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Constitutional Law

State law criminalizing prostitution does not violate First or Fourteenth Amendments (Restani, J.)

Erotic Service Provider Legal Education and Research Project v. Gascon

9th Cir.; January 17, 2018; 16-15927

The court of appeals affirmed a judgment of dismissal. The court held that a state law criminalizing prostitution does not violate the First or Fourteenth Amendments.

Erotic Service Provider Legal Education and Research Project (ESP) and others filed a complaint seeking declaratory and injunctive relief against the district attorneys of the City and County of San Francisco, Marin County, Alameda County, Sonoma County, and the Attorney General of California to enjoin and invalidate Cal. Penal Code §647(b), which makes it a misdemeanor to solicit, agree to engage in, or engage in any act of prostitution. ESP argued that §647(b) violated (1) the Fourteenth Amendment substantive due process right to sexual privacy; (2) freedom of association under the First or Fourteenth Amendment; (3) the Fourteenth Amendment substantive due process right to earn a living; and (4) the First Amendment freedom of speech.

The district court granted defendants’ motion to dismiss for failure to state a claim upon which relief could be granted. The court of appeals affirmed, holding that ESP’s constitutional claims were without merit. Under IDK, Inc. v. Clark Cnty., 836 F.2d 1185 (9th Cir. 1998), there is not a fundamental due process right to engage in prostitution. Accordingly, in addressing ESP’s Fourteenth Amendment due process challenge, §647(b) was subject to rational basis review only. It survived such review. The statute has the legitimate purposes of discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases. Because the relationship between a prostitute and a client does not qualify as a relationship protected by a right of association, §647(b) also does not violate the freedom of intimate or expressive association. Further, because there is no constitutional right to engage in illegal employment, §647(b) does not violate the Fourteenth Amendment right to earn a living. Finally, the statute does not violate the First Amendment freedom of speech. For commercial speech to receive First Amendment protection, it must concern lawful activity. Because prostitution is unlawful, it cannot constitute protected commercial speech.

Criminal Law

State court’s unconstitutional application of causal nexus test to mitigating evidence warranted habeas relief (Fisher, J.)

Poyson v. Ryan

9th Cir.; March 22, 2013; 10-99005

The court of appeals reversed a district court judgment denying a petition for writ of habeas corpus. The court held that the Arizona Supreme Court’s unconstitutional application of a causal nexus test to mitigating evidence had a “substantial and injurious effect or influence” on imposition of the death penalty in this case, warranting habeas relief.

Robert Poyson brutally murdered three people in order to steal a car. The victims included a 15-year-old boy, who was stabbed and bludgeoned to death, and his mother. An Arizona jury found Poyson guilty of murder and sentenced him to death. After pursuing direct review and seeking postconviction relief in state court, he filed a habeas petition in federal district court. The district court denied the petition.

Poyson appealed, arguing that the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence.

The court of appeals reversed, holding that the Arizona Supreme Court denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues. In 2000, when the Arizona Supreme Court upheld Poyson’s sentence on direct appeal, it was in the midst of the 15-year period during which it consistently applied an unconstitutional causal nexus test to evidence of a capital defendant’s family background or mental condition. Further, in upholding Psyson’s sentence, the Arizona Supreme Court gave Poyson’s proffered evidence no weight, and it expressly did so because of the absence of a causal connection between the evidence and his crimes.

In affording that evidence no weight, the Arizona Supreme Court cited a passage in one of its earlier cases that was later specifically identified as articulating that court’s unconstitutional causal nexus test. Finally, although the Arizona Supreme Court couched its decision in terms of “mitigating weight” and “mitigating value,” the case law makes clear that the court deemed the evidence nonmitigating as a matter of law. The Arizona Supreme Court’s application of this unconstitutional causal nexus test was “contrary to” the Supreme Court’s decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), and constituted a violation of Poyson’s rights under the Eighth Amendment. Because the error “had substantial and injurious effect or influence in determining” Poyson’s sentence, he was entitled to habeas relief. Judge Ikuta concurred under compulsion of the court’s en banc decision in McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015).
Criminal Law

Washington drug conspiracy statute not categorical match for federal conspiracy law (Clifton, J.)

**United States v. Brown**

9th Cir.; January 16, 2018; 16-30218

The court of appeals reversed a district court judgment of sentence. The court held that the Washington state drug conspiracy statute is overbroad and thus not a categorical match for its federal generic counterpart.

Michael Brown pleaded guilty to being a felon in possession of a firearm. The district court sentenced him to a 60-month prison term and three years of supervised release, after determining, for purposes of U.S.S.G. §2K2.1(a)(4) (A), that Brown’s 2005 Washington state conviction for conspiracy to distribute methamphetamine was a “controlled substance offense.”

Brown appealed, challenging the district court’s finding that his 2005 conviction was a controlled substance offense.

The court of appeals reversed, holding that the 2005 conviction did not qualify as a controlled substance offense because the Washington drug conspiracy statute is not a categorical match to conspiracy under federal law. Washington law allows for a conspiracy conviction when the only other party is a law enforcement officer or informant who does not actually intend to take part in the conspiracy. Those facts would not support a conviction for conspiracy under federal law. Because the Washington drug conspiracy statute covers conduct that would not be covered under federal law, Brown’s conviction under the Washington statute is not a categorical match. The district court accordingly erred in calculating Brown’s Sentencing Guidelines range. The court remanded for resentencing. Judge Owens concurred, but wrote separately to observe how far the so-called *Taylor* categorical approach had deviated from common sense.

Education Law

Existing state funding to school districts may be designated as offsetting revenue for purposes of determining reimbursement for state mandated programs (Jones, P.J.)

**California School Boards Association v. State of California**

C.A. 1st; January 16, 2018; A148606

The First Appellate District affirmed in part and reversed in part a judgment. In the published portion of its opinion, the court held that the state legislature may properly designate funding already provided to school districts as offsetting revenue when reimbursing them for the costs of new state mandated programs.

The California School Boards Association (CSBA) and various school districts filed a petition for writ of mandate challenging, among other things, the constitutionality of Gov. Code §17557(d)(2)(B), which provides that the State can request to amend parameters or guidelines to “update offsetting revenues and offsetting savings’ applicable to mandated programs and “do not require a new legal finding that there are no costs mandated by the state pursuant to [§17556(e)].” They argued that §17557(d)(2)(B) impermissibly burdened the constitutional right to reimbursement guaranteed by Cal. Const. art. XIII B, §6, and was invalid to the extent it allowed the State to reduce or eliminate mandate claims by claiming “offsetting revenues” that do not represent new or additional funding, but instead simply represent funding already apportioned to school districts for other purposes as provided in Educ. Code §§42238.24 and 56523.

The trial court denied the petition as to §17557(d)(2)(B), finding that “the State can constitutionally designate certain revenues as offsetting revenues that will reduce or eliminate the State’s obligation.” The court denied leave to amend and dismissed petitioners’ remaining claims.

The court of appeal affirmed the trial court’s ruling as to §17557(d)(2)(B), holding that, as applied in §§42238.24 and 56523(f), it does not violate the state’s constitutional obligation to reimburse local governments for the costs of mandated programs. Petitioners failed to show that they are being forced to use local revenues to pay for the costs of state mandated programs. Section 42238.24 specifically directs local school districts and county offices of education to use “state funding” as an offset, not local tax revenues. This directive is not incompatible with the State’s constitutional obligation to reimburse local governments for state-mandated costs. Where school districts and county offices of education receive tens of billions of dollars in state funding each year, it simply does not follow that they are or were required to use local revenues to pay for teacher salaries and benefits associated with state mandated programs. The trial court properly denied the petition as to §17557(d)(2)(B), but erred in deny-
ing leave to amend and/or dismissing petitioners’ remaining claims.

**Employment Litigation**

**Jury’s finding of discrimination did not entitle losing plaintiff to award of attorney fees  (Codrington, J.)**

**Bustos v. Global P.E.T., Inc.**

C.A. 4th; December 22, 2017; E065869

The Fourth Appellate District affirmed a trial court order. The court held that a jury’s finding that a plaintiff’s physical condition was a substantial motivating factor in his termination makes the plaintiff eligible for an award of attorney fees, but does not mandate such an award.

William Bustos sued former employer Global P.E.T., Inc. for disability discrimination and related causes of action, alleging he was fired because he suffered from carpal tunnel syndrome. Global argued that Bustos was terminated for legitimate, nondiscriminatory reasons, specifically, as part of economic layoffs that also resulted in the termination of a number of other employees, and because he had failed one or more drug tests. The jury returned verdicts in favor of Global on each of Bustos’ claims. Although the jury indicated on a special verdict form that Bustos’ physical condition or perceived physical condition was “a substantial motivating reason” for Global’s decision to discharge him, it also found that Global’s conduct was not “a substantial factor in causing harm” to Bustos.

After trial, Bustos sought an award of attorney fees under the Fair Employment and Housing Act (FEHA), citing the holding of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 that “a plaintiff subject to an adverse employment decision in which discrimination was a substantial motivating factor may be eligible for reasonable attorney’s fees and costs expended for the purpose of redressing, preventing, or deterring that discrimination,” even if the discrimination did not “result in compensable injury” for that particular plaintiff. The trial court denied the motion for fees.

The court of appeal affirmed, holding that although *Harris* holds that a plaintiff who proves discrimination was a substantial motivating factor of an adverse employment decision “may be eligible” to recover attorney fees, it does not require such an award of fees. Here, the trial court did not abuse its discretion in finding that Bustos, who did not prevail on any of his claims against Global, was not entitled to an award of fees.
Robert Allen Poyson was convicted of murder and sentenced to death in 1998. After pursuing direct review and seeking postconviction relief in state court, he filed a habeas petition in federal district court. The district court denied the petition, and Poyson appeals.

Poyson raises three claims on appeal, each of which has been certified by the district court pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c): (1) the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence; (2) the Arizona courts failed to consider mitigating evidence of his history of substance abuse; and (3) his trial counsel provided ineffective assistance of counsel during the penalty phase of his trial by failing to investigate the possibility that he suffered from fetal alcohol spectrum disorder. We agree with Poyson on his first claim. We conclude his second claim is without merit. And we hold his third claim is procedurally defaulted.

As to the first claim, we hold the Arizona Supreme Court sentenced Poyson in 2000, which was in the midst of the 15-year period during which that court consistently applied an unconstitutional causal nexus test to evidence of a capital defendant’s family background or mental condition, see McKinney v. Ryan, 813 F.3d 798, 802–03 (9th Cir. 2015) (en banc); (2) in sentencing Poyson, the Arizona Supreme Court gave Poyson’s proffered evidence no weight, and it expressly did so because of the absence of a causal connection between the evidence and his crimes, State v. Poyson, 7 P.3d 79, 90–91 (Ariz. 2000); (3) in affording that evidence no weight, the Arizona Supreme Court cited a passage in one of its earlier cases that we have specifically identified as articulating that court’s unconstitutional causal nexus test, see id. (quoting State v. Brewer, 826 P.2d 783, 802 (Ariz. 1992)); McKinney, 813 F.3d at 815; and (4) although the Arizona Supreme Court couched its decision in terms of “mitigating weight” and “mitigating value,” our case law makes clear that the court deemed the evidence nonmitigating as a matter of law, see McKinney, 813 F.3d at 816–17. The Arizona Supreme Court’s application of this unconstitutional causal nexus test was “contrary to” the Supreme Court’s decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), see 28 U.S.C. § 2254(d)(1), and constituted a violation of Poyson’s rights under the Eighth Amendment. We further hold the error “had substantial and injurious effect or influence in determining” the sentence. McKinney, 813 F.3d at 822 (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). We therefore grant habeas relief on Poyson’s causal nexus claim.

We deny habeas relief on Poyson’s claim that the Arizona courts failed to consider his history of substance abuse as a
I. BACKGROUND

A. The Crimes

Poyson was born in August 1976. The facts of his crimes, committed in 1996, were summarized as follows by the Arizona Supreme Court in State v. Poyson, 7 P.3d 79, 83 (Ariz. 2000).

Poyson met Leta Kagen, her 15 year-old son, Robert Delahunt, and Roland Wear in April 1996. Poyson was then 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48 year-old Frank Anderson and his 14 year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

Anderson informed Poyson that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt and Wear in order to steal the latter’s truck.

On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt’s screams and ran to the travel trailer. While Anderson held Delahunt down, Poyson bashed his head against the floor. Poyson also beat Delahunt’s head with his fists, and pounded it with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated Delahunt’s skull and exited through his nose, the wound was not fatal. Poyson thereafter continued to slam Delahunt’s head against the floor until Delahunt lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes.

After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear’s .22 caliber rifle. Unable to find ammunition, Poyson borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to rescue him. Poyson loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Poyson first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering Wear’s upper right teeth. A struggle ensued, during which Poyson repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, Poyson twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear’s head. After Wear stopped moving, Poyson took his wallet and the keys to Wear’s truck. To conceal the body, Poyson covered it with debris from the yard. Poyson, Anderson and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

B. Trial and Conviction

A grand jury indicted Poyson on three counts of first degree murder, one count of conspiracy to commit murder and one count of armed robbery. The jury convicted on all counts in March 1998, following a six-day trial.

C. Sentencing

I. Mitigation Investigation

Following the guilty verdicts, the state trial court approved funds to hire a mitigation specialist to assist in preparing for Poyson’s sentencing. Counsel retained investigator Blair Abbott.

In a June 1998 memorandum, Abbott informed counsel that Poyson’s mother, Ruth Garcia (Garcia), used drugs during the first trimester of her pregnancy and recommended that counsel investigate the possibility that Poyson suffered brain damage as a result. The memorandum advised counsel that “one of the significant issues should be the hard core drug abuse of both [of Poyson’s] parents, preconception and in the first trimester of Ruth’s pregnancy.” Abbott wrote that “Ruth Garcia’s heavy drug abuse in the pre pregnancy and
early on in the pregnancy undoubtedly caused severe damage to her unborn child.”

In September 1998, Abbott mailed trial counsel “Library & Internet research regarding drug & alcohol fetal cell damage; reflecting how these chemicals when taken in the first trimester affect subsequent intelligence, conduct, emotions, urges etc [sic] as the child grows into adulthood.”

2. Presentence Investigation Report

The probation office prepared a presentence investigation report in July 1998. Poyson told the probation officer that he had a bad childhood because he was abused by a series of stepfathers, who subjected him to physical, mental and emotional abuse. Poyson also said he suffered from impulsive conduct disorder, which was diagnosed when he was 13. Poyson would not answer any questions on his substance abuse history or juvenile record.

3. Presentencing Hearing

In October 1998, the trial court held a one-day presentencing hearing. Poyson’s trial counsel called three witnesses to present mitigating evidence: his aunt, Laura Salas, his mother, Ruth Garcia, and the mitigation investigator, Blair Abbott. Counsel also introduced 56 exhibits. Poyson did not testify. The witnesses testified about Poyson’s drug and alcohol abuse and the mental and physical abuse inflicted on Poyson by his stepfather, Guillermo Aguilar, and maternal grandmother, Mary Milner. They also testified that Poyson’s stepfather, Sabas Garcia (Sabas), committed suicide in 1988, and that Sabas’ death had a devastating effect on Poyson. They further testified that Garcia used drugs and alcohol during the first three months of her pregnancy with Poyson.

4. Poyson’s Sentencing Memorandum

In early November 1998, Poyson filed a sentencing memorandum urging the court to find three statutory and 25 nonstatutory mitigating circumstances. As relevant here, Poyson argued his history of drug and alcohol abuse, troubled childhood and personality disorders constituted both statutory and nonstatutory mitigating circumstances.

a. Substance Abuse

Poyson argued his substance abuse was a statutory mitigating circumstance because it impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law at the time of the murders. See Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998). In the alternative, he argued that, even if his substance abuse was not causally related to the murders, it constituted a nonstatutory mitigating circumstance. In support of these arguments, Poyson emphasized his parents’ use of drugs and alcohol at the time of his conception, his mother’s use of drugs and alcohol during pregnancy, an incident in which Poyson was involuntarily intoxicated at the age of three or four, Poyson’s abuse of alcohol beginning at age 13 and Poyson’s five-month placement at WestCare, a residential treatment facility, for substance abuse treatment in 1992, when he was 15. Poyson also pointed to evidence that he used PCP two days before the murders, used alcohol the night before the murders, used marijuana the day of the murders and suffered a PCP flashback during Delahunt’s murder.

b. Troubled Childhood

Poyson argued his troubled childhood was a statutory mitigating circumstance because it affected his behavior at the time of the murders. In the alternative, he argued his troubled childhood constituted a nonstatutory mitigating circumstance. Poyson emphasized his mother’s use of drugs and alcohol during the first trimester of pregnancy. He argued alcohol and drug use during pregnancy can cause brain damage and birth defects and lead a child to engage in delinquent and criminal behavior. He also attached to the sentencing memorandum several scientific articles on fetal alcohol syndrome. The memorandum pointed out that Poyson never knew his biological father, lacked a stable home life, was physically and mentally abused by several adults (including Aguilar and Milner), was devastated by Sabas’ suicide and was sexually abused and sodomized by a neighbor on one occasion shortly after Sabas’ death. Poyson emphasized that his delinquent behavior and substance abuse began shortly after the death of Sabas and the sexual assault.

c. Mental Health Issues

The sentencing memorandum argued Poyson suffered from several personality disorders, constituting a nonstatutory mitigating circumstance. The memorandum pointed to a 1990 psychiatric evaluation by Dr. Bruce Guernsey. According to the sentencing memorandum, Guernsey diagnosed Poyson with severe “conduct disorder,” reported that Poyson exhibited symptoms of antisocial behavior, “manic depression” or “impulsive conduct disorder” and recommended Poyson be prescribed medication to control his behavior. Poyson also pointed to a 1990 Juvenile Predisposition Investigation by Nolan Barnum. Barnum too recommended Poyson be prescribed medication to control his behavior. A 1993 psychological evaluation performed by Jack Cordon and Ronald Jacques from the State Youth Services Center in St. Anthony, Idaho, diagnosed Poyson with “mild mood disturbance.” Dr. Celia A. Drake, who Poyson’s counsel re-
tained to perform a forensic evaluation of Poyson, diagnosed “Adjustment Disorder with depressive mood, mild intensity,” and “Anti-social Personality Disorder.” Dr. Drake also found Poyson’s overall intellectual functioning to be “in the low average range.”

5. Sentencing Hearing and Imposition of Sentence

The state trial court held a sentencing hearing and imposed sentence in late November 1998.

The court found the state had proved, beyond a reasonable doubt, three aggravating circumstances for the murders of Delahunt and Wear: the murders were committed in expectation of pecuniary gain; the murders were especially cruel; and multiple homicides committed during the same offense. See Ariz. Rev. Stat. Ann. § 13-703(F)(5), (6), (8) (1998). The court found two aggravating circumstances applicable to Kagen’s murder: pecuniary gain; and multiple homicides. See id. § 13-703(F)(5), (8).

The court found Poyson failed to prove any statutory mitigating factors. Poyson’s difficult childhood and mental health issues were not statutory mitigating factors under § 13-703(G)(1) because they did not significantly impair Poyson’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.2 The court explained:

There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.

Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

Turning to nonstatutory mitigating factors, the court first explained the three-step analysis it used to evaluate each nonstatutory mitigating circumstance proffered by Poyson: “[1] to analyze whether the defense has shown this fact by a preponderance of evidence, and then if they have, [2] to determine whether I would assign that any weight as a mitigating factor, and of course, for any that . . . pass both of those two tests, [3] I have to weigh them all along with the other factors in the final [sentencing] determination in this case.” The court then proceeded to consider Poyson’s mental health issues, troubled childhood and history of substance abuse as potential mitigating factors.

a. Mental Health Issues

The court rejected Poyson’s mental health issues as a nonstatutory mitigating factor at the second step in the analysis. The court found Poyson had proven he suffered from personality disorders, but gave them no weight because they were not causally related to the murders:

[T]he defendant had some mental health and psychological issues. I think . . . the defense has established that there were certain . . . personality disorders that the defendant, in fact, may have been suffering from.

The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.3

b. Troubled Childhood

The court similarly rejected Poyson’s difficult childhood as a nonstatutory mitigating factor. At step one, the court found the “defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse.” At step two, however, the court gave these circumstances no mitigating weight because they were not causally connected to the murders: “The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood.” The court also found “the defense has established, by a preponderance of the evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young age.” The court rejected this factor at step two, however, because it was “not convinced that there is any connection between that abuse, that loss, and his subsequent criminal behavior.”

c. Substance Abuse

Finally, the court rejected Poyson’s history of substance abuse at both steps one and two in the analysis: Poyson failed to establish a significant history of drug or alcohol abuse and, even if he could do so, the court would have given the evidence no weight because he failed to establish a causal connection between the substance abuse and the crimes. The court said:

2. See Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998) (“Mitigating circumstances [include] [...] the defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.”).

3. The court rejected evidence of Poyson’s low IQ for similar reasons. At the first step in the analysis, the court found that “there is certain evidence in this case that would support the proposition that the defendant’s mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population.” The court, however, gave this circumstance no mitigating weight in light of the planning and sophistication that went into the crimes – “certain preparatory steps that were taken – admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle.”
The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse, and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it’s very difficult for me to conclude that the defendant’s ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

Ultimately, the state trial court found only one nonstatutory mitigating factor – Poyson’s cooperation with law enforcement. The court concluded this one mitigating factor was insufficiently substantial to call for leniency and imposed a sentence of death.

6. Arizona Supreme Court Decision


With respect to statutory mitigating factors, the supreme court agreed with the trial court that Poyson’s drug use was not a statutory mitigating circumstance under § 13-703(G)(1). See Poyson, 7 P.3d at 88–89. In the court’s view, there was “scant evidence that he was actually intoxicated on the day of the murders.” Id. at 88. “Although Poyson purportedly used both marijuana and PCP ‘on an as available basis’ in days preceding these crimes, the only substance he apparently used on the date in question was marijuana,” and Poyson “reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear.” Id. The evidence that Poyson experienced a PCP flashback during the murder of Delahunt was not credible, and even if the flashback occurred, it lasted only a “few moments.” Id. at 88–89. Poyson was “not under the influence of PCP at any other time.” Id. at 89. Poyson’s claims of substantial impairment were also belied by his deliberate actions, including concocting a ruse to obtain bullets from a neighbor, testing the rifle to make sure it would work properly when needed, cutting the telephone line and concealing the crimes. See id. The court then turned to nonstatutory mitigation, agreeing with the trial court that Poyson’s substance abuse, mental health and abusive childhood were not nonstatutory mitigating circumstances.

As to substance abuse, the supreme court agreed with the trial court that Poyson’s evidence failed at step one because it did not show a history of drug or alcohol abuse:

The trial judge refused to accord any weight to the defendant’s substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant’s claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than “vague allegations.” As discussed above, we agree.

Id. at 90.

b. Mental Health Issues

With respect to mental health issues, the supreme court agreed with the trial court that Poyson’s personality disorders, although proven at step one, were entitled to no weight at step two because they were not causally connected to the murders:

The trial court found that Poyson suffers from “certain personality disorders” but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the “chaotic environment in which he was raised.” She found that there was, among other things, no “appropriate model for moral reasoning within the family setting” to which the defendant could look for guidance. However, we find no indication in the record that “the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required.” State v. Brewer, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); see also [State v. Medina, 193 Ariz. 504, 517, 975 P.2d 94, 107 (1999)] (holding that the defendant’s personality disorder “ha[d] little or no mitigating value” where the defendant’s desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Id. at 90–91 (last alteration in original).

c. Troubled Childhood

The supreme court also agreed with the trial court’s assessment of Poyson’s troubled childhood. The court found Poyson established an abusive childhood at step one, but gave this consideration no weight at step two because of the absence of a causal nexus:

Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor.
Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Id. at 91.

Ultimately, the Arizona Supreme Court found three aggravating factors (pecuniary gain, murder committed in an especially cruel manner and multiple homicides), one statutory mitigating factor (Poyson’s age) and three nonstatutory mitigating factors (cooperation with law enforcement, potential for rehabilitation and family support). See id. at 90–91. The court concluded the mitigating evidence was not sufficiently substantial to call for leniency and affirmed the death sentence. See id. at 91–92; Ariz. Rev. Stat. Ann. § 13-703.1(B) (2000).

D. State Postconviction Review

The Arizona Superior Court denied Poyson’s petition for postconviction relief in 2003. The court provided a reasoned decision on Poyson’s claim of penalty phase ineffective assistance of counsel (his third claim in this appeal) but not on Poyson’s claims that the Arizona courts failed to consider relevant mitigating evidence (his first and second claims on appeal). In 2004, the Arizona Supreme Court summarily denied Poyson’s petition for review.

E. Federal District Court Proceedings

Poyson filed a federal habeas petition in 2004. In 2010, the district court denied the petition. The court rejected on the merits Poyson’s claims that the Arizona courts failed to consider mitigating evidence. The court also concluded Poyson’s penalty phase ineffective assistance of counsel claim was procedurally defaulted because it was “fundamentally different than [the claim] presented in state court.” Poyson timely appealed.

F. Proceedings in This Court

We originally heard argument on Poyson’s appeal in February 2012. We issued an opinion in March 2013, Poyson v. Ryan, 711 F.3d 1087 (9th Cir. 2013), and an amended opinion in November 2013, Poyson v. Ryan, 743 F.3d 1185 (9th Cir. 2013). In April 2014, we stayed proceedings on Poyson’s petition for panel rehearing pending the resolution of en banc proceedings in McKinney v. Ryan, 730 F.3d 903 (9th Cir. 2013). We reissued our decision in December 2015. See McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (en banc). In May 2016, we extended the stay on Poyson’s petition for rehearing pending resolution of Supreme Court proceedings in McKinney. In October 2016, following the Supreme Court’s denial of the petition for writ of certiorari in McKinney, we further extended the stay and directed the parties to file supplemental briefs addressing the impact of McKinney on the issues presented in this appeal. Following the parties’ briefing, we heard oral argument on the petition for rehearing in September 2017. This amended opinion follows.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court’s denial of Poyson’s petition for writ of habeas corpus, and we review the district court’s findings of fact for clear error. See Brown v. Ornoski, 503 F.3d 1006, 1010 (9th Cir. 2007). Dismissals based on procedural default are reviewed de novo. See Robinson v. Schriro, 595 F.3d 1086, 1099 (9th Cir. 2010).

We address Poyson’s three claims in turn.

III. DISCUSSION

A. Causal Nexus Test

Poyson argues the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence of his mental health issues, traumatic childhood and substance abuse history, in violation of his Eighth and Fourteenth Amendment rights to an individualized sentencing. He contends the state courts improperly refused to consider this evidence in mitigation because he failed to establish a causal connection between the evidence and the murders. He argues the state courts’ actions violate his constitutional rights as recognized in Tennard v. Dretke, 542 U.S. 274, 283–87 (2004), Smith v. Texas, 543 U.S. 37, 45 (2004) (per curiam), and earlier decisions. These cases hold that requiring a defendant to prove a nexus between mitigating evidence and the crime is “a test we never countenanced and now have unequivocally rejected.” Smith, 543 U.S. at 45.

Because Poyson filed his federal habeas petition after April 24, 1996, he must not only prove a violation of these rights but also satisfy the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Fenenbock v. Dir. of Corr. for Cal., 681 F.3d 968, 973 (9th Cir. 2012).

Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “based on an unreasonable determination of the facts in light of the evidence presented in the State court pro-

41(d)(2), the authorities upon which the state relies, including Rule 41(d)(2)(D), do not apply here. See Alphin v. Henson, 552 F.2d 1033, 1034–35 (4th Cir. 1977), cited with approval by Bell v. Thompson, 545 U.S. 794, 806 (2005).

1. Exhaustion

As a threshold matter, we agree with Poysn that he has fully exhausted this claim. The state argue that in state court Poysn raised a causal nexus claim with respect to only mental health issues and his troubled childhood, not his history of substance abuse. We disagree. Having reviewed the record, we conclude Poysn exhausted the claim with respect to all three categories of mitigating evidence. See Powell v. Lambert, 357 F.3d 871, 874 (9th Cir. 2004) ("A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.").

2. The Arizona Supreme Court’s Decision Was Contrary to Clearly Established Federal Law

Lockett, Eddings and Penny held “A State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant’s background or character or to the circumstances of the offense that mitigate against imposing the death penalty.” Penny, 492 U.S. at 318. “[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer.” Id. at 319. “The sentencer must also be able to consider and give effect to that evidence in imposing sentence.” Id. “[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime.” Id. (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

Under these decisions, a state court may not treat mitigating evidence of a defendant’s background or character as “irrelevant or nonmitigating as a matter of law” merely because it lacks a causal connection to the crime. Towery v. Ryan, 673 F.3d 933, 946 (9th Cir. 2012), overruled on other grounds by McKinney, 813 F.3d at 824. The sentencer may, however, consider “causal nexus . . . as a factor in determining the weight or significance of mitigating evidence.” Lopez v. Ryan, 630 F.3d 1198, 1204 (9th Cir. 2011), overruled on other grounds by McKinney, 813 F.3d at 818. “The . . . use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence.” Schad v. Ryan, 671 F.3d 708, 723 (9th Cir. 2011), rev’d on other grounds, 133 S. Ct. 2548 (2013), and overruled on other grounds by McKinney, 813 F.3d at 819. As the Court explained in Eddings:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

McKinney recognized that, in AEDPA cases, “we apply a ‘presumption that state courts know and follow the law’ and accordingly give state-court decisions ‘the benefit of the doubt.’” Id. at 803 (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2002)). But that “presumption is rebutted . . . where we know, based on its own words, that the Arizona Supreme Court did not ‘know and follow’ federal law.” Id. at 804.

McKinney also recognized that “[t]he Arizona Supreme Court articulated the causal nexus test in various ways but always to the same effect.” Id. at 816. “The Arizona Court frequently stated categorically that, absent a causal nexus, would-be nonstatutory mitigation was simply ‘not a mitigating circumstance.’” Id. (quoting State v. Wallace, 773 P.2d 983, 986 (Ariz. 1989)). “Sometimes, the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no ‘weight.’” Id. Other times, “the Arizona Supreme Court stated that evidence of a difficult family background or mental illness was ‘not necessarily’ or not ‘usually’ mitigating, and then (often in the same paragraph) held as a matter of law that the evidence in the specific case before the Court was not mitigating because it had no causal connection to the crime.” Id. at 817.

In the case before us, we conclude the Arizona Supreme Court applied an unconstitutional causal nexus test to Poysn’s mitigating evidence of a difficult childhood and mental health issues. First, the court gave no weight at all to the evidence, and it did so because the evidence bore no causal
connection to the crimes. See Poyson, 7 P.3d at 90–91. With respect to Poyson’s childhood, the court ruled:

Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Poyson, 7 P.3d at 91 (emphasis added). With respect to Poyson’s mental health issues, the court ruled:

The trial court found that Poyson suffers from “certain personality disorders” but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the “chaotic environment in which he was raised.” She found that there was, among other things, no “appropriate model for moral reasoning within the family setting” to which the defendant could look for guidance. However, we find no indication in the record that “the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required.” State v. Brewer, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); see also Medina, 193 Ariz. at 517, 975 P.2d at 107 (holding that the defendant’s personality disorder “had[l] little or no mitigating value” where the defendant’s desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Id. at 90–91 (emphasis added) (alterations in original). This is some evidence that the court applied an unconstitutional causal nexus test in Poyson’s case. See McKinney, 813 F.3d at 821 (holding the Arizona Supreme Court applied an unconstitutional causal nexus test based in part on “the factual conclusion by the sentencing judge, which the Arizona Supreme Court accepted, that McKinney’s PTSD did not ‘in any way affect[ ] his conduct in this case’” (alteration in original)).

Second, the Arizona Supreme Court affirmed Poyson’s death sentence in 2000, in the midst of the 15-year period during which that court “consistently articulated and applied its causal nexus test.” McKinney, 813 F.3d at 803 (emphasis added). Indeed, the Arizona court issued its decision in Poyson’s case just a few months before it decided State v. Hoskins, 14 P.3d 997 (Ariz. 2000), supplemented, 65 P.3d 953 (Ariz. 2003), a case McKinney singled out as exemplifying the Arizona Supreme Court’s unconstitutional practice. See McKinney, 813 F.3d at 814–15. This fact further supports the conclusion that the Arizona Supreme Court applied an unconstitutional causal nexus test in Poyson’s case.

Third, in applying a causal nexus test to Poyson’s mental health evidence, the Arizona Supreme Court cited a passage from State v. Brewer, 826 P.2d 783, 802 (1992), that McKinney specifically identified as applying an unconstitutional causal nexus test. Compare Poyson, 7 P.3d at 90–91 (quoting Brewer and stating “we find no indication in the record that ‘the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required’” (alteration in original)), with McKinney, 813 F.3d at 815 (citing this precise language in Brewer as exemplifying the Arizona Supreme Court’s unconstitutional causal nexus test). This fact too supports the conclusion that the Arizona Supreme Court applied an unconstitutional causal nexus test in Poyson’s case. See McKinney, 813 F.3d at 821 (concluding the Arizona Supreme Court applied an unconstitutional test in part based on the court’s “pin citation to the precise page in [State v. Ross, 886 P.2d 1354, 1363 (Ariz. 1994),] where it had previously articulated that test”).

Fourth, although the Arizona Supreme Court said the evidence in Poyson’s case was “without mitigating value” and would be accorded “no mitigating weight,” suggesting the possibility that the court applied a causal nexus test as a permissible weighing mechanism, McKinney makes clear that the court instead applied an unconstitutional causal nexus test, treating the evidence as irrelevant or nonmitigating as a matter of law. See id. at 816 (holding the state court applied an unconstitutional test where “the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no ‘weight’”); id. (holding the state court applied an unconstitutional causal nexus test where it said “a difficult family background is not always entitled to great weight as a mitigating circumstance” (quoting State v. Towery, 920 P.2d 290, 311 (Ariz. 1996))); id. at 820 (holding the state court applied an unconstitutional causal nexus test where it said “[a] difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant’s ability to perceive, to comprehend, or to control his actions” (quoting State v. McKinney, 917 P.2d 1214, 1226 (Ariz. 1996))).

For these reasons, we conclude the Arizona Supreme Court applied an unconstitutional causal nexus test to Poyson’s evidence of a troubled childhood and mental health issues. “This holding was contrary to Eddings.” Id. at 821. Accordingly, as in McKinney, we “hold that the decision of the Arizona Supreme Court applied a rule that was ‘contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.’” Id. (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)).

With respect to Poyson’s evidence of a history of substance abuse, however, we conclude there was no Eddings error. The state supreme court rejected this evidence at step one in the analysis, adopting the trial court’s finding as a matter of fact that Poyson had failed to establish a history of substance abuse by a preponderance of the evidence. See Poyson, 7
P.3d at 90. The court’s treatment of Poyson’s substance abuse evidence thus was not contrary to Eddings.

3. On De Novo Review, Poyson Has Shown the Arizona Supreme Court Applied an Unconstitutional Causal Nexus Test

Because AEDPA is satisfied, we review Poyson’s constitutional claim de novo. See Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc). We begin by asking whether Poyson has shown a constitutional violation. If Poyson has made this showing, we consider whether he was prejudiced under Brecht v. Abrahamson, 507 U.S. 619 (1993).

Poyson has satisfied the first part of this inquiry. The Supreme Court’s decisions in Tennard v. Dretke, 542 U.S. 274, 287 (2004), Smith v. Texas, 543 U.S. 37, 45 (2004) (per curiam), Lockett, Eddings and Penry all prohibit a state from requiring a defendant to prove a nexus between mitigating evidence and the crime. As discussed above, the Arizona Supreme Court violated this rule in Poyson’s case. Poyson has therefore established that the Arizona Supreme Court applied an unconstitutional causal nexus test to evidence of his troubled childhood and mental health issues.

4. Poyson Was Prejudiced

“The harmless-error standard on habeas review provides that ‘relief must be granted’ if the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” McKinney, 813 F.3d at 822 (quoting Brecht, 507 U.S. at 623). “There must be more than a ‘reasonable possibility’ that the error was harmful.” Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015) (quoting Brecht, 507 U.S. at 637). “[T]he court must find that the defendant was actually prejudiced by the error.” Id. (quoting Calderon v. Coleman, 525 U.S. 141, 146 (1998) (per curiam)). Under this standard:

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

McKinney, 813 F.3d at 822 (alteration in original) (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)). Accordingly, “[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury’s verdict, that error is not harmless. And, the petitioner must win.” Id. (alteration in original) (quoting O’Neal v. McAninch, 513 U.S. 432, 436 (1995)).

Our analysis once again is guided by McKinney, where we held the causal nexus error was prejudicial under circumstances similar to those presented here. See id. at 822–24. Here, as in McKinney, there were three aggravating factors – pecuniary gain; especially cruel, heinous or depraved murders; and multiple homicides. See Poyson, 7 P.3d at 87–88; McKinney, 813 F.3d at 823. Here, as in McKinney, the improperly disregarded evidence concerned the defendant’s traumatic childhood and mental health issues. See Poyson, 7 P.3d at 90–91; McKinney, 813 P.3d at 819.

As in McKinney, moreover, the evidence of a traumatic childhood in this case was particularly compelling. Both of Poyson’s parents abused drugs and alcohol at the time of his conception. His mother used LSD on a daily basis. She continued to abuse drugs and alcohol – including daily use of LSD – while she was pregnant with Poyson. Poyson never knew his biological father, an alcoholic. During his childhood, his mother was in relationships with many different men, and Poyson lacked a stable home life. One of these men, Guillermo Aguilar, physically and mentally abused Poyson, subjecting Poyson to repeated beatings. Aguilar brutally whipped Poyson with an electrical cord, and he eventually was sent to jail for abusing Poyson and his siblings. Others of these men abused drugs and alcohol. One even drank and did drugs with Poyson.

Poyson also suffered a number of physical and developmental problems as a child. He was developmentally delayed in areas such as crawling, walking and speaking. He had a speech impediment, fell behind in school and received special education services. He sustained several head injuries. Once, when he and his brother were playing, he had a stick impaled in his head. He suffered severe headaches, and passed out unconscious on several occasions. He was involuntarily intoxicated as a young child. He was subjected to physical abuse not only by Aguilar but also by his mother, who once hit him so hard it dislodged two teeth, and in particular by his maternal grandmother, Mary Milner, who beat him repeatedly and savagely.

When Poyson was 10 or 11 years old, he suffered two traumatic events that, according to witnesses at Poyson’s sentencing, forever changed his life. Of the many adult men in Poyson’s life, Poyson was close with just one of them, Sabas Garcia, his stepfather and the one true father figure Poyson ever had. When Poyson was 10 or 11, however, Sabas committed suicide by shooting himself in the head. Poyson was devastated by Sabas’ death, which changed Poyson completely. He became distant, spending time away from home. He didn’t care anymore. He began using and abusing drugs and alcohol, and he began having behavioral problems. His contacts with law enforcement also began at this time, and his performance in school suffered dramatically. Before Sabas’ death, Poyson had overcome his earlier developmental challenges to become an A or B student, but after Sabas’ death he began receiving Cs, Ds and Fs, and he eventually dropped out of school. His family life became even less
stable. He bounced around from relative to relative, living from time to time with his mother, an aunt, his grandmother and another stepfather. Shortly after Sabas’ death, moreover, Poyson suffered a second severe trauma in his life when he was lured to the home of a childhood friend and violently raped. The attacker threw Poyson face down on a bed and brutally sodomized him.

Under the circumstances of this case, which closely track those in McKinney, we conclude the Arizona Supreme Court’s application of an unconstitutional causal nexus test “had a ‘substantial and injurious effect or influence’ on its decision to sentence [Poyson] to death.” McKinney, 813 F.3d at 824 (quoting Brecht, 507 U.S. at 623).

B. Failure to Consider Substance Abuse

At sentencing, Poyson presented evidence of a history of drug and alcohol abuse, but the state trial court and the state supreme court declined to treat the evidence as a nonstatutory mitigating factor. The trial court found Poyson had presented only “very vague allegations that he has used alcohol . . . or . . . drugs in the past,” and found “very little to support the allegation that the defendant has a significant alcohol and/or drug abuse” history. The supreme court agreed that Poyson’s claims to have “used drugs or alcohol in the past” were “little more than ‘vague allegations.’” Poyson, 7 F.3d at 90.

Poyson contends the state court’s conclusions that he provided only “vague allegations” of substance abuse were unreasonable determinations of the facts under 28 U.S.C. § 2254(d)(2) and violated his constitutional rights under Lockett, 438 U.S. at 605, Eddings, 455 U.S. at 112, and Parker v. Duggar, 498 U.S. 308, 321 (1991). We disagree.

Poyson’s claim — that “[b]ecause his death sentence is based upon [an] unreasonable determination of facts, [he] is entitled to habeas relief” — misunderstands the law. Even assuming that the state court’s determination that Poyson provided only “vague allegations” of substance abuse was an unreasonable determination of the facts under § 2254(d)(2), an issue we need not reach, Poyson’s claim fails because he cannot demonstrate his constitutional rights were violated. See Wilson v. Corcoran, 562 U.S. 5–6 (2010) (per curiam) (holding that although § 2254(d)(2) relieves a federal court of AEDPA deference when the state court makes an unreasonable determination of facts, it “does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner ‘only on the ground that his custody violates federal law’”); see also Frantz v. Hazey, 533 F.3d 724, 737 (9th Cir. 2008) (en banc) (holding AEDPA does not “require any particular methodology for ordering the § 2254(d) and § 2254(a) determination[s]”). An unreasonable determination of the facts would not, standing alone, amount to a constitutional violation under Lockett, Eddings or Parker.

Lockett invalidated an Ohio death penalty statute that precluded the sentencer from considering aspects of the defendant’s character or record as a mitigating factor. See 438 U.S. at 604. Eddings held that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See 455 U.S. at 113–15. Here, the state courts considered Poyson’s evidence of substance abuse, but found it wanting as a matter of fact and that Poyson failed to prove a history of substance abuse. Thus, there was no constitutional violation under Lockett and Eddings.

Nor has Poyson shown a constitutional violation under Parker. There, the state supreme court reweighed aggravating and mitigating circumstances before affirming a death sentence. See Parker, 498 U.S. at 321–22. The court’s reweighing, however, was premised on its erroneous assumption that the state trial court had found that there were no mitigating circumstances. See id. The Supreme Court held the state supreme court’s action deprived the defendant of “meaningful appellate review,” and thus that the sentencing violated the defendant’s right against “the arbitrary or irrational imposition of the death penalty.” Id. at 321. In Poyson’s view, Parker stands for the broad proposition that, “[w]hen a state court’s imposition of the death penalty is based not on the characteristics of the accused and the offense but instead on a misperception of the record, the defendant is not being afforded the consideration that the Constitution requires.” In Parker, however, the state supreme court had misconstrued the state trial court’s findings, something that did not occur here. Parker does not hold that a state court’s erroneous factual finding in assessing mitigation evidence necessarily amounts to a constitutional violation. Rather, it suggests the opposite:

This is not simply an error in assessing the mitigating evidence. Had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented. Similarly, if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different.

Id. at 322.

In sum, we hold Poyson is not entitled to habeas relief, because he has not shown a constitutional violation under Lockett, Eddings or Parker. Because Poyson has raised arguments under only Lockett, Eddings and Parker, we need not decide whether, or under what circumstances, a state court’s erroneous factfinding in assessing mitigating evidence can itself rise to the level of a constitutional violation.

C. Penalty Phase Ineffective Assistance of Counsel

In his federal habeas petition, Poyson argued he received ineffective assistance of counsel during the penalty phase of his trial because his trial counsel failed to investigate the possibility that he suffered from fetal alcohol spectrum disorder (FASD). The district court ruled Poyson failed to present this claim to the state courts, and hence that the claim was proce-
durably defaulted. Poyson challenges that ruling on appeal. We review de novo. See Robinson, 595 F.3d at 1099.

A state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See Picard v. Connor, 404 U.S. 270, 275 (1971); Weaver v. Thompson, 197 F.3d 359, 363–64 (9th Cir. 1999); 28 U.S.C. § 2254(b)(1)(A). This rule “reflects a policy of federal-state comity, an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” Picard, 404 U.S. at 275 (citations and internal quotation marks omitted). “A petitioner can satisfy the exhaustion requirement by providing the highest state court with a fair opportunity to consider each issue before presenting it to the federal court.” Weaver, 197 F.3d at 364.

“[A] petitioner may provide further facts to support a claim in federal district court, so long as those facts do not ‘fundamentally alter the legal claim already considered by the state courts.’” Lopez v. Schriro, 491 F.3d 1029, 1040 (9th Cir. 2007) (quoting Vasquez v. Hillery, 474 U.S. 254, 260 (1986)).

In the state petition’s second claim, Poyson alleged trial counsel failed to properly present mitigation and psychological evidence because counsel “did nothing to show the trial court how [his] abusive childhood caused, or directly related to, [his] conduct during the murders.” He alleged trial counsel were deficient because they were “required to make some attempt to correlate Mr. Poyson’s physically and psychologically abusive background with his behavior,” because “a connection between the two would be much more powerful in mitigation than the abuse standing alone.”

2. Federal Petition

Poyson’s federal petition presented a substantially different claim – counsel’s failure to investigate Poyson’s possible fetal alcohol spectrum disorder. Poyson alleged trial counsel were ineffective because they “failed to make any effort to investigate and develop evidence that Poyson suffered from FASD.” He alleged defense counsel “failed to investigate the obvious possibility that [he] suffered from FASD,” made “no effort” to “pursue this fertile area of mitigation” and “ignored obvious evidence that [he] was exposed to drugs and alcohol in utero.” Poyson further alleged he was prejudiced by counsel’s deficient performance:

Their failure to adequately investigate and substantiate [evidence that Petitioner was exposed to drugs and alcohol in utero] profoundly prejudiced Petitioner. Adequate explanation during the pre-sentence hearing of the effect of FASD on Petitioner’s brain would likely have convinced the trial court that Petitioner had a lesser degree of culpability.

3. Analysis

The district court concluded the claim raised in the federal petition had not been fairly presented to the Arizona courts:

This Court concludes that the claim asserted in the instant amended petition is fundamentally different than that presented in state court. Petitioner’s argument in support of [this claim] is based entirely on trial counsel’s alleged failure to investigate and develop mitigation evidence based on Petitioner’s in utero exposure to drugs and alcohol. This version of Petitioner’s sentencing [ineffective assistance of counsel] claim has never been presented to the Arizona courts. While it is true that new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not “fundamentally alter the legal claim already considered by the state courts.”

6. For purposes of review under 28 U.S.C. § 2254(d)(1), factual allegations must be based on the “record that was before the state court that adjudicated the claim on the merits.” Cullen v. Pinholster, 563 U.S. 170, 180 (2011).
IKUTA, Circuit Judge, concurring:

Our en banc decision in McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015) (en banc) (McKinney II), erred in concluding that any Eddings error had a “substantial and injurious effect,” id. at 822 (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)), on the Arizona Supreme Court’s decision to affirm the defendant’s death sentence. State v. McKinney, 185 Ariz. 567, 917 P.2d 1214 (1996) (McKinney I). As a result, our decision today is wrongly decided. Nevertheless, as a three-judge panel, we are bound by McKinney II until either the Supreme Court or a future en banc panel overrules it. Therefore, I concur in the majority opinion and write separately only to point out how McKinney II’s error in applying Brecht infects our decision here.

I

Under AEDPA, we must determine whether the decision of the Arizona Supreme Court is contrary to or an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). It is clearly established that a sentencer may not “refuse to consider, as a matter of law, any relevant mitigating evidence.” Eddings v. Okla., 455 U.S. 104, 114 (1982) (italics in original); see also Lockett v. Ohio, 438 U.S. 586, 604 (1978). While the sentencer “may determine the weight to be given relevant mitigating evidence,” it “may not give it no weight by excluding such evidence from [its] consideration.” Eddings, 455 U.S. at 114–15. Applying Lockett and Eddings, the Supreme Court held that a state cannot adopt a “causal nexus” rule, that is, a rule precluding a sentencer from considering mitigating evidence unless there is a causal nexus between that evidence and the crime. Tennard v. Dretke, 542 U.S. 274, 287 (2004). The sentencer may, however, consider “causal nexus . . . as a factor in determining the weight or significance of mitigating evidence.” Lopez v. Ryan, 630 F.3d 1198, 1204 (9th Cir. 2011) overruled on other grounds by McKinney II, 813 F.3d at 819.

In this case, the Arizona Supreme Court stated only that it accorded no mitigating weight to Poyson’s evidence of mental health and an abusive childhood. State v. Poyson, 198 Ariz. 70, 81–82 (2000). Before McKinney II, we held that this decision was not an unreasonable application of Lockett, Eddings, and Tennard because we could not presume that the Arizona Supreme Court had refused to consider the mental health and abusive childhood evidence as a matter of law. See Poyson v. Ryan, 711 F.3d 1087, 1090 (9th Cir. 2013). Rather, as instructed by the Supreme Court, we adopted the “presumption that state courts know and follow the law.” Woodford v. Visciotti, 537 U.S. 19, 24 (2002); see Poyson, 711 F.3d at 1099.

McKinney II flipped this presumption. It held that we must presume the Arizona Supreme Court applied the unconstitutional causal nexus test between 1989 and 2005, even when, as here, the court expressly discussed the weight of the evidence. 813 F.3d at 803, 809, 816. This reasoning is contrary to Visciotti, as the McKinney II dissent made clear. See McK-
inney II, 813 F.3d at 827–850 (Bea, J., dissenting). No further elaboration of this error is needed.

II

I write separately to highlight McKinney II’s second error: its conclusion that a causal nexus error has a “substantial and injurious effect” on a state court’s decision. 813 F.3d at 822–23.

A

Under Brecht, even if a state court unreasonably errs in applying Supreme Court precedent, a federal court may not provide habeas relief unless the error had a “substantial and injurious effect.” 507 U.S. at 623. “There must be more than a ‘reasonable possibility’ that the error was harmful.” Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015) (quoting Brecht, 507 U.S. at 637). Rather, a “court must find that the defendant was actually prejudiced by the error.” Id. (quoting Calderon v. Coleman, 525 U.S. 141, 146 (1998) (per curiam)). Even an Eddings error may be harmless. Greenway v. Ryan, 866 F.3d 1094, 1100 (9th Cir. 2017) (per curiam).

In determining that the Arizona Supreme Court’s presumed causal nexus error in McKinney I was prejudicial, McKinney II failed to provide a reasoned or reasonable application of Brecht. Instead, without any meaningful analysis, McKinney II conclusorily held that the evidence presumed excluded under Arizona’s presumed causal nexus test “would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor.” McKinney II, 813 F.3d at 823. Therefore, McKinney II held, the Arizona Supreme Court’s “application of the test had a ‘substantial and injurious effect or influence’ on its decision to sentence [the defendant] to death.” Id. at 823–24 (quoting Brecht, 507 U.S. at 623). In reaching this conclusion, McKinney II came close to enunciating a per se rule that when a state court’s application of a causal nexus test excludes mitigating evidence, such an error will not be harmless.

Such a quasi per se rule may be plausible when the sentencer in a particular case is a jury. If a state rule excludes certain mitigating evidence from the jury’s consideration as a matter of law, either the evidence will not be presented to the jury or the jury will be instructed to disregard it if they find no causal nexus. Because we presume a jury follows its instructions, Penry v. Johnson, 532 U.S. 782, 799 (2001), and a jury generally does not give reasons for its decision, it is reasonable to presume that the jury could not meaningfully consider even strong mitigating evidence in reaching its verdict if it were excluded under a causal nexus rule, see Abdul-Kabir v. Quarterman, 550 U.S. 233, 255 (2007). A court could determine that strong mitigating evidence which was excluded from consideration “would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor.” McKinney II, 813 F.3d at 823. Accordingly, in the absence of other factors (such as the presence of aggravating factors that “overwhelmingly outweighed” the mitigating evidence, see Greenway, 866 F.3d at 1100), an Eddings error could have a substantial and injurious effect.

But the quasi per se rule adopted by McKinney II is entirely implausible when the sentencer is a state supreme court. Unlike a jury, a state supreme court has the authority to review and consider all the evidence in the record; this is particularly important, when as in Arizona, the state supreme court “reviews capital sentences de novo, making its own determination of what constitute legally relevant aggravating and mitigating factors, and then weighing those factors independently.” McKinney II, 813 F.3d at 819 (citing Ariz. Rev. Stat. Ann. § 13-755). A state supreme court’s decision that certain categories of evidence are not mitigating is effectively the court’s conclusion that such evidence does not merit much weight. Just like a jury, a state supreme court can reasonably conclude that if a defendant’s mental impairments did not play a part in causing the defendant to commit a brutal offense, the impairments do not mitigate the defendant’s behavior.

A state supreme court’s conclusion about the mitigating weight of various types of evidence does not have the effect of excluding evidence as a matter of law. Nor does such a conclusion preclude a state supreme court from weighing the evidence differently in a different case. While a jury must follow instructions, the state court is free to disregard its instructions to itself because a state supreme court may always revisit its precedent. As the Arizona Supreme Court has explained, “while we should and do pay appropriate homage to precedent, we also realize that we are not prisoners of the past.” Lowing v. Allstate Ins. Co., 176 Ariz. 101, 107 (1993) (quoting Wiley v. The Indus. Comm’n of Ariz., 174 Ariz. 94, 103 (1993)). Indeed, even McKinney II acknowledged that by the mid-2000s, the Arizona Supreme Court had stopped applying the precedent that McKinney II presumed compelled the use of a causal nexus test. 813 F.3d at 817.

Finally, unlike a jury, a state supreme court generally explains its reasons, and so may articulate its conclusion that defendant’s impairments merited little or no mitigating weight. See Greenway, 866 F.3d at 1100. Where a state supreme court has reached a reasoned conclusion that aggravating circumstances outweigh mitigating evidence in a particular case, there does not seem to be a reasonable possibility that the state supreme court would reach a different result merely because a federal court announces that the state court has secretly maintained an unconstitutional causal nexus rule all along. See id.

B

Because McKinney II failed to distinguish between a state supreme court and a jury, its Brecht analysis fails.

In McKinney I, the Arizona Supreme Court explained that it “conducts a thorough and independent review of the record and of the aggravating and mitigating evidence to determine
whether the sentence is justified, . . . consider[ing] the quality and strength, not simply the number, of aggravating or mitigating factors.” 185 Ariz at 578. In its opinion, the Arizona Supreme Court reviewed the defendant’s evidence of childhood abuse and post-traumatic stress disorder (PTSD). Id. at 587. It determined that the judge had fully considered evidence from several witnesses that defendant had “endured a terrible childhood,” as well as the PTSD diagnosis. Id. But the court held that “a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant’s ability to perceive, comprehend, or control his actions.” Id. After considering the defendant’s abusive childhood and its impact on his behavior and ability to conform his conduct, the Arizona Supreme Court found there was no error in determining that the evidence of childhood abuse was “insufficiently mitigating to call for leniency.” Id.

In light of the Arizona Supreme Court’s reasoned consideration and weighing of the mitigating evidence, there was no basis for concluding that this same evidence would have a different impact – let alone a substantial impact – on the same court on resentencing simply because a federal court provides a reminder that Eddings precludes a sentencer from applying the causal nexus rule. McKinney II, 813 F.3d at 823–24. Brecht does not permit “mere speculation” about the potential prejudice to a defendant. Davis, 135 S. Ct. at 2198 (quoting Calderon 525 U.S. at 146). Because there is not a reasonable possibility that the presumed legal error influenced the Arizona Supreme Court, or have more than a slight effect, the sentence should stand. See Kotteakos v. United States, 328 U.S. 750, 764 (1946); Davis, 135 S. Ct. at 2198. McKinney II erred in ruling otherwise.

III

Because we are bound by McKinney II’s erroneous application of Brecht, its error infects this appeal as well. In our case, the Arizona Supreme Court considered Poyson’s mitigating evidence regarding his mental health and abusive childhood, but stated merely that it accorded these factors “no mitigating weight.” Poyson, 198 Ariz. at 81–82. On the other hand, the Arizona Supreme Court found that the evidence supported aggravating circumstances of (1) pecuniary gain, (2) especially cruel, heinous, or depraved murder, and (3) multiple homicide. Id at 78–79. Based on its findings, the court upheld Poyson’s death sentence. Id at 82. The court did so while performing its duty to “independently review and reweigh the aggravating and mitigating circumstances in every capital case . . . .” Id. at 81.

Here, the Arizona Supreme Court reviewed and considered Poyson’s mitigating evidence, and balanced it against the case’s aggravating circumstances. Accordingly, there is no basis for concluding that our correction of any presumed Eddings error “would have had a substantial impact on a capital sentencer who was permitted to evaluate and give ap-
EROTIC SERVICE PROVIDER LEGAL EDUCATION AND RESEARCH PROJECT; K.L.E.S.; C.V.; J.B., Plaintiffs-Appellants,  

v.  

GEORGE GASCON, in his official capacity as District Attorney for the City and County of San Francisco; EDWARD S. BERBERIAN, JR., in his official capacity as District Attorney of the County of Marin; NANCY E. O’MALLEY, in her official capacity as District Attorney for the County of Alameda; JILL RAVITCH, in her official capacity as District Attorney of the County of Sonoma; XAVIER BECERRA,* Attorney General, in her official capacity as Attorney General of the State of California, Defendants-Appellees.

No. 16-15927
United States Court of Appeals for the Ninth Circuit  
D.C. No. 4:15-cv-01007-JSW  
Appeal from the United States District Court for the Northern District of California  
Jeffrey S. White, District Judge, Presiding  
Argued and Submitted October 19, 2017  
San Francisco, California  
Filed January 17, 2018  
Before: Consuelo M. Callahan and Carlos T. Bea, Circuit Judges, and Jane A. Restani,**Judge.  
Opinion by Judge Restani

*Xavier Becerra is substituted for his predecessor, Kamala Harris. Fed. R. App. P. 43(c)(2).

**The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

COUNSEL

Henry Louis Sirkin (argued) and Brian P. O’Connor, Santen & Hughes LPA, Cincinnati, Ohio; D. Gill Sperlein, Law Offices of D. Gill Sperlein, San Francisco, California; for Plaintiffs-Appellants.

Sharon O’Grady (argued), Deputy Attorney General; Tamar Pachter, Supervising Deputy Attorney General; Douglas J. Woods, Senior Assistant Attorney General; Office of the Attorney General, San Francisco; California, for Defendants-Appellees.

Jerald L. Mosley, Law Offices of Jerald L. Mosley, Pasadena, California, for Amici Curiae Children of the Night.

Allan B. Gelbard, Encino, California; Lawrence Walters, Walters Law Group, Longwood, Florida; Jennifer M. Kinsley, NKU Chase College of Law, Highland Heights, Kentucky; for Amici Curiae First Amendment Lawyers Association and Woodhull Freedom Foundation.

Melissa Goodman and Tasha Hill, ACLU Foundation of Southern California, Los Angeles, California; Elizabeth Gill, ACLU Foundation of Northern California; for Amici Curiae American Civil Liberties Union Foundation of Southern California, American Civil Liberties Union Foundation of Northern California, API Equality-LA, Bienestar, Black Women for Wellness, California Rural Legal Assistance Inc., California Women’s Law Center, Equality California, Familia: Trans Queer Liberation Movement, Free Speech Coalition, Genders & Sexualities Alliance Network, Gender Justice Los Angeles, Justice Now, Los Angeles LGBT Center, National Center For Transgender Equality, Transgender, Gender-Variant, Intersex Justice Project, TransLatin@ Coalition, Transgender Law Center, Transgender Service Provider Network.


On May 23, 2016, the district court entered judgment granting the plaintiff, however ESP declined to file an amended complaint. The district court granted ESP leave to amend their complaint for failure to state a claim upon which relief can be granted. The State promptly moved to dismiss the complaint, arguing that it failed to state a claim for failure to marry; (2) freedom of association under the First Amendment; (3) the Fourteenth Amendment substantive due process right to earn a living; and (4) the First Amendment freedom of speech. We conclude the district court did not err in dismissing ESP’s claims. Accordingly, we affirm.

BACKGROUND

ESP includes three former “erotic service providers” who wish to perform sex for hire, and a potential client who wishes to engage an “erotic service provider” for such activity. On March 4, 2015, ESP filed a complaint seeking declaratory and injunctive relief against the district attorneys of the City and County of San Francisco, Marin County, Alameda County, Sonoma County, and the Attorney General of California (collectively, the “State”) to enjoin and invalidate Section 647(b). The version of Section 647(b) in effect when this lawsuit was filed provides that:

[E]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

Cal. Penal Code §647(b) (2015). ESP challenged the constitutionality of this statute, both on its face and as applied, for criminalizing the commercial exchange of consensual, adult sexual activity. The State promptly moved to dismiss for failure to state a claim upon which relief can be granted. The district court granted ESP leave to amend their complaint, however ESP declined to file an amended complaint. On May 23, 2016, the district court entered judgment granting the State’s motion to dismiss with prejudice. ESP timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. §1291. We review de novo a decision granting a motion to dismiss for failure to state a claim. Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1159 (9th Cir. 2012).

DISCUSSION

In their briefing, Plaintiffs state that they have brought both an “as applied” and a “facial” challenge to Section 647(b). An “as applied” challenge is a claim that the operation of a statute is unconstitutional in a particular case, but not necessarily in all cases, while a “facial” challenge asserts that the statute may rarely or never be constitutionally applied. 16 C.J.S., Constitutional Law § 243 (2017). The State contends ESP has no cognizable as-applied claim because there are no allegations that the individual plaintiffs are being prosecuted or threatened with prosecution. See Hoye v. City of Oakland, 653 F.3d 835, 857–58 (9th Cir. 2011) (denying an as-applied challenge because “the fact situation that [the plaintiff] [is] involved in here is the core fact situation intended to be covered by this [] statute, and it is the same type of fact situation that was envisioned by this court when the facial challenge was denied” (internal quotation marks omitted)). At the outset of oral argument, Plaintiffs stated that they “believe this is a facial attack,” and that they are not attacking “how it is applied.” Accordingly, ESP’s challenge to Section 647(b) is reviewed as a facial challenge.

I. FOURTEENTH AMENDMENT DUE PROCESS

The first issue presented on appeal is whether Section 647(b) violates the Due Process Clause of the Fourteenth Amendment. If there is no fundamental liberty interest in private, consensual sex between adults that extends to prostitution, then Section 647(b) must satisfy only the deferential rational basis standard of review. If, however, there is such a fundamental liberty interest, Section 647(b) must survive a higher level of scrutiny.

The Due Process Clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The fundamental rights protected by the Fourteenth Amendment’s Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining identity and beliefs. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2602–05 (2015) (right of same-sex couples to marry); Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972) (right to contraception); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (right to privacy). Further, in Lawrence v. Texas, the Supreme Court determined that the Due Process
Clause protects the fundamental right to liberty in certain, though never fully defined, intimate conduct:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.


A. Fundamental Liberty Interest

ESP’s primary argument is that Lawrence, the Supreme Court case which ruled unconstitutional laws that prohibit homosexual sodomy, prohibits a state from criminalizing prostitution engaged in by adults. In support, ESP makes two related contentions: (1) Lawrence guarantees to consenting adults a fundamental liberty interest to engage in private sexual activity; and (2) the State cannot wholly outlaw a commercial exchange related to the exercise of such a liberty interest.

In response, the State argues that nothing in Lawrence supports or suggests a fundamental due process right to engage in prostitution. Moreover, the State argues the Lawrence Court’s concern was not with sexual acts per se, but with sexual acts as part of a personal relationship, pointing to the statement in Lawrence that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” Id. at 567.

Lawrence has not previously been interpreted as creating a liberty interest that invalidates laws criminalizing prostitution. See e.g., Doe v. Jindal, 851 F. Supp. 2d 995, 1000 n.11 (E.D. La. 2012) (“Lawrence does not speak to the solicitation of sex for money, and has little precedential force here.”); Lowe v. Swanson, 639 F. Supp. 2d 857, 871 (N.D. Ohio 2009) (“[t]he burden is on the one at issue to prove that their conduct is constitutionally protected.”); United States v. Thompson, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006) (explaining “it would be an untenable stretch to find that Lawrence necessarily renders (or even implies) laws prohibiting prostitution unconstitutional”); United States v. Palfrey, 499 F. Supp. 2d 34, 41 (D.D.C. 2007) (explaining that invalidating laws criminalizing prostitution because of Lawrence “stretches the holding in Lawrence beyond any recognition”); State v. Romano, 155 F.3d 1102, 1110 (Haw. 2007) (explaining that prostitution “is expressly rejected as a protected liberty interest under Lawrence”); and State v. Thomas, 891 So. 2d 1233, 1236 (La. 2005) (“[T]he majority opinion in Lawrence specifically states the court’s decision does not disturb state statutes prohibiting public sexual conduct or prostitution.”).

As we have observed before, “the bounds of Lawrence’s holding are unclear.” In re Golinski, 587 F.3d 901, 904 (9th Cir. 2009). The nature of the right Lawrence protects—be it a right to private sexual activity among consenting adults, or the right to achieve “a personal bond that is more enduring”—Lawrence, 539 U.S. at 567, by the use of private sexual conduct—is never stated explicitly in the opinion and has not been elaborated upon by the Supreme Court since. But whatever the nature of the right protected in Lawrence, one thing Lawrence does make explicit is that the Lawrence case “does not involve . . . prostitution.” Lawrence, 539 U.S. at 578.

We have considered whether a fundamental due process right to engage in prostitution exists. In IDK, Inc. v. Clark Cnty., 836 F.2d 1185, 1193 (9th Cir. 1998), we upheld a regulation which infringed upon the right of escorts and clients to associate with one another, and determined that the relationship between a prostitute and client is not protected by the due process clause of the Fourteenth Amendment.

ESP argues that Lawrence overruled IDK by establishing a fundamental right among consenting adults to engage in sexual activity in private. But, as already noted, Lawrence explicitly stated that Lawrence did not “involve . . . prostitution.” Absent clearer language from the Court regarding the nature of the right Lawrence actually does protect, we cannot rule that IDK, binding Ninth Circuit precedent, is no longer good law.

Due to IDK, we conclude that laws invalidating prostitution may be justified by rational basis review, rather than the more searching review called for when a right protected by Lawrence is infringed.

B. Rational Basis Standard of Review

Rational basis review asks whether “there is a rational relationship between disparity of treatment and some legitimate government purpose.” Cent. State Univ. v. Am. Ass’n of Univ. Prof., 526 U.S. 124, 128 (1999). Under the rational basis standard of review, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 440 (1985). Rational basis review is highly deferential to the government, allowing any conceivable rational basis to suffice. United States v. Hancock, 231 F.3d 557, 566 (9th Cir. 2000). In defending a statute on rational basis review, the government “has no obligation to produce evidence to sustain the rationality of a statutory classification”; rather, “[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.” Heller v. Doe, 509 U.S. 312, 320 (1993) (internal quotation marks omitted).

To determine whether the State’s law can survive rational basis review, we apply a two-tiered inquiry. First, we must determine whether the challenged law has a legitimate pur-
pose. See Jackson Water Works, Inc. v. Pub. Util. Comm’n of Cal., 793 F.2d 1090, 1094 (9th Cir. 1986). Second, we address whether the challenged law promotes that purpose. See id. On rational basis review, the State carries a light burden, as “[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” F.C.C. v. Beach Communications, 508 U.S. 307, 315 (1993).

ESP challenged Section 647(b) as follows: (1) there is no important governmental interest behind Section 647(b); and (2) Section 647(b) does not significantly further any such interest. We hold that the statute, however, does pass the two-tiered rational basis test. Section 647(b) has a legitimate purpose, as the State proffers specific and legitimate reasons for criminalizing prostitution in California, which include discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases. Additionally, as the District Court concluded, the State provided adequate argument to establish that Section 647(b) promotes those purposes.

First, the District Court found an established link between prostitution and trafficking in women and children. See Coyote Pub’l, Inc. v. Miller, 598 F.3d 592, 600 (9th Cir. 2010); Bureau of Justice Statistics, U.S. Dep’t of Justice, Characteristics of Suspected Human Trafficking Incidents, 2008–2010 1, 3 (April 2011) (reporting that 82% of suspected incidents of human trafficking were characterized as sex trafficking, and approximately 40% of suspected sex trafficking incidents involved sexual exploitation or prostitution of a child). Second, studies indicate prostitution creates a climate conducive to violence against women. See United States v. Carter, 266 F.3d 1089, 1091 (9th Cir. 2001); Commercial Sex: Beyond Decriminalization, 73 S. Cal. L. Rev. 523, 533 nn.47–48 (2000) (reporting that a “study of 130 prostitutes in San Francisco found that 82% had been physically assaulted, 83% had been threatened with a weapon, [and] 68% had been raped while working as prostitutes”). Next, the District Court found a substantial link between prostitution and illegal drug use. See Colacurcio v. City of Kent, 163 F.3d 545, 554, 556 (9th Cir. 1998); Amy M. Young, et al., Prostitution, Drug Use, and Coping with Psychological Distress, J. Drug issues 30(4), 789–800 (2000) (describing a destructive spiral in which women engage in prostitution to support their drug habit and increase their drug use to cope with the psychological stress associated with prostitution). Lastly, prostitution is linked to the transmission of AIDS and other sexually transmitted diseases. Center for Disease Control & Prevention, HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items (updated Sept. 26, 2016); available at http://www.cdc.gov/hiv/group/sexworkers.html (stating that sex workers “are at increased risk of getting or transmitting HIV and other sexually transmitted diseases (STDs) because they are more likely to engage in risky sexual behaviors (e.g., sex without a condom, sex with multiple partners) and substance use”).

While ESP maintains that the criminalization of prostitution makes erotic service providers more vulnerable to crimes, and does not significantly deter the spread of diseases, such assertions do not undermine the “rational speculation” found sufficient to validate the legislation under Beach Communications. ESP’s claims may yet convince the California legislature to change its mind. But this court cannot change its mind for them. As indicated, Section 647(b) is rationally related to several important governmental interests, any of which support a finding of no constitutional violation under the Due Process Clause of the Fourteenth Amendment. For these reasons, the district court correctly held that the State “proffered sufficient legitimate government interests that provide a rational basis to justify the criminalization of prostitution in California.”

II. FREEDOM OF ASSOCIATION

Appellant’s next challenge invokes the Fourteenth Amendment freedom of association. There are two distinct forms of freedom of association: (1) freedom of intimate association, protected under the Substantive Due Process Clause of the Fourteenth Amendment; and (2) freedom of expressive association, protected under the Freedom of Speech Clause of the First Amendment. See Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984). While ESP’s argument is framed as an issue of First Amendment freedom of speech, this issue is properly analyzed under the Fourteenth Amendment Substantive Due Process Clause. Any First Amendment claim is precluded, as indicated in Part IV. With regard to intimate association, “choices to enter into and maintain certain human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” Id. Consequently, intimate association receives protection as a fundamental element of personal liberty. Id. Such protection, however, extends only to “certain kinds of highly personal relationships”. See id. at 618.

As noted above, we have already ruled that the relationship between a prostitute and a client does not qualify as a relationship protected by a right of association.1 IDK, 836 F.2d at 1193. As we explained in that case, a prostitute’s relationship with a client “lasts for a short period and only as long as the client is willing to pay the fee.” Id. Therefore, the duration of the relationship between a prostitute and a client does not suggest an intimate relationship. Furthermore, the commercial nature of the relationship between prostitute and client suggests a far less selective relationship than that which previously has been held to constitute an intimate association. Roberts, 468 U.S. at 619–20 (extending the right of intimate association to marriage, child bearing, child rearing, and cohabitation with relatives). Thus, we hold Section

1. Of course, we are bound by our precedent unless overruled by an en banc panel or clearly abrogated or overruled by the Supreme Court. Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).
III. RIGHT TO EARN A LIVING

The third constitutional challenge is that Section 647(b) violates the Fourteenth Amendment right to earn a living. The fundamental right to make contracts is guaranteed by the Constitution, which forbids the government from arbitrarily depriving persons of liberty, including the liberty to earn a living and keep the fruits of one’s labor. See, e.g., Lowe v. S.E.C., 472 U.S. 181, 228 (1985) (“It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose.”) (quoting Dent v. W. Va., 129 U.S. 114, 121–22 (1889)).

Nonetheless, the district court properly dismissed ESP’s claims that Section 647(b): (1) “severely infringes on [their] ability to earn a living through one’s chosen livelihood or profession”; and (2) “unconstitutionally burdens the right to follow any of the ordinary callings in life; to live and work where one will; and for that purpose to enter into all contracts which may be necessary and essential to carrying out these pursuits.” Despite ESP’s attempts to interpret Lawrence as creating a liberty interest that invalidates prostitution laws, ESP’s interpretation is misguided. As stated in Lawrence: “This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution.” Lawrence, 539 U.S. at 560. Furthermore, even if some protectable employment interest exists, Section 647(b) applies to every person and is punishable by a misdemeanor charge, so it can properly be considered a reasonable law of general application. See Blackburn v. City of Marshall, 42 F.3d 925, 941 (5th Cir. 1995) (stating protectable interests in employment arise only “where not affirmatively restricted by reasonable laws or regulations of general application”). We therefore hold there is no constitutional right to engage in illegal employment, namely, prostitution.

IV. FREEDOM OF SPEECH

The final issue presented on appeal is whether Section 647(b) violates the First Amendment freedom of speech. ESP argues that the statute improperly makes pure speech a criminal activity, as Section 647(b) prohibits solicitation of prostitution. Here, we are dealing with commercial speech. Speech is “commercial” if it does “no more than propose a commercial transaction.” Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). Although the Constitution accords lesser protection to commercial speech than other constitutionally guaranteed expression, it still protects commercial speech from unwarranted governmental regulation. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 562–63 (1980).

For commercial speech to receive First Amendment protection, however, it must: (1) concern lawful activity and not be misleading; (2) serve a substantial government interest; (3) directly advance the governmental interest asserted; and (4) be narrowly tailored. Id. at 566. Restrictions on commercial speech are reviewed under the standard of intermediate scrutiny. See id. at 563–66.

Therefore, we assess whether the speech regulated by Section 647(b), i.e. soliciting prostitution, satisfies the four aforementioned elements and thus constitutes protected commercial speech. Central Hudson specifies that if the regulated speech concerns illegal activity or is misleading, the First Amendment extends no protection and the analysis ends. Id. at 563–64. Whether or not the speech regulated by Section 647(b) is misleading is not at issue in this case, thus we confine our discussion of this element to the legality of prostitution. As of 2010, forty-nine of the fifty states prohibited all sales of sexual services. Coyote, 598 F.3d at 600. Moreover, prostitution has not been a lawful activity in California since it was banned in 1872, and we have not invalidated the current version of Section 647(b) based on other constitutional grounds. On this basis alone, ESP’s claim fails because commercially motivated speech that involves unlawful activity is not protected speech under the First Amendment. See, e.g., State v. Roberts, 779 S.W.2d 576, 579 (Mo. 1989) (en banc) (reasoning that words uttered as an integral part of the prostitution transaction do not have a lawful objective and are not entitled to constitutional protection).

While the analysis need not proceed further given the unlawful activity at issue, for completeness we turn to the remaining steps of the Central Hudson test and ask whether the asserted governmental interest is substantial. ESP argues the State can assert no compelling or substantial interest justifying such a regulation of speech. The State contends that criminalizing the commercial exchange of sexual activity is a valid exercise of its police powers. We hold that the criminalization of prostitution is a valid exercise of California’s police power and hence, the State may criminalize prostitution in the interest of the health, safety, and welfare of its citizens under the Tenth Amendment. See, e.g., Roberts, 779 S.W.2d at 579. Accordingly, it is left to the political branches to fix the boundary between those human interactions governed by market exchange and those not so governed. Coyote, 598 F.3d at 604. Banning the commodification of sex is a substantial policy goal that all states but Nevada have chosen to adopt. Id. at 600–01. We therefore conclude the interest in preventing the commodification of sex is substantial.

At step three of the Central Hudson test, we ask whether Section 647(b) “directly and materially advances” its asserted interest in limiting the commodification of sex. See Greater New Orleans Broad. Ass’n, Inc. v. U.S., 527 U.S. 173, 188 (1999). Section 647(b) directly and materially advances the State’s interest in limiting such commodification by reducing the market demand for, and thus the incidence of

2. Despite Nevada’s decision to opt for partial legalization, it too has taken significant steps to limit prostitution, including the total ban on prostitution in its largest population center, Clark County, home to 72 percent of the state’s population. Id. at 600–01 & n.11.
of, prostitution. Common sense counsels that soliciting prostitution tends to stimulate demand for those services, and conversely, criminalizing such speech tends to lessen the demand. Coyote, 598 F.3d at 608. Thus, reducing the demand for prostitution in turn limits the commodification of sex. Id. We reason that the State’s substantial interest in limiting the commodification of sex is directly and materially advanced by Section 647(b).

Finally, we assess whether Section 647(b)’s restrictions on speech are “more extensive than necessary” in light of the State’s interests. Central Hudson, 447 U.S. at 566. While “[t]he Government is not required to employ the least restrictive means conceivable, [] it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily perfect, but reasonable . . .” Greater New Orleans Broad., 527 U.S. at 188 (internal quotation marks omitted). Here the State has tailored its speech restrictions to attain a reasonable fit between ends and means because Section 647(b) prohibits only speech that invokes the illegal act of prostitution. Given the plain language of Section 647(b), we hold that the restrictions on soliciting prostitution are consistent with the First Amendment. In sum, Section 647(b) does not violate the First Amendment freedom of speech because prostitution does not constitute protected commercial speech and therefore does not warrant such protection.

CONCLUSION

For the foregoing reasons, the district court’s judgment dismissing ESP’s action is AFFIRMED.

II. DISCUSSION

Brown argues that the district court erred in calculating his Sentencing Guidelines range. Specifically, Brown contends that the Washington drug conspiracy statute does not qualify as a controlled substance offense under the Sentencing Guidelines because it is overbroad. The reason, he argues, is that Washington law allows for a conspiracy conviction when the only other party is a law enforcement officer or informant who does not actually intend to take part in the conspiracy. Those facts would not support a conviction for conspiracy under federal law.

To determine whether a prior state conviction is a controlled substance offense for purposes of the Sentencing Guidelines, federal courts employ the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990). Under the categorical approach, we are concerned only with the fact of conviction and the statutory definition of the underlying offense. Id. at 600. “If a state law proscribes the same amount of or less conduct than that qualifying [under federal law], then the two offenses are a categorical match.” United States v. Martinez-Lopez, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc) (internal quotation marks omitted). But “[i]f the statute of conviction sweeps more broadly than the generic crime, a conviction under that law cannot categorically count as a qualifying predicate, even if the defendant actually committed the offense in its generic form.” United States v. Hernandez, 769 F.3d 1059, 1062 (9th Cir. 2014) (per curiam) (alterations incorporated) (internal quotation marks omitted). 1

A. Standard of Review

In sentencing appeals, “we review the district court’s identification of the correct legal standard de novo and the district court’s factual findings for clear error.” United States v. Gasca-Ruiz, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). Further, “as a general rule, a district court’s application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion.” Id.

There is an exception to that general rule, however, when it comes to application of the categorical approach, because under the categorical approach “[n]othing turns on the particulars of the defendant’s own prior offense.” Id. at 1174.

1. If there is not a categorical match, a court may ask if the statute is divisible. Martinez-Lopez, 864 F.3d at 1038. If “a defendant was convicted of violating a divisible statute,” a court may employ the modified categorical approach, for which it must “identify, from among several alternatives, the crime of conviction so that the court may compare it to the generic offense.” Descamps v. United States, 133 S. Ct. 2276, 2285 (2013). Neither party argues that the Washington drug conspiracy statute is divisible.

The same reasons for applying de novo review to determinations of whether a prior conviction is a “crime of violence” also apply to whether a prior conviction is a “controlled substance offense.” Though a more searching standard of review in the instant case does not affect the outcome of this case, we review the district court’s determination of whether Brown’s prior conviction was a controlled substance offense de novo.

B. Application of the Categorical Approach

U.S.S.G. § 2K2.1(a)(4)(A) provides a base offense level of twenty if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” § 2K2.1(a)(4)(A). The definition of “controlled substance offense” is the same as that provided in U.S.S.G. § 4B1.2(b). § 2K2.1 cmt. n.1. Section 4B1.2 explains:

The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

§ 4B1.2(b). Here, the relevant offense was Brown’s 2005 state court conviction for conspiracy to deliver methamphetamine in violation of RCW §§ 69.50.401(1) and 69.50.407. Under Washington state law, for sentencing purposes the offense was “unranked,” with a standard sentence of zero to twelve months.

Under federal law, a defendant cannot be convicted of conspiracy if the only alleged coconspirator is a federal agent or informant. See United States v. Lo, 447 F.3d 1212, 1225 (9th Cir. 2006) (“[T]he agreement in a conspiracy cannot be established with evidence that the defendant had an agreement with a government informer.”). The Revised Code of Washington includes both a general conspiracy statute, located in Title 9A of the Criminal Code, and a separate statute for drug conspiracy, located in Title 69, pertaining to Food, Drugs, Cosmetics, and Poisons. The general conspiracy statute states: “A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.” RCW § 9A.28.040(1). Subsection (2)(f)
of the same section of the Criminal Code provides that “[i]t shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired . . . [i]s a law enforcement officer or other government agent who did not intend that a crime be committed.” RCW § 9A.28.040(2)(f).

The Washington drug conspiracy statute provides: “Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” § 69.50.407. The terms “conspires” and “conspiracy” are not defined within this section or anywhere in Title 69 of the Revised Code of Washington. A section in the Criminal Code states that its provisions may apply to offenses defined in other titles: “The provisions of this title shall apply to any offense committed on or after July 1, 1976, which is defined in this title or the general statutes, unless otherwise expressly provided or unless the context otherwise requires, and shall also apply to any defense to prosecution for such an offense.” RCW § 9A.04.010(2).

The important question for this case is whether the definition of conspiracy within the Criminal Code, including the qualification in subsection (2)(f), applies to the drug conspiracy offense defined in Title 69. We conclude that it does. As a result, the Washington drug conspiracy statute covers conduct that would not be covered under federal law, and Brown’s conviction under the Washington statute is not a categorical match.\(^2\)

The history of how subsection (2)(f) came to be enacted helps to explain our conclusion. In 1994, the Washington Supreme Court held, in reviewing a conviction for, among other crimes, conspiracy to deliver controlled substances, that an agreement between the defendant and a sole coconspirator, who was actually an undercover police officer did not satisfy the requirement under the conspiracy statute for an actual agreement between coconspirators. State v. Pacheco, 882 P.2d 183, 185–87 (Wash. 1994).

The court concluded: “[T]he State has not persuaded us the Legislature intended to abandon the traditional requirement of an actual agreement. We hold [§] 9A.28.040 and [§] 69.50.407 require the defendant to reach a genuine agreement with at least one other coconspirator.” Id. at 188.

In response to Pacheco, the Washington Legislature amended the general conspiracy statute by adding § 9A.28.040(2)(f). See 1997 Wash. Legis. Serv. Ch. 17 (S.B. 5085). Nothing in the amendment mentioned § 69.50.407, the Washington drug conspiracy statute, or stated that it amended § 9A.04.010(2), the Criminal Code section that states that provisions in the Criminal Code apply to crimes defined in other titles of the Revised Code of Washington. Washington courts have continued to apply § 9A.04.010(2) to hold that the definition of conspiracy in Title 9A and Title 69 are the same. See, e.g., State v. Pineda-Pineda, 226 P.3d 164, 172 (Wash. Ct. App. 2010) (“We hold the crime of controlled substance conspiracy is concomitant with conspiracy as defined in RCW § 9A.28.020. There is nothing contrary or inconsistent between the controlled substance conspiracy and the Washington Criminal Code definition of conspiracy.”).

The government’s arguments to the contrary are unpersuasive.\(^3\) First, the government submits that, even though Pacheco discussed both § 9A.28.040 and § 69.50.407, the Washington legislature amended only the former statute. The Washington Supreme Court “presume[s] that the legislature enacts laws ‘with full knowledge of existing laws.’” Marziar v. Wash. State Dep’t of Corr., 349 P.3d 826, 828 (Wash. 2015) (quoting Thurston Cty. v. Gorton, 530 P.2d 309, 312 (Wash. 1975)). Section 9A.04.010(2) was one of those existing laws. Because the provisions in Title 9A apply to offenses defined elsewhere, there was no need to amend § 69.50.407 separately. Accordingly, we cannot presume that the Washington legislature failed to recognize that any changes to § 9A.28.040 would apply to § 69.50.407.

Second, the government argues that, where two statutes conflict, the more specific statute controls. Here, § 69.50.407 does not define conspiracy. The definition of conspiracy is provided by § 9A.28.040, and that includes subsection (2)(f). That does not put the statutes in conflict.

\(^2\) Our decision is consistent with decisions of three other federal district courts in Washington state that have concluded that § 69.50.407 is not a categorical match to federal generic conspiracy because it allows for a unilateral agreement when the other party is a law enforcement officer who does not intend to commit a crime. See United States v. Myers, 2:15-CR-00045-JLQ, dkt. no. 95 at 5–6 (E.D. Wash., filed August 21, 2017) (“The court found Defendant’s drug conspiracy conviction to be overturnable and not a predicate offense under U.S.S.G. § 2K2.1(a).”); United States v. Phillips, 1:15-CR-02033-SAB-1, dkt. no. 81 at 13 (E.D. Wash., filed January 10, 2017) (“The defendant’s 2009 state conviction for conspiracy does not qualify as a controlled substance offense, because the Washington conspiracy statute is overbroad, in the court’s opinion.”); United States v. Webb, 166 F. Supp. 3d 1198, 1202–03 (W.D. Wash. 2016) (holding that the two Washington conspiracy statutes are “concomitant,” and that “a defendant may be convicted under [§] 9A.28.040 or [§] 60.50.407 for conspiring with a government agent”).

\(^3\) The government argues that Washington courts have continued to rely on Pacheco for the proposition that conspiracy under state law requires a bilateral agreement. The issue here is what effect subsection (2)(f), which created an exception to the bilateral conspiracy requirement when a coconspirator is a law enforcement officer who lacks the intent to commit a crime, had on § 69.50.407. It is undisputed that, aside from the exception created by the 1997 amendment, Pacheco is still good law, and the cases cited by the government simply confirm this. See, e.g., State v. Blair, No. 67874-4-I, 2013 WL 791854, at *4–6 (Wash. Ct. App. Feb. 25, 2013) (reversing a lower court order for arrest of judgment where there was sufficient evidence of a bilateral agreement to possess marijuana with intent to deliver); State v. Millard, No. 28242-2-III, 2010 WL 5158176, at *1–2 (Wash. Ct. App. Dec. 21, 2010) (affirming a conviction for conspiracy to possess marijuana with intent to deliver where there was a bilateral agreement between the defendant and a coconspirator, the defendant delivered marijuana to the coconspirator, and the coconspirator subsequently delivered the marijuana to a government informant); State v. Kraubell, No. 35752-6-II, 2008 WL 852808, at *4 (Wash. Ct. App. Apr. 1, 2008) (concluding, in part, that the absence of a cautionary instruction regarding the uncorroborated testimony of an accomplice did not affect the jury’s verdict).
Third, the government argues that § 69.50.407 was not impliedly repealed. We have not concluded that it was. The drug conspiracy statute remains on the books and may properly be enforced. It was simply amended, in effect, by the addition of subsection (2)(f) to the general conspiracy statute. Nothing prevents § 9A.28.040 and § 69.50.407 from standing side by side.4

Finally, the government argues that, even if the panel were to find that § 69.50.407 is not a categorical match to federal conspiracy, Brown has not identified a specific instance where Washington has applied the drug conspiracy statute in a manner that proves it is overbroad. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (holding that to find a state statute overbroad “requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime”). Brown has explained the absence of appellate decisions discussing this subject by noting that the relatively light sentence that would result from a drug conspiracy conviction, with a standard sentencing range of zero to twelve months, as noted above at 6–7, encourages prosecutors to charge violations that carry more substantial sentences. Convictions under the drug conspiracy statute, he contends, generally result from negotiations and guilty pleas, which do not produce appeals. Perhaps more to the point, “if a state statute explicitly defines a crime more broadly than the generic definition, no legal imagination is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” Chavez-Solis v. Lynch, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (internal quotation marks omitted). Washington conspiracy is explicitly more broad than the generic federal definition.

C. Harmless Error

The Sentencing Guidelines are advisory, but any calculation error “is a significant procedural error that requires us to remand for resentencing.” United States v. Martinez, 870 F.3d 1163, 1165–66 (9th Cir. 2017) (internal quotation marks omitted). “The Supreme Court has made clear that the district court must correctly calculate the recommended Guidelines sentence and use that recommendation as ‘the starting point and the initial benchmark.’” United States v. Munoz-Camarena, 631 F.3d 1028, 1030 (9th Cir. 2010) (per curiam) (some citations and internal quotation marks omitted) (quoting Kimbrough v. United States, 552 U.S. 85, 108 (2007)). A district court must also “adjust upward or downward from that point, and justify the extent of the departure from the Guidelines sentence.” Id.

The government has argued that any error here was harmless, but we do not agree that it is so certain that the district court would have imposed the same sentence. The sentence imposed on Brown did represent a downward departure of three months from the bottom of the Sentencing Guidelines range as calculated by the district court. The same sentence would have represented an upward departure of nineteen months from the upper end of the range if calculated without treating Brown’s prior conviction as a conviction for a controlled substance offense. The use of an incorrect starting point and the failure to keep the proper Sentencing Guidelines range in mind as the sentencing decision was made constituted “a significant procedural error,” and the case must be remanded for resentencing. Id.

III. CONCLUSION

The district court erred when calculating Brown’s Sentencing Guidelines range, and that error was not harmless. Accordingly, Brown’s sentence is vacated, and this case is remanded for resentencing.

SENTENCE VACATED; REMANDED.

OWENS, Circuit Judge, concurring:

All good things must come to an end. But apparently bad legal doctrine can last forever, despite countless judges and justices urging an end to the so-called Taylor categorical approach. See United States v. Valdivia-Flores, 876 F.3d 1201, 1210–11 (9th Cir. 2017) (O’Scannlain, J., specially concurring) (collecting cases). This case – though correctly decided under current Supreme Court law – typifies how far this doctrine has deviated from common sense.

Here, one lawyer zealously argues that Washington law criminalizes a “conspiracy of one,” while the other lawyer strenuously contends for a narrower reading. Surely, the prosecutor is the one swinging for the fences, and the defense attorney the one pushing for leniency. In state court, you would be right. But we are in federal court, so a defense attorney ethically must play the role of the aggressive prosecutor, pushing for the most expansive reading of state law possible. She succeeded: she has established that the state law is broader than the federal law, so there is no categorical match, which favors her client. But this role reversal confirms that this is a really, really bad way of doing things. Defense attorneys should not be forced to argue for expanding criminal liability to benefit their clients, but in the Taylor Upside Down, that is what necessarily happened here.

Instead of wasting more resources and interjecting more uncertainty into our sentencing (and immigration) decisions, either the Supreme Court or Congress should junk this entire system. See United States v. Perez-Silvan, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring) (urging simplification “to avoid the frequent sentencing adventures more compli-

4. The government also argues that the logical conclusion of Brown’s argument pits the penalty provisions of § 9A.28 against § 69.50.407. This is simply not true. Section 69.50.407 has its own penalty provisions for drug conspiracy, and “[a] general statutory provision normally yields to a more specific statutory provision.” W. Plaza, LLC v. Tsam, 364 P.3d 76, 80 (Wash. 2015). That does not mean that subsection (2)(f) cannot logically apply to both conspiracy statutes.
cated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls").

A regime based on the length of previous sentences, rather than on the vagaries of state law, is the way to go. See *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2016) (en banc) (Owens, J., concurring) (“A better mousetrap is long overdue. Rather than compete with Rube Goldberg, we instead should look to a more objective standard, such as the length of the underlying sentence[]“); U.S.S.G. supp. app. C, amend. 802 at 156–57 (Nov. 1, 2016) (amending U.S.S.G. § 2L1.2 to account for most prior convictions “primarily through a sentence-imposed approach” and “eliminate[] the use of the categorical approach, which has been criticized as cumbersome and overly legalistic”).
Calvin, California Court of Appeal

Cite as 18 C.D.O.S. 585

CALIFORNIA SCHOOL BOARDS ASSOCIATION et al., Plaintiffs and Appellants,
v.
STATE OF CALIFORNIA et al., Defendants and Respondents.

No. A148606
In The Court of Appeal of the State of California
First Appellate District
Division Five
(Alameda County Super. Ct. No. RG11554698)
Filed January 16, 2018

CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of Discussion parts III and IV.

COUNSEL

Olson Hagel & Fishburn, Deborah B. Caplan and Richard C. Miadich, for Plaintiffs and Appellants California School Boards Association and its Education Legal Alliance.

Xavier Becerra, Attorney General, Douglas J. Woods, Senior Assistant Attorney General, Constance L. LeLouis, Supervising Deputy Attorney General and Seth E. Goldstein, Deputy Attorney General, for Defendants and Respondents State of California, State Controller John Chiang, and Director of the Department of Finance Michael Cohen.

Camille Shelton, Chief Legal Counsel, for Defendant and Respondent Commission on State Mandates.

OPINION

We consider the vexing problem of how California, particularly its legislative branch, may comply with the requirement that it fund its education mandates, imposed by the California Constitution, article XIII B, section 6. Is it constitutional for the state legislature to designate funding it already provides to school districts as offsetting revenue when reimbursing them for the costs of new state-mandated programs? In this case, where the legislation operates prospectively only, the answer is yes.

The appellants in this case are the California School Boards Association and its Education Legal Alliance (CSBA), the San Diego Unified School District, the Butte County Office of Education, the San Joaquin County Office of Education, and the Castro Valley Unified School District (the School Districts). Respondents are the State of California, the California State Controller, the Director of the California Department of Finance (collectively, the State), and the Commission on State Mandates.1

CSBA and the School Districts appeal the trial court’s denial of their motion for a writ of mandate as to the second cause of action in their third amended petition, its denial of their motion for leave to file a fourth amended petition, and its dismissal of the remaining causes of action in the third amended petition. CSBA and the School Districts request that we “reverse the trial court and declare Government Code section 17557(d)(2)(B) unconstitutional to the extent it allows the State to avoid mandate reimbursement by identifying ‘offsetting revenues’ that simply represent funding already apportioned to school districts for other purposes as provided in Education Code sections 42238.24 and 56523.”

We affirm in part and reverse in part. In the published portion of our opinion, we affirm the trial court’s denial of the motion for a writ of mandate as to the second cause of action in the third amended petition. We hold Government Code section 17557, subdivision (d)(2)(B), as applied in Education Code sections 42238.24 and 56523, subdivision (f), does not violate the state’s constitutional obligation to reimburse local governments for the costs of mandated programs, and it does not violate the separation of powers doctrine. In the unpublished portion, we reverse the trial court’s denial of the motion for leave to amend, and its subsequent dismissal of the remaining causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

We begin with an overview of the constitutional and statutory provisions regarding reimbursement for the costs of mandates, the specific education mandates at issue in this case, and how amendments to Government Code and Education Code provisions are alleged to affect them.

A. The State’s Constitutional Obligation to Reimburse Local Governments for the Costs of Mandated Programs

In 1978, the voters adopted Proposition 13, adding article XIII A to the California Constitution, which imposed strict limits on the government’s power to impose taxes. (County of San Diego v. State of California (1997) 15 Cal.4th 68, 80–81 (County of San Diego).) The next year, the voters added article XIII B, which imposed corresponding limits on governmental power to spend for public purposes. (Id. at p. 81.) One component of article XIII B’s spending limitation is contained in section 6, which states: “Whenever the Legislature

1. For the most part, the Commission on State Mandates does not take a position on the merits of the claims by CSBA and the School Districts.
or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service . . . .” (Cal. Const., art. XIII B, § 6, subd. (a).) The intent was to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.” (County of San Diego, supra, 15 Cal.4th at p. 81.) School districts are “local governments” protected by section 6. (Cal. Const., art. XIII B, § 8.)

In 1984, the Legislature enacted a comprehensive statutory and administrative scheme to implement and govern the reimbursement process. (Gov. Code, § 17500 et seq.) The Legislature created the Commission on State Mandates (the Commission), a quasi-judicial body with the authority to decide whether a “local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of article XIII B of the California Constitution.” (§§ 17525, 17551.) When the Legislature enacts a statute or executive order imposing obligations on a local government without providing additional funding, the local entity may file a “test claim” with the Commission, which, after a public hearing, must determine whether the statute or executive order requires a new program or increased level of service. (County of San Diego, supra, 15 Cal.4th at p. 81; §§ 17551, 17555.)

“The state shall reimburse each local agency and school district for all ‘costs mandated by the state.’” (§ 17561, subd. (a).) If the Commission determines a statute or executive order imposes state-mandated costs, it must “adopt parameters and guidelines for reimbursement of any claims relating to the statute or executive order.” (§ 17557, subd. (a).) In adopting parameters and guidelines, the Commission “may adopt a reasonable reimbursement methodology.” (§ 17557, subd. (b).)

The Commission submits the adopted parameters and guidelines to the State Controller’s Office, which issues claiming instructions. (§ 17558.) The Controller can initiate an audit or field review of a reimbursement claim for actual costs and may adjust the claim. (§ 17558.5, subds. (a)–(c).) If the Controller reduces a claim, the claimant may appeal costs and may adjust the claim. (§ 17558.6, 17558.7, 17558.8.) If dissatisfied with the Commission’s decision, “[a] claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision . . . on the ground . . . [i]t is not supported by substantial evidence.” (§ 17559, subd. (b).)

If a mandate is “specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year,” then local agencies are not required to implement or give effect to it. (§ 17581, subd. (a).) “If the Legislature deletes from the annual Budget Act funding for a mandate, the local agency or school district may file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement for that fiscal year.” (§ 17612, subd. (c); California School Bds. Assn. v. State of California (2011) 192 Cal.App.4th 770, 798 (CSBA II).)

B. The Graduation Requirements Mandate (the GR Mandate)

In 1983, the Legislature amended the Education Code to include a requirement that no student can graduate from high school without completing two science courses. (Ed. Code, § 51225.3, subd. (a)(1)(C); Stats. 1983, ch. 498, § 94, pp. 2124–2125.) Before the amendment, only one science course was required. In 1987, the Commission determined this additional science class requirement imposed “a reimbursable state mandate upon school districts.” (Commission on State Mandates, Decision No. CSM-4181, Jan. 22, 1987.)

In 1988, the Commission adopted parameters and guidelines for reimbursement of the GR Mandate, determining reimbursable costs included costs of acquiring additional space, remodeling existing spaces, and “staffing and supplying the new science classes.” (San Diego Unified School District, et al. v. Commission on State Mandates, et al. (Super. Ct. Sacramento County, Dec. 27, 2004, No. 03CS01401), p. 4 (San Diego USD).)

Following this determination, there were years of amendments to the parameters and guidelines and related litigation. In 1991, the Commission amended the parameters and guidelines to require school districts to document that acquired spaces were in fact required “for new science classes, not to meet increased high school student enrollment, and that it would have been infeasible or more expensive to remodel existing facilities.” (San Diego USD, supra, at p. 6.) In 2004, the Sacramento County Superior Court rejected the Commission’s 2000 determination that savings attained by laying off teachers for non-mandated courses should be taken into account in determining reimbursements for the costs of staffing the additional science class. (Id. at pp. 17–18.)

In 2008, the Commission further amended the parameters and guidelines covering reimbursement claims for the GR Mandate. In response to a Department of Finance (DOF)
argument that the proposed reasonable reimbursement methodology for teacher salary costs should be denied because it did not consider “revenue limit apportionments” provided to school districts, the Commission determined “revenue limit apportionments . . . are the districts’ ‘proceeds of taxes’ and cannot be considered offsetting revenue under article XIII B, section 6 of the California Constitution.” (Commission on State Mandates, Revised Final Staff Analysis (Hearing Date: Nov. 6, 2008), pp. 1–2)

In 2013, the Sacramento County Superior Court denied the DOF’s petition for a writ of mandate challenging aspects of the 2008 amendments to the parameters and guidelines for reimbursement of the GR Mandate. (Department of Finance v. Commission on State Mandates (Super. Ct. Sacramento County, Mar. 20, 2013, No. 34-2010-80000529), Minute Order, p. 7.) The court noted the DOF’s petition alleged the reasonable reimbursement methodology for the GR Mandate was invalid “because it does not provide for an offset of revenue limit apportionment funding received by school districts . . . . DOF’s opening and reply memoranda contain no argument or authorities to support this claim . . . . The Court therefore deems this claim to have been abandoned, and makes no ruling on it here.” (Id. at pp. 7–8, fn. 10.)

C. The Behavioral Intervention Plans (BIP) Mandate

In 1990, legislation was enacted requiring the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing “behavioral intervention” plans, or BIPs, for special education students. (Ed. Code, § 56523, Stats. 1990, ch. 959, § 1, pp. 4040–4041.) In 1993, the Department of Education adopted implementing regulations. (Cal. Code Regs., tit. 5, §§ 3001, 3052.) According to the Commission, BIPs involved “the design, implementation, and evaluation of instructional and environmental modifications to produce significant improvements in behavior through skill acquisition and the reduction of problematic behavior.” (Commission on State Mandates, Decision No. CSM-4464, adopted Sept. 28, 2000, p. 3, fn. omitted.) In 2000, the Commission determined that aspects of the implementing regulations for BIPs imposed a reimbursable state-mandated program. (Id. at p. 18.) The period of reimbursement began on July 1, 1993. (Commission on State Mandates, Decision No. CSM-4464, adopted Apr. 19, 2013, p. 1.)

In 2008, after years of litigation regarding the BIP Mandate, a settlement was reached calling for “all retroactive and current reimbursement claims to be extinguished by an allocation of $510 million to school districts for the cost of the BIPs activities, $10 million to [special education local plan areas] and county offices of education, and $65 million annually to school districts for ongoing costs of the program.” (Commission on State Mandates, Decision No. CSM-4464, adopted Apr. 19, 2013, p. 4.) However, the Legislature did not fund the settlement, and, according to the Commission, the BIP Mandate “has not been reimbursed to date.” (Ibid.)

In 2013, the Commission adopted parameters and guidelines and reasonable reimbursement methodologies pertaining to the BIP Mandate, covering matters including the costs of training. (Commission on State Mandates, Decision No. CSM-4464, adopted Apr. 19, 2013, pp. 1–8, 63.) In 2013, the Legislature repealed the regulations that were the basis of the BIP Mandate. (Ed. Code, § 56523, subd. (a); Stats. 2013, ch. 48, § 44, p. 1410.) Hence, according to CSBA and the School Districts, “the offsetting revenue issue for this mandate . . . extends only through 2012–2013.”

D. Senate Bill No. 856 and Assembly Bill No. 1610

In 2010, the Legislature enacted Senate Bill No. 856, which, among other changes, amended section 17557 of the Government Code. (Sen. Bill No. 856 (2009–2010 Reg. Sess.) § 32.) Subdivision (d)(2)(B) now provides that the State can request to amend parameters or guidelines to “[u]pdate offsetting revenues and offsetting savings that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of Section 17556.” (§ 17557, subd. (d)(2)(B).)

In 2010, the Legislature also enacted Assembly Bill No. 1610, which, among other changes, added or amended two sections of the Education Code. (Assem. Bill No. 1610 (2009–2010 Reg. Sess.) § 16.) The bill added section 42238.24, which provides in part that “[c]osts related to the salaries and benefits of teachers incurred by a school district or county office of education to provide the courses . . . . [r]equired by the GR Mandate] shall be offset by the amount of state funding apportioned to the district . . . . or . . . . county office of education . . . . The proportion of the school district’s current expense of education that is required to be expended for payment of the salaries of classroom teachers . . . . shall first be allocated to fund the teacher salary costs incurred to provide the courses required by the state.” (Ed. Code, § 42238.24.) In 2011, the DOF filed a request with the Commission to amend the parameters and guidelines for the GR Mandate to identify Education Code section 42238.24 as a required offset. (DOF letter available online at https://csm.ca.gov/matters/11-PGA-03/doc2.pdf. [as of Jan. 12, 2018].) According to the parties, the DOF’s request has been stayed pending the outcome of this litigation.

The assembly bill also amended section 56523 of the Education Code. (Assem. Bill No. 1610 (2009–2010 Reg. Sess.) § 27.) Subdivision (f) provides “[c]ommencing with the 2010–11 fiscal year, if any activities authorized pursuant to this chapter and implementing regulations are found to be a state reimbursable mandate pursuant to Section 6 of Article
XIII B of the California Constitution, state funding provided for purposes of special education . . . [in] the annual Budget Act shall first be used to directly offset any mandated costs.” (Ed. Code, § 56523, subd. (f).)  

In its 2013 statement of decision adopting parameters and guidelines for reimbursement of the BIP Mandate, the Commission responded to the 2010 legislative changes by holding that state funding for special education in the annual budgets since 1993 was “potentially offsetting . . . and must be deducted from a reimbursement claim to the extent a district applied these funds to provide for BIPs mandated activities.” (Commission on State Mandates, Decision No. CSM-4464, adopted Apr. 19, 2013, p. 50.) The Commission further held that Education Code section 56523, subdivision (f) “transform[s] potential offsets to required offsets, beginning in fiscal year 2010–2011.” (Id. at p. 55.)

E. State Funding for Education and the Block Grant System

State funding for education includes, or has included, revenue limit funding, categorical funding, local control funding formula (LCFF) money, and education protection account funds. Revenue limit funding was part of “a strict system of equalized funding (Ed. Code, § 42238 et seq.), under which . . . the amount of property tax revenues a district can raise, with other specific local revenues, [was] coupled with an equalization payment by the state, thus bringing each district into a rough [per student] equivalency of revenues.” (Wells v. One2One Learning Foundation (2006) 39 Cal.4th 1164, 1186, fn. 10, 1194.)

Revenue limit funding was replaced by LCFF beginning in 2013–2014. (Ed. Code, §§ 42238.02, 42238.03; Stats. 2013, ch. 47, §§ 28, 30, pp. 1301, 1308.) According to the School Districts, the LCFF uses a school district’s “prior revenue limit and categorical funding as the base and adds additional funding for high concentrations of English learners and economically disadvantaged students.” Education protection account funding derives from a temporary tax increase imposed on retailers in 2013. (Cal. Const., art. XIII, § 36, subds. (e), (f).) In addition, “Proposition 98, adopted by the voters in 1988, . . . provide[s] a minimum level of funding for schools.” (County of Sonoma v. Commission on State Mandates (2000) 84 Cal.App.4th 1264, 1289.) “Proposition 98 [did] not appropriate funds,” but instead provided new “formulas for determining the minimum to be appropriated [to schools] every budget year.” (Id. at p. 1290.)

According to the DOF, for the fiscal years from 2010 to 2015, the minimum guarantee for funding under Proposition 98 was greater than $40 billion each year, and the state contributed over $30 billion each year “in state General Fund monies . . . [and the] state’s contribution to schools equates to approximately 40 percent of the state’s General Fund revenues each year.” In discovery responses, the DOF indicated over $20 billion was available each fiscal year between 2010 and 2014 as “[p]otentially offsetting revenues” for the GR Mandate.

In a 2010 report, the Legislative Analyst’s Office indicated that virtually every aspect of the education mandates system was “broken.” In 2013–2014, the Legislature adopted the mandate block grant system as an alternative to the traditional mandate reimbursement system. “A school district or county office of education that receives block grant funding . . . shall not be eligible to submit claims to the Controller for reimbursement pursuant to Section 17560 for any costs of any state mandates . . . incurred in the same fiscal year during which the school district or county office of education received funding pursuant to this section.” (§ 17581.6, subd. (c)(3).) In 2013, the GR Mandate became part of the mandate block grant system. (§ 17581.6, subd. (f)(23).)

A 2014 Legislative Analyst’s Office Report provides that “[b]lock grant funding is allocated to participating [local education agencies] on a per-student basis, as measured by average daily attendance (ADA) for schools.” It states that “[a] sizable majority of [local education agencies] have chosen to participate in the block grants rather than access funding through the traditional claims process . . . This includes 84 percent of school districts [and] 79% of [county offices of education] . . . Therefore, according to the State, “for the vast majority of school districts, the offsets at issue in this case are no longer a live controversy going forward.” CSBA and the School Districts allege the block grant system “funds only a portion of the mandate debt that the Commission has determined to be reimbursable.” Nonetheless, San Diego Unified School District, Butte County Office of Education, and San Joaquin County Office of Education are alleged to have opted into the block grant funding scheme. Castro Valley Unified School District has not.

F. The Proceedings Below

With this statutory scheme in mind, we next recount this case’s procedural history, focusing on the allegations, the request for bifurcation, and the court’s ruling on the motion for a writ of mandate as to the second cause of action.

a. The Petition for a Writ of Mandate

On January 6, 2011, CSBA and the School Districts petitioned the Alameda County Superior Court for a writ of mandate, as well as seeking injunctive and declaratory relief. The petition was amended a number of times. The third amended petition, filed February 3, 2014, identified the California School Boards Association as a non-profit corporation.
and “member-driven association composed of the governing boards of nearly 1,000 K-12 school districts and county boards of education throughout California.” The Education Legal Alliance “is composed of over 700 CSBA members dedicated to addressing legal issues of statewide concern to school districts.”

The third amended petition alleged Senate Bill No. 856 (adopting Government Code section 17557, subd. (d)(2)(B)) and Assembly Bill No. 1610 (adopting Education Code sections 42238.24 and 56523, subd. (f)) “implemented . . . broad changes in mandate law that were intended to eliminate or reduce the State’s mandate reimbursement obligations.” CSBA and the School Districts alleged these changes shifted the cost of the BIP Mandate, “approximately $65 million per year, to districts and county offices of education” because “existing funding for other aspects of the special education program is simply required to also be used to reimburse for the costs of [the BIP Mandate].” Similarly, with respect to the GR Mandate, which is alleged to cost over $250 million annually, Education Code section 42238.24 identifies “existing funding and call[s] it ‘offsetting revenues’ in an attempt to avoid mandate payments.”

Based on these allegations, the third amended petition asserted four causes of action. First, CSBA and the School Districts sought “a declaration of whether Education Code sections 42238.24 and 56523 violate article XIII B, section 6 or article III, section 3” of the California Constitution. Second, CSBA and the School Districts sought a declaration that “Government Code section 17557(d)(2)(B) impermissibly burdens the constitutional right to reimbursement guaranteed by article XIII B, section 6 and is invalid to the extent it allows the State to reduce or eliminate mandate claims by claiming ‘offsetting revenues’ that do not represent new or additional funding . . . as reflected in the Legislature’s directives in Education Code sections [42238.24] and 56523.” The second cause of action also sought injunctive relief and a writ of mandate to enjoin the Commission, the Director of Finance and/or the State Controller “from construing Government Code [section] 17557(d)(2)(B) to permit the actions directed by Education Code sections 42238.24 and 56523.”

Third, CSBA and the School Districts sought declaratory relief, injunctive relief, and a writ of mandate regarding Government Code sections 17570 and 17556. The petition alleged these code sections are unconstitutional because they allow “the Commission to set aside final test claim decisions and issue new test claim determinations based on any ‘change in mandate law.’” Fourth, CSBA and the School Districts sought declaratory relief, a prohibitory injunction, and a writ of mandate to declare the “current statutory scheme” contained in Government Code sections 17500 to 17617, “as amended over the past decade” in violation of article XIII B, section 6 of the California Constitution. According to CSBA and the School Districts, these provisions “taken as a whole and as applied to school districts and county offices of education, fail to provide an efficacious remedy and/or constitute an undue restriction on the right to reimbursement under article XIII B, section 6 of the California Constitution.”

b. Bifurcation of the “Offsetting Revenue” Issue

CSBA and the School Districts filed a motion to bifurcate, arguing the court should first address the “offsetting revenues” issue central to their first and second causes of action. The court granted the motion to bifurcate the claim for writ of mandate in the second cause of action and to proceed on that claim first. The court found “the economy and efficiency of handling the litigation would be promoted by [the] proposal to litigate the mandate claim in the Second Cause of Action by a noticed motion for writ of mandate rather than trial.”

c. The Court Denies the Motion for Writ of Mandate as to the Second Cause of Action

CSBA and the School Districts subsequently filed a motion “for Writ of Mandate as to the second cause of action, i.e., asking the Court to invalidate Government Code section 17557(d)(2)(B) facially, or as applied in Education Code sections 42238.24 and 56523 . . .” CSBA and the School Districts argued these statutes were “contrary” to article XIII B, section 6 of the California Constitution. Although only the first cause of action alleged these two Education Code provisions violated the separation of powers doctrine, the motion for writ of mandate also made this argument. After the motion was fully briefed, which included presenting evidence by way of declarations and requests for judicial notice, the court issued a tentative ruling denying the motion, held a hearing on it, and took the matter under submission.

The court denied the motion for a writ of mandate, determining “the State can constitutionally designate certain revenues as offsetting revenues that will reduce or eliminate the State’s obligation.” Regarding the “as applied” constitutional challenge to Government Code section 17557, subdivision (d)(2)(B), the court stated it was “sympathetic to Petitioners’ contention that the Legislature’s intent is to satisfy its BIP Mandate and GR Mandate by shifting funds intended to meet other educational needs to those mandates, with the result that the funds provided for those other educational needs are no longer adequate. Nevertheless, the State’s plenary power over school financing, and the case law upholding the State’s right to allocate funds for specific educational needs, precludes the court from issuing an order that would, in essence, require the State to provide additional funding to school districts to allow them to meet those other educational needs.”

The court also rejected the argument the 2010 legislation violates separation of powers principles. The court found the legislation “is not an attempt to override specific rulings by

7. We do not agree with the State that the court’s failure to mention the first cause of action in its order was “a clerical error.” CSBA and the School Districts sought a writ of mandate in their second cause of action; they did not do so in their first cause of action. Therefore, in addressing the request to proceed first by way of a motion for writ of mandate, the court granted the motion as to the second cause of action.
the Commission,” [and] “the Legislature did not specifically seek to collaterally attack any particular order of the Commission.” The court concluded that even assuming the Legislature sought to obtain a different result in future rulings of the Commission, “that goal is not the basis for a claim that the Legislature usurped the quasi-judicial powers of the Commission.”

DISCUSSION

On appeal, CSBA and the School Districts make four arguments. First, they argue section 17557, subdivision (d)(2)(B), is “contrary” to article XIII B, section 6, of the California Constitution as applied in two Education Code provisions. Second, they contend these statutes violate article III, section 3, of the California Constitution. Third, they argue the court abused its discretion when it denied their motion for leave to amend. Fourth, they argue the court erred when it dismissed their remaining claims. We are not persuaded by the first two arguments, but agree with CSBA and the School Districts that the court should have granted leave to amend, and should not have dismissed the remaining claims.

I.

SECTION 17557, SUBDIVISION (D)(2)(B), AS APPLIED, DOES NOT VIOLATE ARTICLE XIII B, SECTION 6, OF THE CALIFORNIA CONSTITUTION

The California Constitution requires the State to provide “a subvention of funds to reimburse” local governments for the costs of mandated programs or increased levels of service. (Cal. Const., art. XIII B, § 6.) CSBA and the School Districts contend that section 17557, subdivision (d)(2)(B), as applied in two Education Code sections, “allows the State to identify ‘offsetting revenues’ that will reduce or eliminate its mandate debt even if no new or additional funds are actually provided.” We conclude these statutes do not conflict with the constitutional requirement.

A. Section 17557, Subdivision (d)(2)(B), as Applied in Education Code Section 42238.24, Does Not Violate Article XIII B, Section 6

The State may request the Commission to amend the parameters and guidelines for reimbursement of mandated costs to “[u]pdate offsetting revenues and offsetting savings that apply to the mandated program . . . .” (§ 17557, subd. (d)(2)(B).) Some offsetting revenues for the GR Mandate are identified in Education Code section 42238.24, which provides, in part, that “[c]osts related to the salaries and benefits of teachers incurred by a school district or county office of education to provide the courses [required by the GR Mandate] shall be offset by the amount of state funding apportioned to the district . . . or . . . county office of education . . . . The proportion of the school district’s current expense of education that is required to be expended for payment of the salaries of classroom teachers . . . shall first be allocated to fund the teacher salary costs incurred to provide the courses required by the state.” (Ed. Code, § 42238.24.)

CSBA and the School Districts argue section 17557, subdivision (d)(2)(B), is unconstitutional as applied because if the State can identify as “ ‘offsetting revenues’ ” money it already provides to school districts and local offices of education, then article XIII B, section 6 “would be rendered meaningless for education agencies.” CSBA and the School Districts rely primarily on the Commission’s 2008 determination that a similar attempt by the State to offset the costs of the GR Mandate violated article XIII B, section 6.

In 2008, the Commission amended the parameters and guidelines for reimbursement of the GR Mandate, finding in part that “the revenue limit apportionments made to school districts are the districts’ ‘proceeds of taxes’ and cannot be considered offsetting revenue under article XIII B, section 6 of the California Constitution.” The Commission reviewed the history and purpose of article XIII B, section 6, concluding “the amount spent by the district on teacher salaries cannot be considered offsetting revenue for purposes of [the GR Mandate]. Such an interpretation would require school districts to use their proceeds of taxes on a state-mandated program. This violates the purpose of article XIII B, section 6 [which] was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues and restrict local spending in other areas.”

CSBA and the School Districts argue a similar analysis applies to section 17557, subdivision (d)(2)(B), as applied in Education Code section 42238.24, because if the State can request the Commission to amend the parameters and guidelines for reimbursement of the GR Mandate to identify state funding as “offsetting revenue”, then these statutes “require[] education agencies to divert spending away from their own programs and priorities in order to pay for the State’s mandates – contrary to article XIII B, section 6.”

We are not persuaded this argument demonstrates the unconstitutionality of Education Code section 42238.24 because CSBA and the School Districts have not established the statute requires them to use local revenues to pay for the costs of the GR Mandate. Education Code section 42238.24 specifically directs local school districts and county offices of education to use “state funding” as an offset, not local tax revenues. (Ed. Code § 42238.24.) This directive is not incompatible with the State’s constitutional obligation to reimburse local governments for state-mandated costs. (Grossmont Union High School Dist. v. State Dept. of Education (2008) 169 Cal.App.4th 869, 876 (“A state requirement that an entity redirect resources is . . . not a reimbursable mandate”).

This case is similar to Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727, where school districts sought reimbursement for the costs of complying with statutory notice and agenda requirements for meetings of school councils and advisory committees. (Id. at p. 730–
The California Supreme Court concluded “the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda-related expenses.” (Id. at pp. 746–747.)

Similarly here, the state already provides funding to school districts and county offices of education. Indeed, it provides tens of billions of dollars in state funding for education each year. The cost of the GR Mandate is estimated to be over $250 million per year. Article XIII B, section 6, of the California Constitution “was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.” (County of Fresno v. State of California (1991) 53 Cal.3d 482, 487 (Fresno).) Where school districts and county offices of education receive tens of billions of dollars in state funding each year, it simply does not follow that they are or were required to use local revenues to pay for teacher salaries and benefits associated with the GR Mandate.

In arguing otherwise, CSBA and the School Districts contend “the Commission and the courts have long considered general education funding ‘local revenues’ or local ‘proceeds of taxes.’” They also argue that “unrestricted” funds the State provides to school districts must be considered local proceeds of taxes for purposes of article XIII B. In making these contentions, CSBA and the School Districts rely on Government Code section 7906, which provides that, for school districts, “‘proceeds of taxes’ shall be deemed to include subventions received from the state” under specified circumstances. (§ 7906, subds. (c), (e).) But even if a school district’s “‘proceeds of taxes’” include state funding, it does not follow, as CSBA and the School Districts contend, that state funding for education should be considered local proceeds of taxes.

CSBA and the School Districts also rely on CSBA II, where the court determined that “[u]nder article XIII B, section 6, if the State wants to require the local school districts to provide new programs or services, it is free to do so, but not by requiring the local entities to use their own revenues to pay for the programs.” (CSBA II, supra, 192 Cal.App.4th at p. 787.) The court determined the practice of appropriating only $1,000 for mandated programs, with the intention to pay the remainder later, did not comply with the State’s constitutional and statutory obligations to fund the mandates. (Id. at p. 785.)

Here, we face a different question: whether it is constitutional for the Legislature to consider funds it already provides school districts and county offices of education as “offsetting revenue.” (§ 17557, subd. (d)(2)(B); Ed. Code, § 42238.24.) By doing so, the Legislature does not require “the local entities to use their own revenues to pay for the programs.” (CSBA II, supra, 192 Cal.App.4th at p. 787.) Hence, there is no conflict with the constitutional obligation to reimburse for mandated programs. (Fresno, supra, 53 Cal.3d at p. 487 [article XIII B, section 6 protects “the tax revenues of local governments from state mandates”].)

CSBA and the School Districts contend that section 17557, subdivision (d)(2)(B) is susceptible to a “broad” and “narrow” construction, and that only the narrow one, which incorporates the “limiting language” of section 17556, subdivision (e), is constitutional. Section 17556, subdivision (e) provides the Commission shall not find a reimbursable mandate if the statute includes “additional revenue that was specifically intended to fund the costs of the state mandate . . . .” Because section 17557, subdivision (d)(2)(B) incorporates this “limiting language,” CSBA and the School Districts contend it must be interpreted to mean “‘offsetting revenues’” are “specifically intended” to fund the mandate.

We disagree. In construing a statute, our task is to determine the Legislature’s intent and purpose for the enactment. (People v. Tindall (2000) 24 Cal.4th 767, 772 (Tindall).) We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. (Ibid.) If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said. (Ibid.)

Here, section 17557, subdivision (d)(2)(B) addresses amendments to parameters and guidelines for reimbursement of a mandate, and it expressly provides the State can request the Commission to amend parameters and guidelines for reimbursement to “[u]pdate offsetting revenues . . . that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of section 17556.” (§ 17557, subd. (d)(2)(B), italics added.)

This language, by its plain terms, implies the opposite of what CSBA and the School Districts contend it implies. Under their proposed narrow construction, “‘offsetting revenues’” must be “specifically intended” to fund the mandate. But section 17557, subdivision (d)(2)(B) provides that offsetting revenues can be identified that do not require a new legal finding of no costs pursuant to subdivision (e) of section 17556, and hence, that were not “‘specifically intended’” to fund the mandate. (§§ 17557, subd. (d)(2)(B), 17556, subd. (e).) We reject the narrow interpretation of these statutes proposed by CSBA and the School Districts because it does not comport with their plain language, and “[‘the Legislature is presumed to have meant what it said’].” (Tindall, supra, 24 Cal.4th at p. 772.)

Finally, CSBA and the School Districts argue the State’s position would “necessarily” require reimbursement for some school districts but not others because wealthier districts that receive only nominal state funding “would continue to be entitled to receive reimbursement while districts receiving state funding would not.” The trial court did not address this argument in part because CSBA and the School Districts presented no evidence to support it. For the same reason, we do
not consider it. In any event, this argument does not pertain to the constitutionality of the statutes at issue under article XIII B, section 6.

We acknowledge that by enacting Education Code section 42238.24, the Legislature may have largely eliminated the State’s obligation to reimburse school districts and county offices of education for the GR Mandate without actually providing any new or additional funding.8 We emphasize that our decision affirming the constitutionality of a particular statute “is not in any sense an endorsement” of it. (Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal.4th 952, 962.) “Courts have nothing to do with the wisdom of laws or regulations . . . . The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations.” (Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, 461–462.) Moreover, “there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.” (City of San Jose v. State of California (1996) 45 Cal.App.4th 1802, 1817.) Here, given that the State, through its budget acts, provides funding to school districts and county offices of education in amounts it deems sufficient to ensure the local entities do not have to rely on local revenues to pay the costs of the GR Mandate, we discern no conflict with article XIII B, section 6, of the California Constitution.

B. Section 17557, Subdivision (d)(2)(B), as Applied in Education Code Section 56523, Subdivision (f), Does Not Violate Article XIII B, Section 6

For similar reasons, section 17557, subdivision (d)(2)(B), as applied in Education Code section 56523, subdivision (f), which concerns the BIP Mandate, does not violate the constitutional obligation to reimburse local governments for mandates. The statute at issue provides “[c]ommencing with the 2010–11 fiscal year, if any activities authorized pursuant to this chapter and implementing regulations are found to be a state reimbursable mandate . . . . state funding provided for purposes of special education [in] the annual Budget Act shall first be used to directly offset any mandated costs.” (Ed. Code, § 56523, subd. (f).)

The Commission addressed this statute in its 2013 statement of decision regarding the parameters and guidelines for reimbursement of the BIP Mandate. The Commission noted the State currently provides over $3 billion in special education funding each year. The Commission concluded that “[w]here the funding at issue is given by the state in the first instance, the Commission must assume that the Legislature acts consistently with the Constitution if the Legislature designates a portion of those non-local funds to cover the costs of a mandated program or activity.” (Commission on State Mandates, Decision No. CSM-4464, adopted Apr. 19, 2013, p. 57.)

CSBA and the School Districts point out the Commission was “required to presume the constitutionality of section 56523.” Administrative agencies, like the Commission, have no power to declare a statute unconstitutional. (Cal. Const., art. III, § 3.5.) We, unlike the Commission, do have this power. (CSBA II, supra, 192 Cal.App.4th at pp. 785–790 [finding unconstitutional the practice of appropriating a nominal amount for mandated programs].)

Nevertheless, we discern no conflict between the statutes at issue and the California Constitution because they do not require schools to use local revenues to pay for the BIP Mandate. (Fresno, supra, 53 Cal.3d at p. 487.) The BIP Mandate is estimated to cost $66 million per year, but school districts and county offices of education receive approximately $3 billion in special education funding. Given that special education funding is sufficient to cover the costs of the BIP mandate, then section 17557, subdivision (d)(2)(B), as applied in Education Code section 56523, subdivision (f), does not conflict with article XIII B, section 6 of the California Constitution.

In arguing otherwise, CSBA and the School Districts contend that “special education is already significantly underfunded,” and section 56523 provides no actual new funding. But even so, they never explain how these facts establish section 56523, subdivision (f), requires school districts to use “their own local revenues” to pay for the BIP Mandate. By its plain terms, it directs them to use “state funding provided for purposes of special education” to pay for the BIP Mandate, not local revenues. (Ed. Code § 56523, subd. (f).) Therefore, it does not violate article XIII B, section 6, of the California Constitution.

II.

SECTION 17557, SUBDIVISION (D) (2)(B), AS APPLIED, DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES

Next, CSBA and the School Districts contend it violates article III, section 3, of the California Constitution for the Legislature to allow state funding or special education funding to be identified as offsetting revenues for state-mandated programs. We disagree.

A. Separation of Powers

“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” (Cal. Const., art. III, § 3.) “Although . . . article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government,
California decisions long have recognized that, in reality, the separation of powers doctrine "does not mean that the three departments of our government are not in many respects mutually dependent" [citation], or that the actions of one branch may not significantly affect those of another branch." (Superior Court v. County of Mendocino (1996) 13 Cal.4th 45, 52.) "Of necessity the judicial department as well as the executive must in most matters yield to the power of statutory enactments." (Brydonjack v. State Bar of Cal. (1929) 208 Cal. 439, 442; accord, Mendocino, at p. 54.)

In California School Boards Assn. v. State of California (2009) 171 Cal.App.4th 1183 (CSBA I), the court considered a statute directing the Commission to "set aside" some test claim decisions and "reconsider" others. (Id. at p. 1192.) The court concluded the legislation violated the separation of powers doctrine because "[a]s a quasi-judicial decision maker, the Commission does its work independent of legislative oversight and is not subject to review by the Legislature." (Id. at p. 1199.) The Commission "has the sole and exclusive authority to adjudicate whether a state mandate exists." (Id. at p. 1200.) If dissatisfied with the Commission's decision, the state can file a proceeding pursuant to Government Code section 17559. (Ibid.) But once the Commission's decisions are final, and have not been set aside by a court, the Legislature does not have the power to direct the Commission to set them aside or reconsider them. (Id. at pp. 1200–1201.)

B. Government Code Section 17557, Subdivision (d)(2)(B), as Applied in Education Code Section 42238.24, Does Not Violate Separation of Powers Principles

CSBA and the School Districts contend "the Commission and courts have previously rejected the argument that the State’s general funding for the education program can lawfully ‘offset’ its reimbursement obligations. The administrative decision and judicial review are both final. Education Code section 42238.24 is therefore a transparent attempt to overturn these final administrative and judicial decisions . . . ." This argument relies on the Commission’s 1987 decision recognizing the GR mandate, its 1988 decision that staffing for the new science classes was a reimbursable cost, a 2004 Sacramento County Superior Court decision regarding offsetting savings, and the Commission’s 2008 adoption of parameters and guidelines for reimbursement of the GR mandate.

We disagree the statutes at issue violate separation of powers principles. First, this legislation is not an attempt to overturn the Commission’s 1987 decision that recognized the existence of the GR Mandate or its 1988 decision that staffing costs are reimbursable. The question here is not whether the GR Mandate exists or whether staffing costs are reimbursable, but whether it is constitutional for the Legislature to require school districts and county offices of education to rely on "state funding" they already receive to pay for the costs of the GR Mandate. Second, the legislation does not seek to overturn the Sacramento County Superior Court’s 2004 decision, where the court determined that savings attained by laying off teachers for non-mandated courses should not be considered offsetting savings. That decision did not address offsetting revenues.

Third, and most importantly, there is some tension between the 2010 legislative changes and the Commission’s 2008 determination that “revenue limit apportionments made to school districts . . . cannot be considered offsetting revenue under article XIII B, section 6 of the California Constitution.” The statutes at issue seek to identify “state funding” as “offsetting revenue” (§ 17557, subd. (d)(2)(B); Ed. Code, § 42238.24), but state funding, up until the 2013–2014 fiscal year, included revenue limit apportionments. The State contends Education Code section 42238.24, which became effective October 19, 2010, applies “prospectively only.” According to the State, it does not violate separation of powers principles for the Legislature to “abrogate” the Commission’s 2008 decision prospectively. We requested supplemental briefing on whether Education Code section 42238.24 also applies retroactively, to claims for reimbursement of the costs of the GR Mandate preceding the 2010–2011 fiscal year.

Having reviewed the supplemental briefs, we conclude the statute does not apply retroactively. It is within the power of the Legislature to amend statutes to overrule a judicial decision. (McClung v. Employment Development Dept. (2004) 34 Cal.4th 467, 473–474 (McClung).) It is presumed those changes apply prospectively, not retroactively, because of “the unfairness of imposing new burdens on persons after the fact.” (Id. at p. 475) For this reason, a “statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.” (Ibid.)

The text of the statutes does not contain express language of retroactivity; instead, Education Code section 42238.24 provides the costs of teacher salaries and benefits shall be offset by state funding, and Government Code section 17557, subdivision (d)(2)(B), refers to “updating” offsetting revenues. (§ 17557, subd. (d)(2)(B); Ed. Code, § 42238.24.) In arguing the statutes apply prospectively only, the Commission points to a budget committee analysis of Assembly Bill No. 1610. It provides Education Code section 42238.24 was intended to: “Limit state costs for the High School Science Graduation mandate claim (about $2 billion in past costs and $200 million annually in ongoing costs) by directing [local education agencies] to use state apportionment and flexible categorical funding to cover related costs. Requires districts to first fund teacher salary costs for courses required by the state when determining the proportion of their budgets statutorily required to be expended for the salaries of classroom teachers.” (Assem. Com. on Budget, Floor Analyses, Concurrency in Sen. Amends. to Assem. Bill No. 1610 (2009–
2010 Reg. Sess.), as amended Oct. 7, 2010, p. 2.) But this statement cuts both ways in that it refers to limiting both past costs and ongoing costs.

A DOF enrolled bill report is more helpful.9 It provides that Education Code section 42238.24 “would require districts and counties to offset Graduation Requirements mandate costs first with State-provided funds, which should minimize the State’s exposure to hundreds of millions of dollars of new annual costs.” (Cal. Dept. of Finance, Enrolled Bill Rep. on Assem. Bill No.1610 (2009–2010 Reg. Sess.), as amended Oct. 7, 2010, p. 4.) This reference to minimizing “new annual costs” suggests the statute applies prospectively only.

Moreover, the DOF’s discovery responses are consistent with this interpretation. In response to an interrogatory requesting the DOF to identify all potentially offsetting revenues for the GR Mandate pursuant to Education Code section 42238.24 since 2009, the DOF identified revenues starting in the 2010–2011 fiscal year. In the absence of “‘a clear and unavoidable implication that the Legislature intended retroactive application,’ ” we interpret Education Code section 42238.24 to apply to claims for reimbursement of the GR Mandate beginning in the 2010-2011 fiscal year. (McCung, supra, 34 Cal.4th at pp. 475–477 [holding change to employment law that abrogated California Supreme Court’s decision did not apply retroactively to conduct predating its enactment].)

In their supplemental brief, CSBA and the School Districts contend Education Code section 42238.24 “operates retroactively in that it was intended to, and did, ‘affect rights, obligations, acts, transactions and conditions which [were] performed or exist[ed] prior to the creation of the statute.’ ” This approach conflates the issue of whether a statute impacts antecedent rights and obligations with the issue of whether it operates retroactively. “[A] statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be ‘the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.’ ” (McCung, supra, 34 Cal.4th at p. 475.)

Education Code section 42238.24 does interfere with antecedent rights and obligations because, beginning with the 2010–2011 fiscal year, it requires school districts and county offices of education to treat state funding, including revenue limit apportionments, as offsetting revenue when seeking reimbursement for the costs of teacher salaries and benefits under the GR Mandate. (§ 17557, subd. (d)(2); Ed. Code, § 42238.24.) But this change, in and of itself, does not violate the doctrine of separation of powers. It abrogates the Commission’s 2008 decision, but “[o]ver time, any particular decision of the Commission may be rendered obsolete by changes in the law and material circumstances that originally justified the Commission’s decision.” (CSBA I, supra, 171 Cal.App.4th at p. 1202.)

What the Legislature cannot do is order the Commission to set aside or reconsider its previous decision. (CSBA I, supra, 171 Cal.App.4th at pp. 1199–1202.)90 The Commission’s 2008 determination will continue to apply to claims for reimbursement preceding the 2010–2011 fiscal year. As the State observes, the Commission’s 2008 determination “continues to apply to costs claimed prior to the enactment of the statute.” In other words, for reimbursement claims for the cost of teacher salaries and benefits under the GR Mandate prior to the 2010–2011 fiscal year, revenue limit apportionments cannot be considered offsetting revenue. As so construed, this exercise of legislative power does not impermissibly encroach on the powers of the Commission, or otherwise violate article III, section 3, of the California Constitution.

C. Section 17557, Subdivision (d)(2)(B), as Applied in Education Code Section 56523, Subdivision (f), Does Not Violate Separation of Powers Principles

With regard to the BIP Mandate, the legislation at issue provides “[c]ommencing with the 2010–11 fiscal year, if any activities authorized pursuant to this chapter and implementing regulations are found to be a state reimbursable mandate pursuant to Section 6 of Article XIII B of the California Constitution, state funding provided for purposes of special education [in] the annual Budget Act shall first be used to directly offset any mandated costs.” (Ed. Code § 56523, subd. (f).) According to the CSBA and the School Districts, this statute, when used in conjunction with Government Code section 17557, subdivision (d)(2)(B), violates article III, section 3, of the Constitution because it was intended to negate or nullify the Commission’s 2000 decision establishing the BIP Mandate.

We disagree. First, these legislative changes do not question whether the BIP Mandate exists; instead, they update the parameters and guidelines for reimbursement of the BIP Mandate. (§ 17557, subd. (d)(2)(B); Ed. Code, § 56523, subd. (f).) As CSBA and the School Districts themselves acknowledge, “[t]he issue in this case is not whether . . . mandates exist – clearly, they do – it is about what constitutes payment or reimbursement for the mandate.” Second, by its

9. An enrolled bill report is prepared by the executive branch for the Governor after a bill has passed both legislative houses and before it has been signed. (Elsner v. Uveges (2004) 34 Cal.4th 915, 934.) Although not entitled to great weight, courts consider them “instructive on matters of legislative intent.” (Id. at p. 934, fn. 19.)

10. CBSA and the School Districts request we take judicial notice of the Sacramento County Superior Court’s 2007 judgment in California School Boards Association, et al. v. State of California, et al. (Super. Ct. Sacramento County, 2009, No. 06CS1335). We deny this request. Generally, we do not take judicial notice of superior court judgments because they have no precedentual value. (Perreira-Goodman v. Anderson (1997) 54 Cal.App.4th 864, 872, fn. 5.) Moreover, the aspect of the superior court’s decision to which CSBA and the School Districts seek to draw our attention is discussed in CSBA I, supra, 171 Cal.App.4th at p. 1199, so there is no need for us to take judicial notice of the superior court’s decision.
express terms, Education Code section 56523, subdivision (f), applies to reimbursement claims “commencing with the 2010–11 fiscal year.” Because it applies prospectively only, it does not seek to set aside a prior, final decision of the Commission and therefore does not encroach on the powers of the Commission. (CSBA I, supra, 171 Cal.App.4th at pp. 1199–1201.)

CSBA and the School Districts contend the Commission’s 2000 determination establishing the BIP Mandate “concluded that special education funding did not defeat the mandate because such funding was not intended for the BIP Mandate.” They point to the Commission’s 2013 decision adopting parameters and guidelines for reimbursement of the BIP Mandate, wherein the Commission stated that Assembly Bill 1610 is intended “to negate the Commission’s decision on reimbursement for this program,” and they point out the Commission’s decision establishing the BIP Mandate is “final and the subsequent judicial review proceeding was dismissed by the State.”

However, in the Commission’s 2013 decision, the Commission found that appropriations in the state budget for special education “are potentially offsetting from July 1, 1993 until October 19, 2010, and must be deducted from a reimbursement claim to the extent a district applied these funds to provide for BIPs mandated activities.” (Commission on State Mandates, Decision No. CSM-4464, adopted Apr. 19, 2013, p. 50.) The Commission also concluded the 2010 changes to Education Code section 56523 “transform potential offsets to required offsets, beginning in fiscal year 2010–2011.” (Id. at p. 55.) For the Commission, then, amending the parameters and guidelines for reimbursement of the BIP Mandate in the ways required by Education Code, section 56523, subdivision (f), was not incompatible with its decision in 2000, establishing the BIP Mandate. Section 17557, subdivision (d)(2)(B), as applied in Education Code, section 56523, subdivision (f), does not violate the separation of powers doctrine.

reverse the court’s dismissal of the third and fourth causes of action. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

Jones, P. J.

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

[ PARTS III AND IV., See FOOTNOTE*, Ante ]

DISPOSITION

The judgment is affirmed in part and reversed in part. We hold Government Code section 17557, subdivision (d)(2)(B), as applied in Education Code sections 42238.24 and 56523, subdivision (f), does not violate article XIII B, section 6, or article III, section 3, of the California Constitution. However, we reverse the court’s rulings on the motion for leave to amend and the motion to dismiss. We remand this case to the Alameda County Superior Court to allow CSBA and the School Districts to amend the first cause of action to allege that identifying education protection account funding as an offset under Education Code section 42238.24 violates article III, section 36, of the California Constitution. We also
After trial, Bustos sought an award of attorney fees under the Fair Employment and Housing Act, Government Code sections 12900 et seq., 12965 (FEHA), citing the holding of Harris v. City of Santa Monica (2013) 56 Cal.4th 203 (Harris) that “a plaintiff subject to an adverse employment decision in which discrimination was a substantial motivating factor may be eligible for reasonable attorney’s fees and costs expended for the purpose of redressing, preventing, or deterring that discrimination,” even if the discrimination did not “result in compensable injury” for that particular plaintiff. (Id. at p. 235.)

In this appeal, Bustos challenges the trial court’s ruling denying his motion for attorney fees. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Bustos was employed by Global—first as a “Sheet Line Operator,” later as a “Shift Supervisor”—from 2010 until his termination in October 2013. In April 2014, Bustos filed suit, asserting seven causes of action: (1) discrimination on the basis of disability; (2) failure to make reasonable accommodation for a known disability; (3) failure to engage in the interactive process; (4) violation of the California Family Rights Act; (5) retaliation in violation of the California Family Rights Act; (6) failure to prevent discrimination and retaliation; and (7) wrongful termination in violation of public policy.

Bustos alleged, and later argued at trial, that on the date of his termination, he was suffering from carpal tunnel syndrome in his left hand, and was scheduled for surgery on the next business day. His termination, he contended, was a result of discriminatory animus. Global argued that Bustos was terminated for legitimate, nondiscriminatory reasons, specifically, as part of economic layoffs that also resulted in the termination of a number of other employees, and because he had failed one or more drug tests.

The jury returned verdicts in favor of the defense on each of Bustos’s claims, awarding him no damages. As relevant to the present appeal, on the special verdict form for Bustos’s disability discrimination/wrongful termination claim, the jury selected “Yes” in response to the question “Was [Bustos’s] physical condition or perceived physical condition a substantial motivating reason for [Global’s] decision to discharge [Bustos]?” The jury found, however, that Global’s “conduct” was not “a substantial factor in causing harm to [Bustos].”

After trial, plaintiff requested an award of attorney fees in the amount of $454,857.90 pursuant to section 12965, subdivision (b), and the Supreme Court’s holding in Harris, supra, 56 Cal.4th at p. 235. At the outset of the hearing on the motion, the trial court tentatively indicated that it was inclined to deny the motion, commenting as follows: “I’m mindful of [Harris]. But it’s—there’s still a lot of balancing that has to occur. I understand the jury did return—on their verdict, they

1. Further undesignated statutory references are to the Government Code.
answered one of the questions in the affirmative with respect to . . . was [Bustos’s] disability a motivating factor in his termination. However, the second part of that question was, was he harmed? Was it a substantial factor in causing him harm? They said no. [¶] So ultimately, at the end of the day, what we get to, even after Harris, is a discretionary call. And it is just too difficult for me to—under these circumstances, when [Bustos] lost virtually everything in terms of the trial on the contested issues, he did not—this did not result in, for example, an injunction against [Global]. It didn’t result in any declaratory relief against [Global]. He prevailed on nothing in terms of getting—well, he got nothing from the ultimate verdict. [¶] And so for those reasons, it would be difficult for me . . . to award attorneys’ fees notwithstanding the fact that the ultimate judgment is in favor of [Global].” After hearing argument from Bustos’s counsel, the trial court adopted the tentative as its ruling, denying the motion.

III. DISCUSSION

A. Standard of Review.

By statute, the “prevailing party” in a FEHA action may be awarded reasonable attorney fees. (§ 12965, subd. (b); Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 984 (Chavez).) Because FEHA does not define the term “prevailing party,” prevailing party status is determined in this context “based on an evaluation of whether a party prevailed “‘on a practical level,’” and the trial court’s decision should be affirmed on appeal absent an abuse of discretion.” (Donner Management Co. v. Schaffer (2006) 142 Cal.App.4th 1296, 1310 (Donner Management).) In applying this standard, the trial court must identify the prevailing party “by analyzing the extent to which each party has realized its litigation objectives.” (Castro v. Superior Court (2004) 116 Cal.App.4th 1010, 1023 (Castro).)

We review the trial court’s denial of attorney fees for abuse of discretion. (Chavez, supra, 47 Cal.4th at p. 989.) “Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court.” (In re Marriage of Connolly (1979) 23 Cal.3d 590, 597-598.) Nevertheless, we review the question of whether the trial court applied the proper legal standards de novo; a reasoned decision based on a reasonable, but mistaken, view of the scope of discretion would still be an abuse of judicial discretion, even though it would not exceed the bounds of reason in the ordinary meaning of the phrase. (Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 393-394.)

Additionally, in the FEHA context, the trial court’s discretion is guided by the principle that “a prevailing plaintiff should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a prevailing defendant may recover attorney fees only when the plaintiff’s action was frivolous, unreasonable, without foundation, or brought in bad faith.” (Chavez, supra, 47 Cal.4th at p. 985.)

B. Analysis.

The gravamen of Bustos’s claims of error on appeal is that Harris, supra, 56 Cal.4th at p. 235, together with the jury’s finding that his physical condition or perceived physical condition was a substantial motivating reason for his termination, requires the trial court to award him attorney fees. We disagree, and find no abuse of the trial court’s discretion.

In Harris, the Supreme Court considered, among other things, the remedies potentially available to a plaintiff who “has shown that discrimination was a substantial factor motivating a termination decision,” but whose employer “has shown that it would have made the same decision in any event.” (Harris, supra, 56 Cal.4th at p. 232.) Its holding is phrased broadly enough to encompass not only the same decision context, but other situations where a plaintiff proves employment discrimination, but for one reason or another that discrimination “does not result in compensable injury” to that “particular plaintiff.” (Id. at p. 235.) Specifically, with respect to attorney fees, the Supreme Court held that “a plaintiff subject to an adverse employment decision in which discrimination was a substantial motivating factor may be eligible for reasonable attorney’s fees and costs expended for the purpose of redressing, preventing, or deterring that discrimination.” (Ibid.)

Nevertheless, it is important to emphasize that Harris does not require the trial court to award attorney fees to any plaintiff who proves discrimination was a substantial motivating factor of an adverse employment decision; rather, such a plaintiff “may be eligible” to recover attorney fees. (Harris, supra, 56 Cal.4th at p. 235.) Implicitly, therefore, such a plaintiff may not be eligible to recover attorney fees under FEHA, because he or she is not a “prevailing party” as the term is defined in section 12965. (See Donner Management, supra, 142 Cal.App.4th at p. 1310; Castro, supra, 116 Cal.App.4th at p. 1023.) Or, alternatively, in unusual circumstances, the trial court might exercise its discretion not to make an award of attorney fees, even to a plaintiff who is deemed to have prevailed. (See Chavez, supra, 47 Cal.4th at p. 985.) As the Supreme Court reiterated in Harris: “An award of attorney’s fees is discretionary under section 12965, subdivision (b). An award may take into account the scale of the plaintiff’s success, and it must not encourage ‘unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.’” (Ibid.)
In the present case, we find no error in the trial court’s determination that Bustos should not be awarded attorney fees. It is not beyond reason to conclude that a plaintiff who obtains no relief at trial—either monetary or equitable—has not “realized [his] litigation objectives,” regardless of whether one or more preliminary questions on a special verdict form were answered in his favor. (Castro, supra, 116 Cal.App.4th at p. 1023.) Similarly, defendants who obtain judgment in their favor on all claims are reasonably viewed to have “realized [their] litigation objectives,” regardless of how the judgment was reached. (Ibid.) As such, the trial court did not exceed the scope of its discretion by ruling that Bustos should not be awarded attorney fees as a prevailing party pursuant to section 12965 under these circumstances.

Bustos takes issue with the trial court’s characterization of the results of the trial, that he “‘lost virtually everything in terms of the trial on the contested issues.’” In Bustos’s view, the “seminal issue decided by the jury was whether [he] was terminated as part of a legitimate economic layoff” or whether it “was substantially motivated by his disability.” Since that issue was decided in his favor, he contends that the trial court’s comment demonstrates an abuse of discretion. Taken in context, however, the trial court’s comments do not demonstrate any misunderstanding of the record. The trial court explicitly remarked on the jury’s selections on the special verdict form, as well as its bottom line verdicts in favor of the defense. And as discussed above, it was reasonable for the trial court to give priority to the result embodied by the judgment, rather than the jury’s special verdict findings, in determining who prevailed in this matter “‘on a practical level.’” (See Donner Management, supra, 142 Cal.App.4th at p. 1310.)

Bustos also asserts that the trial court denied his motion for attorney fees because it “ignored the holding” in Harris. The record does not support this contention. The trial court explicitly acknowledged Harris in its remarks regarding its tentative ruling. The trial court correctly recognized, moreover, that even under Harris, the award of attorney fees pursuant to section 12695 is discretionary, and it appropriately exercised that discretion. We reject Bustos’s arguments to the contrary, which are based on a misreading of Harris.

IV. DISPOSITION

The order appealed from is affirmed. Respondents are awarded their costs on appeal.

CODRINGTON J.

We concur: RAMIREZ, P.J., MILLER J.