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NINTH CIRCUIT COURT OF APPEALS

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SUMMARIES

Criminal Law

Prosecution violated *Brady* by failing to disclose police dog's known history of mistaken scent identifications (Fletcher, J.)

Aguilar v. Woodford

9th Cir.; July 29, 2013; 09-55575

The court of appeals granted a petition for habeas corpus. The court held that a state prosecutor's failure to disclose a police dog's known history of making mistaken scent identifications violated a defendant's right to exculpatory evidence under *Brady v. Maryland.*

A California state court jury found Gilbert Aguilar guilty of the first-degree murder of John Guerrero. The only question at trial was the identity of a young Hispanic man who emerged from a car and shot Guerrero at a stoplight. Aguilar maintained that another young Hispanic man, Richard Osuna, had committed the crime.

The government's sole evidence tying Aguilar to the vehicle used in the crime was the scent identification of a police dog named Reilly. The evidence indicated that Reilly had alerted to a "scent pad," revealing that Aguilar's scent was present on the front passenger seat of the vehicle. The prosecution did not disclose to the defense that Reilly had a history of making mistaken scent identifications, even though it had stipulated to Reilly's mistaken identifications in a different trial several months earlier.

Overall, the evidence against Aguilar was weak, while there was substantial evidence suggesting that Osuna was the killer.

Aguilar appealed his conviction, contending that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963). The California Court of Appeals rejected Aguilar's argument, leading him to seek relief via a federal petition for habeas corpus under 28 U.S.C. §2254.

The court of appeals granted the petition, holding that the California courts' failure to find a *Brady* violation was an unreasonable application of that case.

A *Brady* claim has three components, the court explained. There must be evidence that is exculpatory or impeaching, suppressed by the state, and resulting prejudice.

Here, there was no doubt that Reilly's history of making erroneous scent identifications was exculpatory evidence. Because Reilly's identification tied Aguilar to the vehicle used in the crime, the undisclosed prosecution evidence that Reilly had a record of mistaken scent identifications was unquestionably favorable for *Brady* purposes.

The record also supported the conclusion that the evidence was suppressed. Among other things, the prosecution had knowledge of the exculpatory evidence in light of its stipulation, in a prior state criminal trial, that Reilly had made mistaken scent identifications. In that case, the trial court judge excluded evidence about Reilly.

The state could not argue that knowledge of the *Brady* evidence could not be imputed to the trial prosecutor. Whether or not the individual prosecutor in Aguilar's case knew *Brady* information, Reilly's handler testified in both Aguilar's case and the earlier case that resulted in the stipulation about Reilly. The prosecutor should have known about Reilly from preparing the officer as a witness, unless the officer deliberately concealed Reilly's record of misidentifications.

In addition, knowledge of the exculpatory evidence was imputed to the trial prosecutor even if he did not, himself, possess the evidence. The court observed that it is also clearly established that *Brady* suppression occurs even where the government fails to turn over evidence known only to police officers.

Finally, Aguilar suffered prejudice due to the *Brady* violation. If the *Brady* evidence had been presented to the trial court, it was virtually certain that the trial judge would have ruled to exclude the evidence of Reilly's scent identification. Dog scent identifications had been challenged successfully in other cases, and the court here seemed receptive to excluding such evidence.

The court reiterated that the gunman's identity was the sole issue at trial, and that there was no corroborating evidence for shaky eyewitness identifications, nor any forensic evidence or showing of motive that would link Aguilar to the crime. The prosecution emphasized the importance of the unimpeached dog scent identification throughout the proceedings, as well.

The court therefore granted Aguilar's petition and reversed the district court's judgment on his *Brady* claim.

Criminal Law

Person facing extension of commitment as legally insane had right not to be compelled to testify (Aaron, J.)

Hudec v. Superior Court (People)

C.A. 4th; July 26, 2013; G047465

The Fourth Appellate District granted a petition for writ of prohibition/mandate. The court held that a person committed to a state hospital as criminally insane had the right not to be compelled to testify at trial on a petition to extend that commitment.

Charles Hudec was committed to Patton State Hospital after pleading not guilty by reason of insanity to killing his father.

In March 2012, the district attorney filed a petition to extend Hudec's commitment. The district attorney also moved to compel Hudec's testimony at trial.

The trial court scheduled a trial and granted the district attorney's motion to compel Hudec's testimony.

Hudec filed a petition for writ of prohibition or mandate challenging the trial court's ruling.

The court of appeal granted Hudec's writ petition, holding that Hudec had the right not to be compelled to testify.

Under subdivision (b)(7) of Penal Code §1026.5, which governs commitment extension proceedings for the criminally insane, the subject of such proceedings "shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees." Hudec argued §1026.5(b)(7) conferred on him the right of a criminal defendant not to be called as a witness and not to testify. The court agreed.

The court agreed with *People v. Haynie* (2004) 116 Cal. App.4th 1224 that subdivision (b)(7) bars the prosecution from calling the defendant as a witness in a §1026.5 commitment extension hearing. The language of the statute is unambiguous, the court found. It clearly conveys the Legislature's intent to convey upon the subjects of such proceedings all of the rights guaranteed under the federal and State Constitutions for criminal proceedings, and not merely "some" of those rights.

In so holding, the court rejected the contrary result reached in *People v. Lopez* (2006) 137 Cal.App.4th 1099. In reaching that result, *Lopez* leaned heavily on policy arguments, with scant attention to the statutory language. In construing a statute, the court explained, one must look first to the words of the statute. A court may not rewrite the law so as to give the words a construction other than their plain and unambiguous meaning.

Under §1026.5(b)(7), Hudek had the right not to be compelled to testify at the pending recommitment proceedings.

Criminal Law

Hawaiian conviction for first degree criminal property damage was categorically crime of violence for purposes of sentencing defendant as career offender (Bybee, J.)

United States v. Spencer

9th Cir.; July 29, 2013; 12-10078

The court of appeals affirmed a district court judgment. The court held that a defendant was subject to career offender enhancement under the United States Sentencing Guidelines where his Hawaiian conviction for criminal property damage in the first degree was categorically a crime of violence under the residual clause of Sentencing Guidelines §4B1.2(a)(2).

Ashford Spencer was convicted of two federal felony drug trafficking charges. The U.S. Probation Office recommended that Spencer be treated as a "career offender" under Sentencing Guidelines §4B1.1 based on his earlier felony convictions for "crimes of violence," including criminal property damage in the first degree under Hawaii Revised Statutes §708-820(1)(a).

Spencer objected, but the district court concluded that the Hawaiian crime categorically constituted a crime of violence as defined under Sentencing Guidelines §4B1.2(a)(2). The court deemed Spencer a career offender and imposed sentence accordingly.

The court of appeals affirmed, holding that the district court did not err in sentencing Spencer as a career offender.

The residual clause of §4B1.2(a) defines a "crime of violence" to include crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." For its part, §708-820(1)(a) criminalizes intentionally damaging property and thereby recklessly placing another person in danger of death or bodily injury.

On the face of the statutes, the court of appeals said, it would seem that a violation of §708-820(1)(a) would qualify as a crime of violence under §4B1.2(a). The analysis was clouded, though, by Supreme Court decisions interpreting an almost identical residual clause in the Armed Career Criminal Act (ACCA). Those decisions reflected that interpretation of the ACCA's residual clause had to include consideration of the offenses set out in the statute's "violent felony" definition immediately prior to the residual clause. The residual clause in §4B1.2(a) had to be interpreted in the same manner.

The court's framework for analyzing whether a state conviction was a crime of violence used two prongs. First, the conduct encompassed by the elements of the offense must present a serious potential risk of physical injury to another. Second, the state offense must be roughly similar to those offenses set out at the beginning of the residual clause, namely burglary of a dwelling, arson, extortion, and crimes involving explosives.

The first prong was straightforward, the court wrote, but the second had to be addressed in light of the Supreme Court's ACCA cases.

The first requirement was met in Spencer's case because it was relatively clear that intentionally damaging property and thereby recklessly placing another in danger of death or bodily injury, in the ordinary case, involved conduct that presented a serious potential risk of physical injury to another. The Hawaiian statute required the conduct to actually and recklessly place another person in danger of death or bodily injury.

It was a more difficult question whether the second requirement was satisfied — that the state offense be "roughly similar, in kind as well as in degree of risk posed" to those offenses enumerated at the beginning of the residual clause. In that regard, the court noted that a conviction under §708-820(1)(a) requires intentional damage to property. That made the pertinent question, under the Supreme Court's analytical scheme, whether such conduct, which involved a conscious disregard of substantial or unjustifiable risk that the damage

would put someone in danger of death or bodily injury, involved risks similar to burglary, extortion, arson, and crimes involving use of explosives in the ordinary case.

The court held that it did. The risk involved in §708-820(1)(a) was comparable to the risk involved in the enumerated offense of arson. Both crimes involved the intentional release of a destructive force dangerous to others. While the Hawaiian statute spoke of destruction of property, which could involve a force less destructive or dangerous than fire, it also required that the force put a person in danger of death or bodily injury. That was more risk than the offense of arson required.

The court noted, too, that the structure of Hawaii's criminal property damage scheme also reflected that §708-820(1)(a) was meant to bar actions creating risks comparable to, and even greater than, arson. When Spencer was convicted, criminal property damage in the second degree incorporated the traditional offense of arson and criminalized other offenses involving similarly destructive forces with risks comparable to arson, so that criminal property damage in the first degree involved risks that were at least comparable to, if not greater than, some crimes of arson.

Further, criminal property damage in the first degree also involved risk comparable to the enumerated crime of burglary, the court said. The latter was dangerous because it risked confrontation that could lead to violence. Putting someone in danger by destroying property carried the same risk.

The court explained that its analysis was consistent with the facts and outcomes of many Hawaiian cases involving convictions under §708-820(1)(a).

Ultimately, then, Spencer's prior conviction under the Hawaiian law was a crime of violence as defined in §4B1.2(a)(2), and he was subject to career offender enhancements under §4B1.1 of the Sentencing Guidelines.

The court rejected Spencer's separate argument that the residual clause in §4B1.2(a)(2) was void for vagueness. That argument was foreclosed by Supreme Court precedent.

Family Law

Issued raised in appeal by parents of dependent minors raised contentions that did not directly challenge rulings appealed and were therefore not cognizable on appeal (Elia, J.)

In re A.H.

C.A. 6th; July 26, 2013; H058633

The Sixth Appellate District dismissed an appeal. The court held that issues raised in an appeal filed by parents of dependent minors raised contentions that did not directly relate to the dependency court rulings that were appealed and were therefore not cognizable on appeal.

Minors A.H. and S.H. were declared dependents under Welf. & Inst. Code §300(a) and (b). After the 18-month review hearing on April 16, the dependency court terminated family reunification services to the children's mother F.S and set a §366.26 hearing for August 8. On August 3, F.S. and the children's father D.S.H. appealed from a July 25 order denying the motion of F.S. to vacate the "default judgment" of April 16, as well as a June 19 order denying the §388 motion of the parents, who both were self-represented, to modify the children's placement so as to place them with relatives. Among other things, the parents contended that the dependency court failed to inform them pursuant to §366.26(*l*(1) of the writ requirements for challenging by mail the §366.26 hearing order.

The court of appeal dismissed the appeal, holding that F.S. and D.S.H.'s appeal did not raise cognizable issues.

The court did not accept the concession of the Santa Clara County Department of Family and Children's Services (county) that, under *In re Cathina W.* (1998) 68 Cal.App.4th 716, which was cited by F.S., she was entitled to challenge the §366.26 hearing order. Rather, F.S. and D.S.H. contended that their correct mailing address was the one given in the headings on the first pages of F.S.' April 11 additional designation of witnesses, her April 16 supporting documents, and F.S. and D.S.H.'s April 16 motion to disqualify a dependency court judge. However, that address was for a church at which a registered process server unsuccessfully attempted on May 2 to personally serve D.S.H. Unlike *Cathina W.*, the clerk of the dependency court timely mailed a notice-of-intent-to-file-writ packet to F.S. and D.S.H. on April 17, which notice correctly stated the §366.26 setting order of April 16.

The clerk also mailed a writ packet to D.S.H. at the different address that was specified in the parents' original notifications of address and that packet was returned to the dependency court with no forwarding address. That was also in contrast to *Cathina W.*, in which a returned envelope did provide a new address. Accordingly, the obligation to advise D.S.H. of the writ requirement under §366.26(*l*)(3)(A) and Cal. Rules of Court, rule 5.590(b) was satisfied and D.S.H.'s failure to receive mailed notice of that requirement was not attributable to court error. Thus, D.S.H. did not show that the statutory writ requirement should be excused.

In addition, the clerk of the dependency court mailed a writ packet to F.S. at the address shown on the county's status-review report for the 18-month review instead of F.S.' designated permanent mailing address. However, F.S. did not contend that she was living at either address when the writ packet was mailed. Further, early in May, the process server found that the address on file for F.S. was occupied by another tenant and that the address on the county's report was vacant. The writ packet that was mailed to F.S. at the latter address was returned with a postal label stating "Return to Sender" and giving the address of the church.

Good cause was not shown to excuse the writ requirement as to F.S. Like D.S.H., F.S. did not file a written change

of address giving the church address until late July, despite the dependency court's having reminded both parents of that obligation only the month before it made the §366.26 setting order on April 16. The returned F.S. writ packet with the church address was not received by the dependency court until April 27.

Moreover, the process server made substitute service on F.S. by leaving a copy at the church address with the "person in charge," who stated that F.S. did receive mail there, and by subsequently mailing a copy to that address. Thus, F.S. apparently did not seek to appeal the §366.26 setting order, notwithstanding she was served with notice of that hearing.

Consequently, the court wrote, it was not appropriate in this situation to treat a timely appeal from an order setting a §366.26 hearing as a cognizable appeal or as a writ petition. Further, he court noted, F.S. and D.S.H. did not receive the oral advisement by the dependency court concerning the writ requirement because they angrily left the 18-month review hearing on April 16 after they discovered that the judge they expected was not presiding and indicated that they wanted that judge to conduct the April 16 hearing.

Accordingly, under both statute and rules of court, none of the parents' contentions on appeal as to earlier final appealable orders were cognizable.

Personal Injury

Disagreement between parties' experts did not undermine county's presentation of "substantial evidence" to support claim of design immunity (Aaron, J.)

Hampton v. County of San Diego

C.A. 4th; July 26, 2013; D061509

The Fourth Appellate District affirmed a judgment. The court held that a disagreement between the parties' experts was insufficient to undermine a county's presentation of substantial evidence in support of its claim of design immunity.

Randall Hampton was seriously injured when the car he was driving was struck by another vehicle. Hampton and his wife sued the County of San Diego, alleging a dangerous condition of public property at the location where the accident occurred. Hampton alleged that the county had duties to "properly and safely plan, design, build, construct, operate, manage, maintain, direct, control, sign and supervise the roadways at the intersection of Cole Grade Road and Miller Road in the county of San Diego," and that the county breached these duties by "providing ... inadequate sight distance for vehicular traffic approaching Miller Road from Cole Grade Road as well as for traffic pulling out from Miller Road onto Cole Grade Road ... creating a defective and dangerous condition for motorists and traffic." As a proximate result, Hampton alleged, he and the driver who struck his vehicle were unable to see each other as Hampton pulled out from Miller Road onto Cole Grade Road.

The county moved for summary judgment and/or adjudication on the ground that the affirmative defense of design immunity applied to bar the Hamptons' claims against the county. In a supporting brief, the county noted that in order to establish the defense of design immunity under Gov. Code §830.6, a public entity is required to establish three elements: 1) a causal relationship between the plan or design and the accident; 2) discretionary approval of the plan or design prior to construction; and 3) substantial evidence supporting the reasonableness of the plan or design.

The county contended that the causal connection element was met based on the Hamptons' allegation that the intersection at which the collision occurred constituted a dangerous condition. With respect to the discretionary approval element, the county stated that the county had approved plans for improvements to the intersection in 1995, prior to the construction of those improvements in 1998. Finally, the county argued that the declaration of county traffic engineer Robert Goralka demonstrated the reasonableness of the plans for the intersection.

Goralka explained that a 1989 road review noted that the sight distance from Miller Road looking south on Cole Grade Road was less than desirable due to a "hump" in Cole Grade Road. The road review recommended lowering the crest on Cole Grade Road south of the Miller Road intersection to obtain additional sight distance at the intersection. In 1995, the county approved plans to lower the crest on Cole Grade Road. In 1998, the reconstruction of the road was completed. After the project was completed, 'as built' plans were approved by the county's lead civil engineer. In Goralka's opinion, the plans were reasonable.

Goralka acknowledged that the redesign did not achieve the amount of sight distance that might have been obtained if a new intersection had been designed from scratch. The project nonetheless achieved "operational sight distance."

In opposition, the Hamptons submitted the declaration of engineer Edward Stevens, who opined that the county's design plan was not reasonable.

The trial court granted summary judgment for the county. The court found that engineer Goralka's opinion as to the reasonableness of the design constituted the substantial evidence necessary to support the county's design immunity defense. It was of no consequence, the court found, that the Hamptons' expert disagreed. The court explained that it did not matter whether the evidence of reasonableness was disputed, as the statute provided immunity even when the public entity's substantial evidence of the reasonableness of its design was contradicted by the opposing party's traffic engineer.

The court of appeal affirmed, holding that the trial court properly determined that the county established, as a matter of law, the affirmative defense of design immunity.

First, the court found, it was undisputed that the plans were approved by a licensed civil and traffic engineer. This fact supported a finding of reasonableness. Goralka's declaration, in which he stated the plans were reasonable, constituted additional evidence of reasonableness. Further, Goralka provided a reasoned explanation for his conclusion that the operational sight distance at the intersection was adequate.

As the trial court itself noted, the Hamptons' presentation of conflicting expert testimony as to the reasonableness of the plans did not demonstrate that the county failed to present substantial evidence of their reasonableness. A disagreement between experts does not, in and of itself, create a triable issue of fact as to the existence of substantial evidence of the reasonableness of a design.

On the record here, the court concluded, the trial court properly determined that the county established, as a matter of law, the affirmative defense of design immunity.

The trial court also properly determined there was no triable issue of fact with respect to the Hamptons' contention that changed circumstances resulted in a loss of design immunity. An "accumulation of additional foliage on the embankment" did not, as the Hamptons argued, cause the county to lose design immunity.

Tax

Communications service company not exempt from paying city taxes on telecommunication services it used in connection with Internet services it provided to its customers (Willhite, J.)

j2 Global Communications, Inc. v. City of Los Angeles

C.A. 2nd; July 26, 2013; B241151

The Second Appellate District affirmed a judgment. The court held that a communcations services company failed to rebut a city's claim the company was not exempt under a federal statute from a city tax on telecommunication services that the business used in connection with services provided to its customers over the Internet.

j2 Global Communications, Inc., provided online fax and hosted email services to businesses and individuals. To provide its eFax service, j2 purchased telephone numbers known as DIDs from third-party telecommunication providers. j2 then assigned local or toll-free DID numbers to j2 customers, from which those customers could receive faxes or voicemail messages in their email. The City of Los Angeles imposed a communications users tax (CUT) on charges for communications services that the city defined to include the DIDs that j2 obtained for its eFax service. j2 apparently paid the CUT on the DIDs it obtained for its eFax service. Subsequently, j2 applied to the city for a refund of the CUT it had paid in the preceding year, contending that under the federal Internet Tax Freedom Act (ITFA), the CUT was improperly imposed on telecommunications service used for exempt Internet access.

The city did not respond to j2's refund application. j2 then filed an action against the city for unlawful collection of an Internet-access tax. The city moved for summary judgment, arguing that j2's purchase of telecommunications services was not exempt from taxation under the ITFA because j2 did not provide "Internet access" as defined in that statute. The trial court granted the motion and entered judgment for the city. j2 appealed.

The court of appeal affirmed, holding that j2 did not rebut the city's evidence that j2 was not exempt from taxation pursuant to the ITFA.

The city's evidence showed that when a j2 customer received a fax to its assigned DID, the sender thus initiated a telephone call that travelled over the domestic public telephone network to a fax card in one of j2's servers. When that incoming fax was received by a j2 server, it was converted to a j2 customer-specified format and sent to the customer as an attachment to an email. j2 did not provide its customers with the services required to receive and access the email. Rather, j2's customer agreement stated that the customer had to obtain and pay for all equipment and third-party services – such as Internet access and email service – that was required for the customer to access and use eFax services.

In opposition, j2 purported to dispute many of the city's facts describing how its eFax service worked. For example, j2 stated that fact were "disputed" because, as set forth by the city, those facts did not completely describe how faxes were transmitted or how fax cards were utilized as parts of j2's services. However, j2 cited the same evidence on which the city relied, but merely cited entire documents without specifying pages, lines, or paragraphs. With regard to other facts pointed to by the city, j2 stated that the city mischaracterized the scope and content of the information in the documents that it cited. However, j2 failed to explain exactly how the city's statement of such information was incorrect. As to still other facts, j2 simply stated that a fact was disputed insofar as the cited documentary statements were meant to describe or suggest how j2's services specifically worked or operated.

In no instance did j2 cite to specific evidence that contradicted or raised doubts as to the accuracy of the city's statement of facts, nor did j2 provide additional facts as to the operation of its eFax service and its use of DIDs. Accordingly, the court deemed the city's facts to be undisputed and determined that those undisputed facts precluded j2 from establishing that its DID-based services came within the definition of "Internet access" and thus were exempt from taxation under the ITFA.

The fact that j2's customers had to connect to the Internet through the eFax service in order to access content, information, or other services did not show that j2 enabled users "to connect to the Internet" to access such content, information, or other services, as 47 U.S.C. §1105(5)(A) of the ITFA re-

quires. Thus, j2 could not establish that its eFax service qualified as "Internet access" under §1105(5)(A). For the same reason, j2 could not establish that its eFax service qualified as "Internet access" under §1105(5)(C), which provides that such access "includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service."

Nor did sending an email to an eFax customer through that customer's independently-obtained email service and allowing j2 customers to access their accounts through eFax's home page constitute providing a homepage or email service to the customers as provided by §1105(5)(E). If it did, the court opined, virtually all business conducted over the Internet would be exempt from taxation. The court declined to interpret §1105(5)(E) so as to make essentially meaningless the IFTA definition of Internet access. In any event, j2 presented no evidence that the DIDs that were subject to the CUT were utilized in providing a homepage or sending email to eFax customers.

FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 13 C.D.O.S. 8023

GILBERT R. AGUILAR, Petitioner-Appellant,

v.

JEANNE S. WOODFORD, Director, California Department of Corrections, Respondent-Appellee.

No. 09-55575
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:06-cv-00554-DOC-MAN
Appeal from the United States District Court for the Central District of California
David O. Carter, District Judge, Presiding
Argued and Submitted October 9, 2012—Pasadena, California
Filed July 29, 2013
Before: Harry Pregerson and William A. Fletcher, Circuit Judges, and Mark W. Bennett, District Judge.*
Opinion by Judge W. Fletcher

* The Honorable Mark W. Bennett, District Judge for the Northern District of Iowa, sitting by designation.

COUNSEL

Neil Jacob Rosenbaum (argued), Rosenbaum & Associates, San Francisco, California, for Petitioner-Appellant.

Elaine Tumonis (argued), Office of the California Attorney General, Los Angeles, California, for Respondent-Appellee.

OPINION

W. FLETCHER, Circuit Judge:

Gilbert Aguilar was convicted of first-degree murder after a jury trial in Los Angeles County Superior Court. A young Hispanic man got out of a white Volkswagen Beetle and shot John Guerrero while Guerrero's car was stopped at a stoplight. The only question at trial was the identity of the shooter. Aguilar's defense was that another young Hispanic man, Richard Osuna, had shot Guerrero.

The prosecution introduced evidence that a police dog named Reilly had alerted to a "scent pad," showing that Aguilar's scent was present on the front passenger seat of the white Volkswagen. The prosecution did not disclose to the defense that Reilly had a history of making mistaken scent identifications, even though it had stipulated to Reilly's mistaken identifications in a different trial several months earlier. Following the stipulation, that court had excluded evidence of Reilly's scent identification from the earlier trial.

Reilly's scent identification was the only evidence that tied Aguilar to the white Volkswagen. Putting the scent identification to one side, the evidence against Aguilar was weak. No clear motive for Aguilar to shoot Guerrero was ever suggested at trial. No physical evidence tied Aguilar to the crime. The faces of Aguilar and Osuna are very similar, but Aguilar is older and, at the time of the shooting, was significantly taller. A number of eyewitnesses identified Aguilar as the shooter at trial. Several of those witnesses had earlier given a quite different physical description to police – one that matched Osuna in age and height rather than Aguilar. At trial, these witnesses changed their description to match Aguilar.

The evidence suggesting that Osuna was the killer was substantial. Osuna's brother was shot several days before Guerrero was shot. Two witnesses testified that Osuna jumped into a white Volkswagen Beetle to pursue Guerrero's car as it drove past. One of them testified that Osuna did so in the belief that the "fools" in the car had shot his brother. That same witness testified that Osuna told her a short time later that he had shot a "fool." Even so, Osuna was never investigated as a suspect in this case. Indeed, the prosecutor in this case expressly told the police not to pursue an investigation of Osuna.

This case comes to us on a petition for habeas corpus under 28 U.S.C. § 2254. Aguilar argues that the prosecution's failure to disclose Reilly's history of mistaken scent identifications violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that the California Court of Appeal's decision to the contrary was an unreasonable application of *Brady*. We agree.

I. STANDARD OF REVIEW

We review de novo a district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254. *Campbell v. Rice*, 408 F.3d 1166, 1169 (9th Cir. 2005) (en banc). To prevail in a habeas petition filed after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted, a petitioner must show that the state court's adjudication of a 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).

This is a "highly deferential standard," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (internal quotation marks omitted). The "contrary to" clause in § 2254(d)(1) applies where the state court adopts "a rule that contradicts the governing law set forth in Supreme Court cases" or "confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)). The "unreasonable application" clause applies where "the state court's application of clearly established law" is "objectively unreasonable." *Lockyer*, 538 U.S. at 75. Under either clause of § 2254(d)(1), the law must be clearly established. There must be a "Supreme Court decision that 'squarely addresses the issue' in the case before the state court" or one that "establishes an applicable general principle that 'clearly extends' to the case before us." *Moses v. Payne*, 555 F.3d 742, 760 (9th Cir. 2009) (quoting *Wright v. Van Patten*, 552 U.S. 120, 123, 125 (2008)). Additionally, the constitutional error must have "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted).

II. BACKGROUND

On July 25, 2001, John Guerrero was driving his red Mitsubishi westbound on Amar Road in La Puente, California, with four friends as passengers. The group was looking for somewhere to eat dinner. Guerrero was not affiliated with a gang. Guerrero drove past several Hispanic males dressed in white baggy shirts, standing near a "primered" white Volkswagen Beetle. Omar Soltero, one of Guerrero's passengers, testified that Guerrero told the other passengers that he could see the Hispanic males running toward them in his rearview mirror. Guerrero and Soltero thought that the individuals might be trying to attract the attention of the occupants of Guerrero's car.

Trying to avoid any confrontation, Guerrero kept driving down Amar Road. Guerrero and his friends then decided to go to a restaurant in the opposite direction. Guerrero made a U-turn and drove eastbound, again passing the Hispanic males standing along Amar Road. The males yelled as Guerrero drove past. Victor Carillo, another passenger in Guerrero's car, testified that they were "throwing up their hands" as Guerrero's car drove by the second time. Carillo believed that the males were "throwing up a neighborhood" – in other words, indicating their neighborhood gang affiliation.

Guerrero drove several more blocks and stopped at the front of a left turn lane at the corner of Amar Road and Hacienda Boulevard, waiting for a red light to change so he could turn northbound onto Hacienda Boulevard. There was a KFC restaurant on the southwest corner of the intersection. There was a gas station at the northwest corner.

A young Hispanic male wearing a dark baseball cap and a white t-shirt got out of a white Volkswagen Beetle in the KFC parking lot. He went into the street and approached Guerrero's car. The male reached into the open passenger side front window with a semi-automatic handgun and shot Guerrero seven times, killing him. The other occupants of the car ducked down and were unhurt. The shooter walked rapidly back to the white Volkswagen, and the car drove away.

Based on descriptions by Desiree Hoefer, Victor Jara, and Laura Jara – all eyewitnesses to the shooting – a police artist made a sketch of the suspect from the neck up. The sketch was made about a month after the murder. A probation officer who knew Aguilar thought the drawing looked like him. Police then put a photograph of Aguilar from the neck up in a photo "six-pack" and showed it to Hoefer and the Jaras. There was no photograph of Richard Osuna in the six-pack. All three picked Aguilar's photograph out of the six-pack. Victor Jara made a positive identification. Hoefer and Laura Jara said that the man depicted in the photograph looked similar to the killer, but neither was sure that this was the killer.

A. Evidence Pointing To Richard Osuna

Aguilar's defense at trial was that Richard Osuna, a young Hispanic male, also known as "Gangster", was the shooter. Aguilar and Osuna were both members of the Puente Street Gang. Osuna's younger brother Raymond had been shot, but not killed, by unknown perpetrators the week before Guerrero was killed. At the time of Guerrero's shooting, Aguilar was twenty years old, between 5'11" and 6'0" tall, and weighed 160 pounds. Osuna was sixteen years old and between 5'5" and 5'7" tall.

The sketch of the suspect, as well as booking photographs of Aguilar and of Richard Osuna, were put into evidence at trial. (Osuna's booking photograph was taken at the time of his arrest for a different offense a year after the Guerrero murder.) The photographs of Aguilar and Osuna are remarkably similar. The sketch somewhat resembles both Aguilar and Osuna. We include the sketch and the photographs as appendices to this opinion.

At the time of the murder, Aguilar lived with his girlfriend and mother of his child, Mary Saiz, in an apartment on Amar Road. Saiz and Alfred DeAnda, a friend of Aguilar, each testified that they saw Osuna jump into a white or gray Volkswagen Beetle to chase after a red car. DeAnda testified that he was walking down Amar Road on his way to the store when he encountered "Gangster" (Osuna) and five or six other people outside the Amar Road apartment. DeAnda testified that he then saw Gangster hop into a white or gray Volkswagen while Aguilar and Saiz remained behind. DeAnda heard about the shooting the following day. He testified that the "word on the street" was that Gangster had shot Guerrero.

Saiz testified that on the day of the shooting, she, Aguilar, Osuna, and several others were gathered at the apartment she and Aguilar shared in order to celebrate Saiz's baby shower. At the time, Saiz knew Osuna only as "Gangster". The group saw a red car drive by the apartment. Osuna appeared to recognize the car and got "real antsy" after it drove by. Saiz

testified that Osuna said, "There go those vatos that shot my brother, fool. Fuck that. I'm going to go get those fools." She testified that Osuna then got into a white Volkswagen Beetle driven by Rico Ballesteros and drove away. Saiz testified that Aguilar left the apartment complex to go to another friend's house shortly after Osuna drove away. After the shooting Osuna returned to the apartment where Saiz and Aguilar were living and rushed into the bathroom to take a shower. Saiz testified that Osuna said, "I just shot a fool. . . . I got to get the gunpowder off of me." After showering, Osuna changed into Aguilar's clothes and left the apartment.

Neither DeAnda's nor Saiz's testimony was entirely consistent with their prior statements. However, two jail conversations between Aguilar and Saiz recorded without their knowledge support the testimony DeAnda and Saiz gave at trial. The jury heard both conversations. In the first conversation, Aguilar declared, "I can't believe I'm in jail for something I didn't do." In response, Saiz announced that she had "a plan already done" to find out "Richard's" last name. Saiz's plan was to go "by the pad like during the day time or whatever, and steal like a piece of mail." She hoped the piece of mail would tell her Richard's last name. Saiz then planned to phone the house from which she stole the mail "and make sure that that's his last name" by pretending that she was calling from Richard's school. Saiz also planned to "check in the records at Queen of the Valley" because Richard's "brother was there the day before. . . . [W]hat reason why wouldn't he want to shoot, know what I mean?" Osuna's brother Raymond was treated at Queen of the Valley Medical Center beginning on approximately July 21, 2001. Raymond was discharged from that hospital on July 24 – the day before Guerrero was murdered. Saiz expressed reservations to Aguilar about approaching Osuna directly "because I . . . have to think about the baby and us too, you know, when you do get out."

At trial, Saiz explained that during this conversation, she knew Richard Osuna only by his first name. She devised her "plan" to find out Osuna's last name so she could disclose it to a police investigator. Saiz also explained that she eventually "chicken[ed] out" and did not follow through with the plan. She later found out Osuna's last name through Aguilar, who had learned the name from fellow inmates.

In the second recorded jail conversation, Saiz told Aguilar that she had obtained a document containing the names and addresses of eyewitnesses in the case. Saiz asked Aguilar whether she should "[s]how people" the report. He told her that "there's no reason to show 'em" because "the[y'] re gonna go do something and get me in trouble" when "I ain't even done." Saiz then asked Aguilar if he wanted her "to rat," and he told her, "Not right now." Saiz responded, "I will Gilbert 'cause I'm not a south sider and look at me Gilbert I'm . . . falling apart[.]" Saiz also stated that she was "ready to rat," because if Aguilar ratted himself he would "get killed in there." She did not want to wait until "it'll be to[o] late for anyone to do anything." She stated she was "gonna tell them the fuckin' whole truth."

Saiz then told Aguilar, "This reward, like I said it's 50/50, if you get a lawyer you'll beat it. If you don't get a lawyer you'll have a small chance maybe, know what I mean? Rico's ass is already, they already he did, he was involved, but th – he's still out here[.]" Aguilar responded that "[t]hat other fool[] stays in Hacienda Heights," and said he wanted to talk to the "fool." At the time, Richard Osuna lived in Hacienda Heights.

At trial, Saiz explained that by Rico, she was referring to Rico Ballesteros, the driver of the white Volkswagen. She understood the "other fool" to refer to Richard Osuna. Saiz also explained that she hesitated to bring Osuna's name to the police because she feared doing so might put the safety of her family at risk. Saiz explained that "if you tell in court like I am right now or speak of things that you shouldn't be telling others that other people are doing, . . . you get killed or someone comes after you and your family." Saiz explained that Aguilar did not himself tell the truth because he was likely to be killed in prison if he was perceived as a "rat."

Saiz testified that at first she tried to resolve the situation without "ratting" Osuna out. Once Saiz identified Osuna by name, she and several friends approached him to ask for money to help her "retain a lawyer or [support] the baby." She testified that "[w]e went over there because he did do the killing, so therefore I felt like he was responsible for me going through all this situation that I'm going through, and Gilbert [Aguilar] also." Osuna gave Saiz his phone number, but when she tried to call it, the number had been disconnected. Saiz testified that she eventually got "fed up" with Osuna's unresponsiveness and decided to tell the truth. She thought she would not be killed because she is not a "south sider" – meaning she did not belong to any gang. Even so, Saiz received threats after she agreed to testify.

The police collected the jail recordings of the conversations between Saiz and Aguilar. In addition, defense counsel and a court-appointed private investigator each brought information about Richard Osuna to Detective Richard Ramirez, the lead police investigator for the Guerrero murder, a few months before trial. Nevertheless, the police never investigated Richard Osuna as a suspect in Guerrero's murder. Indeed, the prosecutor trying Aguilar's case specifically told Ramirez "not to follow up" on the Osuna lead because he believed it would be "a wild goose chase." The prosecutor told the jury at trial that he "instructed Detective Ramirez not to follow up on that lead" because it was "immoral" and "illegal" to do so without more evidence.

B. Evidence Against Aguilar At Trial

At trial, the prosecution introduced three types of evidence to support its case that Aguilar, rather than Osuna, was the killer: physical evidence, eyewitness testimony, and testimony about Reilly's dog scent identification.

1. Physical Evidence

The prosecution had little physical evidence connecting Aguilar to the crime. On August 9, a police patrol stopped a white Volkswagen Beetle that fit the description of the car from the murder. The police discovered that the vehicle was stolen and impounded it. The police recovered fingerprints from the passenger side of the white Volkswagen. Aguilar's prints did not match the recovered fingerprints. The police never tested the fingerprints to see if they matched Richard Osuna.

A forensic scientist testified that all of the bullets fired at Guerrero had been discharged from a single firearm. The police never found that firearm. The police did find a live .25 caliber bullet while searching a bedroom at the Amar Road apartment in which Aguilar kept some of his things. Another person was then living in that room. The bullets used in Guerrero's murder were also .25 caliber, but they were not the same brand as the bullet found in Aguilar's home. The live bullet found in the bedroom had been "cycled through" a weapon, but a forensic scientist's efforts to determine whether the bullet had passed through the murder weapon were inconclusive.

2. Eyewitness Testimony

Because there was limited physical evidence, the prosecution relied heavily on eyewitness testimony from seven witnesses. None of the eyewitnesses personally knew Gilbert Aguilar. No eyewitness had been shown a picture of Richard Osuna.

The first witness, Omar Soltero, was a passenger in Guerrero's car sitting directly behind Guerrero. He ducked down as soon as the gunman approached the passenger side window. During the police investigation, Soltero reported that the gunman was approximately 5'9" tall and about 18–20 years old. At trial, Soltero testified that the gunman was taller than Soltero's 5'3" height. He also admitted that he only got a "momentary glimpse" of the shooter, that he never saw the shooter's face, and that he did not believe he could give an accurate description of the shooter outside of the fact that the shooter was male. Soltero never identified Aguilar at any point during the proceedings.

The second witness, Victor Carillo, was also in Guerrero's car. He was sitting in the middle of the back seat, to the right of Soltero. There is no evidence in the record as to how Carillo initially described the suspect to police investigators. At trial, Carillo estimated that the gunman was "probably about" 5'9" or 5'10", and that the gunman was wearing a white t-shirt and black cap. Carillo admitted that, like Soltero, he could not identify the suspect.

The third witness, Desiree Hoefer, was at the drive-through line at the KFC restaurant when a white Volkswagen Beetle pulled into the restaurant parking lot. Through her rearview mirror, Hoefer watched a Hispanic male get out of the white Volkswagen and walk out of sight. She saw that the male was carrying a gun and feared that she was about to be carjacked. After hearing gunshots, Hoefer decided to leave the KFC. She nearly hit the same male with her car as the male returned to the KFC parking lot. She looked at his face for less than a second.

Hoefer is 5'0". She told the police shortly after the murder that the perpetrator was a Hispanic male around 5'4", 15 to 17 years old, and wearing a baseball cap. A month after the incident, Hoefer told a police sketch artist that the gunman was 5'2" or 5'3" and that he was 16 to 20 years old. Hoefer also described the perpetrator as having a small mouth. After some hesitation, Hoefer identified Aguilar in a six-person photo lineup. The lineup Hoefer viewed did not include a photograph of Osuna. At the time of the lineup, Hoefer said that Aguilar's photograph "looked close" to the suspect, but that she thought Aguilar's "comple[x]ion was lighter" than the murderer's complexion. She also thought that the perpetrator was younger than Aguilar. Hoefer said she was not "a hundred percent" sure she had the right person.

At trial, Hoefer identified Aguilar as the person she had picked out of the lineup. Hoefer testified that she believed she had described the perpetrator as 5'8" or 5'10" to the police, though she had actually described him to the police as between 5'2" and 5'4." Hoefer also stated in court that she continued to believe that the shooter "might have been a little shorter" than Aguilar. The prosecution suggested to Hoefer that the crouching position of the shooter might have led her to underestimate the shooter's height, and Hoefer agreed.

The fourth witness, Victor Jara, was the driver of a car on Amar Road about four cars back from the intersection and one lane closer to the curb than Guerrero's car. He was stopped at the same traffic light as Guerrero when he heard gunshots. Victor Jara took note of the shooter's face as he jogged away from Guerrero's car. He saw the shooter for between two and four seconds.

Victor Jara reported to the police and to the police sketch artist that the suspect was a clean-shaven Hispanic male between 15 and 17 years old with distinctive eyebrows. After speaking with Victor Jara and two other eyewitnesses (Laura Jara and Kevin Feeney) during the initial investigation, Deputy Sheriff Blackmer described the suspect as 5'5" and 130 pounds. Detective Ramirez, the lead case investigator, believed that it was Victor Jara who told Deputy Blackmer that the suspect was 5'5". Victor Jara later told the police sketch artist that the suspect was about 5'6".

Victor Jara identified Aguilar's photo from the same photo lineup of six persons presented to Hoefer. That lineup did not include a photograph of Osuna. At trial, Victor Jara expressed "absolute certain[ty]" that Aguilar was the shooter. He also testified at trial that the perpetrator may have been "taller" than the 5'6" defense counsel.

The fifth witness, Laura Jara, was in the passenger seat of the car driven by her husband Victor. She heard gunshots and looked ahead toward Guerrero's car. Laura saw a male wearing a baseball cap running away from the vehicle. During the initial investigation, Laura Jara described the gunman to the

police as a juvenile, 15 to 17 years old. She could not recall whether she had given a height estimate to the police. However, Deputy Sheriff Blackmer described the suspect as 5'5" and 130 pounds after speaking to Laura Jara. Laura identified Aguilar in a six-person photo lineup on the same date as her husband, but was not certain she had identified the perpetrator. She said it "looks like him a lot."

At trial, Laura Jara stated that the person she saw looked very young and had dark, distinctive eyebrows. Laura Jara also testified that she thought the perpetrator was a "little taller" than the 5'6" defense counsel. Laura Jara did not identify Aguilar as the shooter in court, but she did identify him as the person she had thought "looked like" the shooter in the photo lineup. She also stated that she believed Aguilar had distinctive eyebrows like the perpetrator.

The sixth witness, Kevin Feeney, was putting gas in his car at the station on Amar Road across from the KFC. Feeney saw Guerrero slumped in his vehicle, and then observed an individual running away from the scene. He was approximately 40 yards from the individual he saw running. Deputy Sheriff Blackmer described the suspect as 5'5" and 130 pounds after speaking to Feeney and the Jaras during the police investigation. At trial Feeney testified that the shooter was "tall and slender." Feeney never identified Aguilar at any point during the proceedings.

Finally, the seventh eyewitness, Rene Valles, was the driver of a car facing eastbound on Amar Road, stopped in the far righthand lane a few cars back from the intersection. Valles heard gunshots. He then saw a Hispanic male run in front of his car and into the KFC parking lot. Valles told the police the suspect was 16 to 21 years old and wearing a white t-shirt and baseball cap. He also stated that he was focused on the gun and saw the suspect's face for "just a second." Valles "really wasn't sure" of the suspect's height during the police investigation. The police showed Valles a lineup including a picture of Aguilar. Valles was unable to make an identification.

At trial, Valles identified Aguilar as the shooter. This was the first time he had ever identified Aguilar. Valles testified that he had not identified Aguilar previously because he could not see Aguilar's profile view in the photo lineup. Also for the first time at trial, Valles estimated the perpetrator's height as 5'9" or 5'10".

To counter the eyewitness testimony, the defense used an expert witness on eyewitness identification. The expert testified that the sooner after an incident an eyewitness describes a suspect, the more accurate that description is likely to be. Further, he testified that "people overestimate the height" of individuals carrying guns, such that "the actual person" being sought "might be shorter than the height estimates."

Two things are apparent from the foregoing. First, the eyewitnesses' height, weight, and age estimates during the police investigation more closely resemble Richard Osuna (no more than 5'7" and 16 years old) than Aguilar (no less than 5'11" and 20 years old) at the time of the murder. Desiree Hoefer estimated the suspect to be no taller than 5'4". Victor Jara estimated him to be 5'5" or 5'6". After speaking to the Jaras and Kevin Feeney, Deputy Sheriff Blackmer described the suspect as 5'5". Only Omar Soltero stated to investigators that the shooter was taller, and even he estimated the shooter to be several inches shorter than Aguilar. According to expert testimony, the witnesses would have been expected to overestimate, not underestimate, the height of a man carrying a gun. The eyewitnesses' weight and age estimates are also more similar to Osuna than to Aguilar. Deputy Sheriff Blackmer reported, after speaking to the eyewitnesses, that the suspect was 130 pounds. That is 20 pounds lighter than Aguilar's reported weight. Additionally, Hoefer and the Jaras estimated the perpetrator to be substantially younger than Aguilar.

Second, several of the eyewitnesses changed their testimony at trial from the statements they had given during the police investigation. At least two witnesses (Hoefer and Victor Jara) increased their height estimates, one (Valles) testified to a height estimate when he had not made one before, and two others (Laura Jara and Feeney) testified that the perpetrator was tall when they had given no such opinion before. Hoefer, Laura Jara, and Valles also expressed greater certainty in their identification at trial than they had during the investigation. Valles identified Aguilar for the first time at trial, though he had not previously been able to identify Aguilar from a photo lineup.

3. Dog Scent Identification

To supplement the physical evidence and eyewitness testimony, the prosecution put on evidence that a trained scent dog, Reilly, had identified Aguilar's scent on the white Volkswagen. Shortly after Aguilar was arrested, Officer Joe D'Allura used Reilly to perform a scent comparison test between Aguilar's scent and the scent found in the white Volkswagen. Scent comparison tests are based on the idea that every person has a unique scent, and that dogs can identify particular scents as belonging to particular objects and persons. A scent transfer unit extracted scent from Aguilar's clothes and from the impounded vehicle. The extracted scents were then placed in sterile gauze "scent pads."

Reilly was first given a sample of Aguilar's scent. Reilly then was led to a lineup of four scent pads, one of which had been collected from the passenger side of the impounded Volkswagen. He was trained to bark if he perceived a match between the sample scent and any of the scent pads. Reilly barked at the third scent pad, signaling a match between the scent pad from the Volkswagen and the scent from Aguilar's clothes. While there were four scent pads in the line-up, Reilly only reached the third scent pad before he signaled a match. Reilly did not signal a match on the spent casings from the bullets fired at Guerrero.

The scent test occurred on September 4, 2001, over a month after the murder and several weeks after the car was impounded. Aguilar's scent was taken from Aguilar's street clothes when he was arrested, and the scent test occurred that same day. It is not clear from the record when the scent

was collected from the impounded Volkswagen. On cross examination, Officer D'Allura stated that the scent in the impounded vehicle would have had to have been present "within the last week" in order for it to be "picked up." On redirect, D'Allura changed his testimony. He stated that "[t]he scent would still be in there as long as [the car]'s not being used by other people and things."

During the remainder of the trial, the prosecution used Reilly's scent evidence to support the eyewitnesses' claim that Aguilar was "in fact, the shooter." The prosecutor asked Mary Saiz to explain the presence of Aguilar's scent in the Volkswagen. Saiz responded that perhaps it was her scent the dog identified. She testified that she sometimes wore Aguilar's clothes and had ridden in Ballesteros's car. The prosecutor also emphasized the dog scent evidence on cross-examination of the defense's court-appointed investigator, suggesting that Reilly's scent match made the case "miraculously strong." The prosecutor raised the scent evidence yet again while cross-examining the defense's expert on eyewitness testimony.

The main theme of the prosecutor's closing summation was that the defense could not "explain why Gilbert Aguilar's scent was in the same particular vehicle that was responsible for following the victims to the murder location." The prosecutor discounted the defense's claim that Osuna and Aguilar looked similar, referring to them disparagingly as "twins." He then used the scent evidence to cast doubt on the defense's theory of the case. "[T]hese two twins not only look alike, but they smell alike. So we not only have a look-alike guy, we have a smell-alike guy as well – that being Richard Osuna and Gilbert Aguilar." More particularly, if "Mr. Osuna is, in fact, the shooter in this case," the jury "would be accepting an incredible coincidence that Mr. Aguilar's scent was in the passenger side of that Volkswagen." Further, it would also be "accepting another incredible coincidence":

> That the actual shooter, Richard Osuna, the person responsible for this crime — his scent just so happened to have evaporated from that scent because of what Mary did. Wearing clothing on some prior occasion before the murder even occurred. So how that scent managed to overtake Richard Osuna's scent on July 25th remains a mystery.

The prosecution argued that its theory of the case did not require the jury to accept such incredible coincidences, not least because "[w]e have the scent for Mr. Aguilar in the seat in which the gunman arose." The prosecutor concluded: "[I]f you do acquit Mr. Aguilar, [remember] what version of the facts you're really accepting. You're accepting all the coincidences that his identical twin and smell-alike person is the one who [is] really responsible. You're accepting all the incredible coincidences that Gilbert Aguilar just so happened to be everywhere at the time his twin committed this particular offense."

At the conclusion of the trial, the jury received an instruction on the dog scent evidence stating that "[e]vidence of dog tracking has been received for the purpose of showing . . . that the defendant is a perpetrator of the crime of murder." The jury was also instructed to "consider the training, proficiency, experience, and proven ability, if any, of the dog" in determining the weight given to the dog scent evidence.

C. Jury Deliberation and Verdict

After a six-day trial, the jury began deliberating on October 21, 2002. It deliberated for four days. While deliberating, the jurors asked for a reading of the testimony of Desiree Hoefer, Kevin Feeney, and Rene Valles, as well as Victor Jara's description of the suspect. The jurors also requested a response from the judge to the following question: "Is the fact that the D.A.'s office did not pursue the 'Richard Osuna' lead considered evidence? Is it something we should deliberate about?" The court responded, "The state of mind of the investigator or the prosecutor, except as it relates to a bias, intent or other motive to fabricate evidence, is not relevant to the guilt or innocence of the [defendant]."

During the third day of deliberations, Juror No. 2 approached the court about a conversation he had overheard during a break in the trial. He had seen several eyewitnesses, including Victor Jara, Desiree Hoefer, and Rene Valles, apparently talking about the case. The court dismissed Juror No. 2 because the juror could not "evaluate the testimony of those three witnesses just based on what he heard in court."

Aguilar's counsel argued for a mistrial, pointing out that the witness testimony on height and age had changed substantially from the police investigation. He argued that Juror No. 2's report suggested that the witnesses may have "cooked their testimony," and that a jury could not make a "reasonable" or "accurate determination" about Aguilar's guilt without that information. The court denied Aguilar's motion; it found that Aguilar's counsel had already sufficiently cross-examined the eyewitnesses about the discrepancies in their testimony.

Juror No. 2 was dismissed no earlier than 9:18 am on October 24. With the alternate seated, the reconstituted jury rendered a verdict by 11:23 am that same day. The jury convicted Aguilar on both counts, and he was sentenced to 50 years to life in prison.

D. Brady Evidence

Unbeknownst to defense counsel at the time of trial, the prosecution had stipulated in another case only a few months earlier that Reilly, the scent dog, had made mistaken identifications on two prior occasions. In *People v. White*, No. BA 212658 (L.A. Cty. Super. Ct. Mar. 19, 2002), the prosecution sought to introduce testimony from Officer Joe D'Allura about a scent identification made by Reilly implicating White. The prosecution stipulated that in November 1997 Reilly had identified two different men as the source of scent on the murder suspect's shirt, and that in a 2001 case, *People*

v. Bruner, No. BA 216390 (L.A. Cty. Super. Ct.), Reilly had identified as the perpetrator of a crime an individual who was in prison at the time the crime was committed. After an evidentiary hearing on dog scent lineups, the *White* court ruled that the dog scent procedures Officer D'Allura used with Reilly "were so flawed" that the judge would "not allow the dog scent lineup in."

After the *White* case concluded, the Los Angeles County Public Defender wrote a letter to the Los Angeles District Attorney, Steven Cooley, dated March 20, 2002. The County Public Defender detailed the facts in *White*, and stated:

> I bring this to your attention because I believe that this information constitutes Brady discovery and I believe that at a minimum this information should be disclosed to every defense attorney who represents or has represented an individual in a case in which Mr. D'Allura will or has presented evidence regarding his dog Reilly's ability to detect scents.
>
> In addition, I request that you order an investigation into all the cases in which Reilly has participated in scent lineups.

By the time the prosecution introduced the dog scent evidence in Aguilar's case, Reilly no longer worked as a scent dog.

The Los Angeles District Attorney's office prosecuted Aguilar's case six months after the *White* case concluded. At Aguilar's trial, the prosecutor trying the case did not disclose to the defense the earlier mistaken identifications, the stipulation in the *White* case, or the letter to District Attorney Cooley from the County Public Defender. Aguilar's trial counsel moved to strike the dog scent evidence for foundation, but not for relevance or admissibility. Counsel has since declared that he would have objected to the evidence's admissibility had he been aware of Reilly's history of mistaken identifications, of the *White* stipulation, or of the letter to Cooley.

E. Appeal and Collateral Attack

Aguilar's appellate counsel first discovered the exculpatory evidence about Reilly. Aguilar argued to the California Court of Appeal that "the trial court deprived [him] of due process when it denied his motion for a new trial based on evidence revealed by a juror during deliberations." Aguilar also filed a habeas petition in the Court of Appeal arguing that (1) the prosecution had violated *Brady v. Maryland* by failing to disclose the exculpatory evidence – that Reilly had a history of misidentification, and (2) his counsel was ineffective for failing to challenge the admissibility of the dog scent evidence.

The California Court of Appeal affirmed Aguilar's conviction and denied his habeas petition in a single disposition. The court determined that the failure to grant Aguilar's motion for a new trial did not violate his rights. Further, the court found no ineffective assistance of counsel or *Brady* violation. It noted that the "[u]se of dog-scent evidence in this case was of questionable probity," and concluded that the evidence was immaterial because, had the jury been given such information, "it is not reasonably probable that . . . the result would have been different." Aguilar petitioned for review in the California Supreme Court, but his petition was denied without comment. The California Court of Appeal decision is the last reasoned state-court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991).

Aguilar petitioned for habeas corpus in federal district court in 2006 on all three issues. The magistrate judge hearing the case recommended that the petition be denied. The district court adopted the magistrate judge's recommendation without comment. It dismissed the action with prejudice and denied Aguilar a certificate of appealability. Aguilar appealed to this court, and we granted a certificate of appealability.

Aguilar argues on appeal that the state court unreasonably applied clearly established Supreme Court law in two ways. First, he argues that the state court unreasonably determined that the prosecutor's failure to disclose evidence of Reilly's misidentifications was immaterial under *Brady v. Maryland.* Second, he argues that the state court unreasonably determined that Aguilar's inability to put on Juror No. 2 as a witness at his trial did not violate his right to present a complete defense. We agree with Aguilar's *Brady* argument. We do not reach his second argument.

III. BRADY

The State concedes that *Brady* is "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Thus, the question before us is whether the state court reasonably applied *Brady* to the facts in Aguilar's case. A *Brady* claim has three components. There must be (1) evidence that is exculpatory or impeaching (2) that is suppressed by the state and (3) resulting prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

1. Exculpatory or Impeaching Evidence

There is no doubt that Reilly's history of making erroneous scent identifications is exculpatory evidence. "[I]mpeachment, as well as exculpatory, evidence falls within *Brady*'s definition of evidence favorable to the accused." *United States v. Marashi*, 913 F.2d 724, 732 (9th Cir. 1990) (internal quotation marks omitted). "Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). The evidence not disclosed by the prosecution showed that Reilly had a record of mistaken scent identifications. Because Reilly's identification tied Aguilar to the white Volkswagen, the undisclosed evidence is unquestionably "favorable for *Brady* purposes." *Id.*

2. Suppression

Aguilar also demonstrated that the prosecution had knowledge of this exculpatory evidence. Aguilar attached to his state-court habeas petition the reporter's transcript in *White*, No. BA 212658 (L.A. Cty. Super. Ct.), the case in which the Los Angeles District Attorney's office stipulated to Reilly's mistaken scent identifications, and in which the trial judge excluded evidence about Reilly. Aguilar also attached the letter from the Los Angeles County Public Defender to the Los Angeles District Attorney, Steven Cooley, dated six months prior to Aguilar's trial and specifically stating that, in his view, the record of Reilly's misidentifications was *Brady* material.

The State argued to the California Court of Appeal in this case that knowledge of the *Brady* evidence could not be imputed to the trial prosecutor. For good reason, the State has not made that argument to us. The individual prosecutor at Aguilar's trial may or may not have possessed *Brady* information. Joe D'Allura, who testified in Aguilar's case, was Reilly's handler in the *White* case. D'Allura stated at trial, in response to questioning by the trial prosecutor, that he knew about Reilly's performance in prior gang-related homicides. If the prosecutor in Aguilar's case was unaware of Reilly's prior performance, either he was hasty in preparing his witness or D'Allura deliberately concealed from him Reilly's prior record of misidentifications.

But even if the trial attorney did not himself possess the exculpatory evidence, knowledge of that evidence is imputed to him under *Brady.* First, each "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf" and to disclose it to the other side. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This includes evidence held by other prosecutors. The Public Defender's letter, which put the State on notice that the prior Reilly cases were *Brady* evidence, was addressed specifically to District Attorney Steven Cooley. The prosecutor in Aguilar's case was employed by District Attorney Cooley. Knowledge of the *Brady* evidence therefore is imputed both to Cooley and, by extension, to prosecutors working in his office.

Second, it is clearly established that "*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (per curiam) (quoting *Kyles*, 514 U.S. at 438); *see also United States v. Blanco*, 392 F.3d 382, 393-94 (9th Cir. 2004) ("Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does." (internal quotation marks omitted)). Here, even if the prosecutor's office had not had the *Brady* material, Reilly's handler Joe D'Allura, a "scenting K-9 handler with the Los Angeles County Sheriff's Department," clearly did. D'Allura's testimony about the reliability of Reilly's scent identifications addressed precisely what had been at issue in *White*, and D'Allura has admitted he had knowledge of previous trials involving Reilly's misidentifications. Finally, even if D'Allura himself had not been aware of Reilly's misidentifications, it is enough that other members of the Sheriff's Department were aware of them.

3. Prejudice

The state court based its decision on the third prong of *Brady*, concluding that Aguilar was not prejudiced by the failure of the prosecution to disclose Reilly's record of misidentifications. "To determine whether prejudice exists, we look to the materiality of the suppressed evidence." *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008). *Brady* evidence is material if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435. Aguilar does not need to prove that a different result would have occurred in his case. He needs to show only that the state court unreasonably decided that there was not "a reasonable probability of a different result." *Id.* at 434 (internal quotation marks omitted).

If the *Brady* evidence had been presented to the *Aguilar* court, it is virtually certain that the trial judge would have ruled as did the trial judge in *White* by excluding the evidence of Reilly's scent identification. In at least two contemporaneous California state court trials, defense attorneys successfully challenged the admissibility of dog scent lineups. *See White*, No. BA 212658; *People v. Rhoney*, No. 94HF0957 (Orange Cty. Super. Ct. 1998) (dog scent evidence excluded because it was more prejudicial than probative). One of those cases, *White*, was before the same court, with the same District Attorney's office, and involved the same dog. Further, shortly after Aguilar's trial, the California Court of Appeal found that "evidence of Reilly's scent identification was admitted in error" in a different criminal proceeding because it was not adequately supported by scientific evidence. *People v. Mitchell*, 110 Cal. App. 4th 772, 790–94 (2003); *see also People v. Willis*, 115 Cal. App. 4th 379, 381 (2004) (finding in a case involving a different dog that "the dog scent evidence was improperly admitted").

The court in Aguilar's case already seemed receptive to excluding the dog scent evidence, even without knowledge of the stipulation in the *White* case. At trial, Aguilar's counsel objected to that evidence on grounds of foundation, arguing that the control scent pads were unidentified and may have been prepared improperly. The court deferred ruling on the objection but stated, "I am sure it is likely [the prosecution] will be happy to strike the whole thing because [D'Allura] was real honest. He had no idea where in the world the pads came from . . . . " Aguilar's attorney did not renew his foundation objection. Given that the trial court was already concerned about the admissibility of the dog scent evidence, we are confident that it would have excluded that evidence if the *Brady* material had been presented to it.

Even if D'Allura's testimony about Reilly had been admitted into evidence, at the very least a reasonable state court

would have concluded that the *Brady* evidence provided powerful impeachment material. Despite being asked in jury instructions to consider the "proven ability, if any, of the dog" in determining the weight to give to the dog scent evidence, the jurors in Aguilar's case were presented no evidence about the reliability of Reilly as a scent dog. Thus, they had no reason to question the accuracy of Reilly's identification of Aguilar.

A reasonable state court would have concluded that there was a reasonable probability that the jury would have reached a different verdict if Reilly's dog scent identification had not been presented to the jury, or had been impeached by the evidence of Reilly's earlier misidentifications and the *White* court stipulations. The gunman's identity was the only issue in Aguilar's case. Absent Reilly's dog scent testimony, there was no corroborating evidence for the shaky eyewitness identifications. There was no forensic evidence, murder weapon, or confession. The prosecution did not tie Guerrero and Aguilar to each other in any way. The only motive given for the killing was the unsubstantiated suggestion that Guerrero had trespassed into the territory of Aguilar's Puente Street gang, and this theory was suspect given that Guerrero was shot numerous times at close range while his passengers – equally trespassing – were left unharmed. The prosecution's own gang expert testified that the fact that only Guerrero was shot indicates that he was the intended target, undercutting the government's theory that this was a gang rivalry shooting. Richard Osuna, a suspect who had a motive to commit a targeted shooting, and who more closely resembled the eyewitness descriptions, had not been investigated.

The state court misstated the nature of the eyewitness testimony, making it appear stronger than it was. The Court of Appeal wrote that "Kevin Feeney . . . told police the shooter was 'tall and slender,'" when in fact Feeney first stated that the shooter was "tall and slender" *at trial*. The eyewitness testimony at trial clearly gave the jury pause, even when reinforced by the unimpeached dog scent evidence. The jurors asked to rehear significant portions of the eyewitness testimony during their deliberation. Given that the identity of the killer was the only question in the case, "it does not seem possible that the jury would have deliberated . . . over several days if the jurors did not have serious questions as to the credibility of the eyewitnesses." *Gibson v. Clanon*, 633 F.2d 851, 855 n.8 (9th Cir. 1980); *see also Rhoden v. Rowland*, 172 F.3d 633, 637 (9th Cir. 1999) (deliberations of nine hours over three days suggests jurors "did not find the case to be clear cut"). The dog scent evidence provided the only corroboration that the eyewitnesses had seen what they testified to at trial, rather than what almost all of them had told the police immediately after the shooting.

The prosecution emphasized the importance of the dog scent identification throughout trial. The State now argues to us that "the dog scent evidence in this case did not prove that Petitoner was in the Volkswagen on the date of the murder" because the scent would not last that long. But the State took a very different position at trial. While *defense counsel* argued that the dog scent evidence was not probative, the prosecution consistently contended that the evidence corroborated the testimony that Aguilar was "in fact, the shooter." In his closing argument, the prosecutor said that the relevant question was whose scent was present "on July 25th" (the date of the murder). The jury was told to use the dog scent identification "for the purpose of showing . . . that the defendant is a perpetrator of the crime of murder." The State cannot now argue with a straight face that the evidence upon which it relied so heavily at trial was, in fact, not probative.

The strength of the unimpeached dog scent evidence at trial also forced Aguilar's counsel to make a strategic concession in his closing argument that Aguilar had sat in the white Volkswagen Beetle. Aguilar's counsel during closing arguments admitted that the scent evidence shows that "[Aguilar] at some time sat in that car." He stated, "I don't doubt that Gilbert sat in that white Volkswagen." Had Reilly's dog scent evidence been excluded, or had counsel been able to impeach it using the *Brady* evidence, counsel would never have made this concession.

In every case where a federal or California state court has found dog tracking or scent identification *Brady* evidence to be immaterial, the defendant was convicted on evidence stronger than, and independent from, the dog scent identification. In such cases, there was physical evidence to support the conviction, *see Epperly v. Booker*, 997 F.2d 1, 10 (4th Cir. 1993) (bloodstained clothes with head hair resembling Epperly's hair), a known relationship between the defendant and the victim, *see Sherer v. Stewart*, No. 06-1635-RSM-JPD, 2008 U.S. Dist. LEXIS 118661 at *3, *57–59 (W.D. Wash. June 20, 2008) (history of violence toward victim); *Willis*, 115 Cal. App. 4th at 387 (same), or other evidence corroborating guilt, *see Sherer v. Sinclair*, 476 F. App'x 433, 433 (9th Cir. 2012) (mem.) ("[G]iven the strength of the evidence against petitioner versus the relative weakness of the dog tracking evidence, petitioner has not demonstrated a reasonable probability that disclosure of the allegedly suppressed dog tracking report would have produced a different result."); *People v. Herrera*, No. B181092, 2006 Cal. App. Unpub. LEXIS 8638, at *8, *28 (Cal. Ct. App. Sept. 28, 2006) (mem.) (defendant testified and admitted he lied); *Mitchell*, 110 Cal. App. 4th at 794 (admission to third party of guilt); *People v. Rivera*, No. B166838, 2004 Cal. App. Unpub. LEXIS 10517, at *3–4, *20 (Cal. Ct. App. Nov. 17, 2004) (perpetrator chased and arrested minutes after attack). In each of these cases, the evidence to convict was sufficient even absent the dog scent identification because the prosecution had independently proven guilt beyond a reasonable doubt. Here, in contrast, the only evidence in addition to Reilly's scent identification was shaky eyewitness testimony.

CONCLUSION

Reilly's scent evidence was the only evidence at trial linking Aguilar to the getaway car, as well as the only evidence

corroborating strikingly weak eyewitness identifications. We conclude that the prosecution's failure to disclose that Reilly had a history of mistaken identifications violated *Brady v. Maryland*, and the California courts' decision to the contrary was an unreasonable application of *Brady*.

We grant Aguilar's petition and reverse the district court's judgment on the *Brady* claim. We do not reach Aguilar's other argument. We direct that a conditional writ of habeas corpus issue, requiring the State of California to release Aguilar from custody unless it grants him a new trial to commence within a reasonable period of time to be determined by the district court.

REVERSED and REMANDED.

[APPENDICES DELETED]

Cite as 13 C.D.O.S. 8032

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ASHFORD KAIPO SPENCER, Defendant-Appellant.

No. 12-10078
United States Court of Appeals for the Ninth Circuit
D.C. No. 1:10-cr-00566-JMS-1

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

J. Michael Seabright, District Judge, Presiding

Argued and Submitted February 13, 2013—Honolulu, Hawaii

Filed July 29, 2013

Before: Susan P. Graber, Jay S. Bybee, and Morgan Christen, Circuit Judges.

Opinion by Judge Bybee

COUNSEL

Pamela O'Leary Tower (argued), Law Office of Pamela O'Leary Tower, Kenwood, California; Sheryl Gordon McCloud, Law Offices of Sheryl Gordon McCloud, Seattle, Washington, for Defendant-Appellant.

Chris A. Thomas (argued), Assistant United States Attorney; Florence T. Nakakuni, United States Attorney, District of Hawaii, Honolulu, Hawaii, for Plaintiff-Appellee.

OPINION

BYBEE, Circuit Judge:

Ashford Kaipo Spencer was convicted of two federal drug-trafficking felonies. At sentencing, the district court determined that Spencer was a "career offender" under § 4B1.1 of the Sentencing Guidelines because Spencer had two prior convictions for "crimes of violence," as defined in § 4B1.2(a). In making this determination, the district court applied the "categorical approach" to conclude that Spencer's prior conviction for criminal property damage in the first degree under § 708-820(1)(a) of the Hawaii Revised Statutes constituted a conviction for a "crime of violence."

On appeal, Spencer argues that the district court erred in sentencing him as a career offender because § 708-820(1)(a) is not a crime of violence as defined by the Sentencing Guidelines. In the alternative, Spencer argues that the "residual clause" of the definition of "crime of violence" contained in § 4B1.2(a)(2), which the district court concluded applied to him, is unconstitutionally vague.

We agree with the decision of the district court, and therefore hold that § 708-820(1)(a) is categorically a crime of violence under the residual clause of § 4B1.2(a)(2) of the

Sentencing Guidelines.[1] Spencer's claim that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague is foreclosed by Supreme Court precedent.

I. FACTS AND PROCEDURAL HISTORY

In 2010, Spencer was convicted of two federal counts of felonious drug trafficking. The U.S. Probation Office originally recommended in its draft Presentence Investigation Report (PIR) that Spencer be treated as a "career offender" under § 4B1.1 of the Sentencing Guidelines, based on Spencer's two prior felony convictions for "crimes of violence"—(1) kidnaping and robbery in the second degree, and (2) criminal property damage in the first degree.

The only prior conviction at issue here is Spencer's conviction for criminal property damage in the first degree under § 708-820(1)(a) of the Hawaii Revised Statutes. Haw. Rev. Stat. § 708-820(1)(a) (1996).

Spencer objected to the categorization of his § 708-820(1)(a) criminal property conviction as a crime of violence. In response to Spencer's objections, the U.S. Probation Office revised its position in its final PIR, recommending that § 708-820(1)(a) not be classified as a crime of violence and that Spencer not be treated as a career offender. The district court, however, disagreed. At sentencing, the district court concluded that Spencer's § 708-820(1)(a) conviction for criminal property damage categorically constituted a crime of violence, as defined in § 4B1.2(a)(2) of the Sentencing Guidelines, and held that Spencer's prior convictions rendered him a "career offender" under § 4B1.1.

Applying the sentencing enhancement based on Spencer's status as a career offender, the district court determined that the sentencing range dictated by the Sentencing Guidelines was 360–480 months. Without the "career offender" finding, the Guidelines range would have been 151–188 months. The district court imposed a sentence of 204 months in prison, significantly below the Guidelines range given the "career offender" finding. Spencer timely appealed.

II. DISCUSSION

On appeal, Spencer argues that his § 708-820(1)(a) conviction was not a conviction for a crime of violence, and claims that he should not have been sentenced as a "career offender" under the Sentencing Guidelines. Spencer also argues that the residual clause of the definition of "crime of violence," contained in § 4B1.2(a)(2) of the Sentencing Guidelines, is unconstitutionally vague. We disagree.[2]

A. Career Offender Claim

As relevant here, the Sentencing Guidelines classify a defendant as a "career offender" if he "has at least two prior felony convictions of . . . a crime of violence." U.S.S.G. § 4B1.1(a). Section 4B1.2(a) of the Sentencing Guidelines defines a "crime of violence" as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a).

At the time of Spencer's conviction in 2001, Hawaii defined criminal property damage in the first degree as follows:

> A person commits the offense of criminal property damage in the first degree if . . . [t]he person intentionally damages property and thereby recklessly places another person in danger of death or bodily injury . . .

Haw. Rev. Stat. § 708-820(1)(a) (1996).

The district court held, and both parties agree, that Spencer's prior § 708-820(1)(a) conviction for criminal property damage in the first degree does not qualify as a conviction involving the "use, attempted use, or threatened use of physical force against the person of another" as required by § 4B1.2(a)(1), or as a conviction for one of specific offenses listed in § 4B1.2(a)(2): "burglary of a dwelling, arson, or extortion, [or a crime that] involves use of explosives." Thus, the question on appeal is whether Spencer's conviction under § 708-820(1)(a) qualifies as a conviction for a crime of violence under § 4B1.2(a)'s residual clause, which includes crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."

1. Legal Framework

"We use the categorical approach . . . to determine whether a defendant's prior conviction satisfies the Guidelines definition of a crime of violence." *United States v. Crews*, 621 F.3d 849, 851 (9th Cir. 2010). Under the categorical approach:

> we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction. That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the [sentence-enhancing category], without in-

1. Since we conclude that § 708-820(1)(a) is categorically a crime of violence, we need not apply the modified categorical approach.

2. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's determination that a conviction constitutes a "crime of violence" under § 4B1.2(a) of the Sentencing Guidelines de novo. *United States v. Crews*, 621 F.3d 849, 851 (9th Cir. 2010). We also review de novo whether a statute is unconstitutionally vague. *United States v. Clark*, 912 F.2d 1087, 1088 (9th Cir. 1990).

> quiring into the specific conduct of this particular offender.

James v. United States, 550 U.S. 192, 202 (2007) (internal quotation marks and citation omitted). It is not "requir[ed] that every conceivable factual offense covered by a statute [of conviction] must necessarily" fit into the sentence-enhancing category; "[r]ather, the proper inquiry is whether the conduct encompassed by the elements of the offense [of conviction], *in the ordinary case*," fit into the sentence-enhancing category.[3] *Id.* at 208 (emphasis added).

Based solely on the language of § 708-820(1)(a) and the residual clause in § 4B1.2(a)(2), "intentionally damag[ing] property and thereby recklessly plac[ing] another person in danger of death or bodily injury," Haw. Rev. Stat. § 708820(1)(a) (1996), would seem, in the ordinary case, to "involve[ ] conduct that presents a serious potential risk of physical injury to another," U.S.S.G. § 4B1.2(a)(2), regardless of Spencer's specific conduct in violating § 708820(1)(a). But the Supreme Court's precedent dictates that the analysis is not so straightforward. The Court has interpreted the nearly identical residual clause of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), four times in recent years. *See Sykes v. United States*, 131 S. Ct. 2267 (2011) (holding that knowing or intentional flight from law enforcement by vehicle under Indiana law is a violent felony under ACCA); *Chambers v. United States*, 555 U.S. 122 (2009) (holding that failure to report to prison under Illinois law is not a violent felony under ACCA); *Begay v. United States*, 553 U.S. 137 (2008) (holding that driving under the influence of alcohol under New Mexico law is not a violent felony under ACCA); *James*, 550 U.S. 209 (holding that attempted burglary under Florida law is a violent felony under ACCA). These opinions make clear that interpretation of ACCA's residual clause must be guided not only by the language of the residual clause itself, but also by the offenses enumerated in ACCA's "violent felony" definition just before the residual clause. *See Sykes*, 131 S. Ct. at 2273; *Chambers*, 555 U.S. at 127–29; *Begay*, 553 U.S. at 142–44; *James*, 550 U.S. at 203. Since we make "no distinction between the terms 'violent felony' [as defined in the ACCA] and 'crime of violence' [as defined in § 4B1.2(a)(2) of the Sentencing Guidelines] for purposes of interpreting the residual clause[s]," *Crews*, 621 F.3d at 852 n.4; *see also id.* at 855–56, the enumerated offenses that precede the residual clause in the "crime of violence" definition in the Guidelines must guide our interpretation of the residual clause in § 4B1.2(a)(2) as well.

We set out the framework for analyzing whether a conviction under a state statute, such as § 708-820(1)(a), is a conviction for a "crime of violence" in *United States v. Park*, 649 F.3d 1175 (9th Cir. 2011). For the conviction to constitute a conviction for a crime of violence, "[f]irst, the 'conduct encompassed by the elements of the offense, in the ordinary case,' must 'present[] a serious potential risk of physical injury to another,'" *id.* at 1177–78 (quoting *James*, 550 U.S. at 208), and "[s]econd, the state offense must be 'roughly similar, in kind as well as in degree of risk posed' to those offenses enumerated at the beginning of the residual clause—burglary of a dwelling, arson, extortion, and crimes involving explosives,'" *id.* at 1178 (quoting *Begay*, 553 U.S. at 143).

The inquiry under *Park*'s first prong is straightforward. But the second requirement—whether the state offense is "'roughly similar, in kind as well as in degree of risk posed' to those offenses enumerated at the beginning of the residual clause," *id.* at 1178 (quoting *Begay*, 553 U.S. at 143)—is more complicated, and must be addressed in light of the Supreme Court's quartet of ACCA cases.

Beginning in *James*, the Court held that this second inquiry should focus on whether the risk posed by the state offense "is *comparable* to that posed by its closest analog among the enumerated offenses." *James*, 550 U.S. at 203 (emphasis added). Under this test, the Court explained, "it would be sufficient to establish . . . that the unenumerated offense presented at least as much risk as one of the enumerated offenses." *Id.* at 210. But in *Begay*, the Court did not apply the "closest analog" test. *See Begay*, 553 U.S. at 148–49 (Scalia, J., concurring in the judgment). Rather, after assuming that the state offense of driving under the influence "presents a serious potential risk of physical injury to another," *Begay*, 553 U.S. at 141 (maj. op.), the Court concluded that the state offense was not categorically a violent felony under the ACCA because it "differs from the example crimes—burglary, arson, extortion, and crimes involving the use of explosives" since it does not "involve purposeful, violent, and aggressive conduct," *id.* at 144–45 (internal quotation marks omitted). Then, in *Chambers*, the Court again ignored the "closest analog" test set forth in *James*, opting to apply *Begay*'s "purposeful, violent, and aggressive conduct" formulation instead. *Chambers*, 555 U.S. at 128.

Although *Begay* and *Chambers* seem to suggest that the "purposeful, violent, and aggressive" test is dispositive as to the second requirement set forth in *Park*, the Court disparaged this reading in its most recent ACCA case, *Sykes*. In *Sykes*, the Court asserted that the dispositive inquiry is the level of risk posed by the prior conviction at issue as compared to the level of risk posed by the enumerated offenses. *Sykes*, 131 S. Ct. at 2275–76. The Court noted that

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3. The Supreme Court recently framed the categorical approach as viewing "the offense[] . . . in the abstract[] to see whether the . . . state offense necessarily involved facts" meeting the definition in the federal statute (here the Sentencing Guidelines definition of "crime of violence"), with the caveat that there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal definition]." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013) (internal quotation marks and alterations omitted); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). We are not sure how a "realistic probability" standard might differ, if at all, from looking at the "ordinary case." But we apply the "ordinary case" standard here because the Court has applied the "ordinary case" standard in cases similar to ours. *See, e.g., Sykes v. United States*, 131 S. Ct. 2267, 2278–79 (2011).

"[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk," and explained that the result in *Begay* was dependent on the nature of the state offense at issue there, namely, that driving under the influence is a strict liability crime. *Id.* In contrast, since the state offense of vehicle flight in *Sykes* required knowing or intentional conduct, "risk levels provide[d] a categorical and manageable standard that suffice[d] to resolve the case." *Id.* Thus, the Court in *Sykes* held that *Begay*'s "purposeful, violent, and aggressive formulation" is only dispositive in cases involving a strict liability, negligence, or recklessness offense.[4] It does not apply to intentional crimes.[5]

2. Analysis

a. Serious potential risk of physical injury.

The first requirement is satisfied in Spencer's case. I seems relatively apparent that "intentionally damag[ing] property and thereby recklessly plac[ing] another person in danger of death or bodily injury," Haw. Rev. Stat. § 708820(1)(a) (1996), in the ordinary case, "involves conduct that presents a serious potential risk of physical injury to another," U.S.S.G. § 4B1.2(a)(2). Although the two provisions are not identical, and the Sentencing Guidelines use the word "serious" while § 708-820(1)(a) does not, "metaphysical certainty" of physical injury is not required under the definition in the Sentencing Guidelines. *James*, 550 U.S. at 207. Rather, the "residual provision speaks in terms of a 'potential risk,'" and "potential" and "risk" are "inherently probabilistic concepts." *Id.* "Indeed, the combination of the two terms suggests that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk' . . . ." *Id.* at 207–08.

In contrast, the Hawaiian statutory provision requires the conduct in question to *actually* and *recklessly* place another person in danger of death or bodily injury. At least some risk of death or bodily injury must actually be created, and the risk must be significant enough that the creation of the risk is reckless, meaning that the defendant "consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result." Haw. Rev. Stat. § 702-206(3)(c). Moreover, a risk is "substantial and unjustifiable" under the statute only if "the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation." *Id.* § 702-206(3)(d).[6] Of course, the "in danger of" language in § 708-820(1)(a) is also probabilistic, but conduct that *actually* places another person in sufficient danger of death or bodily injury to be deemed reckless under Hawaiian law—such that there is a conscious disregard of risk in gross deviation from the standard of conduct that a law-abiding person would observe—will, in the ordinary case, at least present a "serious potential risk of physical injury to another."

b. Similarity of risk posed by state offense to the enumerated offenses in U.S.S.G. § 4B1.2(a)(2).

The second requirement—that the state offense be "'roughly similar, in kind as well as in degree of risk posed' to those offenses enumerated at the beginning of the residual clause,'" *Park*, 649 F.3d at 1178 (quoting *Begay*, 553 U.S. at 143)—presents a more difficult question. Because a conviction under § 708-820(1)(a) requires *intentional* damage to property, in light of *Sykes*, our inquiry must be focused on risks. *See Sykes*, 131 S. Ct. at 2275–76; *Park*, 649 F.3d at 1178. That is, the question we must answer under the second prong is whether intentional property damage under § 708-820(1)(a), which involves a conscious disregard of substantial or unjustifiable risk that the damage will put someone in danger of death or bodily injury, involves risks similar to burglary, extortion, arson, and crimes involving use of explosives in the ordinary case. *See Sykes*, 131 S. Ct. at 2277. We hold that it does.

The risk involved in Hawaii's offense of criminal property damage in the first degree, under § 708-820(1)(a), is comparable to the risk involved in the enumerated offense of arson. The Supreme Court has indicated that arson is deemed a violent felony because it involves the "intentional release of a destructive force dangerous to others." *Sykes*, 131 S. Ct.

4. The majority of our sister circuits have read *Sykes* as we do here. *See, e.g.*, *United States v. Bartel*, 698 F.3d 658, 662 (8th Cir. 2012) ("The [*Sykes*] Court held . . . that only crimes akin to 'strict-liability, negligence, and recklessness crimes' required the 'purposeful, violent, and aggressive formulation.'"), *cert. denied*, 133 S. Ct. 1481 (2013); *Harrington v. United States*, 689 F.3d 124, 135–36 (2d Cir. 2012) ("In *Sykes*, the Court clarified that in cases involving intentional criminal conduct, the focus of judicial inquiry should remain on the risk assessment specific in the ACCA's text . . . ."); *United States v. Chitwood*, 676 F.3d 971, 979 (11th Cir. 2012) ("*Sykes* makes clear that *Begay*'s 'purposeful, violent, and aggressive' analysis does not apply to offenses that are not strict liability, negligence, or recklessness crimes . . . ."), *cert. denied*, 133 S. Ct. 288 (2012); *United States v. Meeks*, 664 F.3d 1067, 1070 (6th Cir. 2012) ("The Supreme Court has recently suggested that *Begay*'s 'purposeful, violent, and aggressive conduct' inquiry should be limited to crimes based on strictliability, negligence, and recklessness "); *United States v. Rodriguez*, 659 F.3d 117, 119–20 (1st Cir. 2011) ("Where the prior felony has a 'stringent *mens rea* requirement,' . . . *Begay* provides no shelter."); *United States v. Smith*, 652 F.3d 1244, 1248 (10th Cir. 2011) ("Where the felony at issue is 'not a strict liability, negligence, or recklessness crime' the test is not whether the crime was 'purposeful, violent, and aggressive' but whether it is 'similar in risk to the listed crimes.'"). *But see United States v. Mobley*, 687 F.3d 625, 634 (4th Cir. 2012) ("While the Supreme Court [in *Sykes*] focused primarily on the risk inherent in the act of fleeing arrest, it nevertheless recognized the relevance of the *Begay* [purposeful, violent, and aggressive inquiry] . . . ."), *cert. denied*, 133 S. Ct. 888 (2013).

5. In *Park*, which involved the intentional crime of first-degree burglary, we emphasized the "purposeful, violent, and aggressive" formulation in conducting the second step of the categorical analysis. 649 F.3d at 1180. Although *Park* could be read to require application of the *Begay* formulation as part of the second step of the categorical test, the better reading of *Park* is that it used the "purposeful, violent, and aggressive" test only because it recognized, as the Supreme Court did in *Sykes*, that this analysis tends to produce the same result as the inquiry into risk. *Id.* at 1180 (explaining that "'[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk'" (quoting *Sykes*, 131 S. Ct. at 2275)).

6. These provisions do not seem to have been amended since 1986, so they applied at the time of Spencer's § 708-820(1)(a) offense.

at 2273. Likewise, the crime of property damage in the first degree requires intentional destruction of property, which necessarily involves the intentional release of a destructive force; § 708-820(1)(a) is just less clear about what that destructive force is. Although destroying property could potentially involve a force much less destructive or dangerous than fire, the language of § 708-820(1)(a) specifically requires that the force put a person "in danger of death or bodily injury." As explained, in so doing the perpetrator must consciously disregard a risk of death or bodily injury that is substantial or unjustifiable—in gross deviation from the standard a law-abiding person would follow. This is more risk than the offense of arson requires.

As defined in *Begay*, arson is "causing a fire or explosion with 'the purpose of,' *e.g.*, 'destroying a building of another' or 'damaging any property to collect insurance.'" *Begay*, 553 U.S. at 145 (quoting ALI Model Penal Code § 220.1(1) (1985)) (alterations omitted). Similarly, we have described the modern, generic definition of arson as "willful and malicious burning of property." *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9th Cir. 2005) (internal quotation marks omitted); *see also United States v. Doe*, 136 F.3d 631, 634 (9th Cir. 1998). These definitions of arson do not require that a person actually or recklessly be placed in danger of death or bodily injury. Rather, arson is classified as a dangerous felony because we know that fire is generally dangerous to others, *see Sykes*, 131 S. Ct. at 2273, and common sense indicates that setting fire to someone's home or a building increases the risk that a person will be injured by the fire.

In contrast, § 708-820(1)(a) includes the risk element in the statute—the intentional release of the destructive force damaging property must "place[] another person in danger of death or bodily injury." Like vehicular flight in *Sykes*, criminal property damage in the first degree is similar to arson because it "makes a lack of concern for the safety of property and persons . . . an inherent part of the offense," such that the "perpetrator's indifference to the[] collateral consequences [of his actions] has violent—even lethal—potential for others." *Id.*

The structure of Hawaii's criminal property damage scheme also indicates that § 708-820(1)(a) was intended to prohibit actions creating risks comparable to, and even greater than, some crimes of arson. At the time Spencer was convicted, criminal property damage was divided into three degrees in Hawaii: it was criminal property damage in the first degree to "*intentionally* damage property" in a way that "*recklessly places another person in danger of death or bodily injury*," Haw. Rev. Stat. § 708-820(1)(a) (1996) (emphases added); it was criminal property damage in the second degree to "*intentionally* damage[] the property of another, without the other's consent, *by the use of widely dangerous means*," *id.* § 708-821(1)(a) (emphases added); and it was criminal property damage in the third degree to "*recklessly* damage[] the property of another, without the other's consent, *by the use of widely dangerous means*," *id.* § 708-822 (1)(a) (emphasis added). The second and third degree crimes did not require that the property damage put someone in "danger of death or bodily injury," but rather, required that the property damage be accomplished through "widely dangerous means." "Widely dangerous means" was defined to include "explosion, fire, flood, avalanche, collapse of building, poison gas, radioactive material, or any other material, substance, force, or means capable of causing potential widespread injury or damage." *Id.* § 708-800.

The current Commentary to Hawaii's criminal property damage scheme explains that the legislature's objective in creating the criminal property damage scheme was to "provide a unified treatment of offenses relating to property damage" and "[d]ispense[] with . . . archaic labels such as 'arson.'" Haw. Rev. Stat. §§ 708-820 to -823 cmt. Under this unified scheme, criminal property damage in the *second degree* was intended to "incorporate[] the traditional offense of arson," *id.*,[7] since it prohibits intentional destruction of property by means of fire, *see id.* § 708-821(1)(a); *see also id.* § 708-800. The second degree offense also broadened the crime of arson to include similarly destructive, "widely dangerous means." *See id.* § 708-821(1). The "widely dangerous means" of "explosion, . . . flood, avalanche, collapse of building, poison gas, radioactive material" are arguably as dangerous as fire,[8] and the residual clause of the "widely dangerous means" definition requires that any other force involved in destroying property be "capable of causing potential widespread injury or damage." *Id.* at § 708-800. Thus, the *second degree* offense criminalized the traditional offense of arson and offenses involving risks comparable to arson.[9]

The fact that criminal property damage in *the second degree* incorporated the traditional offense of arson and criminalized other offenses involving similarly destructive forces with risks comparable to arson strongly implies that criminal property damage in *the first degree* involves risks that are at least comparable to, if not greater than, some crimes of arson. Crimes are generally divided into degrees based on levels of

7. Although this is the current version of the Commentary, it is pertinent to the 1996 statute under which Spencer was convicted because it explains the history of the criminal property damage scheme. Curiously, the current Commentary says that criminal property damage in the second degree incorporates the offense of arson. This makes little sense because the current version of property damage in the second degree, § 708-821(1), states that the damage to the property must be committed "by means other than fire" and the current statutory scheme has separate provisions for arson. *See* Haw. Rev. Stat. § 708-8251 to -8254. The 1996 statute under which Spencer was convicted, however, did not exclude fire, and the provisions criminalizing arson separately were not added until 2006. *See* 2006 Haw. Sess. Laws 181. Thus, it seems likely that in stating that § 708-821(1) incorporated the traditional offense of arson, the Commentary was actually referring to the earlier versions of the statute, like the one under which Spencer was convicted.

8. Notably, property damage in the second degree also includes intentional damage by means of explosives—similar to the enumerated offense of a crime "involv[ing] the use of explosives." U.S.S.G. § 4B1.2(a)(2).

9. We express no view on whether the second degree offense constitutes a "crime of violence" under U.S.S.G. § 4B1.2(a).

severity. Although this might not necessarily mean that the risk of harm is greater in a first degree crime than in a second degree crime, the Commentary to the statute explains that this is the case for criminal property damage: the degrees of criminal property damage are "gradations of penalty depending both on: (1) the culpability of the actor (*i.e.*, whether the actor acts intentionally or merely recklessly), [and] (2) the means used (*i.e.*, whether the means present potential danger of widespread damage to persons or property)." Haw. Rev. Stat. §§ 708-820 to -823 cmt. Criminal property damage in the first degree clearly involves greater risk of harm to persons than does the second degree crime because it expressly requires that a person actually be in danger of injury. The Commentary explains:

> Criminal property damage in the first degree . . . presents the most aggravated form of property damage: damage which carries with it an incidental risk of danger to the person. Under former formulations of property offenses, arson, which is sometimes regarded as an offense against the person, was regarded as the most serious property offense deserving the most severe sanction. Yet actual risk of danger to another was not required for conviction of arson, and it is possible to think of many cases in which, although fire is not the method used in causing the damage, actual risk to the safety of another would result from property damage.

Id. The intent behind § 708-820(1)(a) was to separate the very worst forms of arson—those actually endangering a person—as well as other crimes involving damage to property that created a similar risk. Thus, not only does § 708-820(1)(a) criminalize risks comparable to arson, it criminalizes the very worst forms of arson, those with actual risk of injury.

Criminal property damage in the first degree thus involves risks that are, at least, comparable to arson.

In addition to arson, criminal property damage in the first degree also involves risk comparable to the enumerated crime of burglary. Burglary "is dangerous because it can end in confrontation leading to violence." *Sykes*, 131 S. Ct. at 2273; *see also James*, 550 U.S. at 199 (reasoning that "the most relevant common attribute of [all of] the enumerated offenses . . . is . . . that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury"). With § 708-820(1)(a), criminal property damage in the first degree, putting someone in danger of injury by destroying property creates a clear "possibility of a face-to-face confrontation" because the person who is threatened with injury might defend himself or retaliate against the perpetrator. *James*, 550 U.S. at 203. Moreover, with criminal property damage, there is more than just "the possibility [that there is in burglary] that an innocent person might appear while the crime is in progress," *id.*; since criminal property damage requires that a person is actually put at risk of death or bodily injury, a person must actually be nearby. In that sense, criminal property damage "presents more certain risk as a categorical matter than burglary." *Sykes*, 131 S. Ct. at 2274. "Unlike burglaries, [criminal property damage] by definitional necessity," *id.*, occurs in a way that "places another person in danger of death or bodily injury," Haw. Rev. Stat. § 708-820(1)(a). Thus, criminal property damage in the first degree involves risks comparable to burglary in the ordinary case.

Admittedly, in the ACCA cases considered by the Supreme Court, it was much easier to conceptualize the "ordinary case" for the crimes at issue—attempted burglary (*James*), DUI (*Begay*), failure to report to prison (*Chambers*), and vehicle flight (*Sykes*). With this ordinary case in mind, additional information about the level of risk involved could be gleaned from common experience. *See, e.g.*, *Sykes*, 131 S. Ct. at 2274 ("It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others."); *James*, 550 U.S. at 204 ("[T]he risk posed by an attempted burglary . . . may be even greater than that posed by a typical completed burglary . . . [A]ttempted burglaries often [involve outside intervention]; indeed, it is often just such outside intervention that prevents the attempt from ripening into completion."). The more monolithic nature of the crimes at issue in the ACCA cases also enabled the use of statistical studies to compare risk levels. *See, e.g.*, *Sykes*, 131 S. Ct. at 2274 (discussing an International Association of Chiefs of Police study on police pursuits and resulting injuries); *Chambers*, 555 U.S. at 129–30 (discussing a United States Sentencing Commission report containing statistics on violent activity during prison escapes and failure-to-report situations); *see also Sykes*, 131 S. Ct. at 2274 ("Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony."). However, envisioning the "ordinary case" in the abstract is less crucial where, as here, the risk of danger to another person is built into the statute because the crime will involve the level of risk required by the statute every time and not just "ordinarily." Indeed, the Second Circuit held that a state conviction for unlawful restraint categorically fell within the ACCA residual clause, even though it is hard to "know how first-degree unlawful restraint is committed in the 'ordinary case,'" because the text of the state statute "effectively tracks the language of the ACCA's residual clause" by requiring that the crime exposed the victim "to a substantial risk of physical injury," and state case law confirmed that the state offense involved serious risks similar to burglary. *See Harrington v. United States*, 689 F.3d 124, 132–35 & n.6 (2d Cir. 2012).

A comprehensive survey of Hawaii cases involving convictions under § 708-820(1)(a) also confirms that criminal property damage in the first degree involves risks of injury comparable to the enumerated offenses in the ordinary case.[10]

10. Although some of these defendants were prosecuted or convicted under a slightly different version of the statute than Spencer

A large number of the Hawaii cases actually involved arson or some form of intentionally setting fire to property. *See, e.g.*, *State v. Ganal*, 917 P.2d 370, 375–76 (Haw. 1996) (defendant set fire to his place of employment, a plant that operates twenty-four hours a day with people working at all hours); *State v. Baker*, 691 P.2d 1166, 1167 (Haw. 1984) (per curiam) (defendant set a boarding house on fire, almost completely destroying it); *State v. Sadino*, 642 P.2d 534, 535 (Haw. 1982) (per curiam) (defendant set a fire to a hotel room, killing two men); *State v. Yamamoto*, 216 P.3d 127, at *1 (Haw. Ct. App. 2009) (unpublished) (defendant, who wielded a spear gun, shattered the windows of a car with a hammer or a stick while a family was in it, and then squirted gasoline through the shattered window on a man sitting in the driver's seat, and tossed a book of matches inside, setting the man and the car on fire); *State v. Armstrong*, 149 P.3d 811, at *1–2 (Haw. Ct. App. 2006) (unpublished) (defendant lit his girlfriend's parked car on fire, "engulf[ing it] in flames" while four people were standing across the street). The risks involved in these cases are obviously comparable to the risks involved in the enumerated offense of arson.

Many of the Hawaii cases also involved vehicular flight and violent police confrontations. *See, e.g.*, *State v. Plichta*, 172 P.3d 512, 516 (Haw. 2007) (defendant accelerated a van "vigorously . . . into [a] police cruiser" that was blocking his exit twice, knocking the car back "roughly fifteen feet"); *State v. Anthony*, No. 29998, 2012 WL 540092, at *3 (Haw. Ct. App. Feb. 17, 2012) (unpublished) (defendant attempting to escape police drove a truck into a police officer's vehicle three times while the officer was in the car); *State v. Masaoka*, 196 P.3d 324, at *3 (Haw. Ct. App. 2008) (unpublished) (defendant attempting to escape police "barrel[ed]" between the middle and fast lanes on the freeway in a van, side swiping and hitting thirteen vehicles, several of which "sustained significant damage"). As the Court held in *Sykes*, vehicular flight is similar to burglary because it can end in confrontation leading to violence since flight demands pursuit. 131 S. Ct. at 2273–74. Moreover, "[b]etween the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes." *Id.* at 2274. Indeed, vehicular flight "presents more certain risk as a categorical matter than burglary" because, "[u]nlike burglaries, vehicle flights from an officer by definitional necessity occur when police are present . . . and are effected with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Id.*

The remaining Hawaii cases consisted of violent confrontations involving cars. *See State v. Birdsall*, 960 P.2d 729, 730 (Haw. 1998) (defendant rammed a car with three women in it with his Jeep Cherokee); *State v. Pang*, 226 P.3d 523, at *1–2 (Haw. Ct. App. 2010) (unpublished) (defendant hit the roof of a car with a baseball bat and shattered the windows while a man was in it, threatening to kill him). These cases also involved risk of confrontation similar to burglary. *Sykes*, 131 S. Ct. at 2273–74.

Although Spencer can imagine various ways to violate the statute that involve risks that are not comparable to arson and burglary, this "does not disprove that [criminal property damage] is dangerous in the *ordinary case*. It is also possible to imagine committing [the enumerated offenses] . . . under circumstances that pose virtually no risk of physical injury" or confrontation. *Id.* at 2281 (internal quotation marks and citation omitted, emphasis added); *see James*, 550 U.S. at 207–08. Here, the text of the statute, the statutory scheme, and Hawaii cases all confirm that criminal property damage involves risks comparable to arson and burglary in the ordinary case. Section § 708-820(1)(a) thus meets both of *Park*'s prongs.

Because the risks involved in criminal property damage in the first degree present a serious potential risk of physical injury to another, and that risk is similar to the risks involved in arson and burglary in the ordinary case, we hold that Spencer's prior conviction under § 708-820(1)(a) was a crime of violence as defined in § 4B1.2(a)(2). Spencer is thus subject to the "career offender" enhancement under § 4B1.1 of the Sentencing Guidelines.

B. Void for Vagueness Claim

Spencer also argues that the residual clause in § 4B1.2(a)(2) of the Sentencing Guidelines is void for vagueness. This argument is foreclosed by Supreme Court precedent.

In *James*, the Court held that the residual provision in the ACCA was not unconstitutionally vague, explaining that although "ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses," it "is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." 550 U.S. at 210 n.6. The Court reiterated this holding in *Sykes*, reasoning that although Congress's decision to "frame ACCA in general and qualitative, rather than encyclopedic, terms" resulted in a statute that "may at times be more difficult for courts to implement, it is within congressional power to enact" laws in such a manner, and the ACCA residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" *Sykes*, 131 S. Ct. at 2277 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion)).

Because precedents interpreting the ACCA residual clause apply to § 4B1.2(a)(2) of the Sentencing Guidelines, *Crews*, 621 F.3d at 852 n.4, 855–56, § 4B1.2(a)(2)'s residual clause is not unconstitutionally vague.

was, all of these statutes required the same basic elements of intentional property damage that places another person in risk of death or bodily injury. The only material difference in the statute over time is that after Spencer's conviction, in 2006, § 708-820(1)(a) was amended to exclude damage by means of fire and a separate arson statute was passed. *See* 2006 Haw. Sess. Laws 181.

III. CONCLUSION

We hold that the 1996 version of Hawaii Revised Statute § 708-820(1)(a), criminal property damage in the first degree, is categorically a crime of violence under the residual clause of § 4B1.2(a)(2) of the Sentencing Guidelines. Thus, the district court did not err in applying the "career offender" sentencing enhancement to Spencer under § 4B1.1. We also hold that Spencer's claim that the residual clause in § 4B1.2(a)(2) is unconstitutionally vague is foreclosed by Supreme Court precedent.

AFFIRMED.

Cite as 13 C.D.O.S. 8039

PACIFIC RIVERS COUNCIL, Plaintiff-Appellant,

v.

UNITED STATES FOREST SERVICE; MARK REY, in his official capacity as Under Secretary of Agriculture; DALE BOSWORTH, in his capacity as Chief of the United States Forest Service; JACK BLACKWELL, in his official capacity as Regional Forester, Region 5, United States Forest Service, Defendants-Appellees,

and

CALIFORNIA FORESTRY ASSOCIATION; AMERICAN FOREST & PAPER ASSOCIATION; QUINCY LIBRARY GROUP; PLUMAS COUNTY; CALIFORNIA SKI INDUSTRY ASSOCIATION, Defendant-intervenors-Appellees.

No. 08-17565
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:05-cv-00953-MCE-GGH
On Remand From The United States Supreme Court
Filed July 29, 2013
Before: Stephen Reinhardt, William A. Fletcher, and N. Randy Smith, Circuit Judges.

ORDER

Pursuant to the June 17, 2013, order of the Supreme Court, we remand this case to the United States District Court for the Eastern District of California with instructions to dismiss the case as moot in its entirety.

California Courts of Appeal

Cite as 13 C.D.O.S. 8040

j2 GLOBAL COMMUNICATIONS, INC., Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, Defendant and Respondent.

No. B241151
In the Court of Appeal of the State of California
Second Appellate District
Division Four
(Los Angeles County) (Super. Ct. No. BC423661)

APPEAL from a judgment of the Superior Court for Los Angeles County, Ralph W. Dau, Judge. Affirmed.

Filed July 26, 2013

COUNSEL

Carr & Ferrell, James W. Lucey, Marcus H. Yang and Robert J. Yorio for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Beverly A. Cook; Colantuono & Levin, Holly O. Whatley and Tiana J. Murillo for Defendant and Respondent.

OPINION

Plaintiff j2 Global Communications, Inc. appeals from a summary judgment in favor of defendant City of Los Angeles on j2's claim for a refund of taxes it paid for telecommunication services it used in connection with services it provided to its customers over the Internet. j2 contends it is exempt from taxation on those telecommunication services under the Internet Tax Freedom Act, as amended in 2007 (ITFA) (47 U.S.C. § 151, note, § 1100 *et seq.*).[1] The trial court concluded that the City produced evidence to show that j2's purchase of telecommunication services did not fall within the ITFA exemption, and j2 failed to adequately rebut that showing. We agree, and affirm the summary judgment.

BACKGROUND

j2 is a company that provides "online fax, virtual phone systems, hosted email, email marketing, online backup and bundled suites of these services" to businesses and individuals worldwide. One of its core services is eFax, which "enable[s] users to receive faxes into their email inboxes and to send faxes via the Internet" from their computers. To provide this service, j2 purchases telephone numbers known as Direct Inward Dial (DIDs) from third-party telecommunication providers. It assigns one or more DID numbers (local or toll-free) to each customer, from which the customer may receive faxes or voicemail messages in the customer's email. j2 remains the customer of record for all of those DIDs, and derives "a substantial portion" of its revenues from its DID-based services.

The City imposes a communications users tax (CUT) on charges for communications services, which, as defined in Los Angeles Municipal Code section 21.1.1, subdivision (b), includes the DIDs j2 obtained for its eFax service.[2] The tax is collected by the person providing the communications services (such as a telephone company) from the person paying for those services, in this case, j2. (LAMC § 21.1.3, subd. (a), (b).) j2 apparently paid the CUT on the DIDs it obtained for its eFax service.[3]

In May 2009, j2 filed with the City a claim for refund application, seeking a refund of approximately $175,000 in taxes collected from j2 during the period from May 2008 to May 2009. j2 asserted that "[t]hese taxes were incorrectly imposed on telecommunications service used for exempt Internet access." When the City did not respond to its application, j2 filed the instant lawsuit, alleging a single cause of action for unlawful collection of Internet access tax.

The City moved for summary judgment or, in the alternative, summary adjudication. The City argued it was entitled to summary judgment because j2's purchase of telecommunications services was not exempt from taxation under ITFA because j2 did not provide "Internet access" as defined in ITFA. The City also argued it was entitled to summary adjudication of its affirmative defense that j2 failed to exhaust its administrative remedies.

The trial court found the City was entitled to summary judgment, declined to address the City's motion for summary adjudication, and entered judgment in favor of the City. j2 timely filed a notice of appeal from the judgment.

1. ITFA was originally enacted in 1998, and has been amended several times. The last amendment, in 2007, was made by the Internet Tax Freedom Act Amendments Act of 2007, which j2 refers to as the ITFAAA. Unless otherwise stated, references to ITFA in this opinion are to the Internet Tax Freedom Act as amended by the ITFAAA.

2. We need not describe in detail which services are included within the definition of "communications services," since it does not appear that j2 contends that the services at issue are outside the definition; rather, j2 argues that ITFA precludes the City from imposing taxes on j2's use of those services.

3. As the City notes in its respondent's brief, the City objected to j2's evidence that the City collected CUT from it, the trial court sustained that objection, and j2 did not challenge the trial court's ruling in its appellant's opening brief. j2's belated attempt to challenge the ruling in its appellant's reply brief does not suffice to preserve the issue for review. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [" 'Points raised for the first time in a reply brief will ordinarily not be considered' "].) Nevertheless, because the City's motion for summary judgment did not address whether j2 actually paid the CUT and appears to assume that it did pay, we will assume for the purposes of our review that the CUT was pa*id.*

DISCUSSION

As noted, the City's motion for summary judgment was based upon its assertion that j2's purchase of telecommunications services was not exempt from taxation under ITFA. ITFA was first enacted by Congress in 1998 to temporarily impose a moratorium on the collection of taxes by state and local governments on "Internet access." (Pub.L. 105–277, Div. C, Title XI, Oct. 21, 1998, 112 Stat. 2681–719.) The moratorium was extended, and the definition of "Internet access" was modified in a series of amendments, culminating with the most recent amendment in 2007. (Pub.L. 110–108, §§ 2 to 6, Oct. 31, 2007, 121 Stat. 1024 to 1026.) At present (and at the time the taxes at issue in this case were collected), ITFA defines "Internet access" as follows:

"The term 'Internet access' –

"(A) means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;

"(B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold. –

"(i) to provide such service; or

"(ii) to otherwise enable users to access content, information or other services offered over the Internet;

"(C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;

"(D) does not include voice, audio or video programming, or other products and services (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and

"(E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access." (47 U.S.C.A. § 151, note, § 1105, subd. (5).)

In moving for summary judgment, the City contended that j2 was not a provider of Internet access, and that its purchase of telecommunications services (i.e., the DIDs) did not qualify as Internet access as defined in ITFA. In support of its motion, the City submitted its statement of undisputed facts supported by evidence, including j2's Form 10-K Annual Report filed with the Securities and Exchange Commission; j2's form customer agreement for its eFax customers; the declaration of an officer of j2 that was filed in a lawsuit in federal district court, describing how faxes are transmitted to eFax customers; j2's Confidential eFax Corporate Operational Overview; and the declaration of a telecommunications expert, explaining how DIDs work.

According to the facts set forth in the City's statement of undisputed facts, j2 uses the DIDs (for which it paid the CUT) as part of its eFax service. In general, DID numbers are used in a private branch exchange (PBX), which is a switching system physically located on the premises of a telecommunications subscriber, such as a law office. The PBX is connected to the Public Switched Telephone Network (PSTN), which is the generic term for the domestic public telephone network. Each station on a PBX is assigned a DID number drawn from a bank of numbers designated by a local phone company, which typically leases or rents DID numbers to user organizations in blocks of 50, 100, or 250. When an outside caller dials a DID number, the call is connected over a special DID trunk and is passed to the PBX, which automatically routes the call to the station assigned that DID number.

In the case of j2's eFax service, j2 assigns a DID number to each of its customers. When someone sends a fax to a DID number that has been assigned to a j2 customer, the sender is initiating a telephone call that travels over the PSTN to a fax card in one of j2's servers. When the incoming fax is received by a j2 server, it is converted to a customer-specified format (such as PDF) and sent to the customer as an attachment to an email. j2 does not provide its customers with the services required to receive and access the email; j2's customer agreement states that the customer must "obtain and pay for all equipment and third-party services (e.g., Internet access and email service) required for [the customer] to access and use eFax Services."

In opposition to the City's motion, j2 purported to dispute many of the City's facts describing how the eFax service works, but, as the trial court found, those purported disputes were ineffective both procedurally and substantively. For example, as to several of the City's facts, j2 stated the fact was "disputed" because the fact as set forth by the City "do[es] not provide a complete description of how fax transmissions are transmitted [or fax cards are utilized] as part of j2's Internet fax services." In support of its "dispute," j2 cited to the same evidence the City relied upon (although j2 merely cited to the entire documents without specifying a page, line, or paragraph). With regard to some of those facts and others, j2 also stated that the City "mischaracterizes the scope and content of the information" on the pages of the documents

the City cited to, but failed to explain exactly how the City's statement of the information was incorrect. In response to still other facts, j2 simply stated that the fact is "[d]isputed insofar as these statements are meant to describes [*sic*] or suggest how j2's services specifically work or operate." In no instance did j2 cite to specific evidence that contradicted or raised doubts as to the accuracy of the City's statement of facts, nor did j2 provide additional facts as to the operation of its eFax service and its use of DIDs. Therefore, as did the trial court, we deem the City's facts to be undisputed, and determine whether those undisputed facts preclude j2 from establishing that its DID-based services come within the definition of Internet access and thus are exempt from taxation under ITFA.

j2 contends that, notwithstanding the undisputed facts, its services qualify as Internet access under subdivisions (5)(A), (C), and (E) of ITFA's definition.[4] It notes that subdivision (5)(A) "only requires the following: *First*, the provided service must 'enable[] users to connect to the Internet'… [and] *Second*, this connection to the Internet must be 'to access content, information, or other services offered over the Internet.' " It argues that its eFax service meets both requirements because "its users necessarily must connect to the Internet through the eFax service in order to use the service," and its users use that connection "to receive inbound fax messages in their email inboxes, access these messages via a full-featured Web-based email interface, send digital documents to any fax number in the world directly from their desktops, and monitor this service using a Web browser-based account administration interface." In making this argument, j2 appears to ignore crucial language in subdivision (5)(A), and instead reads that subdivision to say that Internet access "means a service that enables users… to access content, information, or other services offered over the Internet." The fact that j2's customers must connect to the Internet through the eFax service to access content, information, or other services does not show that j2 enables users "*to connect to the Internet*" to access that content, information, or other services, as subdivision (5)(A) requires. (47 U.S.C.A. § 151, note, § 1105, subd. (5)(A), italics added.) Indeed, the undisputed facts show that j2 requires its customers to obtain services from a third-party to enable them to connect to the Internet. Thus, j2 cannot establish that its eFax service qualifies as Internet access under subdivision (5)(A).

For the same reason, j2 cannot establish that its eFax service qualifies as Internet access under subdivision (5)(C). Under that subdivision, Internet access "includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service." (47 U.S.C.A. § 151, note, § 1105, subd. (5)(C).) Because the undisputed facts establish that j2 does not provide the service described in subdivision (5)(A), its eFax service necessarily does not provide services incidental to that service.[5]

That leaves subdivision (5)(E). Under that subdivision, Internet access "includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access." (47 U.S.C.A. § 151, note, § 1105, subd. (5)(E).) j2 argues that its services meet this definition because it "provides a 'homepage' and 'electronic mail' to its users," since "eFax users receive faxes via email and access Web-based email and account interfaces via each service's home page." But sending an email to an eFax customer through that customer's independently-obtained email service, and allowing customers to access their accounts through eFax's home page do not constitute providing a homepage or electronic mail service to the customers. If it did, virtually all business conducted over the Internet would be exempt from taxation. We decline to interpret subdivision (5)(E) in such a way as to render ITFA's definition of Internet access essentially meaningless.

In any event, j2 presented no evidence that the telecommunications services that were subject to the CUT in this case (i.e., the DIDs) were utilized in providing a homepage or sending electronic mail to eFax customers. As noted, the undisputed facts are that the DIDs are used solely to transmit faxes from third parties to j2's servers. j2 then converts the faxes into a certain format and attaches them to emails that j2 sends to eFax customers; there was no evidence that the DID services are used for transmitting those emails. In short, j2 cannot establish that its purchase and use of DIDs for its eFax service is exempted from taxation under subdivision (5)(E).

We note that j2 asserts that other jurisdictions have determined that j2's services are exempt from taxation under ITFA, and that it has received refunds from at least two jurisdictions. Although it did not cite to any evidence of those determinations in its response to the City's separate statement of undisputed facts, j2 did submit to the trial court a document that purports to be a refund from the Minnesota Department of Finance, which j2 contends evidences that State's determination. The document, however, merely states that j2 is entitled to a refund, and does not indicate the reason for the refund.

But even if the document did indicate that the Minnesota Department of Finance found that ITFA exempted j2's services from taxation, it would not assist j2 here. We are reviewing a summary judgment based upon the record before the trial court. The City presented evidence that j2's services were not exempt from taxation. In opposing the City's mo-

4. Although j2 addressed only these subdivisions in its appellant's opening brief, counsel argued at oral argument that its services also qualify as Internet access under subdivision (5)(B).

5. For this same reason, j2's argument, raised for the first time at oral argument, that its eFax service qualifies as Internet access under subdivision (5)(B) also fails, since that subdivision applies only when the purchase of telecommunications is made "by a provider of a service described in subparagraph (A)." (47 U.S.C.A. § 151, note, § 1105, subd. (5)(B).)

tion, j2 bore the burden to show that a triable issue of material fact exists by pointing to evidence from which a reasonable trier of fact could conclude that j2's services were exempt under ITFA. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) It failed to do so. Therefore, the City is entitled to judgment as a matter of law on j2's claim for a refund on the CUT it paid with respect to the telecommunications services it purchased.

DISPOSITION

The judgment is affirmed. The City of Los Angeles shall recover its costs on appeal.

WILLHITE, J.

We concur: EPSTEIN, P. J., SUZUKAWA, J.

Cite as 13 C.D.O.S. 8043

RANDALL KEITH HAMPTON et al.,
Plaintiffs and Appellants,

v.

COUNTY OF SAN DIEGO, Defendant and Respondent.

No. D061509
In the Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. 37–2010-00101299-CU-PA-CTL)
APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.
Filed July 26, 2013

COUNSEL

Thorsnes Bartolotta McGuire, John F. McGuire, Ian C. Fusselman and Benjamin I. Siminou for Plaintiffs and Appellants.

Thomas E. Montgomery, County Counsel, and Christopher J. Welsh, Deputy County Counsel, for Defendant and Respondent.

OPINION

I.

INTRODUCTION

In November 2009, a vehicle that Randall Keith Hampton was driving collided with another vehicle at an intersection in Valley Center. Hampton and his wife sued the driver of the other vehicle as well as the County of San Diego (County).[1] The Hamptons brought claims against the County for dangerous condition of public property (Gov. Code, § 835 *et seq.*)[2] (fourth cause of action) and loss of consortium (third cause of action). The County moved for summary judgment on the ground that the Hamptons' claims were barred by the affirmative defense of design immunity. The trial court granted the County's motion. On appeal, the Hamptons claim that the court erred in granting the County summary judgment. We affirm.

1. The County is the only respondent in this appeal.
2. Unless otherwise specified, all subsequent statutory references are to the Government Code.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Hamptons' complaint

In their cause of action claiming dangerous condition of public property, the Hamptons alleged that the County had duties to "properly and safely plan, design, build, construct, operate, manage, maintain, direct, control, sign and supervise the roadways at the intersection of Cole Grade Road and Miller Road in the County of San Diego," and that the County breached these duties by "providing… inadequate sight distance for vehicular traffic approaching Miller Road from Cole Grade Road as well as for traffic pulling out from Miller Road onto Cole Grade Road… creating a defective and dangerous condition for motorists and traffic." The Hamptons further alleged:

> "As a proximate result, Defendant ROBERT PAUL CULLEN [the other driver involved in the accident] was unable to see the plaintiff as the plaintiff pulled out from Miller Road onto Cole Grade Road and the plaintiff RANDALL KEITH HAMPTON was unable to see Defendant ROBERT PAUL CULLEN as defendant approached this intersection while driving on Cole Grade Road[,] causing their vehicles to collide at this intersection. As a proximate result of Defendants' conduct, Plaintiff sustained the injuries and damages as herein alleged."

In a loss of consortium cause of action, the Hamptons alleged that Randall Keith Hampton had been unable to perform "necessary duties as a husband and the work and services usually performed in the support… of the family," due to the County's conduct.

B. The County's motion for summary judgment

1. The County's motion

The County filed a motion for summary judgment and/or adjudication on the ground that the affirmative defense of design immunity applied to bar the Hamptons' claims against the County. In a supporting brief, the County noted that in order to establish the defense of design immunity, a public entity is required to establish three elements: 1) a causal relationship between the plan or design and the accident; 2) discretionary approval of the plan or design prior to construction; and 3) substantial evidence supporting the reasonableness of the plan or design.

The County contended that the causal connection element was met based on the Hamptons' allegation that the intersection at which the collision occurred constituted a dangerous condition. With respect to the discretionary approval element, the County stated that the County had approved plans for improvements to the intersection in 1995, prior to the construction of those improvements in 1998. Finally, the County argued that the declaration of Robert Goralka, a licensed engineer, demonstrated the reasonableness of the plans for the intersection. The County also maintained that the Hamptons would be unable to demonstrate changed conditions resulting in a loss of design immunity, arguing that the Goralka declaration "establishes that the physical configuration of the intersection was the same when this accident occurred as it was in 1998 when the improvement project was completed."

The County supported its motion with two "Road Review[s]"[3] pertaining to the intersection, engineering documents entitled "Plans for Construction of Cole Grade/Miller Road Interim Intersection Improvements [(Plans)]," and Goralka's declaration, among other items.

In his declaration, Goralka stated that he is the County's traffic engineer and that his current duties involved managing various aspects of traffic operations on County roads. Goralka further stated that a 1989 Road Review noted that the sight distance from Miller Road looking south on Cole Grade Road was less than desirable due to a "hump" in Cole Grade Road. The Road Review recommended lowering the crest on Cole Grade Road south of the Miller Road intersection to obtain additional sight distance at the intersection.

Goralka stated that he had reviewed the Plans and noted the following with respect to their approval:

> "The[] [P]lans consist of road cross-section diagrams, profiles, and striping plans. . . . Prior to actual construction[,] the [Plans] were, on March 3, 1995[,] signed by David Solomon, a licensed civil engineer and traffic engineer who served as Deputy County Engineer and was in charge of the County… Design Engineering Section. As the person in charge of the County's Design Engineering Section, he had been delegated by the County Board of Supervisors, through the Director of the Department of Public Works, discretion and authority to approve plans such as [the Plans]. After the project was completed, 'as built' plans were approved and signed by John Bidwell, a licensed civil engineer who served as Senior Civil Engineer of the County's Design Engineering Section on April 13, 1998."

Goralka described the purpose of the Plans as follows:

> "The [Plans] called for the lowering of the crest on Cole Grade Road, just south of the Miller Road intersection. The effect of lowering the crest is to improve intersection sight distance for the users of westbound Miller Road who look to view northbound traffic on Cole Grade Road as they are preparing to enter the intersection. The 'as-built' plans confirm that the crest of Cole Grade Road was lowered by several feet. The plans

3. The Road Reviews were generated by the County's Department of Public Works and identified various traffic conditions near the intersection and offered recommendations for improving such conditions.

called for widening of both Cole Grade and Miller Roads, at their intersection to accommodate a left turn pocket on both northbound and southbound Cole Grade Road for vehicles turning west, and east respectively onto Miller Road. The as-built plans confirm that this feature of the project was constructed."

With respect to the issue of sight distance at the intersection in the wake of the improvements, Goralka stated the following:

"I have reviewed the [1999 Road Review] regarding Cole Grade Road. . . . In this Road Review, which is after the intersection improvement project, the reviewer notes that sight distance for westbound traffic is not adequate from 10 feet behind the limit line on Miller Road at the intersection with Cole Grade Road. This is a measurement typically used in designing new roads, and it does not mean that the County failed to provide reasonable sight distance for existing, previously constructed roads such as the intersection of Miller Road and Cole Grade Road. My usual manner of gauging operational sight distance from a side street at an intersection such as this, and the manner I have usually seen used by those working for the County, is to measure back from the prolongation of the painted edge of [the] lane line, not the limit line. In this instance, the edge of the lane line is several feet in front of the limit line. As a practical matter, a driver on westbound Miller Road who creeps forward from the limit line but has not yet crossed into the oncoming travel lane is able to gain more sight distance to the left, looking for traffic on northbound Cole Grade Road. This results in 'operational' sight distance."

Goralka also stated that, in his opinion, the Plans are reasonable.

"The [Plans] are reasonable. The configuration of the intersection shown in the plans provides adequate operational sight distance for a driver who creeps forward from the limit line. Having viewed the site in person, I can say that the operational sight distance provided between westbound Miller Road and northbound Cole Grade Road is adequate. The plans did not achieve a more desirable amount of sight distance sought when a new intersection is being designed from scratch in an open area. But the project did achieve operational sight distance, which is a reasonable improvement when, as here, there are design constraints including roadways already in place that are near the crest of a hill and an embankment with existing utilities."

2. The Hamptons' opposition

The Hamptons filed an opposition in which they argued that the County was not entitled to summary judgment based on the affirmative defense of design immunity because the County failed to establish as a matter of law the "discretionary approval" and "reasonable design" elements of the defense.[4] The Hamptons based their opposition primarily on the contention that the Plans disregarded the County's "own methodology for measuring sight distance." In support of this contention, the Hamptons stated that the Plans failed to provide either adequate "design sight distance" or "operational sight distance."[5]

The Hamptons noted that although the parties agreed that the County's design sight distance standard had not been met,[6] the parties disputed whether the Plans achieved sufficient operational sight distance under County guidelines. The Hamptons maintained that in stating that operational sight distance at the intersection was adequate, the County's expert, Goralka, "fail[ed] to follow the County['s] protocol for measuring sight distance." The Hamptons argued that Goralka failed to base his calculation of operational sight distance on measurements derived "from the edge of the *pavement*" as required under County protocol, and that he had instead improperly measured from "the edge of the *lane*."[7]

With respect to the discretionary approval element, the Hamptons argued that "the Plans are silent as to sight distance," and that the County thus failed to "provide[] evidence that the deviations from design standards… were approved or even considered." In addition, the Hamptons argued that any approval of the Plans was necessarily unreasonable in light of the fact that the plans deviated from County sight distance standards.

The Hamptons also argued that the County's failure to maintain the intersection had resulted in changed conditions that precluded the application of the County's design immunity defense. Specifically, the Hamptons maintained that plant growth along an embankment on Cole Grade Road south of Miller Road further reduced the already inadequate sight distance at the intersection provided for in the Plans.

The Hamptons supported their motion with various documents and the declaration of Edward Stevens, a licensed civil engineer who has significant traffic engineering experi-

4. The Hamptons did not dispute that the County had established the first element of its design immunity defense, namely, the existence of a causal relationship between the Plans and the accident.

5. The Hamptons argued that "[t]he purpose of providing design sight distance is to allow a driver intending to enter the intersection with sufficient time to decide whether it is safe to enter." The Hamptons contended that "[t]he purpose of providing 'operational' sight distance is to allow a party sufficient time to perceive and then stop before impacting a vehicle in the intersection."

6. Although the County agreed that the design sight distance standard had not been met, the County contended that this standard applied only to the design of *new* intersections, and that operational sight distance standards applied to improvements made to *existing* intersections.

7. It is undisputed that since there is a difference of several feet between the edge of the pavement and the edge of the lane of traffic at the intersection at which the accident occurred, a sight distance measurement taken relative to the pavement edge yields less sight distance than one taken from the edge of the lane line.

ence. In his declaration, Stevens stated that an embankment runs along the east side of Cole Grade Road as it approaches Miller Road and that this embankment limits sight distance for westbound traffic on Miller Road looking south toward northbound traffic on Cole Grade Road. Stevens further stated that the Plans do not depict the embankment and that as a result, it is not possible to determine from the Plans the actual sight distance at the intersection. Stevens stated that although the County standard for design sight distance requires at least 550 feet of sight distance at the intersection and the County standard for operational sight distance requires at least 388 feet, actual design sight distance at the intersection was only 214 feet and operational sight distance was only 323 feet.

Stevens stated the following with respect to Goralka's declaration as to the adequacy of sight distance at the intersection:

> "The standards set out by the County of San Diego… require that design and operational sight distance be measured backwards from the prolongation of the curb or gutter line or edge of the pavement, not from the edge lane line. The Declaration of Robert Goralka suggests that satisfactory operational sight distance exists at the si[te]. However, Mr. Goralka does not use the standard adopted by the County of San Diego for measuring sight distance. Further, Mr. Goralka's methodology is not generally accepted in the traffic engineering community as an appropriate means of measuring design or operational sight distance."

Stevens contended that because of the lack of information pertaining to sight distance in the Plans, "the engineer approving the Plans could not have exercised discretionary approval of the sight distance." In addition, Stevens maintained that given the inadequacies in the Plans pertaining to sight distance, "there is no basis upon which a traffic engineer could have reasonably approved the Plans."

Stevens attached various documents to his declaration, including two County engineering drawings, numbered DS-20A and DS-20B. The drawings are marked, "San Diego County Design Standard[s]" and are entitled, "Clear Space Easement Type A" and "Clear Space Easement Type B," respectively. The drawings appear to depict easements necessary to achieve adequate "corner sight distance"[8] at two different shaped intersections. Both documents also contain an identical table that lists the "minimum corner intersection sight distance" in feet for various "design speed[s]." The table states that for a design speed of 50 miles per hour (MPH), 500 feet of corner intersection sight distance is required, and that when the design speed increases to 60 MPH, 600 feet of sight distance is required.

Stevens also included a document that contains several tables. One table, entitled, " 'Corner' Sight Distance on Level Roadways," repeats the corner sight distance information discussed in the previous paragraph, and includes a notation that states the following: "Corner sight distance measured from a point on the minor road at least 10 feet from the edge of the major road pavement and measured from a height of eye of 3.5 feet on the minor road to a height of object of 4.25 feet on the major road. (See Count[y]… Public Road Standards Drawings DS-20A and DS-20B)." Another table is entitled, " 'Operational' Stopping Sight Distance on Level Roadways," and contains a note that states, "Operational [Sight] Distance Measured from a point on the minor road 8 feet from the edge of pavement. (Distance from the front of the vehicle to the driver's eye is nearly always 8 ft [citation].) Measured from a height of eye of 3.5 feet on the minor road to a height of object of 3.5 feet on the major road [citation]."

3. The County's reply

The County filed a reply in which it reiterated its argument that Goralka's declaration established the existence of discretionary approval of the Plans prior to construction. With respect to the reasonableness of the Plans, the County argued that the fact that "experts disagree on the best approach to the sight distance problem" did not establish a lack of "substantial evidence to support the reasonableness of the approach actually followed by the County."

Specifically, the County argued that " 'operational' rather than 'design' criteria appl[y] to an intersection of existing roadways," such as the intersection at issue. The County also contended, "The way that operational sight distance at this intersection was measured is consistent with the County's practices, where the edge of the lane used by oncoming traffic is several feet in front of the limit line, thereby allowing drivers on westbound Miller Road plenty of room to safely creep forward and look both ways before reaching the oncoming lane and crossing into the intersection." The County further argued that when operational sight distance is measured in this manner, the Plans provide for adequate sight distance. Finally, the County argued that any growth in plants on the embankment along Cole Grade Road did not constitute a relevant changed condition since even with such growth, the embankment does not reduce the operational sight distance of a reasonable driver who creeps forward beyond the limit line and checks for oncoming traffic prior to entering the intersection.

In support of its reply, the County lodged a portion of the deposition testimony of its retained expert, Arnold A. Johnson. In the deposition, Johnson testified that a County document entitled "Service Request Guidelines Si[ght] Distance at Intersection" states, "Sight distance is measured 8 feet back from the prolongation of the curb *or 8 feet back from an edge line*." (Emphasis added.) The County also lodged a portion of Stevens's deposition in which Stevens acknowledged that if Hampton had pulled his vehicle to a point forward of the limit line on Miller Road just before entering the lane of

8. It appears from the record that the terms "design sight distance" and "corner sight distance" are used interchangeably.

traffic on Cole Grade Road, "Cullen's vehicle would be within his view if it was within 550 feet of the intersection… ."

C. The trial court's ruling

The trial court held a hearing on the motion. At the conclusion of the hearing, the court took the matter under submission. Four days later, the trial court issued an order granting the County's motion for summary judgment. The court ruled that the County had established its design immunity affirmative defense as a matter of law. In reaching this conclusion, the court reasoned in part:

> "Defendant County has shown that no material issues of fact exist to overcome the County's statutory entitlement to design immunity. As is made clear by the Goralka Declaration… the [Plans] were approved by Deputy County Engineer David Solomon, a licensed civil engineer and traffic engineer on [March 3, 1995]. He was in charge of the County of San Diego Design [E]ngineering Section. As the person in charge of that Section, he had been delegated by the County Board of Supervisors, through the Director of the Department of Public Works, to have discretion and authority to approve such plans. This bespeaks sufficient discretion to entitle the County to invoke design immunity, as a matter of law. The court finds that the Goralka declaration is of solid evidentiary value and inspires confidence in the conclusions expressed.
>
> "Further, . . . (as built) Drawings were signed off on by John Bidwell, a licensed civil engineer who served as Senior Civil Engineer of the County's Design Engineering Section on [April 13, 1998]. [Citation.] Defendant County has satisfied the three elements necessary to show the County's entitlement to design immunity by substantial evidence . . . . Typically, the opinion of a civil engineer as to the reasonableness of the design constitutes the 'substantial evidence' that is necessary to support the design immunity defense. [Citation.]
>
> "The fact that Plaintiffs have an expert, Ed Stevens, who disagrees with the County's witness, is of no consequence. It does not matter whether the evidence of reasonableness is disputed, as the statute provides immunity even when the public entity's substantial evidence of the reasonableness of its design is contradicted by the opposing party's traffic engineer. [Citations.]
>
> "The court finds that there is substantial evidence upon which a reasonable public employee could have adopted the plan or design which gave rise to the 1998 modifications to Cole Grade Road near the subject intersection. . . . Further the court determines that plaintiff has failed to offer material admissible evidence of significant changed physical conditions since 1988 rendering the subject intersection dangerous (let alone that the County had prior notice of same). There is no material triable issue of fact on this contention. The County is entitled to Judgment as a matter of law."[9]

The trial court subsequently entered judgment in favor of the County.

D. The Hamptons' appeal

The Hamptons timely appealed from the judgment.

III.

DISCUSSION

The trial court properly granted the County's motion for summary judgment

A. The trial court properly determined that the County established, as a matter of law, the affirmative defense of design immunity

The Hamptons contend that the trial court erred in concluding that the County established, as a matter of law, the affirmative defense of design immunity.

1. Governing law

a. The law governing summary judgment

A moving party is entitled to summary judgment when the party establishes that it is entitled to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant may make this showing by demonstrating that the plaintiff cannot establish one or more elements of all of his causes of action, or that the defendant has a complete defense to each cause of action. (*Towns v. Davidson* (2007) 147 Cal. App.4th 461, 466.)

In reviewing a trial court's ruling on a motion for summary judgment, the reviewing court makes " 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]' [Citation.]" (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143.)

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9. The trial court also sustained numerous objections that the County made to Stevens's declaration, including portions of his declaration described above. On appeal, the Hamptons contend that the trial court erred in sustaining those objections, contending that the "propriety of [the County's] objections turns on this court's view of the law on design immunity." We need not consider the propriety of the trial court's evidentiary rulings, because even assuming that *all* of Stevens's declaration was admissible, for the reasons that follow, we conclude that the trial court properly granted the County's motion for summary judgment.

b. General principles of law governing the affirmative defense of design immunity

In *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 69 (*Cornette*), the Supreme Court explained the purpose of the design immunity defense as follows:

> "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.] ' " '[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.' " [Citation.]' [Citation.]" (*Id.* at p. 69.)

Section 830.6, which codifies the defense of design immunity, provides in relevant part:

> "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

"In other words, a public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. [Citations.]" (*Cornette*, *supra*, 26 Cal.4th at p. 69.)

The discretionary approval element may be resolved as an issue of law if the material facts pertaining to the element are undisputed. (*Grenier v. City of Irwindale* (1997) 57 Cal. App.4th 931, 940 (*Grenier*).) The element "simply means approval in advance of construction by the legislative body or officer exercising discretionary authority." (*Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 526 (*Ramirez*).) "A detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval." (*Grenier*, *supra*, at pp. 940–941.)

The third element, substantial evidence supporting the reasonableness of plan or design *always* presents a question of law. (See *Cornette*, *supra*, 26 Cal.4th at

p. 72 ["Section 830.6 clearly makes the resolution of the third element of design immunity, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, a matter for the court, not the jury."].) Further, the statute provides immunity when there is *any* substantial evidence of reasonableness, even if contradicted. (*Grenier*, *supra*, 57 Cal.App.4th at p. 940.)

2. Application

The Hamptons contend that the trial court erred in concluding that the County established the elements of discretionary approval of the Plans and substantial evidence supporting the reasonableness of the Plans. We consider each element in turn.

a. Discretionary approval

The County presented undisputed evidence that a licensed civil and traffic engineer working for the County, David Solomon, approved the Plans prior to the construction of the improvements. The Plans consist of construction documents that include various drawings, including details of the intersection at which the accident occurred. The Plans themselves indicate that they have been "approved by" Solomon. The County also presented undisputed evidence both that Solomon had the discretionary authority to approve the Plans, and that a licensed engineer working for the County approved and signed "as built" plans after construction of the improvements. This evidence demonstrates the discretionary approval element, as a matter of law. (See, *e.g.*, *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1263 (*Laabs*) [evidence that an engineer employed by a public entity "reviewed and approved" construction plans established discretionary approval element as a matter of law]; *Grenier*, *supra*, 57 Cal. App.4th at p. 941 [concluding that City established discretionary approval element as a matter of law where "plans were prepared by Saguchi, a civil engineer, and approved by Alvarado, the city engineer, after review"]; *Ramirez*, *supra*, 192 Cal.App.3d at p. 525 [concluding discretionary approval element demonstrated as a matter of law where "the City's engineer, along with the engineers and other officials of the county who were recognized as being competent in the design of highways, approved the design before it was adopted by the City"].)

In arguing that the trial court erred in concluding that the County established the discretionary approval element, the Hamptons cite two cases, *Levin v. State of California* (1983) 146 Cal.App.3d 410 (*Levin*), and *Hernandez v. Department of Transp.* (2003) 114 Cal.App.4th 376 (*Hernandez*). The Hamptons argue, "*Levin* and *Hernandez* teach that where, as here, there is evidence the design at issue violated the pub-

lic entity's own standards, the public entity cannot establish the second element of design immunity — discretionary approval — unless it shows that the engineer who approved the plans (1) knew it was substandard, (2) elected to disregard the standard, *and* (3) had the authority to do so." We agree that *Levin* and *Hernandez* support this proposition. (*Levin*, *supra*, at p. 418 [concluding that state failed to establish discretionary approval of plans because state failed to show that the public employee who approved plans decided to "to ignore the standards [pertaining to placement of a guardrail] or considered the consequences of the elimination of the eight feet shoulder"]; *Hernandez, supra*, at p. 388 [concluding triable issue of fact existed as to discretionary approval element because there was "[c]onflicting evidence… presented in the trial court as to whether the off-ramp design at issue in this case deviated from the applicable guardrail standards and, if so, whether that deviation was knowingly approved by the responsible Caltrans authorities"].) However, for reasons we explain below, we do not find either decision persuasive in this regard, and we therefore decline to follow *Levin* or *Hernandez* with respect to the nature of the evidence that the governmental entity must present to establish the discretionary approval element.

In *Levin*, Dr. Marcia Levin was killed in an automobile accident that occurred when she tried to avoid a head-on collision with a drunk driver who had illegally crossed the double yellow line, into Levin's lane. (*Levin*, *supra*, 146 Cal.App.3d at p. 414.) Levin was "driving at a lawful speed, and in a reasonable manner, and tried to avoid the collision swerving to her right, but went over a steep embankment into the channel from which the embankment had been excavated." (*Ibid.*) Levin's car overturned and she drowned. (*Id.* at p. 415.) Levin's family members sued the state and brought a cause of action for wrongful death. (*Id.* at p. 413.) The state filed a motion for summary judgment based on the defense of design immunity, which the trial court granted. (*Ibid.*)

On appeal, the Levins contended that the trial court erred in granting the state's motion for summary judgment. (*Levin*, *supra*, 146 Cal.App.3d at pp. 413–414.) After outlining the elements of the design immunity defense, and concluding that the causal relationship element of design immunity had been established (*id.* at pp. 415- 417), the *Levin* court noted that the discretionary approval element was "the major focus of the contentions on this appeal." (*Id.* at p. 417.) With respect to this element, the *Levin* court observed that the changes to Route 37 had been approved by a person named J. A. Legarra, a state deputy highway engineer who had the authority to approve such changes. The *Levin* court also noted that the record contained evidence that another state engineer had "considered the placement of a median barrier and exterior guardrails, but concluded that neither was advisable on this particular stretch of Highway 37." (*Id.* at p. 418.) Despite the existence of this evidence, the *Levin* court concluded that the state had not established the discretionary approval element of its design immunity defense, reasoning:

> "The state has not challenged the existence and application of the… guardrail standards. [The state's evidence does] not mention them or the degree of the steep slope created by the embankment, which was created by the 1974 construction. There was no evidence that Legarra had discretionary authority to disregard the standards.
>
> "As our Supreme Court pointed out in *Cameron v. State of California* (1972) 7 Cal.3d 318, 326 [(*Cameron*)], the rationale of the design immunity defense is to prevent a jury from simply reweighing the same factors considered by the governmental entity which approved the design. *An actual informed exercise of discretion is required*. The defense does not exist to immunize decisions that have not been made. Here, as in *Cameron*, *supra*, the design plan contained no mention of the steep slope of the embankment. The state made no showing that Legarra, who alone had the discretionary authority, decided to ignore the standards or considered the consequences of the elimination of the eight feet shoulder. It follows that the state also failed to establish the second element of the defense." (*Id.* at p. 418, italics added; accord *Hernandez, supra*, 114 Cal.App.4th at p. 388 [applying *Levin* and concluding that triable issues of fact existed as to discretionary approval element of design immunity defense in light of conflicting evidence as to whether off-ramp design at issue in case deviated from applicable standards and, if so, whether deviation was *knowingly* approved,] italics added.)

We respectfully disagree with *Levin* and *Hernandez* to the extent they suggest that a public entity attempting to establish the discretionary approval element of a design immunity defense must establish an exercise of *informed* discretion, and that evidence that the public entity failed to adhere to *standards* pertaining to an element of a design plan constitutes evidence of a lack of discretionary approval of the design. The text of section 830.6, from which the discretionary approval element is derived, does not contain any requirement of *informed* discretion. (See *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 552 (*Alvis*) ["[S]ection 830.6 does not state the approval must be knowing or informed. A court may not rewrite a statute to make it conform to a presumed intent that is not expressed."].) Nor does the relevant statutory text require the presentation of evidence demonstrating that the design conformed to relevant *standards.* On the contrary, the statute provides that the discretionary element may be established *either* by evidence of appropriate discretionary approval *or* evidence that the plan conformed with previously approved standards. (§ 830.6 ["Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design… where such plan or design has been approved… by some… employee exercising discretionary authority to give such approval *or* where such plan or

design is prepared in conformity with standards previously so approved," italics added].)

The Supreme Court's decision in *Cameron*, *supra*, 7 Cal.3d 318, the sole case that the *Levin* court cites in its analysis of the discretionary approval element,[10] does not support a requirement that the design conform to previously approved standards. In *Cameron*, plaintiffs suffered injuries in an automobile accident that occurred after the driver of the vehicle in which they were traveling lost control of the vehicle while negotiating a curve on a highway. (*Cameron*, *supra*, at p. 321.) The plaintiffs brought a cause of action against the state alleging that it "failed in its duty to keep the highway in a safe condition in that the curve was so improperly graded or banked that an automobile could not negotiate the curve even though going at a lawful speed." (*Id.* at p. 322.) The trial court concluded that the state established as a matter of law all of the elements of its design immunity defense. (*Id.* at p. 322, fn. 3.) On appeal, the Supreme Court agreed with the plaintiffs "that the design immunity conferred by Government Code section 830.6 is inapplicable since the design plan approved… did not specify the degree of superelevation [on the curve] and since it was the improper superelevation which constituted the dangerous condition causing the accident." (*Id.* at p. 322.)

Cameron does not support the *Levin* court's interpretation of the discretionary approval element because the holding in *Cameron* was premised not on an analysis of the element of discretionary approval, but on the court's analysis of an entirely different element of the design immunity defense, namely, the requirement that there be a causal relationship between the plan and the accident. In *Cameron*, the court determined that a causal relationship was lacking because the plan did not contain the design feature (a superelevated curve) that plaintiffs alleged was the cause of the accident. (*Cameron*, *supra*, 7 Cal.3d at p. 326 [concluding that because the "superelevation as… constructed did not result from the design or plan introduced into evidence[,]… there was no basis for concluding that any liability for injuries *caused* by this uneven superelevation was immunized by section 830.6," fn. omitted, italics added].)

In addition, while the *Levin* court was correct in noting that the *Cameron* court observed that the rationale of the design immunity defense is to prevent a jury from simply reweighing the same factors considered by the governmental entity that approved the design (*Levin*, *supra*, 146 Cal.App. at p. 418, citing *Cameron*, *supra*, 7 Cal.3d at p. 326), the *Cameron* court merely stated that this rationale would not be served by providing immunity for a lawsuit based on the existence of a project design that is *unrelated* to the accident. In contrast, permitting a jury to reweigh the reasonableness of a project design that *is* related to the accident, as in *Levin* and as in this case,[11] *would* permit a jury to simply reweigh the same factors already considered by the governmental entity, in contravention of the rationale for design immunity.

On a related point, the *Levin* court's statement in arguing that a public entity must demonstrate that its employee's approval was *informed (Levin*, *supra*, 146 Cal.App.3d at p. 418), conflates the third element of design immunity — the reasonableness of the design, with the second — discretionary approval of the plans. This conflation is significant, because while conflicting evidence as to the discretionary approval element would require that a public entity's motion for summary judgment premised on design immunity be denied (*Grenier*, *supra*, 57 Cal.App.4th at p. 940), conflicting evidence as to the reasonableness of the design would not (*ibid.*).

Finally, the determination of the nature of the evidence necessary to satisfy this element in *Levin* and *Hernandez* is in conflict with numerous decisions in which courts have held that the discretionary approval element is satisfied by proof that the plans were approved by a public employee having discretionary authority to effectuate such approval. (See *e.g.*, *Becker v. Johnston* (1967) 67 Cal.2d 163, 172–173 (*Becker*); *Laabs*, *supra*, 163 Cal.App.4th at p. 1263; *Grenier*, *supra*, 57 Cal.App.4th at p. 941; *Ramirez*, *supra*, 192 Cal.App.3d at p. 525.) For example, in *Becker*, *supra*, at pages 172–173, the Supreme Court cited the following evidence pertaining to the discretionary approval element of the design immunity defense at issue in that case:

> "The record in this case contains a copy of the plans of the intersection here involved, as recorded by the Recorder of Sacramento County in State Highway Map Book 3. Such plans on their face indicate that on July 11, 1927, they were approved by F.W. Hazelwood, Division Engineer, Division III; Fred Quinn, Engineer, Surveys and Plans; and R.W. Morton, State Highway Engineer; and, further, that the work was completed in 1929 in accordance with the plans."

The *Becker* court held that this evidence, when considered in connection with evidence pertaining to the reasonableness of the design plan, established, as a matter of law, the public entity's design immunity defense. (*Id.* at p. 173.)

As discussed above, in this case, the evidence that the County presented pertaining to the discretionary approval of

10. *Levin*, *supra*, 146 Cal.App.3d 410 is the only relevant authority that the *Hernandez* court cited with respect to this issue. (See *Hernandez*, *supra*, 114 Cal.App.4th at pp. 385–388.)

11. In *Levin*, as noted above, the court concluded that the causal relationship element of design immunity had been established. (*Levin*, *supra*, 146 Cal.App.3d at pp. 415–417.) In this case, the Hamptons did not dispute in the trial court or in this court that the County established the existence of a causal relationship between the design and the accident. Thus, we need not consider whether any alleged inadequacy of sight distance at the intersection as built was *unrelated* to the design plans, as was the case with the superelevated curve at issue in *Cameron*. (See *Cameron*, *supra*, 7 Cal.3d at p. 326.)Further, nothing we say in this opinion is contrary to the *Cameron* court's holding that evidence that a plan *omitted* the condition that is the alleged cause of the accident may defeat a showing of a causal relationship, since that element is not in dispute in this case. (*Ibid.*)

the Plans is similar to that presented in *Becker* and in numerous other cases in which courts have concluded that a public entity demonstrated the discretionary approval element as a matter of law. Accordingly, we conclude that the trial court properly determined that in presenting undisputed evidence that a licensed civil and traffic engineer employed by the County approved the Plans prior to construction, that this engineer had the discretionary authority to approve the Plans, and that another licensed engineer employed by the County approved and signed the "as built" plans after construction of the improvements, the County demonstrated the discretionary approval element of its design immunity defense as a matter of law.

b. Substantial evidence of the reasonableness of the Plans

The Hamptons also contend that the trial court erred in concluding that the County presented substantial evidence supporting the reasonableness of the plans.

i. Additional relevant law

As discussed above, a public entity claiming a design immunity defense must present substantial evidence supporting the reasonableness of the plan or design. (*Cornette*, *supra*, 26 Cal.4th at p. 69.) "In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. [Citations.]" (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 757.) "The task for the trial court is to apply the deferential substantial evidence standard to determine whether any reasonable [public] official could have approved the challenged design. [Citation.] If the record contains the requisite substantial evidence, the immunity applies, even if the plaintiff has presented evidence that the design was defective. [Citation.]" (*Ibid.*) In *Ramirez*, *supra*, 192 Cal.App.3d 515, the court explained the rationale for this standard, as follows:

> "The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances. By deciding on a 'reasonableness' standard, the Legislature intended that government officials be given extensive leeway in their decisions concerning public property.
>
> "A governmental entity. . . is entitled to rely on what is apparently competent advice in making legislative decisions. The fact that on hindsight that advice may prove to have been flawed is not a basis for imposing liability on the governmental entity." (*Id.* at p. 525.)

Therefore, " ' "[A]s long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity." [Citation.]' [Citation.]" (*Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1158.)

"The fact of approval by competent professionals can, in and of itself, establish the reasonableness element. (See, *e.g.*, *Ramirez*[, *supra*,] 192 Cal.App.3d at p. 526.)" (*Higgins v. State of California* (1997) 54 Cal.App.4th 177, 187 (*Higgins*).) However, "[t]ypically, 'any substantial evidence' consists of an expert opinion as to the reasonableness of the design, *or* evidence of relevant design standards. [Citations.]" (*Laabs*, *supra*, 163 Cal.App.4th at pp. 1263–1264, italics added.)

ii. Application

It is undisputed that the Plans were approved by a licensed civil and traffic engineer. As this court recognized in *Compton v. City of Santee* (1993) 12 Cal.App.4th 591, this fact supports a finding of reasonableness. (*Id.* at p. 597 ["First, the design of the Magnolia Avenue Bridge was supervised by R. J. Massman, county engineer. This factor, alone, probably suffices to establish immunity."].) In addition, Goralka's declaration in which he stated that "[t]he [Plans] are reasonable," constitutes additional evidence of the reasonableness of the plans. (*Laabs*, *supra*, 163 Cal.App.4th at pp. 1263–1264 [substantial evidence of the reasonableness of a design may be demonstrated by an expert's opinion]; see also *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1015 (*Hefner*) ["Ordinarily, the opinion of a civil engineer as to the reasonableness of a design constitutes 'any' substantial evidence sufficient to support a design immunity defense under section 830.6"].)

Contrary to the Hamptons' contention that Goralka's declaration is "perhaps the charter example of conclusory expert testimony," Goralka provided a reasoned explanation for his conclusion that the operational sight distance at the intersection is adequate. Goralka explained that it was reasonable for the engineer to anticipate that a reasonable driver on westbound Miller Road would move slowly past the limit line on Miller Road in order to gain adequate sight distance to the left, prior to entering the intersection with Cole Grade Road. That Goralka's explanation is reasonable finds support in case law:

> "The practice of stopping at a limit line and then 'creeping' forward to a point of visibility has long been recognized as 'practical' under California law. [Citation.] There are many reasons why a limit line would be placed where visibility of oncoming traffic might be impaired. Troll[e]y or railroad tracks could require the limit line to be set back from the intersection. Or (as anyone who has driven in San Francisco would understand), many times the limit line is placed below the crest of a steep hill to avoid a pedestrian crosswalk, requiring the driver to cross the limit line before he or she can tell whether it is safe to proceed further." (*Hefner*, *supra*, 197 Cal.App.3d at p. 1016.)

The Hamptons' presentation of conflicting expert testimony as to the reasonableness of the Plans does not demonstrate that the County failed to present substantial evidence of their reasonableness. (See, *e.g.*, *Grenier*, *supra*, 57 Cal.App.4th at p. 941 ["That a plaintiff's expert may disagree does not create a triable issue of fact," as to the existence of substantial evidence of the reasonableness of a design]; *Higgins*, *supra*, 54 Cal.App.4th at p. 186 [same]; *Compton*, *supra*, 12 Cal. App.4th at pp. 596–597 [same].)

The Hamptons' citation to *Levin*, *supra*, 146 Cal.App.3d at page 418, also does not support reversal. While the *Levin* court concluded that the testimony of the state's expert witness in that case did not constitute substantial evidence of the reasonableness of the design plan, the *Levin* court reached this conclusion in part because there was *undisputed* evidence that the design at issue did not meet applicable standards. (*Ibid.* ["The state has not challenged the existence and application of the above quoted guardrail standards"].) In contrast, in this case, the County maintains that the intersection complied with all applicable County guidelines for sight distance. The County supported this argument in the trial court with expert testimony that the intersection provides adequate sight distance, when such distance is probably measured under County standards. (See pt. II.B.3., *ante*.) Under these circumstances, the fact that the Hamptons' expert concluded otherwise does not preclude summary judgment. For example, in *Compton*, *supra*, 12 Cal.App.4th 591, the plaintiff presented an "expert's testimony that the 'sight distances' were below recommended standards," and argued that "this testimony raises an issue of fact as to whether the design was reasonable." (*Id.* at p. 596.) This court rejected plaintiff's argument, reasoning:

> "The problem with this argument is that it does not focus on the key determination to be made in a design immunity case. The issue is not whether the trial court or jury could find the design unreasonable based on conflicting evidence, but whether there is *any* reasonable basis on which a reasonable public official could initially have approved the design." (*Id.* at pp. 596–597; accord *Grenier*, *supra*, 57 Cal.App.4th at pp. 938, 940–942 [concluding City presented substantial evidence of the reasonableness of a design notwithstanding plaintiff's expert testimony that design failed to meet various applicable standards].)

Further, the *Levin* court's conclusion that the state had failed to present substantial evidence of the reasonableness of the design at issue in that case was premised in part on the fact that "the record reveals a conflict between Levin's experts and the state's as to the reasonableness of the design." (*Levin*, *supra*, 146 Cal.App.3d at p. 418.) However, as noted above, the law is well established that "section 830.6 provides immunity even if the evidence of reasonableness is contradicted." (*Alvis*, *supra*, 178 Cal.App.4th at p. 554.) We therefore decline to follow the reasoning of *Levin* in this respect.

In sum, the trial court properly concluded that there is substantial evidence in the record that the Plans are reasonable.

3. Conclusion

Contrary to the Hamptons' counsel's suggestion at oral argument, we do not hold that a public entity is entitled to design immunity any time an employee with authority signs off on a plan and another employee/engineer attests that the plan is reasonable. To begin with, as noted previously, the Hamptons did not dispute in the trial court or in this court that the County established a causal relationship between the Plans and the accident. Thus, while "section 830.6 does not immunize for liability caused independent of design," we have no occasion to consider the potential application of this principle in this case. (*Alvis*, *supra*, 178 Cal.App.4th at p. 550, citing *Cameron*, *supra*, 7 Cal.3d at pp. 328–329.) With respect to the discretionary approval element, we conclude that the trial court properly determined that the County presented evidence establishing that an employee with discretionary authority approved the Plans for the redesign of the intersection at issue, and that nothing more is required to establish the second element of design immunity. Finally, we conclude that the County presented substantial evidence of the reasonableness of the Plans by offering expert testimony that the intersection provides adequate sight distance when such distance is properly measured under the applicable County guideline. Accordingly, we conclude that the trial court properly determined that the County established, as a matter of law, the affirmative defense of design immunity.

B. The trial court properly determined that there is no triable issue of fact with respect to the Hamptons' contention that changed circumstances resulted in a loss of design immunity

The Hamptons maintain that the trial court erred in concluding that they failed to demonstrate a triable issue of fact with respect to their contention that changed circumstances at the intersection resulted in a loss of design immunity.

1. Governing law

In order to defeat the County's motion for summary judgment on the ground of loss of design immunity, the Hamptons bore the burden of producing evidence sufficient to demonstrate a triable issue of fact with respect to the following three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds,

had not reasonably attempted to provide adequate warnings. (*Laabs*, *supra*, 163 Cal.App.4th at p. 1268.)

2. Application

The Hamptons contend that they established the existence of a triable issue of fact with respect to whether the County lost any applicable design immunity based on the existence of an "accumulation of additional foliage on the embankment which further limited sight distance looking south from Miller Road." We are not persuaded.

To begin with, we disagree that any changes in the physical topography of the embankment constituted evidence that the design for the intersection had become dangerous. It is undisputed that the embankment does not impede operational sight distance for a westbound driver on Miller Road looking south on Cole Grade Road who is within eight feet of the edge of lane of traffic on Cole Grade Road regardless of any overgrowth.[12] Further, as discussed above, the County presented evidence that it was reasonable for an engineer to design the intersection using operational sight distance calculations measured from this location. (See pt. II.B.3., *ante*.) Thus, any changes in the physical condition of the embankment do not constitute evidence of a dangerous condition.

With respect to the notice element, the Hamptons cite a 2008 "County of San Diego - Department of Public Works Traffic Engineer Request." This one-page handwritten document appears to pertain to a citizen's request that an "Adopt-A-Road" sign be placed on Miller Road. The document recommends removing Miller Road from the Adopt-A-Road availability list on the grounds that the "majority of the road is curvilinear," and there are "limited roadsides[13] due to vegetation being overgrown and [the] embankment." The document does not refer to the intersection in question, and clearly does not demonstrate the existence of a triable issue of fact with respect to whether the County had actual or constructive notice of a dangerous condition created by the purported changed condition. Finally, the Hamptons do not discuss the third element of loss of design immunity, pertaining to funding, in their brief.

Accordingly, we conclude that the Hamptons failed to demonstrate that the trial court erred in determining that there is no triable issue of fact with respect to the Hamptons' contention that changed circumstances resulted in a loss of design immunity.

IV.

DISPOSITION

The judgment is affirmed. The Hamptons are to bear costs on appeal.

AARON, J.

WE CONCUR: NARES, Acting P. J., O'ROURKE, J.

12. The County's retained expert testified that the embankment had no effect on sight distance when a driver is "within 8 feet of the edge line," and stated "the embankment is not a factor, in my opinion." The Hamptons' expert, Edward Stevens, was asked during his deposition, "[I]f Mr. Hampton had pulled forward and just before entering — the front of his vehicle would enter and cross into that through lane, if he had looked left, Mr. Cullen's vehicle would be within his view if it was within 550 feet of the intersection, correct?" Stevens responded, "That's true."

13. The handwriting on the document makes this word difficult to read, but it appears to state "roadsides."

Cite as 13 C.D.O.S. 8054

CHARLES HUDEC, Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY, Respondent;

THE PEOPLE, Real Party in Interest.

No. G047465
In the Court of Appeal of the State of California
Fourth Appellate District
Division Three
(Super. Ct. No. C47710)

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, Kazuharu Makino, Judge. Writ granted.

Filed July 26, 2013

COUNSEL

Frank Ospino, Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Mark Brown, Assistant Public Defender, Christopher D. McGibbons, Deputy Public Defender, for Petitioner.

Tony Rackauckas, District Attorney, Brian F. Fitzpatrick, Deputy District Attorney, for Respondent.

OPINION

Charles Hudec seeks a writ of prohibition or mandate to overturn the trial court's order granting the district attorney's motion in limine compelling him to testify in a trial to extend his commitment to Patton State Hospital (Pen. Code, § 1026.5; all statutory citations are to the Penal Code unless noted otherwise). He relies on the Legislature's statutory command that individuals facing commitment "shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings." (*Id.*, subd. (b)(7).) Both constitutions guarantee the familiar right in a civil or criminal case not to incriminate oneself. (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 (*Cramer*).) But both constitutions afford broader protection in criminal proceedings that includes a "separate and distinct testimonial privilege[]," namely "an absolute right not to be called as a witness and not to testify." (*Ibid.*) Because the plain words of the statute provide that the rights afforded in criminal proceedings "shall" be afforded to individuals facing a civil commitment trial, we grant Hudec's petition.

I

FACTUAL AND PROCEDURAL BACKGROUND

This court presented the facts of the underlying case in a 1985 opinion modifying and affirming the judgment committing Hudec to Patton State Hospital. (*People v. Hudec* (Aug. 15, 1985, G000694) [nonpub opn.].) As noted in the earlier opinion, Hudec, a paranoid schizophrenic, killed his father in May 1981 after he heard voices tell him he had to commit the killing to please God and to avoid becoming a homosexual. The parties stipulated Hudec was not guilty by reason of insanity, and this court modified the commitment order to reflect Hudec committed voluntary manslaughter rather than first degree murder.

In March 2012, the district attorney filed the latest petition to extend Hudec's commitment to Patton Hospital under section 1026.5. The trial court scheduled a trial on the petition and later granted the district attorney's written in limine motion to compel Hudec's testimony at trial. Hudec petitioned for a writ of prohibition or mandate. We issued an order to show cause, stayed the trial, and scheduled oral argument.

II

DISCUSSION

Persons found not guilty of a felony because of legal insanity may not be committed to a state hospital longer than the maximum state prison sentence that the trial court could have imposed for the underlying offense. (§ 1026.5, subd. (a).) The district attorney may petition to extend the commitment, however, if the person "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (§ 1026.5, subd. (b)(1).) The trial court must advise the person named in the petition of his or her rights to an attorney and to a jury trial, and that the rules of discovery in criminal cases apply (§ 1026.5, subd. (b)(3)). "The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney." (§ 1026.5, subd. (b)(4).)

The issue in the current case concerns the scope of section 1026.5, subdivision (b)(7). The subsection provides: "The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees."

Hudec contends section 1026.5, subdivision (b)(7), confers on him the right of a criminal defendant not to be called as a witness and not to testify. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15 ["Persons may not… be compelled in a criminal cause to be a witness against themselves"]; Ev*id.* Code, § 930; *Cramer*, *supra*, 23 Cal.3d at p. 137 [in a criminal matter a defendant has an absolute right not to be called as a witness and not to testify].) The district attorney correctly notes a commitment extension proceeding is civil in nature and therefore constitutional proscriptions against compelled testimony do not apply. (*Allen v. Illinois* (1986) 478 U.S. 364,

374–375 [privilege did not apply to proceedings under the Illinois Sexually Dangerous Persons Act because the proceedings were not criminal within the meaning of the Fifth Amendment to the United States Constitution]; *Cramer*, at p. 137 [same under California Constitution].) Here, we must decide whether section 1026.5, subdivision (b)(7) confers on the defendant the right to refuse to testify at a section 1026.5 extension trial.[1]

In construing section 1026.5, subdivision (b)(7), our task is to ascertain the Legislature's intent and adopt the construction that best effectuates the law's purpose. (*People v. Leiva* (2013) 56 Cal.4th 498 (*Leiva*).) We start with " 'the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.' [Citation.] We consider first the words of the statute because ' " 'the statutory language is generally the most reliable indicator of legislative intent.' " ' [Citation.] '[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.' [Citation.] However, [Penal Code] section 7 cautions that 'words and phrases must be construed according to the context… .' (§ 7, subd. 16.) Accordingly, … words in a statute ' " 'should be construed in their statutory context' " ' [citation], and… 'we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results' [citation], or 'would result in absurd consequences that the Legislature could not have intended.' [Citation.]" (*Leiva*, *supra*, at p. 506.)

A. People v. Haynie

We are not the first court to grapple with this issue. In *People v. Haynie* (2004) 116 Cal.App.4th 1224 (*Haynie*), the appellate court concluded section 1026.5, subdivision (b)(7), prohibited the prosecution from calling the defendant at the commitment extension trial and questioning him about his mental state. The court explained "the Legislature's words clearly and unambiguously state the person 'is entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings.' A defendant in a criminal matter has an absolute right not to be called as a witness and not to testify. (U.S. Const., 5th Amend; Cal. Const., art. I, § 15; Ev*id.* Code, § 930.) Under the plain language of the statute, because Haynie is entitled to the same rights guaranteed to a criminal defendant, he should not have been compelled to testify in the prosecution's case at his commitment extension trial." (*Id.* at p. 1228.)

Haynie agreed subdivision (b)(7) does not extend rights that "bear no relevant relationship to the proceedings." (*Haynie*, *supra*, 116 Cal.App.4th at p. 1229.) *Haynie* noted several courts had not applied all the constitutional rights guaranteed for criminal proceedings in section 1026.5 trials. (See *People v. Powell* (2004) 114 Cal.App.4th 1153, 1158 [constitutional requirement of personal waiver of jury trial; common sense *dicta*tes an insane person should not be able to veto counsel's informed tactical decision to waive jury]; *Williams*, *supra*, 233 Cal.App.3d at pp. 484–485 [double jeopardy did not bar prosecuting attorney's appeal after trial court granted nonsuit in section 1026.5 proceeding]; *People v. Juarez* (1986) 184 Cal.App.3d 570, 575 [extended commitment procedures could not disadvantage the defendant in the determination of his criminal guilt, any amendment to them could not, by definition, constitute an ex post facto violation]; *People v. Beard* (1985) 173 Cal.App.3d 1113, 1118–1119 [the defendant failed to show privilege against self-incrimination violated by court-ordered psychiatric exams; no evidence questions posed by psychiatrists sought to elicit information that could subject the defendant to criminal prosecution]; *People v. Henderson* (1981) 117 Cal.App.3d 740, 748 (*Henderson*) [admission at trial of the defendant's statements to hospital staff during routine therapy sessions did not violate privilege against self-incrimination]; *People v. Poggi* (1980) 107 Cal.App.3d 581, 585–586.)

But *Haynie* disagreed subdivision (b)(7) " 'merely codifies the application of constitutional protections to extension hearings mandated by judicial decision.' " (*Haynie*, *supra*, 116 Cal.App.4th at p. 1230; see *Williams*, *supra*, 233 Cal. App.3d at p. 488.) *Haynie* stated that "if the courts have granted rights to committees under case law, there is no need for the statutory declaration of rights — it is surplusage. Second, that [construction] supplants the legislative rights-inclusive language with a process whereby judges select which rights will apply. We prefer to leave it to the Legislature to be more specific as to which rights apply if it does not intend that all rights apply. … Finally, to the extent that case law holds that certain rights apply to extended-commitment proceedings under constitutional principles, those holdings do not prevent the Legislature from providing additional rights to civil committees." (*Haynie*, *supra*, 116 Cal.App.4th at p. 1230.)

Haynie concluded the right against compelled testimony "is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her even if what is said on the witness stand is not per se incriminating. By calling the person in its case-in-chief, the state is essentially saying that his or her testimony is necessary for the state to prove its case. We have no doubt that a committee so compelled to testify is prejudiced under these circumstances." (*Haynie*, *supra*, 116 Cal.App.4th at p. 1230.)

1. The district attorney argues extraordinary relief is unwarranted because Hudec has an adequate appellate remedy if the court grants the order extending his commitment. In issuing the order to show cause, we determined Hudec lacked "a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086; *Moore v. Superior Court* (2004) 117 Cal.App.4th 401, 405, fn. 4; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205 [court necessarily determined appeal was not an adequate remedy when it issued alternative writ].) Denial of a claim of statutory privilege is properly reviewed by extraordinary writ. (See *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336; see also *People v. Superior Court* (*Williams*) (1991) 233 Cal. App.3d 477, 482, fn. 2 [special circumstances warrant review by mandate given the urgent nature of extension proceedings and because the trial court's ruling will impact other extension proceedings].)

The *Haynie* court decided *In re Luis C.* (2004) 116 Cal. App.4th 1397, about a week later. *Luis C.* held Welfare and Institutions Code section 1801.5, which pertains to analogous recommitment trials involving persons within the control of the Division of Juvenile Facilities, granted the person the right not to testify. A panel of this court later agreed in *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549 (*Joshua D.*)[2], although the court emphasized section 1801.5 extends "all" rights guaranteed under the federal and state constitutions in criminal proceedings, which is arguably broader than the language in section 1026.5. (*Id.* at pp. 557, 560.)[3] *Joshua D.* concluded the right not to testify "is necessarily included in the rights afforded by section 1801.5 because the word 'all' means 'all' and not 'some.' The Legislature's chosen term leaves no room for judicial construction." (*Id.* at p. 558; see also *In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1510 [section 1801.5 unambiguously includes prohibition against double jeopardy].)

Joshua D. also noted the Legislature had amended section 1801.5 after *Luis C.* without changing the " 'all rights' " language. (*Joshua D., supra*, 157 Cal.App.4th at pp. 560–561.) "It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.)

B. People v. Lopez

People v. Lopez (2006) 137 Cal.App.4th 1099 (*Lopez*) disagreed with the *Haynie* court's analysis. *Lopez* considered an equal protection challenge raised by a defendant civilly committed as a mentally disordered offender (MDO). (See § 2960 *et seq.*) Section 2972, the statute governing the procedures for hearing these petitions, provides the committee with the right to a jury trial, assisted by appointed counsel if indigent, and requires proof beyond a reasonable doubt and jury unanimity. But section 2972 does not contain the language found in section 1026.5, subdivision (b)(7) (or Welf. & Inst. Code, §1801.5) entitling the person to rights guaranteed under the federal and state Constitutions for criminal proceedings.

In *Lopez*, the defendant argued admission of testimony from a prior MDO commitment hearing where he had been compelled to testify subjected him to disparate treatment compared to section 1026.5 and Welfare and Institutions Code section 1801.5 committees. (*Lopez, supra,* 137 Cal. App.4th at pp. 1105–1106.) He argued MDOs must be afforded the same rights as committees found not guilty by reason of insanity (NGI), including the right to refuse to testify per *Haynie* and *Luis C.*

Lopez noted courts previously had held the right against self-incrimination did not apply in proceedings under the MDO law and other civil commitment statutes. (*People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1446; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1079 [requiring MDO to testify about her actions and mental condition during underlying offense did not violate her privilege against self-incrimination]; see also *People v. Leonard* (2000) 78 Cal. App.4th 776, 781, 792–793 [defendant in proceeding under Sexually Violent Predator (SVP) Act (Welf. & Inst. Code, § 6600 *et seq.*) had no constitutional right not to be called as a prosecution witness].)

Lopez faulted *Haynie* for failing to follow *Henderson*, *supra*, 117 Cal.App.3d 740. *Henderson* involved a proceeding to extend the defendant's commitment under the now-repealed mentally disordered sex offenders (MDSO) law (Welf. & Inst. Code, former § 6300 *et seq.*). Former Welfare and Institutions Code section 6316.2, subdivision (e) of the MDSO law contained language almost identical to that found in section 1026.5, subdivision (b)(7): "The patient shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees."

In *Henderson*, the patient complained admission into evidence of his statements to hospital staff violated his statutory right (former § 6316.2, subd. (e)) to the constitutional privilege against self-incrimination. *Henderson* disagreed: "We do not so read the command of the statute. Subdivision (e) of section 6316.2 codifies the application of constitutional protections to MDSO proceedings mandated by judicial decision (see, *e.g.*, [*People v. Burnick* (1975) 14 Cal.3d 306, 314, 324 (*Burnick*) and *People v. Feagley* (1975) 14 Cal.3d 338, 359 (*Feagley*)]). It does not extend the protection of the constitutional privileges against self-incrimination to testimonial communications which are not incriminatory." (*Henderson*, *supra*, 117 Cal.App.3d at p. 748.)

Henderson cited *Burnick* and *Feagley* as examples of judicial decisions applying certain constitutional protections mandated by due process. For instance, *Burnick* concluded due process required the government to prove the MDSO allegations by proof beyond a reasonable doubt. *Feagley* held due process required a unanimous verdict where the alleged MDSO was tried by a jury and that confining an MDSO indefinitely to prison where the offender has been deemed unamenable to treatment was cruel and unusual punishment. (See *Henderson*, *supra*, 117 Cal.App.3d at pp. 746–747.)

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2. We initially denied the petition in *Joshua D.*, but the California Supreme Court granted review and transferred the matter directing us to issue an order to show cause why the petition should not be granted.

3. Welfare and Institutions Code section 1801.5 provides: "The person shall be entitled to all rights guaranteed under the federal and state constitutions in criminal proceedings. A unanimous jury verdict shall be required in any jury trial. As to either a court or a jury trial, the standard of proof shall be that of proof beyond a reasonable doubt." The Legislature added the " 'all rights' " language in 1984 following the decision in *People v. Superior Court* (*Vernal D.*) (1983) 142 Cal. App.3d 29, which held the Welfare and Institutions Code section 1800 *et seq.* commitment scheme violated due process by authorizing commitment based on less than a unanimous jury verdict and by implying the civil preponderance of the evidence standard applied. (See *Joshua D., supra,* 157 Cal.App.4th at pp. 559–560.)

Lopez also relied on *Conservatorship of Bones* (1987) 189 Cal.App.3d 1010, 1013 (*Bones*), which dealt with the procedures used in determining whether to temporarily commit a person alleged to pose "a demonstrated danger of inflicting substantial physical harm upon others" (Welf. & Inst. Code, § 5304, subd. (a)(1)). These procedures were adopted as part of the Lanterman-Petris-Short Act (LPS), which prescribed standards for involuntary civil commitments for psychiatric treatment. Welfare and Institutions Code Section 5303 required LPS hearings to be conducted "in accordance with constitutional guarantees of due process of law and the procedures required under Section 13 of Article 1" of the State Constitution.

When Welfare and Institutions Code section 5303 was adopted, section 13 of the Constitution "enumerated various procedural safeguards guaranteed to criminal defendants," including the following: " 'No person shall be . . . compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.' " (*Bones, supra,* 189 Cal.App.3d at p. 1016.) In 1974, the Legislature repealed section 13 and transposed the rights described in section 13 to other sections of the Constitution. The right not to be compelled to testify and the guarantee against double jeopardy migrated to article I, section 7, while the due process clause moved to article I, section 15. (*Ibid.*)

The *Bones* court concluded the Legislature, in guaranteeing the rights enumerated in section 13, and subsequently moved to sections 7 and 15, did not intend to grant potential LPS committees a privilege not to testify. The *Bones* court based its holding on its interpretation of a footnote in the Supreme Court's opinion in *Burnick*.

The issue in *Burnick* was whether the federal and state due process clauses required proof beyond a reasonable doubt in MDSO proceedings. (*Burnick*, *supra*, 14 Cal.3d at p. 310.) *Burnick* explained the question of the proper standard of proof "is not answered by the People's reliance on the general proposition that mentally disordered sex offender proceedings are 'civil in nature.' [Citation.] Nor is it necessary to inquire into the constitutionality of the quoted language of [Welfare and Institutions Code] section 6321 or Evidence Code section 115. Rather we apply those statutes, and proceed to determine whether the standard of proof beyond a reasonable doubt is 'otherwise required' in mentally disordered sex offender proceedings. Yet in so doing we are moved by constitutional considerations of the highest order, inasmuch as we discharge our duty to insure that no person be deprived of his liberty without the due process of law guaranteed by article I, section 7, subdivision (a), of the California Constitution, and the Fourteenth Amendment to the United States Constitution." (*Burnick*, *supra*, 14 Cal.3d at p. 314, fn. omitted.)

In a footnote, *Burnick* noted, "Similarly, the Legislature has not specified the standard of proof for involuntary commitment of persons under our general mental health law (Welf. & Inst. Code, § 5000 *et seq.*, known as the Lanterman-Petris-Short Act), but has provided that such proceedings shall be conducted 'in accordance with constitutional guarantees of due process of law and the procedures required under Section 13 [now § 7, subd. (a)] of Article 1 of the Constitution of the State of California.' (§ 5303.) As in the case at bar, it will be for the courts to decide which standard of proof is necessary to comport with those 'guarantees and procedures' in view of the consequences to the individual of a commitment under the Lanterman-Petris-Short Act." (*Burnick*, *supra*, 14 Cal.3d at p. 314, fn. 5.)

Bones concluded *Burnick*'s reference in this footnote to section 7 but not section 15 demonstrated Welfare and Institutions Code section 5303 merely incorporated due process principles found in section 7 and not the panoply of criminal defense rights found in section 15. (*Bones, supra,* 189 Cal. App.3d at p. 1016.)

Lopez accepted without question *Bones*'s interpretation of the *Burnick* footnote, explaining that "*Burnick* as interpreted in *Bones*… affects our analysis in the following way: The Supreme Court in *Burnick apparently* concluded that, despite the Legislature's reference in Welfare and Institutions Code section 5303 to 'the procedures required under' the part of the constitution containing the right not to testify, the Legislature did not intend that a potential LPS committee have the right not to testify. Rather, the Legislature meant only to afford the committee the rights guaranteed by due process, i.e., the rights to proof beyond a reasonable doubt and a unanimous jury. [¶] *If that conclusion is correct*, then it is reasonable also to conclude the Legislature acted with the same intent in enacting section 1026.5(b)(7). That is, in granting a potential NGI committee "the rights guaranteed under the federal and State Constitutions for criminal proceedings," the Legislature intended to grant the rights guaranteed by due process, such as proof beyond a reasonable doubt and a unanimous verdict, but not other rights that are granted criminal defendants alone, such as the privilege not to testify." (*Lopez, supra,* 137 Cal.App.4th at pp. 1113–1114, italics added.)

Lopez cited due process case law contemporaneous with the adoption of section 1026.5, subdivision (b)(7), to support its conclusion the Legislature did not intend to grant potential committees the right not to testify. Before 1979, the Legislature had not enacted commitment procedures for individuals acquitted by reason of insanity. Because these individuals faced indefinite commitment exceeding the maximum possible prison term had they been convicted, and the Legislature had enacted less onerous civil commitment procedures for similarly situated individuals in MDSO proceedings, the Supreme Court in *In re Moye* (1978) 22 Cal.3d 457 (*Moye*) concluded indefinite commitment of NGI defendants violated equal protection.

Lopez reasoned, "With this context in mind, it becomes readily apparent why the Legislature in enacting Penal Code section 1026.5 would include subdivision (b)(7): The Legislature wanted to establish a commitment procedure for NGI's that would overcome the equal protection problems identified

in *Moye* when it compared the treatment of NGI's and MDSO's. Therefore, it included in the NGI commitment law the identical language it had included in the MDSO law, by enacting Welfare and Institutions Code former section 6316.2, subdivision (e): the person subject to commitment 'shall be entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings.' [¶] As *Henderson* later concluded, however, Welfare and Institutions Code former section 6316.2, subdivision (e) was merely intended to provide the constitutional protections mandated by judicial decision, i.e., the rights to proof beyond a reasonable doubt and a unanimous verdict, not additional rights such as the privilege against self-incrimination. It is therefore reasonable to conclude that in including the identical language in Penal Code section 1026.5(b)(7), the Legislature acted with the same intent." (*Lopez, supra,* 137 Cal.App.4th at pp. 1114–1115.)

Lopez concluded its reading of section 1026.5(b)(7) was "supported by (1) *Henderson's* nonliteral reading of identical language as not guaranteeing the privilege against self-incrimination; (2) *Burnick*'s and *Bones*'s nonliteral reading of a statute specifically referring to the part of the state Constitution containing the right not to testify; (3) the circumstances under which section 1026.5(b)(7) was enacted; and (4) the fact that no decision other than *Haynie* and *Luis C.* has found the right not to testify to apply to a civil commitment proceeding. [¶] That reading is further supported by the fact that, two years after *Williams* was decided, the Legislature amended section 1026.5 without modifying its language to overrule *Williams* or to state explicitly that an NGI committee has the criminal defendant's privilege not to testify." (*Lopez, supra,* 137 Cal.App.4th at p. 1115.)

Focusing on the absence of a constitutional right to refuse to testify in civil proceedings, *Lopez* viewed *Haynie* as inconsistent with *Cramer*, *supra,* 23 Cal.3d 131, which found no bar to the district attorney calling a mentally disabled person to testify at his own commitment hearing under former Welfare and Institutions Code section 6502. *Lopez* noted *Cramer*'s analysis centered on the essential nature of civil commitment, which "may not reasonably be deemed punishment either in its design or purpose. It is not analogous to criminal proceedings." (*Lopez*, *supra*, 137 Cal.App.4th at p. 1116.) Because " 'the historic purpose of the privilege against being called as a witness has been to assure that the *criminal* justice system remains accusatorial, not inquisitorial," the high court in *Cramer* concluded the "extension of the privilege to an area outside the criminal justice system, in our view, would contravene both the language and purpose of the privilege." (*Cramer*, at pp. 137–138.) According to *Lopez*, because "[c]ivil commitment, by definition, does not involve the 'system of criminal justice,' " and therefore does not implicate a constitutional right to refuse to testify, "[t]he conclusion of the court[s] in *Haynie* and *Luis C.* that civil committees do have the right not to testify is inconsistent with" the decisions in *Allen, Cramer, Merfeld, Clark,* and *Leonard* holding the "right not to testify does not apply in civil commitment proceedings, because they are not criminal proceedings, do not involve adjudication of guilt, and do not result in punishment." (*Lopez,* at p. 1116.)

C. Analysis

We agree with *Haynie* subdivision (b)(7) bars the prosecution from calling the defendant as a witness in a section 1026.5 commitment extension hearing. In reaching the opposite result, *Lopez* leans heavily on policy arguments, with scant attention to the statutory language. But " ' "[i]t still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words." [Citations.]… "Words may not be inserted in a statute under the guise of interpretation." [Citation.]' " (*People Ex Rel. Allstate Insurance Co. v. Muhyeldin* (2003) 112 Cal.App.4th 604, 611.) " 'In other words, the courts "may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." ' [Citation.]" (*California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 584.)

Here, the Legislature bestowed upon potential committees "*the* rights guaranteed under the federal and State Constitutions *for criminal proceedings*, not "*some* of the rights," or "the due process rights required by judicial decision in commitment extension proceedings." The Legislature's words here are not ambiguous and, of course, demonstrate its intent. We are bound by the plain meaning of these words and may not by judicial fiat adopt an interpretation at odds with that of the Legislature. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919 [statute's "plain meaning controls" and obviates "resort to extrinsic sources to determine the Legislature's intent"].)

Our reading does not contravene any legislative intent apparent in the statute, nor does it lead to absurd results or consequences the Legislature could not have intended. A person subject to extended commitment under section 1026.5 faces the prospect of a loss of liberty akin to that associated with incarceration following a criminal trial. (See *Burnick*, *supra*, 14 Cal.3d at p. 321; *In re Gault* (1967) 387 U.S. 1, 50 ["commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil' "].) As we noted in *Joshua D.*, the privilege not to testify reflects fundamental values and aspirations and a " 'sense of fair play which *dicta*tes "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .; [and] 'our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life. . . .' . . ." ' " (*Joshua D.*, *supra*, 157 Cal.App.4th at p. 565, quot-

ing *Murphy v. Waterfront Com'n* (1964) 378 U.S. 52, 55; overruled on another point in *United States v. Balsys* (1998) 524 U.S. 666, 687.)~(**check cite**)~ We therefore cannot agree with *Lopez* the right not to testify has no meaningful application in a section 1026.5 proceeding. It is not our province to second-guess the Legislature's policy choices by allowing the prosecution to call the defendant committee as a witness.

Adopting *Lopez*'s rationale in denying a committee the right not to testify in commitment extension hearings would produce an anomalous contrast with juvenile commitment extensions under Welfare and Institutions Code section 1801.5. As noted, *Luis C.* held juveniles in commitment extension hearings have the right under section 1801.5 not to testify, and we presume the Legislature approved this construction when it amended the statute without disturbing *Luis C.*'s interpretation. We discern no reason why the Legislature would choose to treat persons subject to extended commitment under section 1801.5 differently from those subject to extended commitment under section 1026.5.

Lopez's historical rationale for deviating from the statutory language of section 1026.5 is not persuasive. While it is plausible the Legislature amended section 1026.5 in 1979 in response to *Moye*, and intended to conform the procedures for the extension of commitment of individuals acquitted by reason of insanity with commitment procedures for MDSOs, nothing suggests the Legislature intended by the use of similar language in both statutes (patient or person "shall be entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings") to limit the rights in either proceeding to the due process-based rights of proof beyond a reasonable doubt and a unanimous verdict.

Lopez relied on *Henderson* in determining former section 6316.2 merely codified constitutional protections previously mandated by judicial decision. *Henderson*, in turn, relied on *Burnick* and *Feagley*, but neither case suggested the rights discussed in those cases (proof beyond a reasonable doubt, unanimous verdict, cruel or unusual punishment) should be the only ones available to persons subject to extended commitment. In *Burnick*, the Supreme Court likened the commitment of an MDSO to imprisonment for crime. (*Burnick*, *supra*, 14 Cal.3d at p. 310 ["it is no less cruel to falsely find a man to be a 'mentally disordered sex offender' and confine him indefinitely in a prison-like state mental institution. Against such grievous errors the law has erected sturdy bulwarks of procedure."].) Given the backdrop of *Burnick* and *Feagley*, and the Legislature's use of broad language in section 6316.2, it is implausible the Legislature intended to guarantee only those rights expressly at issue in *Burnick* and *Feagley*.

Lopez's reliance on *Bones* is also problematic. As noted above, *Bones* held Welfare and Institutions Code section 5303 did not grant the potential LPS committee a privilege not to testify. *Bones* relied on *Burnick*, where the Supreme Court explained why the due process clauses of the California and federal Constitutions required proof beyond a reasonable doubt in MDSO proceedings even though they are viewed as civil matters. The court stated it was "moved by constitutional considerations of the highest order, inasmuch as we discharge our duty to insure that no person be deprived of his liberty without the due process of law guaranteed by article I, section 7, subdivision (a), of the California Constitution and the Fourteenth Amendment to the United States Constitution." (*Burnick*, *supra*, 14 Cal.3d at p. 314.) In the footnote mentioned above, *Burnick* noted that while the Legislature had not specified the standard of proof for involuntary commitment of persons under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 *et seq.*), the Legislature had provided in section 5303 that such proceedings must comply with constitutional guarantees of due process and the procedures required under article 1, section 13 of the California Constitution. The Supreme Court placed the following bracketed insertion after the reference to section 13: "[now § 7, subd. (a)]." (*Burnick*, *supra*, 14 Cal.3d at p. 314, fn. 5.)

Based solely on this footnote, *Bones* surmised that *Burnick*'s reference to section 7, but not section 15, showed the Supreme Court would interpret section 5303 to merely incorporate due process principles found in section 7 and not the panoply of criminal defense rights found in section 15. (*Bones, supra,* 189 Cal.App.3d at p. 1016.) *Lopez* surmised, "The Supreme Court in *Burnick apparently* concluded that, despite the Legislature's reference in Welfare and Institutions Code section 5303 to 'the procedures required under' the part of the constitution containing the right not to testify, the Legislature did not intend that a potential LPS committee" to have that right. (*Lopez, supra,* 137 Cal.App.4th at p. 1113.)

Bones's conclusion does not withstand scrutiny. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.) *Burnick* did not decide whether an MDSO was entitled to the right not to testify, nor did it consider whether Welfare and Institutions Code section 5303 also included the rights contained in section 15 after the 1974 constitutional reshuffling of criminal rights. The issue in *Burnick* concerned whether due process required proof beyond a reasonable doubt in MDSO proceedings. The footnote in *Burnick* simply pointed out where the due process and burden of proof provisions were currently located in the State Constitution. Indeed, *Lopez* implicitly recognized *Bones* may have overstated the import of *Burnick* when *Lopez* remarked the Supreme Court had "*apparently* concluded" (italics added) the Legislature's reference in Welfare and Institutions Code section 5303 included only the section 7 criminal rights (*Lopez, supra,* 137 Cal. App.4th at p. 1113). *Lopez*'s construction of section 1026.5, subdivision (b)(7), proceeds from the unwarranted assumption that *Bones* correctly interpreted *Burnick*. The conclusion in *Bones* on which *Lopez* relies is weak fodder compared to "the plain, commonsense meaning of the language used by the Legislature." (*Leiva, supra*, 56 Cal.4th at p. 506.)

Lopez also noted that two years after *Williams* was decided, the Legislature amended section 1026.5 without modi-

fying its language to overrule *Williams* or to state explicitly that an NGI committee has the criminal defendant's privilege not to testify. (*Lopez, supra,* 137 Cal.App.4th at p. 1115.) *Williams*, however, involved double jeopardy, not testimonial privileges. That the Legislature later amended the statute in a manner that had nothing to do with jeopardy or a right not to testify, but rather to overrule the determination in *People v. Gunderson* (1991) 228 Cal.App.3d 1292 that time spent in outpatient status must count towards an MDSO's extended commitment, is of little import here.

In *Joshua D.*, we recognized policy reasons exist both to grant and to deny the right not to testify at commitment extension hearings, but "[w]here the Legislature has made a policy choice, using as here particularly clear and unambiguous language, we may not second-guess its determination." (*Joshua D.*, *supra*, 157 Cal.App.4th at p. 565; see *Murphy, supra*, 378 U.S. at p. 55.) That conclusion applies here with equal force.

III

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its order granting the People's motion to compel Hudec to testify at the section 1026.5 hearing and enter a new and different order denying the People's motion.

ARONSON, J.

WE CONCUR: RYLAARSDAM, ACTING P. J., BEDSWORTH, J.

Cite as 13 C.D.O.S. 8060

In re A.H. et al., Persons Coming Under the Juvenile Court Law.

SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent,

v.

F.S. et al., Defendants and Appellants.

No. H038633
In the Court of Appeal of the State of California
Sixth Appellate District
(Santa Clara County) (Super. Ct. Nos. JD20223; JD20224)
Filed July 26, 2013

COUNSEL

Attorney for Appellant Mother: Allison Cruz, Under Appointment by the Court of Appeal

Attorney for Appellant Father: Louise E. Collari, Under Appointment by the Court of Appeal

Attorneys for Respondent: Orry P. Korb, County Counsel; and Julie F. McKellar, Deputy County Counsel

OPINION

In the present dependency proceeding, minors A.H. and S.H. (the children), were declared dependents of the court. (Welf. & Inst. Code, §§ 300, subds. (a) &(b).)[1] On April 16, 2012, after the 18-month review hearing, the juvenile court terminated family reunification services to F.S (mother) and made an order setting a section 366.26 hearing for August 8, 2012. On August 3, 2012, the children's parents, F.S. and S.H. (father),[2] filed a timely notice of appeal from two rulings of the juvenile court: (1) the July 25, 2012 order denying mother's Motion to Vacate a Default Judgment and (2) the June 19, 2012 order denying parents' modification motion to place the children with relatives (§ 388).[3]

Parents now raise contentions not directly challenging the rulings from which they appeal. Mother makes the following

1. All further statutory references are to the Welfare and Institutions Code unless otherwise specified. We have taken judicial notice of the prior appellate record in Case Number H036264. (Evid. Code, §§ 452, subd. (d), 459.)

2. Father is also known as D.S.H.

3. Insofar as parents may also be attempting to also appeal from the court's April 25, 2012 order denying their peremptory challenge, it is not an appealable order. (Code Civ. Proc., § 170.3, subd. (d); see *People v. Hull* (1991) 1 Cal.4th 266, 268 [writ of mandate under Code of Civil Procedure section 170.3, subdivision (d), is the exclusive means by which a party may seek review of an unsuccessful peremptory challenge against a trial judge].)

arguments: (1) the juvenile court failed to inform mother of the writ requirements for challenging the order setting a section 366.26 hearing by mail as required, (2) the juvenile court failed to obtain a valid waiver of her right to counsel and, therefore abused its discretion in granting her request to represent herself on February 16, 2012 and then the court failed to advise parents of their right to counsel at the 18-month review hearing on April 16, 2012 (see Cal. Rules of Court, rule 5.534(g)),[4] (3) Judge Yew improperly heard the 18-month review after mother allegedly timely challenged the judge and attempted to disqualify the judge from hearing the matter, and (4) the evidence did not support the court's finding following the 18-month review hearing that reasonable reunification services were provided to mother.

Father joins in mother's arguments one and three; he claims that the juvenile court failed to advise him of the writ requirement. He further claims that the juvenile court (1) failed to adequately inquire into his competency and erred by not appointing a guardian *ad litem* for him at the January 26, 2012 hearing and (2) failed to determine whether he was mentally competent to waive counsel and, therefore, abused its discretion by granting his request to represent himself on February 15, 2012.

Under ostensible authority of *In re Cathina W.* (1998) 68 Cal.App.4th 716, respondent Santa Clara County Department of Family and Children's Services (Department) concedes that mother was entitled to challenge the juvenile court's order setting the section 366.26 hearing. We do not accept this concession. For the reasons explained below, we find that none of the issues sought to be raised on appeal is cognizable and dismiss the appeal.

PROCEDURAL HISTORY

Dependency petitions were filed on behalf of the children. In July 2010, parents filed the Judicial Council "Notification of Mailing Address" forms (JV-140), which each designated the same permanent mailing address in San Jose, California. The form itself advised that all documents and notices would be sent to the address provided "until and unless you notify the court or the social worker… on your case of your new mailing address." It directed: "Notice of the new mailing address must be provided in writing."

A first amended petition was filed on August 30, 2010.

Following a contested jurisdiction hearing, the court found the children were described by section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect). The children were adjudged dependent children of the court. This court rejected father's challenges to the jurisdictional and disposition orders in a prior appeal (H036264).

On October 11, 2011, following a consolidated six-month/12-month review hearing, the juvenile court found, by clear and convincing evidence, that reasonable services had been offered and provided to parents. The court terminated family reunification services to father and terminated the children's visitation with father due to the detriment to their wellbeing. At that time, both mother and father were represented by counsel.

The status review report, dated January 3, 2012, for the 18-month review hearing and addendum reports recommended that the court terminate family reunification services to mother and set a section 366.26 hearing. The status review report reflected that father remained at the originally noticed San Jose address but stated a Campbell address for mother.

On January 3, 2012, the date set for the 18-month review hearing, mother was represented by an attorney with the Office of Dependency Counsel (ODC). Mother challenged the competency of the ODC and the juvenile court continued the matter until January 11, 2012 for a *Marsden* hearing (see *People v. Marsden* (1970) 2 Cal.3d 118)[5] and the 18-month review hearing.

On January 9, 2012, mother filed a combined "preemptory challenge" and request for judicial disqualification against Judge Teresa Guerrero-Daley.

On January 11, 2012, by written order, the juvenile court denied the preemptory challenge as untimely and struck the statement of disqualification. At the January 11, 2012 hearing, all parties were personally served with a copy of that decision and the court denied the peremptory challenge. After several warnings, parents were removed from the courtroom. The court ordered the deputy to look for them to provide a second opportunity to participate in the day's hearing but they could not be located. The court took the *Marsden* hearing off calendar and continued the matter until January 18, 2012 for a *Sara D.* hearing (see *In re Sara D.* (2001) 87 Cal. App.4th 661) for father and a waiver of counsel hearing for both parents and ordered the 18-month review hearing to trail.

On January 26, 2012, hearings were held before Judge Daniel Nishigaya. After a closed *Sara D.* hearing regarding an appointment of a guardian *ad litem* (GAL) for father, the juvenile court determined that such appointment was unnecessary because father understood the nature and consequences of the dependency proceedings and was able to assist counsel. The court then considered parents' request for self representation. Upon inquiry by the court, both parents clarified that they were not asking the court to appoint different counsel but rather wished to represent themselves. The court confirmed that each parent had received a JV-2023 form (Advisement and Waiver of Right to Counsel). In addition, the court gave an oral advisement regarding disadvantages of self-representation. The court directed parents to

4. All further references to rules are to the California Rules of Court.

5. "Juvenile courts, relying on the *Marsden* model, have permitted the parents, who have a statutory and a due process right to competent counsel, to air their complaints about appointed counsel and request new counsel be appointed. (§ 317.5; *In re James S.* (1991) 227 Cal. App.3d 930, 935, fn. 13.)" (*In re V.V.* (2010) 188 Cal.App.4th 392, 398; see *In re Z.N.* (2009) 181 Cal.App.4th 282, 289 [*Marsden* principles apply by analogy to dependency proceedings].)

make their decision regarding self-representation by the next hearing. The matter was continued until February 15, 2012.

On February 15, 2012, the court again explained that self-representation was disfavored and discouraged and individuals representing themselves do not receive special treatment or legal advice from the court and are treated the same as lawyers. Father completed, initialed and signed the "Advisement and Waiver of Right to Counsel" form, which spelled out the disadvantages of self-representation and indicated that the court's advice and recommendation was that he not represent himself and he accept court-appointed counsel. Father confirmed that he understood everything on the form and what he was undertaking by choosing to represent himself. The court found that father's waiver of the right to counsel was knowing, intelligent, free, and voluntary and it granted father's request to represent himself.

Mother told the court that she was interested in relieving her current court-appointed counsel and hiring her own attorney but she had a financial issue. Mother indicated that, if she could not have a different court-appointed counsel, she was comfortable representing herself. The court continued the matter to the following day for a *Marsden* motion as to mother.

At the time scheduled for the *Marsden* hearing on February 16, 2012, mother made plain that she wanted to represent herself. Mother completed, initialed and signed the "Advisement and Waiver of Right to Counsel" form. Mother had no concerns or questions. She understood that she would not receive special treatment from the court, the court was not going to assist her in presenting her case, and she would be held to same standards as licensed attorneys. The court confirmed that mother, keeping in mind everything the court had previously said about representing oneself and everything she had initialed on the form, still wanted to represent herself. The court granted mother's request for self-representation.

On March 1, 2012, the juvenile court held a trial setting conference before Judge Nishigaya. Father was not present.

On March 19, 2012, the juvenile court held a trial management conference before Judge Nishigaya. When asked why he was not present at the prior conference, father indicated he was attending to other matters, including "moving into a new place." After discussion, the court deemed the 18-month review hearing a long cause matter and scheduled it for April 16, 2012. The court reminded parents that all notifications and documents concerning the proceedings would be sent by the court or the Department to whatever address they had on file with the court. The court warned parents that if they wished to receive notifications and documents at a different address, they would have to change their permanent mailing address in writing and unless and until that happened everything would be sent to the address on file. The court told parents that they could not subsequently complain that "you were not aware that notices were being sent to that written address or that address you have on file."

At the beginning of the 18-month review hearing on April 16, 2012, father became upset because the hearing was not before Judge Nishigaya and threatened to leave. Judge Erica Yew explained that the matter was before her because it had been set on the long-cause calendar and she told father that the hearing would proceed without him if he left. Mother indicated she wished to have Judge Nishigaya as well.

During the discussion regarding the witness schedule, counsel for the Department mentioned that Marla Johanning might be called as a rebuttal witness. Judge Yew began to explain that, "years ago," Johanning and she had been part of a community group that started a collaborative assisting families dealing with violence. Both parents became incensed, began talking over each other, and walked out. Before they left, Judge Yew warned them that the trial would go forward without them if they left the courtroom.

Later in the hearing, Judge Yew indicated for the record that she had worked with Johanning in 2006 but, after she "went to dependency," they did not have much contact. Judge Yew also stated with respect to parents: "[B]ecause they represented themselves, they did not know about a 170.6. I wanted to tell them if they wanted to exercise the challenge they could have, but I could not get a word in to do that."

After parents' outburst and departure, the Department's counsel submitted the matter on the reports. The juvenile court terminated mother's visitation with the children and prohibited mother's physical contact or communication with them based on detriment to their wellbeing. It found that reasonable reunification services had been offered and provided to mother. The court terminated reunification services to mother and ordered the setting of a section 366.26 hearing.

Sometime later that day, parents filed a combined Code of Civil Procedure section 170.6 peremptory challenge and request for disqualification against Judge Yew (Code Civ. Proc., §§ 170.1, 170.6). The motion's heading reflected a San Jose address on S. Market Street.

A proof of service indicates that, on April 17, 2012, the day after the 18-month review hearing, the clerk of the court mailed a blank Notice of Intent to File Writ to mother at the Campbell address reported for her in the Department's Status Review Report for the 18-month review hearing and to father at the San Jose address specified in his Notification of Mailing Address. The record discloses that the mailing included, among other documents, JV-820 ("Notice of Intent to File Writ Petition And Request for Record . . .") and JV-825 ("Petition for Extraordinary Writ") (hereinafter "Notice of Intent to File Writ packet").

The Notice of Intent to File Writ packet sent to father was returned to sender and received by the court on April 24, 2012. The postal label states "Return to Sender," "Attempted – Not Known," "Unable to Forward."

It appears that the Notice of Intent to File Writ packet was originally mailed to mother at her Campbell address. It was received back to the court on April 27, 2012. The postal label

stated: "Return to Sender [¶] [mother's name] [¶] [S. Market Street address] [¶] Return to Sender."

By order filed on April 25, 2012, the court issued an order denying parents' peremptory challenge as untimely because it was filed after conclusion of the 18-month review hearing. Also on April 25, 2012, Judge Yew filed a "Verified Answer" in which she stated that she did not know of any facts or circumstances requiring her disqualification or recusal in this case.

The Notice of Hearing on Selection of a Permanent Plan, filed May 4, 2012, specified that a section 366.26 hearing would be held on August 8, 2012. The record on appeal contains declarations of reasonable diligence of a registered process server, which indicate that unsuccessful attempts were made to personally serve that notice on parents. When the process server attempted to personally serve the notice on father on May 1, 2012 and on mother on May 4, 2012 at the original San Jose address that the parents' written notifications in the court file designated as their permanent mailing address, the process server found that the apartment was occupied by someone else and the parent was unknown. On May 2, 2012, the process server found that a church was located at the S. Market Street address and father was unknown. On May 4, 2012, the process server found that the Campbell address was a vacant apartment.

On June 19, 2012, parents filed a motion to modify the children's placement pursuant to section 388. The motion was denied the same day.

Also on June 19, 2012, parents filed a Petition to Modify, Change or Set Aside Previous Orders — Change of Circumstances (JV-740). The court denied the petition, noting that they sought to revisit issues that were the subject of the contested hearing conducted on April 16, 2012. The ruling stated in part: "The parents cannot decline to participate in a contested evidentiary hearing and then seek to litigate the issues by filing a procedurally defective document with attachments."

On July 10, 2012, mother filed a "Motion to Vacate a Default Judgment of 4–16-2012." The court denied the motion on July 25, 2012.

On July 23, 2012, father and mother separately each filed a new Notification of Mailing Address specifying a change of address. Both notifications specified the San Jose address on S. Market Street at which location the registered process server had found a church.

On August 3, 2012, parents filed their notice of appeal from the July 25, 2012 order denying their motion to vacate and from the June 19, 2012 order denying their motion to modify the children's placement.

DISCUSSION

A. Judicial Advisement of Writ Requirement

Parents claim that this court may reach the merits of the issues concerning the 18-month review hearing because they were not properly advised by mail of the writ requirement for challenging an order setting a section 366.26 hearing and therefore, under existing case law, their compliance with that requirement is excused.

Section 366.26, subdivision (*l*), provides that an order setting a section 366.26 hearing "is not appealable at any time" unless "[a] petition for extraordinary review was filed in a timely manner," the petition raised the substantive issues and they were supported by an adequate record, and the writ petition "was summarily denied or otherwise not decided on the merits." (§ 366.26, subd. (*l*)(1); see § 366.26, subd. (*l*)(2).) This writ requirement is implemented by the Rules of Court. (See § 366.26, subd. (*l*)(3); rules 8.450 & 8.452; see also rule 8.403(b)(1).)

After the juvenile court makes an order setting a section 366.26 hearing, the court must advise all parties, including a parent, of section 366.26's requirement of filing a petition for extraordinary writ review. (Rule 5.590(b); see § 366.26, subd. (*l*)(3)(A).) The court must give an oral advisement to parties present at the time the order is made. (Rule 5.590(b)(1); see § 366.26, subd. (*l*)(3)(A).) The court must explain that the party is required to seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record (form JV-820) and a Petition for Extraordinary Writ (form JV-825). (Rule 5.590(b).) "Within one day after the court orders the hearing under Welfare and Institutions Code section 366.26, the advisement must be sent by first-class mail by the clerk of the court to the last known address of any party who is not present when the court orders the hearing under Welfare and Institutions Code section 366.26." (Rule 5.590(b)(2).) Copies of Petition for Extraordinary Writ (form JV-825) and Notice of Intent to File Writ Petition and Request for Record (form JV-820) "must accompany all mailed notices informing the parties of their rights." (Rule 5.590(b)(4).) The Judicial Council's JV-820 form contains an advisement about the need to file the Notice of Intent form to obtain Court of Appeal review of an order setting a section 366.26 hearing and provides important information regarding completion and filing of the form, filing of the writ petition, and specific deadlines.

In *In re Cathina W., supra,* 68 Cal.App.4th 716 (*Cathina W.*), one of the cases cited by mother, the appellate court concluded that mother was entitled to review of the juvenile court's order setting the section 366.26 hearing on appeal from the subsequent order terminating her parental rights at the section 366.26 hearing because mother was not duly advised of the writ requirement. (*Id.* at pp. 722–725.) In that case, the undelivered envelope containing the Notice of Intent was marked "Return to Sender" and had mother's new address on it but the court clerk did not re-mail the notice to the mother at the new address. (*Id. at p.* 723.) In addition, the notice was sent late and date of the setting order was misstated. (*Ibid.*)

In *In re Rashad B.* (1999) 76 Cal.App.4th 442 (*Rashad B.*), another case cited by mother, the appellant mother did not ap-

pear for the continued jurisdictional/dispositional hearing, at which time "the court sustained the petitions, adjudged the minors dependents, continued their placement out of home, denied reunification services to appellant pursuant to section 361.5, subdivision (b)(10)(A) and set a hearing pursuant to section 366.26." (*Id.* at p. 446.) After a section 366.26 hearing, the juvenile court terminated the mother's parental rights and referred the children for adoption. (*Id.* at p. 446.) On appeal from the orders following that hearing, the mother raised several alleged errors occurring prior to the section 366.26 hearing. (*Id.* at p. 444.)

The appellate court in *Rashad B.* found that the juvenile court did not give the mother "notice of her right to file a writ petition because the court erroneously failed to ascertain appellant's permanent mailing address (to which notice could be sent) when appellant appeared in court at the inception of the dependency." (*Id.* at p. 444.) No advisement of writ review was sent to her "because, in the words of the court, 'ADDRESSES UNKNOWN.' " (*Id.* at p. 446.) The appellate court concluded that the mother was "excused from her failure to file a writ petition, and her current claims are therefore cognizable on appeal" from orders issued after the section 366.26 hearing. (*Id.* at p. 444.)

Cathina W. and *Rashad B.* stand for the proposition that judicial error in failing to advise a party in a dependency proceeding of the writ requirement for challenging an order setting a section 366.26 hearing that results in a failure to file a writ petition may excuse a party's failure to comply with that requirement and allow a reviewing court to reach the issues on appeal from the orders following the section 366.26 hearing. This is not a purported appeal from the order setting the section 366.26 hearing or an appeal from orders issued after section 366.26 hearing. In any case, the record does not demonstrate that parents' failure to comply with the writ requirement should be excused for exceptional circumstances constituting good cause.

"At the first appearance by a parent or guardian in proceedings under section 300 *et seq.*, the court must order each parent or guardian to provide a mailing address." (Rule 5.534(m); see § 316.1, subd. (a).) A parent's designated permanent mailing address is used by the court and the social services agency for notice purposes *unless and until* the parent provides written notice of a new mailing address. (See § 316.1, subd. (a).) The Judicial Council has developed a "Notification of Mailing Address" form for parents to use to notify the juvenile court and Department of their permanent mailing address and any subsequent change thereof. (See JV-140; JV-140S; see also § 316.1, subd. (b).) The permanent mailing address provided by both parents in their notifications on file in April 2012 is *not* the address they are now claiming was their correct address for the mailing of the Notice of Intent to File Writ packet.

On appeal, parents indicate that the correct mailing address was the S. Market Street address reflected in the headings on the first page of mother's additional designation of witnesses (filed April 11, 2012), mother's supporting documents (filed on April 16, 2012) and parents' written motion to disqualify Judge Yew (filed April 16, 2012). As indicated, that S. Market Street address turned out to be the location of a church. A register process server unsuccessfully attempted to personally serve father with a notice at that address on May 2, 2012.

This case is distinguishable from the cited cases. The record in this case discloses that the clerk of the superior court timely mailed a Notice of Intent to File Writ packet to parents on April 17, 2012. Also unlike *Cathina W.*, *supra*, 68 Cal. App.4th at page 723, the notice correctly stated the date of the setting order. This is not a case where the court failed to obtain the parents' permanent mailing addresses in the first place. (*Cf. Rashad B.*, *supra*, 76 Cal.App.4th at pp. 444, 449–450.)

The Notification of Mailing Address forms filed by parents at the inception of the dependency proceedings contained a clear advisement that each parent must file a new form to notify the court, clerk, and social services agency of a change of permanent mailing address. On March 19, 2012, the juvenile court admonished parents to provide written notification of any change of permanent mailing address and warned them that they would have no basis for complaining they were unaware of notices if they failed to do so.

As indicated, the clerk mailed a Notice of Intent to File Writ packet to father at the address specified in the parents' original notifications and it was returned to the court without any forwarding address. In contrast to *Cathina W.*, the returned envelope did not provide a new address for him. Accordingly, the obligation to advise father of the writ requirement (§ 366.26, subd. (*l*)(3)(A); rule 5.590(b)) was satisfied. Further, the incidental inclusion of an address on a document filed with the court by a parent does not constitute written notification of a change in the parent's permanent mailing address to the court, the clerk, and the social services agency. In short, father's failure to receive mailed notice of that requirement was not attributable to court error. Moreover, when a registered process server attempted to personally serve a notice on father at the S. Market Street address at the beginning of May 2012, he discovered a church at that location and father was unknown. Father has not shown that the writ requirement should be excused.

It appears the clerk mailed a Notice of Intent to File Writ packet to mother at her Campbell address (reported in the January 2012 Status Review Report for the 18-month review) instead of the designated permanent mailing address. It can be implied that the Campbell address was mother's last known address. But mother is not claiming that she was still living at either address at the time the packet was mailed by the clerk on April 17, 2012. The evidence of the attempts to serve her with a notice in May 2012 also indicates that she was not living at either address at the time of that mailing. At the beginning of May 2012, the registered process server

found the San Jose address on file occupied by another tenant and the Campbell address vacant.

The Notice of Intent to File Writ packet mailed to mother at her Campbell address was returned to the court with a postal label stating "Return to Sender" and the S. Market Street address. The parties seem to believe that the label means that the S. Market Street address had been given as a change of address, impliedly to the U.S. Post Office. If so, it is not clear why the mail was not forwarded to that address by the Post Office and we can only speculate that perhaps the time for forwarding mail had expired. Even if the clerk of the court could have mailed the packet to mother at that address, we do not think good cause has been shown to excuse the writ requirement as to mother.

Like father, mother did not file written change of address notifications giving that S. Market Street address until late July 2012 even though the court had reminded parents of that obligation only the month before issuing the setting order. The returned packet with the S. Market Street address was not received by the court until April 27, 2012. On May 2, 2012, a process server found that a church was located at the S. Market Street address and father was unknown.

Mother argues that it is not enough that the process server unsuccessfully attempted to serve father with a notice at the church located at the S. Market Street address and it was not a "bogus" address for her. She points out the process server who had attempted to personally serve father at the church address provided her "with substituted service at the same address by leaving a notice with the person in charge, who acknowledged that [she] did receive her mail there." The record shows that substituted service was effected on mother by delivering a copy of the notice of the section 366.26 hearing to the S. Market Street address on May 31, 2012 and leaving it with the "person in charge" who stated mother received mail there and thereafter mailing a copy to that address.

We find that this evidence cuts the other way. Although mother acknowledges she was served with the notice of the section 366.26 hearing, she apparently did not seek to appeal from the order setting that hearing. Consequently, we are not in the procedural posture to treat a timely appeal from an order setting a section 366.26 hearing as a cognizable appeal or as a writ petition. (*Cf. In re Merrick V.* (2004) 122 Cal. App.4th 235, 247–249 [appellate court reviewed mother's claims on appeal from setting order because court failed to orally provide her with notice of the writ requirement]; *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 260 (*Jennifer T.*) [where juvenile court failed to orally advise mother of her writ rights, appellate court construed purported appeal from order setting section 366.26 hearing as a standard petition for writ of mandate "without regard to the shortened period for writ review that would otherwise be applicable (Rules 8.450, 8.452.)"[6].)

Moreover, mother at some point became aware of the writ requirement but she did not seek an extension of time to file a late Notice of Intent to File a Writ supported by an adequate showing. Rule 8.450(d) now provides as to extensions of time: "The superior court may not extend any time period prescribed by rules 8.450–8.452. The reviewing court may extend any time period but must require an exceptional showing of good cause."[7]

Because they stormed out of the 18-month review hearing on April 16, 2012, parents did not receive the oral advisement of the writ requirement. Parents failed to timely file written notification of their change of permanent mailing address as required even though the court had reminded them of that obligation only the month before. (See § 316.1, subd. (a).) We do not think that the appellate record demonstrates exceptional circumstances justifying excusing either parent's compliance with the writ requirement. We decline to review contentions concerning the 18-month review hearing in this appeal from later rulings.

B. Scope of Appeal and Cognizable Issues

As stated, parents' August 3, 2012 notice of appeal purports to appeal from the juvenile court's July 25, 2012 order denying mother's Motion to Vacate a Default Judgment and from its June 19, 2012 order denying parents' modification motion to place the children with relatives (§ 388). Their contentions, however, challenge prior determinations and orders.

"A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." (§ 395, subd. (a)(1).) The notice of appeal must ordinarily "be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.406(a)(1).)

"The dispositional order is the 'judgment' referred to in section 395, and all subsequent orders are appealable. [Citation.] ' "A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." [Citation.]' [Citations.]" (*In re S.B.* (2009) 46 Cal.4th 529, 532.) Stated another way, "[a]n appeal from the most recent order in a dependency matter may not challenge earlier orders for which the time for filing an appeal has passed. [Citation.]" (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018.) " 'Permitting a parent to raise issues going to

6. The Second District Court of Appeal concluded in *Jennifer T.* that "[b]ecause the right to appeal is purely statutory, an appellate court cannot confer the right to appeal as a remedy for the juvenile court's failure to advise a party of the writ requirement. (§ 366.26, subd. (*l*)(3)(A).)" (*Jennifer T., supra,* 159 Cal.App.4th at p. 260.)

7. Rule 8.450(f)(2) states in pertinent part: "If a notice of intent is… late, the superior court clerk must promptly: [¶] (A) Mark the notice of intent 'Received [date] but not filed;' [¶] (B) Return the marked notice of intent to the party with a notice stating that: [¶] (i) The notice of intent was not filed either because… it is late; and [¶] (ii) The party should contact his or her attorney as soon as possible to discuss this notice, because the time available to take appropriate steps to protect the party's interests may be short; and [¶] (C) Send a copy of the marked notice of intent and clerk's notice to the party's counsel of record, if applicable."

the validity of a final earlier appealable order would directly undermine dominant concerns of finality and reasonable expedition,' including 'the predominant interest of the child and state… .' [Citation.]" (*Ibid.*)

Accordingly, we conclude that *none* of parents' contentions raised on appeal concerning earlier final appealable orders are cognizable.

C. No Issues Raised Regarding the June 19 and July 25, 2012 Rulings

Parents do not assert any error concerning the June 19, 2012 order denying the motion to modify the children's placement or the July 25, 2012 order denying their motion to vacate a default judgment. Thus, no cognizable issue remains for this court's review.

Accordingly, we shall dismiss the appeal.

DISPOSITION

The appeal is dismissed.

ELIA, J.

WE CONCUR: RUSHING, P. J., PREMO, J.

Cite as 13 C.D.O.S. 8067

Kamala D. Harris, Attorney General

DIANE E. EISENBERG, Deputy Attorney General

No. 13–102
Office Of The Attorney General State of California
July 25, 2013

CHARLES WAGNER, as proposed relator, has requested leave to sue in quo warranto upon the following questions:

1. Is Jack Halpin unlawfully exercising the powers and authority of a judge of the Superior Court of Shasta County?

2. Is each or any of the following practices an abuse of discretion, and either illegal or unconstitutional: (a) assigning retired judges for service in the absence of genuinely exigent or extraordinary circumstances; (b) issuing assignment orders that authorize an assigned retired judge to complete and dispose of causes and matters that the judge originally heard during the designated dates of the assignment, even when proceedings in the causes or matters continue after the designated dates; and (c) assigning the same retired judge to judicial service pursuant to successive or multiple temporary assignment orders, which may result in the retired judge serving on a court for a significant length of time?

CONCLUSIONS

1. The question whether Jack Halpin is unlawfully exercising the powers and authority of a judge of the Superior Court of Shasta County does not warrant the initiation of an action in quo warranto because the issue is moot.

2. Quo warranto does not lie to determine whether each or any of the following practices is an abuse of discretion, and either illegal or unconstitutional: (a) assigning retired judges for service in the absence of genuinely exigent or extraordinary circumstances; (b) issuing assignment orders that authorize an assigned retired judge to complete and dispose of causes and matters that the judge originally heard during the designated dates of the assignment, even when proceedings in the causes or matters continue after the designated dates; and (c) assigning the same retired judge to judicial service pursuant to successive or multiple temporary assignment orders, which may result in the retired judge serving on a court for a significant length of time.

The application for leave to sue in quo warranto is therefore DENIED.

ANALYSIS

Background

The Judicial Council is a state entity established by the California Constitution[1] to "improve the administration of justice"[2] and set policies and priorities for the judicial branch of government.[3] The Council is chaired by the Chief Justice of California.[4] Article VI, section 6(e) of the California Constitution directs that:

> The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.[5]

The Assigned Judges Program (AJP) is administered by the Administrative Office of the Courts (AOC), which is the staff agency of the Judicial Council.[6] Assisted by the AJP, and pursuant to the constitutional mandate of Article VI, section 6(e), the Chief Justice issues temporary judicial assignment orders to active or retired judges and justices in response to a variety of circumstances, including vacancies, illnesses, disqualifications, and calendar congestion in the courts.[7] Although assignments are generally granted for up to 60 days, a judge can be assigned for any length of time.[8] Assignments can be renewed by the Chief Justice at the request of the presiding judge or justice of a court.[9]

Jack Halpin, the proposed defendant in this matter, was appointed as a superior court judge in 1962, and retired in 1964, without having stood for election. In 1994, Judge Halpin[10] was assigned for judicial service under the auspices of the AJP. Between 1994 and April 2012, Judge Halpin was regularly assigned to the Shasta County Superior Court, pursuant to a series of approximately 200 separate assignment orders by the Chief Justice. Judge Halpin's assignment orders typically provided that Judge Halpin was assigned to sit as a Shasta County Superior Court judge for a designated time period, "and until completion and disposition of all causes and matters heard pursuant to this assignment." The Shasta County Superior Court designated Judge Halpin to be the

1. Cal. Const. art. VI, § 6(a).
2. Cal. Const. art. VI, § 6(d).
3. Cal. Rules of Court, rule 10.1(a)(2).
4. Cal. Rules of Court, rule 10.1(a)(2). The full membership of the Council is set forth in article VI, section 6(a), of the state constitution.
5. *See also* Govt. Code §§ 68540–68550 (statutes implementing Judicial Council's program for assignment of judges).
6. *See* Govt. Code § 68500; Cal. Rules of Court, rules 10.1(d), 10.81.
7. Administrative Office of the Courts, *Fact Sheet, Assigned Judges Program* 1, http://www.courts.ca.gov/documents/Assigned_Judges_Program.pdf (Jan. 2013).
8. *Id.* at 2.
9. *Id.*
10. Although Judge Halpin is not currently a judge, assigned or otherwise, we adopt the customary practice of referring to him by using the title of his former position.

Supervising Judge of the Family Law Division of the court in 2008, and Judge Halpin served in that capacity through April 2012. We are informed that in April 2012, Judge Halpin announced to the local community his intention to discontinue his service as an assigned judge on the Shasta County Superior Court, and that he was not assigned new family law cases by the court after April 30, 2012. However, we are informed by the AOC that Judge Halpin did not withdraw from the AJP. Indeed, when the Shasta County Superior Court requested that Judge Halpin assist the court with its civil calendar (in non-family law matters) for several days in July and August of 2012, the Chief Justice issued short-term assignment orders to enable that assistance.

Proposed relator Charles Wagner is a party to a dissolution case that dates back to 2004. The case, a family law matter, was assigned to Judge Halpin in 2010. Trial on certain issues in the case commenced before Judge Halpin in December 2011. At this time, Judge Halpin was serving under an order assigning him to sit from December 1, 2011 to December 30, 2011, and until completion of all causes and matters heard pursuant to the assignment. The trial was interrupted, and further proceedings related to it were set in the family law department and took place before Judge Halpin in July, August, and September 2012. Mr. Wagner objected that Judge Halpin no longer had the authority to hear the matter, but the Shasta County Superior Court took the position that the December 2011 assignment order provided that authority.

On or around December 11, 2012, Mr. Wagner filed a motion to disqualify Judge Halpin from further proceedings in the dissolution case pursuant to Code of Civil Procedure section 170.1. The motion was granted by operation of law on or about December 21, 2012.

On December 18, 2012, Chief Justice Tani G. Cantil-Sakauye issued the following order:

> Pursuant to the authority conveyed under Article VI, section 6(e) of the California Constitution, it is ordered that the HONORABLE JACK H. HALPIN (Ret.) is no longer authorized to serve as an assigned judge in any case, cause, or matter in the Superior Court of Shasta County, including in connection with any assignments authorized by prior assignment order of the Chief Justice. Effective as of the date of this order, and until such time as the Chief Justice may order otherwise, Judge Halpin shall have no authority, by virtue of assignment by the Chief Justice, to hear any case, cause, or matter in the Superior Court of Shasta County.

Mr. Wagner has requested that this office file suit in the nature of quo warranto against Judge Halpin on its own initiative, or, in the alternative, grant leave to Mr. Wagner to file the suit. For the reasons explained in greater detail below, we must decline Mr. Wagner's request.

Nature of and Criteria for Quo Warranto

Code of Civil Procedure section 803 provides in pertinent part:

> An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.

An action filed under the terms of this statute is known as a "quo warranto" action. Quo warranto originated in an ancient writ used by the British crown to command the claimant of an office or franchise to show by what warrant or authority ("quo warranto") that person held or exercised the office or franchise.[11] In its modern form, "the remedy of quo warranto belongs to the state, in its sovereign capacity, to protect the interests of the people as a whole and guard the public welfare,"[12] and it is appropriately sought in a number of contexts. For example, quo warranto is the proper remedy to "try title" to public office;[13] that is, to evaluate whether a person has the right to hold a particular office by virtue of eligibility requirements, valid election procedures, the absence of disqualifying factors, etc.

In addition, quo warranto may lie to determine whether a public corporation is unlawfully holding or exercising a right or privilege ("franchise"),[14] and, in this connection, it is an appropriate remedy by which to challenge the validity of the process by which a city or county charter was enacted or amended.[15] In a proper case, quo warranto may also lie to consider whether a private corporation is unlawfully holding or exercising a corporate right or privilege.[16] With one

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11. *See Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 687, 695 (1985).

12. *Citizens Utils. Co. of Cal. v. Super. Ct.*, 56 Cal. App. 3d 399, 406 (1976); *see also City of Campbell v. Mosk*, 197 Cal. App. 2d 640, 648 (1961).

13. *Nicolopulos v. City of Lawndale*, 91 Cal. App. 4th 1221, 1225–1226, 1228 (disputes over title to public office are public questions of governmental legitimacy); *Elliott v. Van Delinder*, 77 Cal. App. 716, 719 (1926); 93 Ops.Cal.Atty.Gen. 144, 145 (2010); 81 Ops.Cal.Atty. Gen. 207, 208 (1998).

14. *E.g. People ex rel. Adams v. City of Oakland*, 92 Cal. 611, 614 (1891).

15. *Intl. Assn. of Fire Fighters*, 174 Cal. App. 3d at 694 (state delegates part of its sovereign power to public corporations; hence, when such corporations do not comply with state laws governing the lawmaking process, "they are usurping franchise rights as against [the] paramount authority" of the state); *People ex rel. Kerr v. Co. of Orange*, 106 Cal. App. 4th 914, 920 (2003); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 595 (1984); 86 Ops.Cal.Atty.Gen. 127 (2003); 75 Ops.Cal.Atty.Gen. 70, 72 (1992).

16. *People ex rel. Atty. Gen. v. Dashaway Assn.*, 84 Cal. 114, 117 (1890) (Corporations are creatures of the law; state may forfeit their franchises if they abuse such franchises in a way that affects the public interest); *Chambers v. Sec. Com. & Sav. Bank*, 51 Cal. App. 212, 217

exception not at issue here,[17] a quo warranto action may be brought only by the Attorney General, or by a private party who has secured the Attorney General's consent.[18] The Attorney General is accorded broad discretion in determining whether to grant an application to file a quo warranto action, and the existence of a debatable issue or a legal dispute does not necessarily establish that the issue or dispute requires judicial resolution through the quo warranto procedure.[19]

In determining whether to grant a particular application to sue in quo warranto, we do not resolve the matter on its merits but rather consider the following questions:

(1) Is quo warranto the proper remedy to resolve the issues that are presented?

(2) Does the application present a substantial issue of fact or law appropriate for judicial resolution?

(3) Would granting the application serve the overall public interest?[20]

We must answer all three questions in the affirmative in order to grant a quo warranto application.[21] As a general rule, we have viewed the need for judicial resolution of a substantial question of fact or law as a sufficient "public purpose" to warrant the granting of leave to sue in quo warranto.[22] However, certain circumstances will override this general rule. For example, we typically find that granting a quo warranto application would not be in the public interest when the issues have been or are being litigated in another judicial action,[23] or when the issue of an allegedly unlawfully-held office is moot because the term of office has expired or has only a short time remaining.[24] In addition, we have considered the existence of alternative remedies in determining whether the issuance of leave to sue would serve the public interest,[25] and a quo warranto application may be denied when such other remedies are available.[26] With this legal framework in mind, we proceed to the questions presented by Mr. Wagner's application.

1. Is Jack Halpin unlawfully exercising the powers and authority of a judge of the Superior Court of Shasta County?

As noted above, a quo warranto action is the proper legal means for testing title to public office; indeed, where available, it is usually the exclusive remedy for testing title to public office.[27] In *People v. Kwolek*, the court of appeal stated that quo warranto is the proper method to challenge the authority of an assigned judge to sit on a court.[28] The *Kwolek* court did not, however, discuss the attributes of a "public office" for purposes of Code of Civil Procedure section 803. Our Supreme Court has stated that, "[g]enerally, quo warranto is appropriate only where there is involved a public office in the sense that the incumbent exercises some of the sovereign powers of government."[29] An elected judge, or a judge appointed by the Governor to fill a vacancy, is an "incumbent" in that he or she both occupies a position that is not transient or occasional, but rather has some permanence and continuity,[30] and exercises judicial functions of government.

(1921); *and see e.g. Citizens Utils. Co.*, 56 Cal. App. 3d at 406–407 (privately-owned public utility).

17. *See* Code Civ. Proc. § 811 (authorizing the legislative bodies of local governmental entities to maintain an action against those holding certain franchises within their jurisdiction).

18. *Oakland Mun. Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 170 (1972); 67 Ops.Cal.Atty.Gen. 151, 153–154 (1984). Here, Mr. Wagner asserts that his limited financial means makes it more practicable for the Attorney General to initiate and prosecute the quo warranto action. However, because we conclude that a quo warranto action on the questions presented is not warranted, we do not further evaluate whether such an action would more appropriately be brought by the Attorney General, or by Mr. Wagner with the consent of the Attorney General. We note that as a general matter the Attorney General rarely pursues an action in quo warranto on his or her own initiative (*see Nicolopulos*, 91 Cal. App. 4th at 1228; *and see* Cal. Atty. Gen., *Quo Warranto – Nature of Remedy*, http://oag.ca.gov/opinions/nature-of-remedy), and most quo warranto actions are prosecuted by a private party (who is termed the "relator") upon the authorization of the Attorney General. For the sake of convenience, we refer herein to Mr. Wagner's application as an application for leave (or our authorization) to sue.

19. *City of Campbell*, 197 Cal. App. 2d at 650 (public interest is paramount consideration in exercise of Attorney General's discretion); 86 Ops.Cal.Atty.Gen. 76, 79–81 (2003); 72 Ops.Cal.Atty.Gen. 15, 20 (1989); 67 Ops.Cal.Atty.Gen. at 153–154.

20. 73 Ops.Cal.Atty.Gen. 197, 200 (1990); 72 Ops.Cal.Atty.Gen. at 20. In a number of our opinions, we have used only the latter two questions to articulate our standards for granting leave to sue in quo warranto. *See e.g.* 93 Ops.Cal.Atty.Gen. at 145; 89 Ops.Cal.Atty.Gen. 55, 56 (2006); 88 Ops.Cal.Atty.Gen. 25, 26 (2005). But, as we recently observed, such formulations necessarily encompass "the more fundamental question as to whether quo warranto is the appropriate legal remedy in the given circumstances." 95 Ops.Cal.Atty.Gen. 50, 54 (2012).

21. 73 Ops.Cal.Atty.Gen. at 200; 72 Ops.Cal.Atty.Gen. at 20.

22. 89 Ops.Cal.Atty.Gen. at 61; 85 Ops.Cal.Atty.Gen. 90, 94 (2002).

23. *See e.g.* 86 Ops.Cal.Atty.Gen. at 79–81; 74 Ops.Cal.Atty.Gen. 31, 32 (1991); 73 Ops.Cal.Atty.Gen. 183, 190 (1990); 73 Ops.Cal.Atty.Gen. 109, 110 (1990); 36 Ops.Cal.Atty.Gen. 317, 319 (1960).

24. *See e.g.* 87 Ops.Cal.Atty.Gen. 179–180 (2004); 83 Ops.Cal.Atty.Gen. 181, 184 (2000); 82 Ops.Cal.Atty.Gen. 6, 11 (1999); 75 Ops.Cal.Atty.Gen. 10, 14 (1992).

25. 75 Ops.Cal.Atty.Gen. at 74; 74 Ops.Cal.Atty.Gen. at 32; 12 Ops.Cal.Atty.Gen. 340, 342 (1949).

26. 89 Ops.Cal.Atty.Gen. 285, 287–288 (2006); 86 Ops.Cal.Atty.Gen. at 79–81; 80 Ops.Cal.Atty.Gen. 290, 292–293 (1997); 77 Ops.Cal.Atty.Gen. 65, 70 (1994) ("Generally speaking, a section 803 proceeding is maintained where it is the only available remedy."); 9 Ops.Cal.Atty.Gen. 1, 2 (1947).

27. *Nicolopulos*, 91 Cal. App. 4th at 1225 (title to an office cannot be tried by mandamus, injunction, writ of certiorari, or petition for declaratory relief); *Visnich v. Sacramento Co. Bd. of Educ.*, 37 Cal. App. 3d 684, 690 (1974); 93 Ops.Cal.Atty.Gen. 104, 109 (2010); 89 Ops.Cal.Atty.Gen. at 56.

28. *People v. Kwolek*, 40 Cal. App. 4th 1521, 1531 (1995) (holding that municipal court judge temporarily assigned to the superior court had proper authority to preside over defendant's trial).

29. *Stout v. Democratic Co. Central Comm.*, 40 Cal. 2d 91, 94 (1952).

30. S*ee Moore v. Panish*, 32 Cal. 3d 535, 545 (1982); 87 Ops.Cal.

Such a person clearly holds a public office.[31] An assigned active judge is not an incumbent of the court to which he or she is assigned,[32] and a retired judge sitting on assignment is not an incumbent of any court.[33] Nevertheless, an assigned judge exercises all of the authority of an incumbent judge of the court for the period of the assignment,[34] and this is true also of a retired judge sitting on assignment.[35] Mindful of the observation that no one definition of public office will adequately and effectively cover every situation,[36] we find that a quo warranto proceeding is the proper method by which to challenge the right of a retired judge to hold the position of assigned judge and to exercise the powers and authority of a judge of the court to which the retired judge is assigned.[37]

However, an action in quo warranto may be filed "only to right an existing wrong and not to try moot questions."[38] In this instance, we conclude that the Chief Justice's December 18, 2012, order renders moot the question whether Judge Halpin is *currently* unlawfully usurping, intruding into, or holding the position of assigned judge, and we deny leave to sue with respect to this issue on that basis.

Both Mr. Wagner and Judge Halpin attempt to persuade us to discount the Chief Justice's order, though on different grounds.[39] We nonetheless find the Chief Justice's order to be dispositive. Judicial precedent has established that the Chief Justice, as Chair of the Judicial Council, is invested with "discretion of the broadest character" in the assignment of judges.[40] As our Supreme Court has stated: "The manner, method, or criteria for selection of duly qualified assigned judges is… within the discretion of the Chief Justice in the exercise of her constitutional authority to make the assignments."[41] It is "a well-settled rule of law that where there are no restrictive provisions the power of appointment carries with it the power of removal."[42] Accordingly, the Chief Justice's discretion in the making of judicial assignments generally encompasses both the non-renewal and the termination of such assignments.[43] We conclude that the Chief Justice's December 18, 2012 order effectively terminated Judge Halpin's status as an assigned judge with the Shasta County Superior Court, and thereby terminated Judge Halpin's authority to exercise the powers of a judge of that court.

We are aware that Mr. Wagner's initial quo warranto application was completed, and was in transmission to our office, before the Chief Justice's December 18, 2012 order was issued. Nevertheless, the public interest will not be served by allowing quo warranto to proceed merely because the issue raised by the application was mooted by events that occurred shortly after the application was submitted.[44] We are informed by the Shasta County Superior Court that Judge Halpin has not been scheduled to hear, and has not heard, any matter, case, or cause in that court since the Chief Justice

Atty.Gen. at 57.

31. *See People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 640, 642, 644 (1940) (characterizing city judge as a public official for purposes of quo warranto action).

32. *Bach v. McNelis*, 207 Cal. App. 3d 857, 871 (1995); *Kwolek*, 40 Cal. App. 4th at 1530–1531 (quoting from *Bach*); 79 Ops.Cal.Atty. Gen. 159, 162 (1996).

33. *See People v. Super. Ct. (Mudge)*, 54 Cal. App. 4th 407, 412 (1997) (noting that the assignment of a retired judge to act temporarily as a regular sitting judge is *sui generis*).

34. *Fay v. Dist. Ct. of App.*, 200 Cal. 522, 529 (1927); *Bach*, 207 Cal. App. 3d at 871; *Mosk v. Super. Ct.*, 25 Cal. 3d 474, 483 (1979).

35. *Pickens v. Johnson*, 42 Cal. 2d 399, 406 (1954) (retired judge sitting on assignment to the superior court is vested with powers of superior court judge during the length of the assignment).

36. *See Chapman*, 16 Cal. 2d at 639; 68 Ops.Cal.Atty.Gen. 337, 341 (1985).

37. We note that we have previously determined, in a different context, that a retired judge sitting on assignment has the equivalent status of a judicial officer. *See* 68 Ops.Cal.Atty.Gen. 127, 128–130 (1985) (retired judge on assignment is subject to same immunity and indemnification provisions as those governing public officers acting in a judicial capacity).

38. *People v. City of Whittier*, 133 Cal. App. 316, 324 (1933).

39. The Chief Justice's order was transmitted to us by the AOC. In a letter accompanying the order, the AOC also asserted that Mr. Wagner's quo warranto application should be denied as moot. Mr. Wagner does not contest the authenticity of the Chief Justice's order, but rather argues that we must ignore the AOC's correspondence because the AOC is not named as a party to the application. But the mere fact that the AOC transmitted the order in question to our offices has no bearing on the legal significance of that order.

Judge Halpin requests that if we deny Mr. Wagner's application on the ground of mootness, we do so only on the basis of the disqualification of Judge Halpin pursuant to Code of Civil Procedure section 170.1. Judge Halpin further states that he is "unwilling to concur" that the Chief Justice's order of December 18, 2012 is val*id.* Essentially, Judge Halpin suggests that we may consider the issue of mootness only as it pertains to Judge Halpin's authority to hear further causes or matters in Mr. Wagner's dissolution case, but not as it pertains to Judge Halpin's exercise of authority as an assigned judge in other cases or matters. We reject this suggestion. Judge Halpin has presented no arguments or materials, nor have we been otherwise informed of any, that would negate the facial validity of the Chief Justice's order of December 18, 2012.

40. *People v. Ferguson*, 124 Cal. App. 221, 231 (1932).

41. *Mosk*, 25 Cal. 3d at 483; *see also Pickens*, 42 Cal. 2d at 410 (Chair of Judicial Council is "logical constitutional officer in whom to vest the power of assignment"); *Mudge*, 54 Cal. App. 4th at 412; *People v. Swain*, 33 Cal. App. 4th 499, 503 (1995).

42. *Fee v. Fitts*, 108 Cal. App. 551, 556 (1930). *See also* Govt. Code § 1301 ("Every office, the term of which is not fixed by law, is held at the pleasure of the appointing power.").

43. We note in this regard that the AJP "Standards and Guidelines for Judicial Assignments" states that representations of assignments staff "are not intended to give rise to any contractual rights or obligations, nor should they be construed as a guarantee of a judicial assignment or of a specific type or period of assignment. Assignments are within the sole discretion of the Chief Justice." AOC, *AJP Handbook; Standards and Guidelines for Judicial Assignments* 1 (Oct. 2012). The AOC *Fact Sheet* for the AJP also states, at page 4, that the Chief Justice may remove an assigned judge from the program; *see* http://www.courts.ca.gov/documents/Assigned_Judges_Program.pdf (Jan. 2013). We do not here assert that there could *never* be any circumstances under which the termination of an assignment or the removal of a judge from the AJP could be challenged. However, the contemplation of such circumstances in the abstract is beyond the scope of this opinion, and, as we have stated, we are aware of no facts that would give rise to a challenge of the termination of the assignment in the present matter.

44. *See People v. Muehe*, 114 Cal. App. 739, 740 (1931) (quo warranto proceeding will not be maintained "merely to try the abstract title to the office").

issued her order of December 18, 2012.[45] Quo warranto is a "preventative remedy addressed to preventing a *continuing exercise* of an authority unlawfully asserted rather than to correcting what has already been done under that authority."[46] We have repeatedly declined to grant leave to sue in a quo warranto proceeding where the alleged unlawful term of office has expired, or the question of unlawfulness has become moot because of subsequent events.[47]

Mr. Wagner cites one of our recent opinions, Opinion No. 12–602, in an attempt to avoid a finding of mootness with respect to Judge Halpin's status. This opinion addresses the applicability of the incompatible offices doctrine to a very specific, and unusual, factual situation.[48] The facts before us in the present matter are in no way analogous to those addressed by Opinion No. 12–602, and thus we find no support in that opinion for Mr. Wagner's arguments regarding mootness.

As to Question 1, then, we find that the issue of Judge Halpin's current authority to exercise the powers of a superior court judge is moot, and therefore that a quo warranto proceeding on that issue would not be in the public interest.

2. Do certain practices used in connection with the assignment of judges constitute an abuse of discretion or violate the law?

Mr. Wagner alleges that the three practices described in Question 2 have been used in connection with the assignment of Judge Halpin and other retired judges, and contends that the practices effectively violate sections 16(b) and (c) of Article VI of the California Constitution. Section 16(b) provides in pertinent part that "[j]udges of superior courts shall be elected in their counties at general elections except as otherwise necessary to meet the requirements of federal law," and section 16(c) states:

> Terms of judges of superior courts are six years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the second January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.

Specifically, Mr. Wagner contends that the practices of issuing assignment orders that authorize an assigned retired judge to complete and dispose of causes and matters that the judge originally heard during the designated dates of the assignment, even when proceedings in the causes or matters continue after the designated dates (Question 2(b)), and assigning the same retired judge to judicial service pursuant to successive or multiple temporary assignment orders, which may result in the retired judge serving on a court for a significant length of time, sometimes many years (Question 2 (c)), transform ostensibly temporary assignments of retired judges to superior courts into indefinite and permanent assignments. In so doing, he argues, these practices thereby deprive the electorate of its right to elect and to remove (by failing to re-elect) superior court judges every six years.[49] Mr. Wagner seeks to have the practice described in Question

45. Mr. Wagner submitted a reply brief in January 2013 which alleged that Judge Halpin was being scheduled to hear matters even after the issuance of the Chief Justice's order, but Mr. Wagner has since acknowledged through his attorney that he was in error on this point.

46. *Citizens Utils. Co.*, 56 Cal. App. 3d at 406 (emphasis added). In this connection, we note that, under the "de facto officer" doctrine, Judge Halpin's rulings and orders while sitting on assignment are valid and binding. *See In re Redev. Plan for Bunker Hill*, 61 Cal. 2d 21, 42 (1964) (persons claiming to be public officers while in possession of an office, ostensibly exercising their functions lawfully, are de facto officers, and their acts done within the scope and by the apparent authority of office are valid and binding); 82 Ops.Cal.Atty.Gen. 219, 223 n. 3 (1999); 74 Ops.Cal.Atty.Gen. 116, 121 (1991). The de facto officer doctrine applies to judges. *Ensher, Alexander & Barsoom, Inc. v. Ensher*, 238 Cal. App. 2d 250, 255 (1966). In other words, Judge Halpin's rulings and orders in individual cases would not be invalidated or undermined by a successful quo warranto proceeding. As a general matter, complaints about judicial misconduct on the part of an assigned judge are handled by the AOC, with the assistance of the presiding judge of the court involved (Cal. Rules of Court, rule 10.603(c)(4)(E)), and allegations of legal error may be grounds for an appeal.

47. *See e.g.* 87 Ops.Cal.Atty.Gen. at 179; 87 Ops.Cal.Atty.Gen. 30, 34–35 (2004); 84 Ops.Cal.Atty.Gen. 206, 207 (2001); 82 Ops.Cal. Atty.Gen. at 223–224; 72 Ops.Cal.Atty.Gen. 63, 71 (1989); 25 Ops. Cal.Atty.Gen. 223, 224 (1955).

48. 95 Ops.Cal.Atty.Gen. 67, 67 (2012). The doctrine of incompatible offices provides that if a person holds two offices that are incompatible, the first office to which the person acceded is deemed forfeited. In this opinion, we considered the situation of a person who was appointed to be a city planning commissioner, and, while serving in that capacity, was elected to the board of a sanitary district. Later, while still serving on the sanitary district board, the person was reappointed to the planning commission. He subsequently resigned from the planning commission, and thereafter occupied only one office, that of sanitary district director. We determined that the resignation did not necessarily moot the question of whether the doctrine of incompatible offices applied. We based this conclusion solely on the fact that the person's re-appointment to the planning commission could be construed as having reversed the sequence in which the offices were occupied, thus making the sanitary district directorship the office that was subject to forfeiture. *See* 95 Ops.Cal.Atty.Gen. at 72–73. The present matter does not involve any alleged violation of the incompatible office doctrine, much less does it call for a determination as to whether one such office, versus the other, should have been forfeited. Accordingly, our earlier opinion has no bearing on the present circumstances.

49. Mr. Wagner also alludes to a concern (citing to a dissenting opinion in the case of *Pickens v. Johnson*, 42 Cal. 2d at 419 (Carter, J., concurring and dissenting)) that a sitting judge could be defeated at an election, but then subsequently assigned, thereby continuing to function as a judge and thwarting the will of the electors. We note that Government Code section 68549 (enacted after *Pickens* was decided) provides that a judge who has been defeated in an election for his or her office "shall not be deemed a retired judge within the meaning of Section 6 of Article VI of the California Constitution," and therefore is not eligible for assignment. It is also the Chief Justice's express policy that a retired judge shall not be considered for assignment if the judge was defeated in the last judicial election in which the judge was required to stand in order to retain his or her judicial office. AOC, *AJP Handbook; Standards and Guidelines for Judicial Assignments* 4 (Oct. 2012).

2(b) declared to be an abuse of discretion and illegal, and the practice described in Question 2(c) declared to be an abuse of discretion and unconstitutional.[50] Mr. Wagner also seeks to have the assignment of retired judges in the absence of genuinely exigent or extraordinary circumstances (Question 2(a)) declared to be an abuse of discretion and unconstitutional.

First, we observe that Judge Halpin, the only proposed defendant named in Mr. Wagner's application, does not issue assignment orders, nor does he make policy for or administer the AJP. Rather, the Chief Justice, as Chair of the Judicial Council, makes assignments, with the assistance of the AOC and the AJP, and the assignment orders are then implemented by the courts. None of these persons or entities has been named by Mr. Wagner as a party to the quo warranto application, and it appears to us that they would be indispensable parties if such an action were to proceed. However, because we believe that our substantive reasons for denying the application would not change if any of these persons or entities were added as parties, we may simply proceed with our analysis of the questions Mr. Wagner has posed.

Our main consideration with respect to Question 2 is whether quo warranto is the appropriate form of action for the litigation of Mr. Wagner's claims or for the relief he seeks. We conclude that it is not. Mr. Wagner does not here claim that the Chief Justice has "usurped" the office she holds, so the issues raised in Question 2 do not implicate title to a public office. We construe the essence of Mr. Wagner's claim to be that the Chief Justice has used her assignment powers in a way that is *ultra vires* – that is, beyond the scope of power allowed by law.[51] In this case, the claim is that the current Chief Justice, and previous Chief Justices who allegedly have also engaged in the practices described in Question 2, have exceeded the assignment authority provided by Article VI, section 6(e). However, while a claim of *ultra vires* conduct might sustain a quo warranto action involving a corporate franchise granted by the state,[52] neither the Chief Justice nor the Judicial Council is a corporation holding a franchise for purposes of Code of Civil Procedure section 803. Rather, they exercise the sovereign power of the state pursuant to constitutional mandate. We find no basis in section 803 or in any judicial decision for the invocation of a quo warranto action in connection with the issues presented in Question 2, and we have not considered quo warranto to be the proper vehicle for challenging the legality of the actions of legitimate state officers under the type of circumstances presented here.[53] For example, in a previous opinion, we rejected quo warranto as an appropriate form of action for the contention that the Governor had exceeded his constitutional and statutory authority with regard to actions he took in connection with a statewide initiative.[54]

We conclude that the issues raised in Question 2 do not constitute proper grounds for a quo warranto action, and for that reason, we deny the application as to those issues.[55] The denial of this application with respect to Question 2 does not preclude Mr. Wagner from bringing a different form of legal action to challenge the validity of the Chief Justice's assignment orders or the Judicial Council's and the AOC's/AJP's assignment policies.[56]

Because the issue presented in Question 1 is moot, and the issues presented in Question 2 are not appropriate to bring in a quo warranto proceeding, the application for leave to sue in quo warranto is DENIED.

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50. Mr. Wagner does not identify the precise temporal threshold at which he believes the aggregate length of service of an assigned retired judge becomes an abuse of discretion and unconstitutional.

51. *See Black's Law Dictionary* 1311–1312 (Bryan A. Garner ed., abr. 9th ed., West 2010) (defining "*ultra vires*").

52. *See e.g. Dashaway Assn.*, 84 Cal. at 117 (1890) *People ex rel. Clark v. Milk Producers' Assn. of Central Cal.*, 60 Cal. App. 439, 441–445 (1923); *see also* Code Civ. Proc. § 811.

53. To the extent that Mr. Wagner's application could alternatively be construed as seeking the ouster of a class of currently assigned, long-serving retired judges, where there are no allegations that any of the judges personally violated a rule or lacked a requisite qualification when they took their assignments, the application also fails to state appropriate grounds for a quo warranto action.

54. 75 Ops.Cal.Atty.Gen. at 71–73.

55. In his application, Mr. Wagner makes a number of assertions and allegations about the compensation of retired judges sitting on assignment. Such compensation has been set by the Legislature in Government Code section 68543.5. Mr. Wagner does not allege that any assigned judge's compensation violates the prescriptions of this statute, and he does not request any particular relief regarding the subject of compensation. It is well established that the compensation of superior court judges, including retired judges sitting by assignment, is within the control of the Legislature. *See e.g. Pickens*, 42 Cal. 3d at 406–407; 72 Ops.Cal.Atty.Gen. 258, 261 (1989). Therefore, any complaints or concerns about the compensation of assigned retired judges must be addressed to the Legislature, and would not constitute the basis for a quo warranto application.

56. *Pulskamp v. Martinez*, 2 Cal. App 4th 854, 860 (1992) (when quo warranto is not available, private citizen may proceed to seek relief by other means).