreme Court had intended to preclude public agencies from relying on a categorical exemption from CEQA when considering plastic bag bans, it would not have suggested the exemption process as an alternative to conducting an initial study.

3. County as a Regulatory Agency for Purposes of Categorical Exemptions

Plaintiff argues that the categorical exemptions relied upon by the county are inapplicable because they only apply to regulatory agencies implementing regulations authorized by a preexisting state law or ordinance.

Before considering the merits of plaintiff's contention, we first address the county's argument that plaintiff failed to exhaust its administrative remedies with respect to this contention. There appears to be no dispute that plaintiff failed to raise this argument in its lengthy objections submitted to the board. The question is whether the exhaustion-of-administrative-remedies requirement applies under the circumstances presented here.

The Supreme Court addressed the applicability of the requirement to categorical exemption cases in *Tomlinson v. County of Alameda, supra,* 54 Cal.4th 281. The court held "that the exhaustion-of-administrative-remedies requirement set forth in subdivision (a) of section 21177 applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance *as long as the public agency gives notice of the ground for its exemption determination*, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project." (*Id.* at p. 291, italics added.)

Here, the county's agricultural commissioner indicated it would be appropriate to seek a categorical exemption based upon the fact the result of the ordinance is "environmentally superior." The commissioner's analysis did not specify the regulatory or other basis upon which a categorical exemption might be claimed. It was not until the day of the continued public hearing that county counsel identified the basis for the claimed exemptions — sections 15307 and 15308 of the Guidelines. This belated identification of the grounds for the exemption does not qualify as adequate notice sufficient to permit interested parties to meaningfully address the basis for the exemptions. Even assuming this belated notice would suffice for purposes of requiring a member of the public to exhaust administrative remedies, it is unclear whether county counsel's letter was even made public before the hearing. Furthermore, it is irrelevant that plaintiff actually referred to the two exemptions relied upon by the county in its objections. Plaintiff could not be expected to raise all possible arguments concerning the applicability of a categorical exemption when it was unclear which exemption the county intended to claim. Thus, we conclude plaintiff was not required to exhaust administrative remedies with respect to this contention.

Turning to the merits of plaintiff's argument, the contention is based on the language of the exemptions in sections 15307 and 15308 of the Guidelines (referred to as "Class 7" and "Class 8" exemptions), which establish an exemption from CEQA for "actions taken by regulatory agencies as authorized by state law or local ordinance" either "to assure the maintenance, restoration, or enhancement of a natural resource" in the case of a Class 7 exemption or "to assure the maintenance, restoration, enhancement, or protection of the environment" in the case of a Class 8 exemption.[6]

Plaintiff relies upon the general rule that "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language." (*Mountain Lion Foundation v.*

6. Guidelines section 15307 provides: "Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption." Guidelines section 15308 provides: "Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption."

Fish & Game Com. (1997) 16 Cal.4th 105, 125.) Without citation to authority, plaintiff claims that the Class 7 and 8 exemptions are based on a "three-level hierarchy" divided between legislative, regulatory, and ministerial actions. Plaintiff then argues, again without citation to authority, that legislative actions, such as the enactment of the ordinance, are never exempt from CEQA under the Class 7 and 8 exemptions, which apply only to regulatory agencies. In reliance on *Magan v. County of Kings* (2002) 105 Cal.App.4th 468 (*Magan*), plaintiff argues that the purpose of the regulatory exemptions is to avoid the need for regulatory agencies to repeat environmental review that has already been done at the legislative level.

We are aware of no support for plaintiff's claimed distinction between legislative and regulatory actions in the context of exemptions from CEQA. There is, however, a distinction between ministerial actions and discretionary actions. Ministerial actions of public agencies are exempt from CEQA. (Guidelines, § 15060, subd. (c)(1).) Discretionary actions by public agencies *may* be subject to CEQA. (*Ibid.*) The county readily concedes that enactment of the ordinance involved the "exercise of discretionary powers by a public agency." (*Ibid.*) Although ordinances are always "legislative" in character, they also may constitute "regulations." The authority for counties to enact regulations is provided in section 7 of article 11 of the California Constitution: "A county or city may make or enforce within its limits all local police, sanitary, and other ordinances and *regulations* not in conflict with general laws." (Italics added.)

Plaintiff's reliance on *Magan* is puzzling because the case does not support its position. In *Magan,* the Kings County Board of Supervisors enacted an ordinance regulating the application of sewage sludge to agricultural property. (*Magan, supra,* 105 Cal.App.4th at p. 470.) In setting limits on what types and quantities of sewage sludge could be applied to agricultural property, the ordinance relied on sewage sludge classifications established by federal regulation. (*Id.* at pp. 471–472.) The county determined the ordinance was categorically exempt from CEQA as "an action taken by a regulatory agency for the protection of the environment" under Guidelines section 15308. (*Magan, supra,* at p. 472.) The county's notice of exemption referred to the regulatory powers granted to the county. (*Ibid.*) The appellate court upheld the categorical exemption without considering whether the county was a "regulatory agency" within the meaning of section 15308 of the Guidelines. (*Id.* at p. 477.)

Just as in *Magan,* the county here exercised the regulatory powers afforded to it by the California Constitution. The ordinance constitutes a regulation enacted for the purpose of protecting natural resources and the environment. It is immaterial that Kings County referred to certain federal regulations in its ordinance for purposes of defining which limitations applied to which types of sewage sludge. The classifications established by federal regulation did not empower the county to enact the ordinance. Rather, they were simply convenient classifications to clarify how the county's ordinance was to be applied. In one instance, Kings County recognized that it could not prohibit the application of a certain type of sewage sludge because federal law was to the contrary. (*Magan, supra,* 105 Cal.App.4th at p. 471.) That fact does not support a conclusion that Kings County's authority to implement regulations derived from a specific authorization by the federal government. The situation is no different here, where the county was constrained from imposing a fee for plastic bags because state law prohibited it. Although the county was bound by the prohibition, the state law prohibiting fees on plastic bags was not the source of the county's authority to enact the ordinance.

Plaintiff contends the county is trying to create an enormous loophole in CEQA by allowing cities and counties to adopt ordinances they deem to be "green" or "environmentally protective" without conducting any form of CEQA analysis. We disagree. In order to support a categorical exemption under CEQA, a public agency must be able to marshal substantial evidence to support the conclusion that the project fell within the exemption. (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 115.) Even if a public agency meets its initial burden to show the exemption is supported by substantial evidence, it still has to defend against claims that the exemption is subject to an exception. (*Ibid.*) Thus, it is simply not the case that a city or county can circumvent CEQA merely by characterizing its ordinances as environmentally friendly and therefore exempt under the Class 7 or 8 categorical exemptions.

It is particularly telling that plaintiff's briefs appear to lack any mention of whether the county satisfied its initial burden to establish that the claimed exemptions are supported by substantial evidence in the record. We agree with the county's observation that "at no point has [plaintiff] attempted to argue that a regulation limiting the distribution of single-use bags and plastic bags, and encouraging the use of re-usable [sic] bags would not constitute an action to help 'assure the maintenance, restoration, enhancement, or protection of the environment.' " As the county points out, plaintiff argues that plastic bags are not as pernicious as sometimes claimed but does not dispute the fundamental point that the environment would be enhanced without plastic and paper bag waste. Because plaintiff has not directly addressed the issue of whether there is substantial evidence to support the Class 7 and 8 exemptions (before considering the exceptions to the exemptions), we will consider the issue forfeited. In any event, we agree with the trial court that the administrative record contains substantial evidence to support the conclusion that the ordinance is an action that will maintain, enhance, and protect natural resources as well as the environment generally.

[PARTS 4-7, *See* FOOTNOTE*, *Ante*]

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

McGuiness, P. J.

We concur: Siggins, J., Jenkins, J.

Cite as 13 C.D.O.S. 8008

STATE FARM GENERAL INSURANCE COMPANY, Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD, CALIFORNIA INSURANCE GUARANTEE ASSOCIATION et al., Respondents.

2d Civil No. B240742
In the Court of Appeal of the State of California
Second Appellate District
Division Six
(W.C.A.B. Nos. ADJ4684775, ADJ4381820, ADJ7684775)

Proceeding to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded with directions.

Filed July 1, 2013
Pub. order July 25, 2013

COUNSEL

Finnegan, Marks, Theofel & Desmond, Ellen Sims Langille, for petitioner State Farm General Insurance Company.

Guilford Steiner Sarvas & Carbonara, Richard E. Guilford; Floyd, Skeren & Kelly, James K. Lowery, for respondent California Insurance Guarantee Association.

No appearance for respondent Workers' Compensation Appeals Board.

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on July 1, 2013, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

OPINION

Labor Code section 5950 provides that any person aggrieved by a final order, decision, or award of the Workers' Compensation Appeals Board (WCAB) may, within the prescribed time limit, apply to the Court of Appeal for a writ of review. Appellate review is limited to final orders that affect a substantial right or liability of a party. (*Duncan v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 294, 299.) The failure of an aggrieved party to seek judicial review of a final order of the WCAB bars later challenge to the propriety of the order or decision before either the WCAB or the

court. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075–1076 (*Maranian*); see also *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (1980) 104 Cal. App.3d 528, 532–535.)

This petition for writ of review challenges the WCAB's decision allowing California Insurance Guarantee Association (CIGA) to pursue a claim for reimbursement against State Farm General Insurance Company (State Farm), after the WCAB had previously rejected the claim and CIGA had failed to timely seek judicial review. We conclude that CIGA's claim is barred by principles of *res judicata*. We annul the WCAB's decision and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 1999, and January 20, 2000, Joanne Lutz (applicant) was injured while working as a personal assistant to Linda McDonald, President of Roto Rooter (aka Russell Warner, Inc.). The applicant was on Roto Rooter's payroll at the time. During 1999 and 2000, Roto Rooter was insured for workers' compensation by Fremont Compensation Insurance Company and Paula Insurance Company, respectively. Linda McDonald and her homeowner's insurance carrier, State Farm, were joined as additional parties to the applicant's claim.

In February of 2002, at a mandatory settlement conference, the parties disputed the issues of employment and which insurance carrier should be responsible for coverage of the applicant's claim, i.e., whether the applicant was working as a domestic employee of McDonald at the time of her injuries such that State Farm should provide coverage for her claim, or whether she was employed by Roto Rooter.

On March 15, 2002, in lieu of trial, the parties entered into "Joint Stipulations With Request for Award." The parties stipulated that the applicant was employed by Roto Rooter and Linda McDonald, and "sustained injury arising out of and in the course of employment." Paula Insurance Company agreed to administer all benefits under the award, and under any future award. State Farm agreed to "indemnify and/or contribute 25% of all incurred benefits paid to or on behalf of applicant (including, but not limited to TD [temporary disability], PD [permanent disability], medical treatment, and vocational rehabilitation), as to injuries of 6/8/99 and 1/20/00. [¶] Paula Ins. reserves its right to seek contribution from Fremont Compensation Ins. Co." That same day, Workers' Compensation Judge (WCJ) William Carero approved the award allocating liability between the parties. No party sought reconsideration of the award and, consequently, it became final between these parties.

In June of 2002 and July of 2003, Paula Insurance Company and Fremont Insurance Company, respectively, were liquidated. CIGA assumed administration of the claim. Since then, State Farm has been reimbursing CIGA for 25 percent of all benefits paid to the applicant.

In September of 2003, CIGA filed a petition for dismissal, arguing it should be dismissed because Paula Insurance Company had not provided workers' compensation coverage for residential or domestic employees. State Farm opposed the petition, contending the evidence supported a finding of employment by Roto Rooter and coverage, and that the March 15, 2002, stipulated award was final and binding on CIGA. The record before us discloses no action on this petition.

In February of 2008, five years later, CIGA sought to be relieved as administrator of the applicant's claim. CIGA filed a declaration of readiness with the WCAB, stating that the parties were unable to "resolve the dispute concerning employment as a domestic employee versus employment with Roto Rooter." CIGA requested resolution of the questions (1) "whether State Farm homeowner's insurance qualifies as 'other insurance' to make the claim against CIGA a non-covered claim per Insurance Code section 1063.1"; and (2) whether the applicant qualifies as a domestic employee under Labor Code section 3351, subdivision (d).

On April 4, 2008, the WCJ ruled that the WCAB was without jurisdiction to rescind or alter the March 15, 2002, stipulated award, and that CIGA was bound by the stipulation. The WCJ reasoned: "Labor Code section 5804 confers limited power upon the Board to rescind, alter or amend its Awards. That power is limited by the statutory language as to time and as to content. Specifically, that Section states 'that after an award has been made finding that there was employment and the time to petition for a rehearing or reconsideration or review has expired… , the appeals board upon a petition to reopen shall not have the power to find that there was no employment.' This includes determination of the identity of the employer previously determined by the Award. [¶] Neither does the subsequent liquidation of the Paula Insurance Company and Fremont Indemnity… permit CIGA to upset the final legal determination as to employment. … [¶] In essence, CIGA avers that it is not bound by the Award entered against the then-solvent carriers for which CIGA is now responsible to the extent the Insurance Code requires. [¶] No determination is made as to the extent of CIGA's ultimate liability under the March 15, 2002 Award. It is found nevertheless that the Award binds CIGA." CIGA did not seek reconsideration of the WCJ's order before the WCAB. (Lab. Code, § 5900.)

Two months later, on June 9, 2008, CIGA filed a petition for reimbursement and for a change of administrator, renewing its claim that it should be relieved of responsibility to pay benefits because of the presence of other insurance. (Ins. Code, § 1063.1, subd. (c)(9).)[1] CIGA argued that State Farm was jointly and severally liable for the benefits paid by CIGA, and as solvent "other insurance" must reimburse

1. Insurance Code section 1063.2, subdivision (a) limits CIGA's liability to paying for "covered claims." Insurance Code section 1063.1, subdivision (c)(9) provides that "covered claims" do not include "a claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured."

CIGA in full for all temporary disability benefits, medical treatment, and medical-related expenses. CIGA requested that State Farm reimburse it $382,833, less credit for payments made by State Farm.

State Farm opposed the petition, arguing that (1) CIGA's failure to seek reconsideration of the WCJ's decision on April 4, 2008, precluded it from relitigating its reimbursement claim (Lab. Code, § 5804); (2) State Farm's homeowner's insurance policy does not constitute "other insurance" as defined by the Insurance Code because its policy was not "available to the claimant or insured" (Ins. Code, § 1063.1, subd. (c)(9)); and (3) CIGA's claims were barred by the equitable doctrine of laches.

In May of 2009, CIGA filed a declaration of readiness (presumably for its June 2008 petition), seeking dismissal as a party-defendant on the ground that "'other solvent insurance' is available" pursuant to Insurance Code section 1063.1, subdivision (c)(9). According to the pretrial conference statement, the parties proceeded to trial on issues including: (1) whether CIGA should be dismissed pursuant to Insurance Code section 1063.1, subdivision (c)(9), because "other solvent insurance" is available; (2) joint and several liability/reimbursement from State Farm; (3) Insurance Code section 11590 provides that domestic workers are covered under homeowner's insurance policy for workers' compensation; and (4) petition to change administrator.

On June 25, 2009, the WCJ conducted a hearing on CIGA's petition. The minutes of the hearing specify that the issue of whether there was "good cause to dismiss CIGA due to the presence of other insurance" was "raised and accepted to be heard" as part of the trial. With respect to this issue, the WCJ ruled: "The presence of other insurance in this case does not support good cause to dismiss CIGA. [CIGA] has already been determined [to be] bound by the [Stipulated Award of March 15, 2002]; and that determination having been made on April 8th, 2008, without any appellate response, remains the law of this case, and the motion of CIGA to be dismissed is therefore denied."

CIGA then sought reconsideration by the WCAB, contending that CIGA is statutorily prohibited from making payments to the applicant and must be dismissed pursuant to Insurance Code section 1063.1, subdivision (c)(9) because other solvent insurance is available. CIGA argued that our decisions in *Weitzman* and *Hooten* entitle it "to shift the entire amount of joint and several liability onto the still-solvent carrier."[2]

On July 28, 2009, the WCJ recommended the WCAB deny reconsideration, reasoning that "[r]ight or wrong, the 2008 decision on jurisdiction to rescind, alter or amend the 2002 stipulated award is the law of this case. [¶] [CIGA] seeks to distinguish the issue here presented from that presented in 2008. However, both efforts boil down to an effort to impose the liability in this case solely on State Farm." The WCJ explained that CIGA "remains liable because the 2002 stipulation and award was a finding of employment which was not the subject of a petition for reconsideration and was followed by a decision six years later that jurisdiction to change the terms of the 25%/75% deal was lacking. The 2008 decision in turn became final." The WCJ also observed that CIGA was barred by laches from attempting to avoid the stipulated award "where five to six years elapse with the injured worker and the homeowner carrier relying upon the deal they struck." On October 15, 2009, the WCAB adopted WCJ Carero's recommendation and denied CIGA's petition for reconsideration. CIGA did not file a petition for writ of review in the Court of Appeal.

In January of 2010, CIGA proceeded to trial on the applicant's claim of permanent disability, future medical treatment, a lien claim by the Employment Development Department (EDD), and other related issues. On April 27, 2010, the WCJ issued his decision granting the applicant permanent disability of 39 percent and awarding benefits against CIGA for future medical treatment. The WCJ ordered CIGA to reimburse the EDD for disability benefits provided to the applicant.

In May of 2010, CIGA sought reconsideration of the WCJ's decision, contending that the WCJ should have found that the applicant was jointly employed by Roto Rooter and Linda McDonald on the date of injury, and the award should have identified State Farm as jointly liable for all benefits due the applicant.

The WCJ recommended that reconsideration be granted in part to correct certain miscalculations he had made in the amount of permanent disability and to eliminate CIGA's obligation to reimburse the EDD. The WCJ also clarified that CIGA is the party liable for the benefits due the applicant, and that "State Farm remains obligated to its co-defendant(s), but not to the applicant." The WCJ recommended denial of CIGA's reconsideration petition in all other respects.

On January 18, 2011, the WCAB adopted the WCJ's recommendations in all respects and modified the WCJ's award accordingly. The WCAB amended the award to conform to the 2002 stipulation by identifying Linda McDonald as an additional employer on the date of injury. The WCAB rejected CIGA's contention that the award should be amended to reallocate liability for the applicant's claim to State Farm by finding it jointly and severally liable. The WCAB reasoned that CIGA's contentions were rejected by the WCJ in his decisions of April 4, 2008, and July 13, 2009, and by the WCAB when it denied reconsideration on September 1, 2009. Because CIGA did not appeal those decisions, the WCAB concluded they "are now final and the law of the case."

2. See *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2005) 128 Cal.App.4th 307, 320 (*Weitzman*) ["covered claims" under Ins. Code section 1063.1, subdivision (c)(9), do not include claims covered by other solvent insurers in situations of joint and several liability]; *CIGA v. Workers' Comp. Appeals Bd.* (2005) 128 Cal. App.4th 569, 573 (*Hooten*) [even in absence of joint and several liability, "covered claims" under section 1063.1, subdivision (c)(5) do not include claims by other insurers].)

The WCAB stated: "We recognize that several appellate cases describe limits of CIGA's liabilities in cases where solvent insurers are 'available' to provide an injured worker with benefits within the meaning of Insurance Code section 1063.1(c)(9), notwithstanding that the insolvent insurer would be liable for those benefits but for the insolvency. [Fn. and citations omitted.] However, those cases did not involve a request by CIGA to amend an award made more than five years earlier by stipulation of all the solvent insurers. In this situation, Labor Code section 5804 precludes CIGA's request to re-allocate liability by amending the 2002 stipulated award."[3] Once again, CIGA elected not to petition for a writ of review in the Court of Appeal.

On April 18, 2011, CIGA filed another declaration of readiness, renewing the issue of reimbursement. CIGA stated that "[t]he parties require the intervention of the WCAB to resolve the dispute between CIGA and State Farm concerning contribution/reimbursement." On June 2, 2011, the WCJ conducted a hearing on: (1) whether *res judicata* bars further proceedings on reimbursement; and (2) whether good cause exists to refer the matter to arbitration. On July 29, 2011, the WCJ denied CIGA's request for trial of its claim for reimbursement and/or contribution. He found that the respective liabilities of the parties had previously been finally determined and could not be "relitigated by way of seeking contribution or reimbursement."

CIGA then petitioned the WCAB for reconsideration, contending that it may proceed with its reimbursement claim against State Farm because (1) CIGA and State Farm are jointly and severally liable under the 2002 stipulated award; and (2) it is not precluded from seeking reimbursement by either *res judicata* or Labor Code section 5804. CIGA pointed to the wording of the WCJ's April 2008 decision, stating that "[n]o determination is made as to the extent of CIGA's ultimate liability under the March 15, 2002 Award." CIGA argued that it relied on this language in not appealing or seeking reconsideration earlier, believing that it meant that Insurance Code section 1063.1 might still shift all liability to State Farm. CIGA argued that the issue of CIGA's right to reimbursement against State Farm was raised for the first time in CIGA's declaration of readiness filed on April 18, 2011, and the issue was not "identical" to the issues previously decided.

On August 25, 2011, the WCJ disagreed with CIGA, concluding its reimbursement claim was not made in good faith and was not supported by the cases cited. The WCJ stated that no determination as to the ultimate liability of any party was possible in 2008 because the extent of the applicant's permanent disability was still being evaluated. The WCJ noted this did not prevent CIGA from appealing or seeking reconsideration of the 2008 determination that it was bound by the 2002 stipulated agreement. The WCJ concluded that "[r]egardless of the semantics employed," CIGA's renewed effort to "re-allocate liability by amending the 2002 stipulated award" was barred by "the component of *res judicata* known as issue preclusion."

On December 19, 2011, the WCAB granted reconsideration, notwithstanding its contrary decision 11 months earlier (on January 18, 2011), ruling against CIGA on the question of whether it could pursue a reimbursement claim under Insurance Code section 1063.1, subdivision (c)(9). The WCAB noted that CIGA was not a party to the 2002 stipulation and was not seeking to amend the earlier 2002 award. Instead, it reasoned, CIGA was seeking to enforce its statutory right under Insurance Code section 1063.1 to obtain reimbursement from a solvent insurer that is "available" to provide benefits to the applicant within the meaning of the statute. The WCAB reasoned that the 2002 stipulated award and the five-year limitations period of Labor Code section 5804 were not dispositive of CIGA's petition for reimbursement. The applicant was jointly employed by Linda McDonald and Roto Rooter when she was injured. "Because applicant had two employers

. . . each employer and their respective insurers on those dates of injury are as a matter of law jointly and severally liable for workers' compensation benefits that are due."

The WCAB went on to reason that the 2002 stipulation did not change State Farm's joint and several liability to the applicant. "This is because agreements between employers and/or their insurers cannot diminish or eliminate an applicant's right to recover benefits from the employers and insurers that are jointly and severally liable for the injury.

. . . When Freemont and Paula became insolvent, State Farm became 'available' to applicant as 'other insurance' under Insurance Code section 1063.1(c)(9) because McDonald is jointly and severally liable for applicant's injuries. [¶] Because State Farm appears to be 'other insurance' that is 'available'… within the meaning of Insurance Code section 1063.1(c)(9), it appears to be responsible for the provision of workers' compensation benefits that are due because of her injuries."

The WCAB concluded "[t]here has been no earlier final decision on CIGA's petition to obtain reimbursement from State Farm. Thus, there is no basis for denying the petition for reimbursement on the grounds of *res judicata* or collateral estoppel as concluded by the WCJ in his August 25, 2011 Report." Accordingly, the WCAB rescinded the WCJ's decision and returned the case to the trial level for further proceedings on CIGA's petition for reimbursement.

Thereafter, State Farm petitioned the WCAB for reconsideration. State Farm argued that the question whether homeowner's insurance qualifies as "other insurance" under Insurance Code section 1063.1 was expressly raised by CIGA and decided against it by the WCJ in April of 2008, and by the WCAB in September of 2009. State Farm contended these decisions were final and entitled to *res judicata* effect. Alternatively, State Farm contended that CIGA's request for reim-

3. Labor Code section 5804 provides in part: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years… ."

bursement was barred by the doctrine of laches. State Farm pointed out that it will suffer irreparable harm and prejudice should CIGA be allowed to re-litigate its request for reimbursement. State Farm pointed out that if CIGA is allowed to seek reimbursement in an amount greater than 25 percent, it will have been denied due process by being precluded from litigating the issue of employment. State Farm abided by the terms of the stipulated award and detrimentally relied on it by withdrawing its challenge to the employment issue in 2002.

On March 14, 2012, the WCAB denied State Farm's petition for reconsideration. State Farm's petition for writ of review followed.

DISCUSSION

The dispositive question before us is whether CIGA's reimbursement claim is barred by *res judicata* or laches.[4] It is well settled that these doctrines apply in workers' compensation litigation. (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 379–380; *United Dredging Co. v. Industrial Acc. Com.* (1930) 208 Cal. 705, 713–714.)

Labor Code section 5950 provides that a party "affected by an order, decision, or award" of the WCAB may, within the prescribed time period, apply to the Court of Appeal for a writ of review "for the purpose of inquiring into and determining the lawfulness" of the order, decision, or award. "[A]ppellate review… is limited to 'final' orders that determine a substantial right or liability of a party." (*Duncan v. Workers' Comp. Appeals Bd., supra,* 166 Cal.App.4th at p. 299.) An order of the WCAB is final for the purpose of seeking judicial review when it "settles, for purposes of the compensation proceeding, an issue critical to the claim for benefits, whether or not it resolves all the issues in the proceeding or represents a decision on the right to benefits." (*Maranian*, *supra*, 81 Cal.App.4th at pp. 1075, 1078; *Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd.* (2003) 112 Cal.App.4th 1435, 1438, fn. 3; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd., supra,* 104 Cal.App.3d at pp. 534–535.) Such final orders include, for example, threshold orders dismissing a party, rejecting an affirmative defense, terminating liability, or determining whether the employer has provided compensation coverage. (*Maranian,* at pp. 1075, 1078.)

The characterization of an order or decision as final and susceptible to judicial review has critical consequences. The failure of an aggrieved party to seek judicial review of a final order of the WCAB bars later challenge to the propriety of the order or decision before either the WCAB or the court. (*Maranian, supra*, 81 Cal.App.4th at p.1076; see also *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182.) The purpose of this rule is to facilitate early disposition of core questions, and promote the public policy favoring expeditious and inexpensive resolution of workers' compensation claims. (*Maranian,* at p. 1078.)

CIGA contends that State Farm cannot point to any place in the record where CIGA's right to reimbursement was consciously raised and litigated prior to the WCAB's decision on December 19, 2011. CIGA denies that its right to reimbursement was litigated in April of 2008, June of 2009, or January of 2011. We disagree.

In 2008, CIGA filed a formal "Petition for Reimbursement," requesting resolution of the question whether the homeowner's insurance policy qualified as "other insurance" to make the claim against CIGA a non-covered claim under Insurance Code section 1063.1. The WCJ found the WCAB lacked jurisdiction to rescind or alter the 2002 stipulated settlement agreement and that CIGA was bound by it. In 2009, CIGA again asked the WCJ to resolve the questions whether it should be dismissed pursuant to Insurance Code section 1063.1 because "other solvent insurance" was available, whether joint and several liability existed for State Farm, and whether administration of the claim should be changed. On October 15, 2009, the WCAB adopted the WCJ's findings that CIGA was bound by the 2002 stipulated settlement and barred by laches from attempting to avoid it. Finally, on January 18, 2011, the WCAB rejected CIGA's contention that liability should be re-allocated to State Farm because State Farm was jointly and severally liable for the applicant's injuries. Contrary to CIGA's contention, its entitlement to reimbursement was expressly raised in these proceedings in 2008, 2009, and 2011, and determined adversely to it. CIGA did not seek judicial review of any of these decisions. Consequently, these decisions have become final and conclusive. CIGA is barred by *res judicata* from relitigating its right to reimbursement.

Next, CIGA contends that State Farm misapprehends the obligations created by the 2002 stipulated settlement agreement. It argues that, in the agreement, both Roto Rooter and Linda McDonald admitted concurrent employment. Dual employers are jointly and severally liable for payment of all compensation due the injury of the shared employee. (*McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal.2d 698 [where relationship of general and special employment exists, injured worker can look to both employers for compensation benefits].)

CIGA adds that its right to reimbursement is statutory and it has no statutory liability for claims covered by other available solvent insurance. (Ins. Code, § 1063.1, subd. (c)(9).) CIGA argues that State Farm's agreement to pay 25 percent of the applicant's benefits does not "trump" CIGA's statutory obligations.

We need not address the ultimate question of whether State Farm is jointly and severally liable for 100 percent of the applicant's claim, or whether its homeowner's insurance policy is "other insurance" under Insurance Code section 1063.1, subdivision (c)(9), because CIGA did not preserve its right

4. We reject CIGA's contention that State Farm's petition for writ of review should be dismissed as premature. We also reject CIGA's contention that our standard of review is abuse of discretion. The application of the doctrine of *res judicata* is a question of law we review *de novo.* There are no factual issues involved in this determination.

to pursue these issues.[5] Right or wrong, the WCJ's decision in 2008, and the WCAB's 2009 and 2011 decisions are final, and CIGA may not invoke the jurisdiction of the WCAB or this court to review the lawfulness of those decisions.

The cases cited by CIGA regarding its statutory right to reimbursement are distinguishable. In each of the cases CIGA cites, unlike the facts of this case, CIGA's request for reimbursement due to the presence of other solvent insurance was timely brought

before the WCAB or the Court of Appeal. (E.g., *Sherman Loehr Custom Tile Works v. Workers' Compensation Appeals Board* (2003) 68 Cal.Comp.Cases 1262 [two carriers stipulated to percentage of liability before one carrier liquidated; WCAB granted CIGA's timely petition for a change of administrators because other solvent insurance available].)

We recognize that the Legislature has limited CIGA's liability to "covered claims." (Ins. Code, § 1063.1.) CIGA's "powers, duties and responsibilities are strictly defined and circumscribed by statute; they are not co-extensive with the duties owed by the insolvent insurer." (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 524, 532.) Nevertheless, this statutory policy limiting CIGA's liability to covered claims must be weighed against the strong "public policy interests in an expeditious and inexpensive system of workers' compensation, the encouragement of settlements of workers' compensation proceedings to further that system, the justified expectations of parties dealing with CIGA, the importance of there being an end to litigation, the resulting finality of judgments, and CIGA's role in obtaining the order at issue." (*Fireman's Fund Ins. Co. v. Workers' Compensation Appeals Bd.* (2010) 181 Cal.App.4th 752, 770.)

Here, the applicant was 61 years old on the date of her first injury in 1999. She is now 75 years old and the issue of liability for her claim continues to be litigated despite CIGA's failure to seek judicial review of adverse decisions in 2008, 2009, and 2011, and the stipulated settlement over a decade ago. In these circumstances, the strong public policy in favor of CIGA's paying only covered claims does not outweigh the policy interests enumerated above. (See *Fireman's Fund Ins. Co. v. Workers' Compensation Appeals Bd.*, *supra*, 181 Cal. App.4th at p. 770.)

In light of our determination that CIGA's reimbursement claim is barred by principles of *res judicata*, we need not address State Farm's alternative contentions that it would be deprived of due process if CIGA is allowed to pursue its reimbursement claim, or that CIGA's claim is barred by laches. Contrary to CIGA's contention, these issues were preserved for review and raise substantial concerns.[6]

We annul the WCAB's order of March 14, 2012, denying State Farm's petition for reconsideration. We remand the matter to the WCAB for further proceedings consistent with this opinion. Costs are awarded to State Farm.

PERREN, J.

We concur: GILBERT, P. J., YEGAN, J.

5. We question whether homeowner's insurance qualifies as "other insurance" under section 1063.1, subdivision (c)(9), because it is not "available to the claimant." The parties have not briefed whether CIGA is relieved from liability under Insurance Code section 1063.1, subdivision (c)(5) [covered claims do not include obligations to insurers nor their claims for contribution or indemnity].

6. State Farm argues that CIGA has not diligently pursued its reimbursement claim since it took over administrating the claim in 2003 and that it will suffer prejudice from CIGA's delay, including loss of control over supervision of the medical treatment, deterioration of evidence, diminishment of witness memory, and its withdrawal of a defense to the issue of employment. (See, *e.g.*, *ICW Group v. Workers' Compensation Appeals Board* (*Fieldhouse*) (2003) 68 Cal.Comp. Cases 1217 [writ denied; president of company has wide discretion to place domestic employees on corporate payroll; liability for employee's injury rests solely with corporation's carrier].)

Cite as 13 C.D.O.S. 8014

JAMES ENLOE et al., Plaintiffs and Appellants,

v.

CASEY LEE KELSO et al., Defendants and Respondents.

2d Civil No. B241201
In the Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. 118183) (San Luis Obispo County)
Filed July 25, 2013

COUNSEL

Christian E. Iversen for Plaintiffs and Appellants.

Duggan Smith & Heath LLP, Jane E. Heath, Janet L. Wallace for Defendant and Respondents.

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

IT IS ORDERED that the opinion filed herein on July 3, 2013, be modified as follows:

1. On page 4, after the last sentence of the second full paragraph, add the following text:

> We reject the fiction argued by the Enloes that the $93,750 was a "hard money loan" and not part of the purchase price.

There is no change in the judgment.

Appellants' petition for rehearing is denied.

Dodie A. Harman, Judge

Superior Court County of San Luis Obispo