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Counsel’s unequivocal description of defendant’s worsening mental illness warranted reinstatement of competency proceedings (Richman, Acting P.J.)

People v. Easter

C.A. 1st; March 13, 2019; A148197

The First Appellate District reversed a judgment. The court held that the trial court erred in failing to reinstate competency proceedings after being advised of both a worsening of defendant’s preexisting symptoms of mental illness and the onset of new symptoms.

Kevin Easter was charged with murdering his wife. When defense counsel expressed doubt’s about Easter’s competency to stand trial, Easter was evaluated by two medical professionals, one finding him competent to stand trial, the other finding him incompetent. Eight months later, in April 2015, a jury found Easter competent to stand trial. In October 2015, on the eve of trial, defense counsel again expressed a doubt regarding Easter’s present competency, citing auditory hallucinations, difficulties with personal hygiene, and “incomprehensible paranoid responses to certain questions,” otherwise known as “word salad.” On counsel’s opinion, this latter symptom, particularly, rendered Easter unable to assist in his defense and unable to testify at trial.

The trial court declined to reinstate competency proceedings, finding defense counsel failed to present substantial evidence of a substantial change of circumstances or new evidence casting doubt on the prior competency finding. The criminal case proceeded, and a jury found Easter guilty of murder.

The court of appeal affirmed the conviction, holding that the record supported the jury’s finding that a pimp acted in concert with a “john” in forcibly raping a victim.

Accompanied by his female companion Destiny, Beau Dearborne drove victim Yolanda to a vacant parking lot, where he raped her at gunpoint. He then forced her out of the car, accompanied by Destiny, in an area known for prostitution. A “john” approached them for sex. Destiny agreed and, over Yolanda’s repeated protests to Destiny that she did not want to do this, the john had sex with her. Destiny then brought Yolanda back to Dearborne. Dearborne was charged with kidnapping, forcible rape, forcible rape in concert with the john, and other crimes. A jury found him guilty.

Dearborne appealed, arguing he could not be found guilty of forcible rape in concert absent proof that the john was aware of Yolanda’s lack of consent.

The court of appeal affirmed the conviction, holding that Dearborne’s challenges to the sufficiency of the evidence were without merit. The record showed that Dearborne acted in concert with Destiny and the john to accomplish sexual intercourse with Yolanda, against her will, by means of force or violence. Even if the john did not have the mens rea to personally be found guilty of rape, Dearborne did. This was not a situation where the rape of Yolanda was an innocent mistake. Dearborne intended it. The court found no basis for imputing the john’s mental state to Dearborne. Accordingly, the john’s alleged mistake of fact would be no help to Dearborne. Further, even if Dearborne could benefit from the john’s mens rea, there was no substantial evidence that the john honestly and reasonably believed Yolanda consented. The john did not testify and, according to Yolanda’s testimony, she repeatedly pleaded with Destiny, in the john’s presence, not to make her do this. On this record, the jury could not reasonably have concluded that the john was unaware of Yolanda’s lack of consent. Dearborne was nonetheless entitled to remand to permit the trial court’s exercise of discretion on various sentencing issues.
reliable result. The court reversed the judgment of conviction and remanded for further proceedings.

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**Criminal Law**

Counsel’s concession of guilt at trial violated defendant’s Sixth Amendment rights (Dato, J.)

*People v. Flores*

C.A. 4th; April 12, 2019; D073215

The Fourth Appellate District reversed a judgment of conviction. The court held that defendant’s Sixth Amendment rights were violated by counsel’s concession of guilt at trial.

Roberto Flores was charged with attempted murder after he accelerated his car towards a police officer, struck and seriously injured the officer, and then sped away. The incident was captured on video. Following his arrest, Flores bragged about the incident to a cellmate. A public defender was assigned to represent him. From the outset, Flores expressed considerable discontent with his representation, stating he wanted a new attorney because “they are trying to make me admit to something that I don’t want to admit.” The trial court denied Flores’s request for a new attorney.

At the trial, Flores’s counsel pursued a lack-of-premeditation defense, arguing that while the evidence showed Flores was driving the car that hit the officer, he acted in “the spur of the moment,” “especially in light of his intoxicated state.” The jury found Flores guilty of attempted murder.

The court of appeal reversed, holding that defense counsel’s trial strategy violated Flores’ Sixth Amendment right to determine the course of his defense. Under *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, fundamental principles of personal autonomy inherent in the Sixth Amendment afford criminal defendants the right to tell their own story and define the fundamental purpose of their defense at trial, even if most other accused persons in similar circumstances would pursue a different objective and adopt a different approach. Regardless the wisdom of Flores’ preferred trial strategy, it was structural error for counsel to take a factual position at odds with Flores’s insistence that he did not commit the criminal acts alleged by the prosecution. The record demonstrated that counsel overrode Flores’s stated goal of maintaining his innocence of the alleged acts. Instead, in pursuit of the understandable objective of achieving an acquittal, counsel conceded the actus reus of the charged offense at trial. Although any reasonable lawyer might agree with counsel’s judgment, *McCoy* instructed that this was a decision for the client to make.

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**Criminal Law**

Recent amendment to sentencing law entitled defendant to remand for possible imposition of lesser firearm enhancement (Needham, J.)

*People v. Morrison*

C.A. 1st; April 11, 2019; A154092

The First Appellate District affirmed a judgment of conviction, but remanded for resentencing. The court held that defendant was entitled to remand to afford the sentencing court the opportunity to exercise its discretion under recent amendments to the sentencing law to impose a lesser firearm enhancement.

Warren Morrison shot and killed the victim during an argument. Given the number of shots fired, even after the victim was obviously disabled, Morrison was charged with first degree murder. A jury found him guilty and found true a firearm enhancement under Penal Code §12022.53(d). At sentencing in September 2017, the trial court imposed a prison term of 50 years to life—25 years to life on the murder count and 25 years to life for the firearm enhancement. In December 2017, Morrison moved to recall his sentence pursuant to §1170(d) (1), based on recent amendments to §12022.53 that gave the court the discretion, effective January 1, 2018, to strike a firearm enhancement under its provisions. The trial court denied Morrison’s request to strike the firearm enhancement.

Morrison appealed, arguing the case should be remanded for resentencing because the court did not understand the scope of its discretion. Although the trial court properly declined to strike the enhancement completely, he argued the court had the discretion to modify the enhancement to a “lesser included” enhancement under §12022.53(b) or (c), which carry lesser terms of 10 years or 20 years, respectively.

The court of appeal granted remand, holding that it did not appear the trial court considered the issue now raised by Morrison. Although the trial court stated adequate reasons for declining to strike the lifetime enhancement under §12022.53(d), the record did not reflect whether it understood that it could impose a lesser enhancement under §12022.53(b) or (c) instead. Further, at the time of resentencing, no published case had held an uncharged lesser firearm enhancement could be imposed in lieu of an enhancement under §12022.53(d) in connection with striking the greater enhancement. The court accordingly remanded to allow the trial court to exercise its discretion to impose a lesser enhancement.
**United States v. Price**

9th Cir.; April 12, 2019; 15-50556

The court of appeals affirmed a judgment of conviction. The court held that where an international airline passenger is charged with knowingly engaging in sexual contact with another passenger without that person’s permission, the government is not required to prove the accused’s subjective knowledge of the victim’s lack of consent.

During an overnight flight from Tokyo to Los Angeles, forty-six year old Juan Price moved from his assigned seat to an open seat adjacent to that of a sleeping twenty-one-year-old female Japanese student, where he fondled her breast and slipped his hand into her underwear, touching her vagina. A jury found him guilty of violating 18 U.S.C. §2244(b), which makes it a crime to knowingly engage in sexual contact with another person without that other person’s permission on an international flight. The jury found that Price knowingly had sexual contact with the victim and that the sexual contact was without the victim’s permission.

Price appealed, arguing that the government was also required to prove that he subjectively knew that his victim did not consent.

The court of appeals affirmed, holding that the government was not required to prove Price’s subjective awareness of the victim’s lack of consent. Congress’s purpose in enacting the Sexual Abuse Act of 1986, of which §2244(b) is part, was to criminalize sexual contact by focusing on the defendant’s conduct. If the government were required to prove that an accused’s subjective knowledge of the victim’s lack of consent, as Price urged here, every accused sexual predator could defend his admitted sexual contact in the face of no objective sign of permission by asserting a supposed subjective belief that the victim was “enjoying herself,” a result directly contrary to the purpose of the 1986 Act. Price’s reading of the statute was contrary to its text, the structure of the statutory scheme and its very purpose in penalizing those who sexually prey upon victims on the seas or in the air within federal jurisdiction. Because unwanted sexual contact of the type Price engaged in—touching first, and arguing later that he “thought” the victim consented—was precisely the type of conduct that §2244(b) criminalizes, there was no error.

Judge Gilman, concurring, disagreed with the majority’s conclusion that §2244(b) does not require proof of a defendant’s subjective awareness of lack of consent, but found the error was harmless in this case because no juror could reasonably have concluded that Price subjectively believed that he had permission to touch a sleeping stranger’s breast.

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**Castro v. Tri Marine Fish Company LLC**

9th Cir.; February 27, 2019; 17-35703

The court of appeals reversed in part and vacated in part a judgment and remanded. The court held that the underlying arbitration order was the result of a proceeding that was an arbitration in name only, but not in substance, and thus was not enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Philippines citizen Michael Castro was injured while working on a fishing vessel operated by Tri Marine Fish Company LLC, which operated out of American Samoa. Tri Marine paid for Castro’s surgery and other care in the Philippines. Several months into Castro’s rehabilitation, he found himself in need of funds and agreed to a cash settlement of his disability claims with Tri Marine. After negotiating and executing the settlement, a Tri Marine representative escorted Castro to an office building that housed the National Conciliation and Mediation Board. There, in the crowded building lobby, Castro and the Tri Marine representative met with maritime arbitrator Gregorio Biares, who reviewed the settlement paperwork and then signed an “order” recognizing the settlement. The order acknowledged that the parties had executed the settlement prior to meeting with Biare.

Castro later sued Tri Marine in Washington state court for additional medical expenses. Invoking the Convention, Tri Marine removed the case to federal court and moved to confirm the order as a foreign arbitral award. The district court denied Castro’s motion to remand, confirmed the order, and dismissed the case.

The court of appeals reversed in part and vacated in part, holding that the so-called arbitration order was not entitled to enforcement under the Convention. First, the “order” itself made clear that any dispute between the parties was resolved prior to their meeting with Biare. Having settled their dispute, Castro and Tri Marine had nothing to arbitrate. Further, the purported arbitration proceeding in no way conformed with the agreement to arbitrate previously executed by Castro, either when he accepted employment with Tri Marine or when he entered into the settlement agreement with Tri Marine. The arbitration agreement designated American Samoa, and not the Philippines, as the venue for arbitration. Neither the “order” nor the settlement agreement referenced waiver of that designated venue. Finally, Castro’s conduct hardly demonstrated an intent to arbitrate his dispute in the Philippines. Castro had no dispute. He accompanied the Tri Marine representative to the office building with the understanding that he was there to pick up the settlement check and acknowledge receipt, and later professed ignorance that the sit-down meeting in the lobby supposedly constituted arbitration. That meeting did not transform the parties’ settlement agreement into an arbitration order subject to enforcement under the Convention.

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**Dispute Resolution**

Arbitration order in name only not subject to enforcement (McKeown, J.)
Wrongful Death

Out-of-wedlock child lacked standing to pursue wrongful death action against father’s alleged killer
(Aronson, J.)

Stennett v. Miller

C.A. 4th; April 12, 2019; G054989

The Fourth Appellate District affirmed a judgment. The court held that a father’s failure to openly hold out his out-of-wedlock child as his own, coupled with the child’s failure to obtain a paternity order during his lifetime, deprived the child of standing to pursue a wrongful death action following his death, despite DNA testing establishing his paternity.

Minor A.S. was conceived during a brief relationship between Jacqueline Stennett and Amine Britel when they were both graduate students. After learning of the pregnancy, Britel refused any further contact with Stennett or the child. When A.S. was 10 years old, Britel was killed by a drunk driver. Stennett filed a petition to have A.S. declared Britel’s heir under the Probate Code’s intestacy provisions. The petition was supported by DNA evidence conclusively establishing Britel’s paternity. Acting as A.S.’s guardian ad litem, Stennett also filed a wrongful death complaint against the driver who killed Britel. The probate court held that A.S. did not qualify as Britel’s heir, and that ruling was upheld on appeal.

The trial court thereafter dismissed A.S.’s wrongful death action for lack of standing.

The court of appeal affirmed, holding that A.S. did not have standing, and her lack of standing did not violate equal protection. The legislative history of California’s wrongful death statute establishes that standing to sue for wrongful death turns on whether the plaintiff has a right to inherit from the decedent under California’s intestate succession statutes. Here, A.S. had no right to inherit from Britel because he never openly held her out as his own and she never obtained a court order declaring paternity during his lifetime. It followed that she did not have standing to sue for his wrongful death. Further, California’s wrongful death standing rules do not categorically exclude nonmarital children so as to violate equal protection. Rather, they confer standing on children conceived both in and out of wedlock where the child is able to satisfy certain criteria concerning her relationship with the decedent during her lifetime. California’s wrongful death standing rules also do not illegally discriminate on the basis of gender. A state may validly impose different requirements for establishing natural parent status for birth mothers and biological fathers because mothers and fathers are not similarly situated when it comes to their role in becoming parents. Justice Moore dissented, finding that where, as here, postmortem DNA testing unequivocally established Britel’s paternity, it was unnecessary to rely on intestacy laws in order to interpret the wrongful death statute.
The motion to substitute Carri Robertson, authorized representative, as petitioner in place of Joseph D. Robertson, Deceased is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for consideration of the question whether the case is moot.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Bucklew v. Precythe, 587 U. S. ___(2019).
UNITED STATES OF AMERICA, Plaintiff-Appellee,
v. JUAN PABLO PRICE, Defendant-Appellant.

No. 15-50556
In the Supreme Court of the United States
D.C. No. 2:15-cr-00061-GHK-1
Appeal from the United States District Court for the Central District of California
George H. King, District Judge, Presiding
Argued and Submitted November 6, 2017
Submission Vacated May 18, 2018
Resubmitted April 12, 2019
Pasadena, California
Filed April 12, 2019

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This case was submitted to a panel that included Judge Stephen R. Reinhardt. Following Judge Reinhardt’s death, Judge Nguyen was drawn by lot to replace him. Ninth Circuit General Order 3.2.h. Judge Nguyen has read the briefs, reviewed the record, and listened to oral argument.

COUNSEL

Christopher C. Kendall (argued), Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; United States Attorney’s Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION
WARDLAW, Circuit Judge:

It is a federal crime under 18 U.S.C. § 2244(b), enacted as part of the Sexual Abuse Act of 1986, to knowingly engage in sexual contact with another person without that other person’s permission on an international flight. During an overnight flight from Tokyo, Japan to Los Angeles, California, Juan Pablo Price, a forty-six-year-old man, moved from his assigned seat to an open seat adjacent to that of a sleeping twenty-one-year-old female Japanese student, where he fondled her breast and slipped his hand into her underwear, touching her vagina. The jury convicted Price under 18 U.S.C. § 2244(b), finding that the government proved beyond a reasonable doubt that Price knowingly had sexual contact with the victim and that the sexual contact was without the victim’s permission. Price appeals his conviction, contending that the government was also required to prove beyond a reasonable doubt that he subjectively knew that his victim did not consent.

We reject Price’s reading of the statute as contrary to its text, the structure of the statutory scheme and its very purpose in penalizing those who sexually prey upon victims on the seas or in the air within federal jurisdiction. Congress’s purpose in enacting the Sexual Abuse Act of 1986 was to criminalize sexual contact by focusing on the defendant’s conduct. If the government were required to prove that the defendant subjectively knew he lacked consent, as Price urges here, every accused sexual predator could defend his admitted sexual contact in the face of no objective sign of permission by asserting a supposed subjective belief that the victim was “enjoying herself,” a result directly contrary to the purpose of the 1986 Act. Even Price recognized, following his arrest, that “it sure is going to be my job not to touch a woman” whom he doesn’t know and hasn’t talked to. As the arresting officer responded to Price, “in your forty something years, you should’ve already known that[].”

Because unwanted sexual contact of the type Price engaged in—touching first, and arguing later that he “thought” the victim consented—is precisely what § 2244(b) criminalizes, we reject Price’s claim of instructional error. We also conclude that the police had probable cause to arrest Price, that he was properly Mirandized, and that the district court acted within its discretion in refusing to read back to the jury portions of the victim’s testimony. We therefore affirm Price’s conviction and sentence.

I.

The objective facts are fairly undisputed. Price, then forty-six, was a passenger on the overnight flight from Tokyo, Japan to Los Angeles, California. A.M., a twenty-one-year-old college student, and her friend, Maki Fujita, were traveling on the same flight. After take-off, Price asked A.M. if he could move from his assigned seat to the unoccupied seat next to her, a seat where the video monitor was not working. After take-off, Price asked A.M. if he could move from his assigned seat to the unoccupied seat next to her, a seat where the video monitor was not working, explaining that his original seat had limited legroom. A.M said “okay.” Price attempted to engage A.M. in conversation, but A.M. could not speak English very well, and he eventually realized that she was not completely understanding what he was saying. A flight attendant, Hidemori Ejima, noticed that Price had changed his seat, and asked him why. When
Price responded that he wanted more legroom, Ejima offered Price another seat with a working video monitor and three times more legroom. Price declined the offer—something Ejima had not seen before in his twenty-five years as a flight attendant. After food service, Ejima handed Fujita a note warning Fujita and A.M. to “watch out” for the person sitting next to them. A.M. interpreted the warning to mean that Price might try to steal her wallet or other belongings. She moved her purse and wallet deeper into her bag and fell asleep.

A.M. woke up to Price touching the right side of her body, including her arm, hip, and leg. Thinking that Price was trying to steal the cell phone in her pocket, she moved the phone to inside the seat pocket and went back to sleep. When A.M. awoke again, Price was touching her breast. A.M. began panicking, but did not want to bother the people around her. She tried to avoid Price’s touch by pulling the blankets up to her shoulder and crossing her arms in front of her. Undeterred, Price placed his blanket over both of them, covering his arms, and continued to touch her breast, first over her shirt and then under it. Price then moved his hand into A.M.’s jeans and underwear and touched her vagina.

In a state of shock, panic, and fear, and looking for the words to tell Price to stop, A.M. twisted her body toward Fujita on her left, away from Price. Price hauled her back around with “strong force” and tried to pull her jeans down. At this point, Fujita woke up, and, seeing her awake, Price retreated to his seat. When Fujita asked A.M. if she was okay, A.M. responded that she was not and asked what she should do. Fujita told her to tell the flight attendant. A.M. did not have the English words to explain what happened, although she was able to ask for “help.”

Price’s perception of the encounter differed from the others on the plane. He testified that while his hand was on the armrest, he felt A.M.’s hand touch his. Thinking that this could be an invitation, Price began to rub her hand. Price stated that they started holding and rubbing each other’s hands. As he began moving his hands across A.M.’s body and to her breast area, he thought she was “enjoying herself” because she was arching her body, he could feel her heartbeat, her breathing was intense, and she was opening and closing her eyes. It was only when Price tried to move her face toward him and A.M. would not budge that Price thought something was wrong. At that point, Price noticed that Fujita was awake, and A.M. then got up. According to both A.M.’s and Price’s accounts, no words were exchanged during this encounter. Price agrees A.M. did not verbally consent to his touching her.

While A.M. got up to tell the flight attendant what happened, Price wrote a note that he never ended up giving to A.M., which said, “If a man touches you and you don’t want him to always feel free to say No.” The purser or lead chief flight attendant, Yosri Zidan, then obtained written statements from both Price and A.M. Price’s story was that he changed seats because he wanted more legroom; he then fell asleep and awoke to find A.M. stroking his hand.

While still in flight, the pilot sent a message to American Airlines employees at Los Angeles International Airport (LAX) that read, “WE NEED LAX POLICE TO MEET AIRPLANE [/] WE HAVE A MOLESTER/FONDLER ON BOARD.” The LAX Police Department (LAXPD) then contacted the Transportation Security Administration (TSA), who in turn contacted the Federal Bureau of Investigation (FBI). Special Agent David Gates (S.A. Gates) of the FBI instructed the sergeant at LAX to first investigate the incident to determine if he needed to respond.

On February 18, 2015, after a federal grand jury indicted Price for abusive sexual contact under 18 U.S.C. § 2244(b), Price was formally arrested. Price filed a pre-trial motion to suppress evidence found in his bag and cell phone, and his statements to the LAXPD officers and to S.A. Gates, arguing that he was arrested without probable cause upon the flight’s arrival at LAX and that he was questioned without being given Miranda warnings. The government and Price disputed the 18 U.S.C. § 2244(b) jury instruction, based on the statute’s use of the word “knowingly.” The district court ultimately selected the Ninth Circuit’s Model Criminal Jury Instruction for § 2244(b) and the additional instruction proposed by Price that “permission” under § 2244(b) can be express or implied, “that is[,] inferred from words or actions.” The district court denied Price’s request to instruct the jury that, in addition, the government must prove that Price “knew the sexual contact was without A.M.’s permission.” The district court reasoned “that it is appropriate not to read into the statute that which it does not say it requires.” Price timely appeals.

II.

18 U.S.C. § 2244(b) provides:

Whoever, in the special maritime and territorial jurisdiction of the United States … knowingly engages in sexual contact with another person without that other person’s permission shall be fined under this title, imprisoned not more than two years, or both.

“Sexual contact” is defined as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3). The Ninth Circuit’s model instruction provides:

The defendant is charged in [Count ______ of] the indictment with abusive sexual contact in violation of Section 2244(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: First, the defendant knowingly had sexual contact with [name of victim]; Second, the sexual contact was without [name of
Our analysis begins with the text of the statute. “In determining what mental state is required to prove a violation of the statute, we look to its words and the intent of Congress.” United States v. Johal, 428 F.3d 823, 826 (9th Cir. 2005). We keep in mind the “background rules of the common law in which the requirement of some mens rea for a crime is firmly embedded.” Staples v. United States, 511 U.S. 600, 605 (1994) (citation omitted).

We begin with the statutory text and interpret “statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary.” I. R. ex rel. E. N. v. L. A. Unified Sch. Dist., 805 F.3d 1164, 1167 (9th Cir. 2015) (citation omitted). Examining the text of § 2244(b), we conclude that its most natural grammatical meaning is that the government must prove that the defendant knew he engaged in sexual contact, not that it prove that the defendant subjectively knew he lacked consent. The term “knowingly” modifies only the verb phrase “engages in sexual contact with another person” and does not modify the adverbial prepositional phrase “without that other person’s permission.”

In United States v. X-Citement Video, Inc., the Supreme Court examined the Protection of Children Against Sexual Exploitation Act of 1977, which punishes, inter alia, any person who “knowingly transports or ships in interstate or foreign commerce” or who “knowingly receives, or distributes . . . , or knowingly reproduces” from such commerce “any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct.” 513 U.S. 64, 68 (1994) (quoting 18 U.S.C. § 2252(a) (1988 ed. & Supp. V 1993)). The “critical determination” the Court had to make was whether the term “knowingly,” in the phrases “knowingly transports or ships” and “knowingly receives, or distributes” modifies not only those verbs but also the phrase “the use of a minor.” Id. The Court recognized that “[t]he most natural grammatical reading . . . suggests that the term ‘knowingly’ modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces.” Id. at 68. Nevertheless the Court was “reluctant[t] to simply follow the most grammatical reading of the statute,” because the results of that reading were “positively absurd” and would “sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material.” Id. at 69–70.

We followed suit in construing the most natural grammatical reading of a statute in United States v. Backman, 817 F.3d 662 (9th Cir. 2016). There we construed an analogous mens rea requirement in a criminal sex trafficking statute, the Trafficking Victims Protection Act of 2000. That statute required proof that the defendant “knowingly”—(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person.” Id. at 666–67 (quoting 18 U.S.C. § 1591(a)). We rejected the defendant’s argument that the government must prove, in addition to proving knowing recruitment, that he knew his acts affected interstate or foreign commerce, concluding “it is most natural to read the adverb ‘knowingly’ in [18 U.S.C.] § 1591(a) to modify the verbs that follow: ‘recruits, entices, harbors, transports, provides, obtains, or maintains.’ The phrase ‘in or affecting interstate or foreign commerce’ describes the nature or extent of those actions but, grammatically, does not tie to ‘knowingly.’” Id. at 667.

Similarly, here, the phrase “without that other person’s permission” describes the nature or extent of the prohibited action “engag[ing] in sexual contact” but, grammatically, does not tie to the term “knowingly.” 18 U.S.C. § 2244(b). Price attempts to distinguish Backman on the ground that the phrase “in or affecting interstate or foreign commerce” is jurisdictional, but that was only a secondary rationale for our Backman holding, which we found persuasive in a Seventh Circuit opinion, United States v. Sawyer, 733 F.3d 228 (7th Cir. 2013). The principal rationale in Backman was our view of the statute’s most natural grammatical reading, which demonstrates the statute’s ordinary meaning.

Our reading of § 2244(b) is consistent with our precedent for interpreting mens rea requirements in criminal statutes. “When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.” Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (internal quotation marks and citation omitted). Thus, although courts must be careful not to interpret crimes too broadly, “[i]n some cases, a general
requirement that a defendant act knowingly is itself an adequate safeguard.” *Id.*

Here, the other elements of § 2244(b) provide that adequate safeguard. First, the statute already provides for a mens rea requirement that the defendant engage in sexual contact knowingly, rendering unnecessary a second mens rea requirement. See *Lo*, 447 F.3d at 1230 (finding that a conviction under 21 U.S.C. § 841(c)(2) did not require knowledge that the substance was a listed chemical, because the mens rea requirement that the defendant knowingly possessed or distributed the chemical was sufficient to ensure that “apparently innocent conduct is not criminalized”). Second, the government must also prove beyond a reasonable doubt that the sexual contact was without the victim’s permission, which is sufficient to render it wrongful. *See, e.g.*, *United States v. Gavin*, 959 F.2d 788, 791–92 (9th Cir. 1992). As the district court properly recognized in instructing the jury on “permission,” although it is an objective concept, it includes both explicit and implicit permission, and may be proven by circumstantial evidence. Thus, hewing close to the natural grammatical reading of “knowingly” here does not portend “absurd” results that would sweep up innocent actors not intended to be covered by the statute. *Cf.* X-Citement Video, 513 U.S. at 69.

*Flores-Figueroa v. United States*, 556 U.S. 646 (2009), is inapposite. In *Flores-Figueroa*, the Supreme Court considered a federal aggravated identity theft statute that provided for an increased criminal penalty of an additional two years of imprisonment for certain offenses if the offender “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” 18 U.S.C. § 1028A(a)(1). The Court concluded that the term “knowingly” modified the entire sentence such that the government needed to show that the defendant knew that the “means of identification” belonged to “another person.” *Flores-Figueroa*, 556 U.S. at 657; *see also id.* at 650 (“It makes little sense to read the provision’s language as heavily penalizing a person who ‘transfers, possesses, or uses, without lawful authority’ a *something*, but does not know, at the very least, that the ‘something’ (perhaps inside a box) is a ‘means of identification.’ Would we apply a statute that makes it unlawful ‘knowingly to possess drugs’ to a person who steals a passenger’s bag without knowing that the bag has drugs inside?”).

Price argues that *Flores-Figueroa* requires us to adopt his interpretation of § 2244(b) because “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.” *Id.* at 652. But Price erroneously takes the *Flores-Figueroa* holding out of the context of the aggravated identity theft statute. As the Court reasoned, *Flores-Figueroa*’s directives were specific to particular grammatical contexts that “[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” *Id.* at 650. This grammatical structure does not appear in § 2244(b), where the phrase in question—“without that other person’s permission”—is not the object of the sentence but an adverbial prepositional phrase.

Second, and most importantly, in *Flores-Figueroa*, the mens rea requirement was necessary to “separate wrongful conduct from otherwise innocent conduct.” *Elonis*, 135 S. Ct. at 2010 (internal quotation marks and citation omitted). By contrast, “[h]ere, there is no potential for the penalization of innocent conduct nor do we face constitutional avoidance concerns.” *United States v. Jefferson*, 791 F.3d 1013, 1016–18 (9th Cir. 2015) (finding it unnecessary to extend the “knowingly or intentionally” mens rea to the type and quantity of drugs at issue, where the requirement that the government prove the other elements of the case was “sufficient to ensure the statute penalizes only culpable conduct”). We have explicitly rejected the notion that the Court’s reading of “knowingly” in *Flores-Figueroa* compels the same reading in every criminal statute that uses the word “knowingly.” *See id.* at 1017–18 (“Because [21 U.S.C.] § 960’s statutory text and structure are not parallel to that of § 1028A(a)(1), the ordinary grammatical interpretive rules articulated in *Flores-Figueroa* do not apply here.”); *United States v. Stone*, 706 F.3d 1145, 1147 (9th Cir. 2013) (“[T]he Court in *Flores-Figueroa* did not announce an ‘inflexible rule of construction.’ Rather, statutory interpretation remains a contextual matter.” (citations omitted)); *United States v. Castagana*, 604 F.3d 1160, 1166 (9th Cir. 2010) (rejecting the argument that the court “treat ‘with intent’ the same way the Supreme Court treated ‘knowingly’ in *Flores-Figueroa*” because “the language of the statute in *Flores-Figueroa* is not parallel to that of [18 U.S.C.] § 1038(a)(1)”). Indeed, the *Flores-Figueroa* Court itself cautioned that “the inquiry into a sentence’s meaning is a contextual one.” 556 U.S. at 652.

As the X-Citement Video Court advised, however, this does not necessarily end our analysis “because of the respective presumptions that some form of scienter is to be implied in a criminal statute even if not expressed.” 513 U.S. at 69. We therefore next examine the structure, *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018), and legislative history of the statute, to determine if we, like the X-Citement Video Court, should be reluctant to “simply follow the most grammatical reading of the statute,” 513 U.S. at 70.

Section 2244(b) is part of a statutory scheme criminalizing abusive sexual contact. First, subsection (a) criminalizes conduct that, “had the sexual contact been a sexual act,” would be “punished [elsewhere] by this chapter.” 18 U.S.C. § 2244(a). Second, subsection (b) criminalizes sexual contact “[i]n other circumstances.” *Id.* § 2244(b). Finally, subsection (c) enhances the sentence “[i]f the sexual contact that violates
this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years.” *Id.* § 2244(c).

Subsections 2244(a) and 2244(b) work in parallel ways, and we must read the two subsections together. See *United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995) (“Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.”). Both § 2244(a) and (b) require that the defendant “knowingly” have “sexual contact” and set forth one additional element of the offense. In § 2244(a), the additional element the government must prove is that the sexual contact would be punishable by certain other statutes if the sexual contact had instead been a sexual act; in § 2244(b), the additional element is the victim’s lack of permission. The government is not required to prove that the defendant knew that the second element of § 2244(a) was met—in other words, the government need not prove that the defendant knew that the sexual contact he engaged in would have been punished by another law if the contact had risen to the level of a sexual act. We have not read § 2244(a)(3) to tie the word “knowingly” to the second element. Courts have instead read the second element as subject to objective proof. *United States v. Granbois*, 376 F.3d 993, 995 (9th Cir. 2004) (delineating the elements for conviction under § 2244(a)(3), which does not include a mens rea requirement for the second element); see also *United States v. Jennings*, 496 F.3d 344, 352 (4th Cir. 2007) (concluding that to determine a violation of § 2244(a)(3), “under the straightforward language of the statute, we are to read § 2243(a) and determine whether [the defendant] had committed that offense, substituting for ‘sexual act’ the term ‘sexual contact’”). To read “knowingly” to apply to the second element in § 2244(a) would both be grammatically unnatural and produce absurd results. Because a conviction under § 2244(a) does not require that the government prove the defendant’s knowledge of the additional element, we should read § 2244(b) in the same manner.

Price argues that reading the statute along with its neighboring provisions, 18 U.S.C. § 2241(c) and § 2243(a), requires the opposite interpretation. Section 2244(b) follows the same general sentence structure as the other two subsections—although the other two subsections address sexual acts with minors, a more serious crime than sexual contact.

According to Price, because § 2241(d) and § 2243(d) expressly provide that “the Government need not prove that the defendant knew” the age of the minor, the absence of such a provision in § 2244(b) indicates that Congress intended that the government must prove that the defendant knew that sexual contact was without permission. We disagree.

Sections 2241 (aggravated sexual abuse) and 2243 (sexual abuse of a minor or ward) impose severe penalties, with maximum sentences of life imprisonment and fifteen years, respectively. By contrast, § 2244(b) prescribes a maximum sentence of no more than two years. We generally expect that criminal laws subject to potentially more severe penalties would require more stringent mens rea requirements. See *Staples*, 511 U.S. at 618 (“[A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement.”); cf. *United States v. Gomez-Leon*, 545 F.3d 777, 793 (9th Cir. 2008) (“Commensurate with lesser punishment is a lesser mens rea requirement—.” (citation omitted)). Thus, Congress’s decision to expressly eliminate the mens rea requirements in § 2241 and § 2243 is not instructive of the proper interpretation of § 2244(b). Sections 2241 and 2243, with their harsh sentencing maximums, require the explicit statement that “the Government need not prove that the defendant knew” the age of the minor victim in order to overcome the strong presumption “that Congress did not intend to eliminate a mens rea requirement.” *Staples*, 511 U.S. at 618. Section 2244(b) does not give rise to the same strong presumption because its violation bears a dramatically less severe consequence. Moreover, § 2243(c) provides that mistake about age can be a defense, making § 2243(d) necessary to clarify that knowledge of age is not an element. Therefore, Congress’s decision not to explicitly eliminate the knowledge requirement in § 2244(b) is of no import. It would have been redundant to do so because it was already clear from the language of the statute itself, together with its relatively light penal consequence, that the government need not prove knowledge as to the second element.

Furthermore, Price’s logic would produce absurd results in interpreting § 2244 as a whole. Subsection 2244(c) provides that, “If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.” That the only mens rea requirement in § 2244(a) and (b) is the defendant’s knowing engagement in sexual contact is only bolstered by § 2244(c)’s

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1. 18 U.S.C. § 2246(2) defines the term “sexual act” as

- (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

2. The district court sentenced Price to probation for three years.

3. Price points to an Eighth Circuit opinion that relied on this comparison with § 2244(c) and § 2243(a) to hold that 18 U.S.C. § 2242(2), which addresses sexual abuse of an incapacitated person, requires that the defendant knew the victim was incapacitated or unable to grant consent. *United States v. Braguier*, 735 F.3d 754, 761 (8th Cir. 2013) (en banc). We are not persuaded by Price’s argument because § 2242(2) also has a severe maximum penalty of life imprisonment, unlike § 2244(b). We do not think the Eighth Circuit’s interpretation of § 2242(2) affects our analysis of § 2244(b) in any way.
omission of any explicit provision that the defendant need not know the person was under the age of twelve. Price’s argument would read into subsection (c) a requirement that the government prove that the defendant knew that the child was under twelve to sustain a conviction under § 2244(c). Congress could not have intended to impose that extra mens rea requirement on sexual contact with a child under § 2244(c), with less severe penalties, when it chose not to impose that requirement on sexual abuse of a child under § 2241(c) and § 2243(a), with penalties as severe as life in prison.

C.

“Although we need not rely on legislative history because the statute is unambiguous, the legislative history of the statute and common sense support” our conclusion. Castagana, 604 F.3d at 1164. Congress’s stated purpose in enacting the Sexual Abuse Act of 1986 was to “modernize[] and reform[] Federal rape provisions by … defining the offenses so that the focus of a trial is upon the conduct of the defendant” and “expanding the offenses to reach all forms of sexual abuse of another,” among other changes. H.R. Rep. No. 99-594, at 10–11 (1986). The House Report also communicated Congress’s expectation that the law would “simplify law enforcement” activities. Id. at 21. It would be inconsistent with these goals to hold that Congress intended to require proof that the defendant subjectively knew the victim did not consent.

In enacting the 1986 Act, Congress was concerned with whether lack of consent needed to be an element at all, and it consistently described this element in objective terms. See, e.g., id. at 13 (“Where the Committee believes it appropriate to the offense to require the prosecution to show that the conduct was engaged in without the victim’s permission, such a requirement has explicitly been set forth.”). Congress would not have singled out § 2244(b) for an onerous burden of proof without comment given that its goal was to facilitate prosecutions. See id. at 12 (explaining that the 1986 Act was “drafted broadly to cover the widest possible variety of sexual abuse”); cf. Lo, 447 F.3d at 1231 (9th Cir. 2006) (“[I]t seems very unlikely that Congress would have chosen to make prosecution more difficult by requiring proof that the defendant knew that the chemical was a listed chemical, while at the same time seeking to expand the scope of prosecution for the possession and distribution of precursor chemicals by increasing the number of chemicals that could provide the basis for prosecution.”).4

III.

Price also argues that all of his statements and the evidence seized from him when he was escorted from the plane and handcuffed by LAXPD Officers Christopher Faytol and Ngan Lee, and at least one U.S. Customs and Border Protection officer, should be suppressed. He contends that the officers lacked probable cause to arrest him at the arrival gate. The district court concluded that because the officers did not arrest Price at that time, there was no need to demonstrate probable cause. While we disagree with the district court as to whether an arrest occurred, we conclude that the officers had probable cause to arrest Price as he disembarked from the plane. Therefore, the district court did not err by denying Price’s suppression motion.

We review de novo the denial of a motion to suppress, although we review underlying factual findings for clear error. United States v. Fernandez-Castillo, 324 F.3d 1114, 1117 (9th Cir. 2003). “The determination of probable cause to arrest a suspect is a mixed question of law and fact reviewed de novo.” United States v. Nava, 363 F.3d 942, 944 (9th Cir. 2004) (citation omitted).

In the context of an international border, an arrest occurs when “a reasonable person would believe that he is being subjected to more than the temporary detention occasioned by border crossing formalities.” United States v. Bravo, 295 F.3d 1002, 1009 (9th Cir. 2002) (internal quotation marks and citation omitted). We ask, considering the totality of the circumstances, “whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.” Id. (internal quotation marks and citation omitted). “[H]andcuffing is a substantial factor in determining whether an individual has been arrested”—although it “alone is not determinative.” Id. at 1010; see also United States v. Guzman-Padilla, 573 F.3d 865, 884 (9th Cir. 2009) (“[O]fficers with a particularized basis to believe that a situation may pose safety risks may handcuff or point a gun at an individual without converting an investigative detention into an arrest.”).

Price was escorted by three armed law enforcement officers off the plane at a remote gate, while the rest of the passengers remained seated. Officer Faytol performed a pat-down search and Officer Lee handcuffed him. This was not a routine border airport screening and search process, as the district court found. Although the officers cited safety justifications for handcuffing Price, including the fear that Price might become aggressive as other passengers deplaned, the officers kept Price in handcuffs until the FBI interviewed him—from the time Price deplaned at approximately 9:08 AM, until after S.A. Gates arrived at around 11:30 AM. This was not a “temporary detention occasioned by border crossing formalities”; this was an arrest. Bravo, 295 F.3d at 1009 (citation omitted).

We nevertheless conclude that the officers had probable cause to believe Price had committed a crime when they arrested him. Police may arrest a suspect if “under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime.” Beier v. City of

4. We agree with Judge Gilman’s conclusion that even if the statute required the government to prove that Price subjectively knew the sexual contact was without permission, any error in the jury instruction was harmless. See United States v. Pierre, 254 F.3d 872, 877 (9th Cir. 2001). Given the totality of the circumstances, it was clear beyond a reasonable doubt that Price subjectively knew that he did not have permission to have sexual contact with A.M.
Lewison, 354 F.3d 1058, 1065 (9th Cir. 2004) (internal alteration marks and citation omitted). We must “consider the nature and trustworthiness of the evidence of criminal conduct available to the police.” Id. at 1064. The police need not know, however, precisely what offense has been committed. See United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977) (per curiam) (finding probable cause where officers believed only that the defendant was “clandestinely engaging in illegal business of some kind”).

Here, the officers had “reasonably trustworthy information” to arrest Price as he deplaned. Beier, 354 F.3d at 1064. They knew that a female passenger had reported that Price had perpetrated a sexual offense. The pilot had sent an advance message asking LAXPD to meet the airplane, stating “WE HAVE A MOLESTER/FONDLER ON BOARD.” The actions of the flight crew demonstrated that they viewed the allegations as credible as they sought law enforcement assistance.

We reject Price’s argument that the officers lacked probable cause because the information available to the officers was not trustworthy. We acknowledge the minor differences in the officers’ recollections of the event at the suppression hearing—Faytol recalled that the incident was a “290,” the code for sexual battery, while Lee recalled that the incident was a “311,” the code for indecent exposure. However, these differences did not render the information untrustworthy. Price also points to S.A. Gates’s testimony that mid-flight reports can be unreliable because they involve a series of messengers. Although we disagree that mid-flight reports are categorically so untrustworthy that they can never establish probable cause, we need not address these concerns here because before arresting Price, the officers spoke directly with the purser, lead flight attendant Zidan, who reported that a female passenger had complained about a male passenger touching her and gave details about where both individuals were sitting on the plane. Based on purser Zidan’s report, “a prudent person would have concluded that there was a fair probability that the defendant had committed a crime.” Id. at 1065 (internal alteration marks and citation omitted).

IV.

Price also moved to suppress the statements he made to S.A. Gates when he was interviewed, contending that he did not adequately understand his rights when he waived them. He points to the transcript of the interview where he expressed confusion as to whether he was being arrested. We agree with the district court, however, that though Price may have been confused about whether he was under arrest, there was no doubt that his Miranda waiver was knowing, intelligent, and voluntary, and that his statements were voluntarily made. “We review a district court’s ruling on a Miranda waiver under two standards: Whether the waiver was knowing and intelligent is a question of fact that we review for clear error. Whether the waiver was voluntary is a mixed question of fact and law, which we review de novo.” United States v. Rodriguez-Preciado, 399 F.3d 1118, 1127 (9th Cir.) (citation omitted), amended by 416 F.3d 939 (9th Cir. 2005). “We review de novo the voluntariness of a confession and the factual findings supporting the determination for clear error.” United States v. Heller, 551 F.3d 1108, 1112 (9th Cir. 2009) (citation omitted).

Before S.A. Gates interviewed Price, he removed the handcuffs. S.A. Gates then explained to Price his Miranda rights, describing it as “just like you see on T.V.” Price first sought clarification that he was not arrested, which S.A. Gates confirmed, and S.A. Gates then recited the Miranda rights, as Price read along and responded “Mm-hmm” at various points. At the end, Price asked once again whether or not he was under arrest, noting that in movies, when you hear Miranda rights, “you know that somebody is being arrested.” S.A. Gates again assured Price that he was not under arrest. Price signed the “Advice of Rights” form. At the end of the interview, S.A. Gates cited Price with simple assault and allowed him to leave.

“To admit an inculpatory statement made by a defendant during custodial interrogation, the defendant’s waiver of Miranda rights must be voluntary, knowing, and intelligent.” United States v. Shi, 525 F.3d 709, 727 (9th Cir. 2008) (internal quotation marks and citation omitted). In determining the knowing and intelligent nature of the waiver, we consider the totality of the circumstances, including

(i) the defendant’s mental capacity; (ii) whether the defendant signed a written waiver; (iii) whether the defendant was advised in his native tongue or had a translator; (iv) whether the defendant appeared to understand his rights; (v) whether the defendant’s rights were individually and repeatedly explained to him; and (vi) whether the defendant had prior experience with the criminal justice system.

United States v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007) (citation omitted).

Price disputes only the fourth factor—whether he understood his rights. Price argues that his questions to S.A. Gates showed that he did not understand that he could exercise his Miranda rights. However, Price’s questions were all directed towards clarifying whether or not he was actually under arrest. As the district court found, Price “was not confused as to the nature and extent of his rights” but rather “was confused about why (‘the reason’) he was being read his rights given that SA Gates had told him only moments earlier that he was not under arrest.”

We must also find that both Price’s waiver and the statements themselves were voluntary. A Miranda “waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement.” United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc) (citation omitted). We find the confession voluntary unless, “considering
the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect’s will was overborne.” *Heller*, 551 F.3d at 1112 (citation omitted).

We agree with the district court that both Price’s waiver and his statements were voluntary. Price mischaracterizes the record of the interview. S.A. Gates never threatened Price with his power to detain him unless he answered S.A. Gates’s questions. It is evident from the record that S.A. Gates stated in a jocular manner that he could find a reason to arrest Price if Price wanted—a joke that elicited Price’s laughter—and S.A. Gates explained that it was his expectation that Price would “walk out of here” that day. The interview does not reveal any sign of coercion: Price was not in handcuffs or otherwise physically restrained, and the FBI agents asked Price if he was doing okay and if he needed water or to use the bathroom.

V.

The district court did not abuse its discretion by declining to read back A.M.’s testimony when requested by the jury. We review denials of a jury’s request to read back a witness’s testimony for abuse of discretion and have noted “the district court’s great latitude to address requests for readbacks.” *United States v. Medina Casteneda*, 511 F.3d 1246, 1249 (9th Cir. 2008). “In general, rereading is disfavored because of the emphasis it places on specific testimony and the delay it causes in the trial.” *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir. 1983) (citation omitted). During deliberations, the jury asked for a transcript of Price’s FBI interview and of A.M.’s testimony. We reject Price’s argument that because the district court acquiesced to the jury’s request by replaying the recording of Price’s FBI interview, the simultaneous decision not to read back A.M.’s testimony was improper.

Here, the district court gave two appropriate reasons for denying the readback. First, it cited the logistical difficulties in preparing a readback, and second, it expressed concern that reading back A.M.’s testimony without also reading back Price’s testimony would lead to an unfair focus on one part of the trial over others. We have determined that the district court’s rationale is appropriate as a basis for declining a readback of testimony. See, *e.g.*, *Medina Casteneda*, 511 F.3d at 1249 (finding no abuse of discretion in the district court’s denial of the jury’s request for a readback because of the concern that the jury would focus on “one particular piece of evidence at the expense of other evidence”).

VI.

In enacting the Sexual Abuse Act of 1986, of which 18 U.S.C. § 2244(b) is a part, Congress sought to expand criminal culpability for sexual acts and contacts and facilitate prosecution of those crimes. Thus it placed the burden on the actor who knowingly engages in sexual contact with another person to first obtain that person’s consent, objectively given. The government need not prove that the defendant subjectively knew he lacked consent, as Price asserted here. It need only prove that the victim did not consent as an objective matter. Because Price’s remaining contentions also lack merit, we AFFIRM his conviction and sentence.

**GILMAN, Circuit Judge, concurring:**

I concur in the lead opinion’s conclusion that Juan Pablo Price’s conviction should be affirmed. But I respectfully disagree with its holding that the term “knowingly” in 18 U.S.C. § 2244(b) modifies only the phrase “engages in sexual contact with another person” and does not extend to the phrase “without that other person’s permission.” That holding is contrary to the plain text of the provision and its place in the overall statutory scheme.

In order to obtain a conviction under 18 U.S.C. § 2244(b), I believe that the government has the burden of proving that Price subjectively knew that he was acting without A.M.’s permission. The statute, in other words, does not criminalize otherwise innocent sexual contact based on a fact that the lack of permission. Unknown to the defendant, that the defendant knew he lacked permission may be proved by circumstantial evidence but, nevertheless, the defendant’s subjective knowledge is an issue to be resolved by the jury.

Accordingly, the district court erred in refusing to instruct the jury that such knowledge was necessary to convict Price under 18 U.S.C. § 2244(b). Despite the court’s faulty instructions, however, the error was harmless beyond a reasonable doubt because no reasonable juror could have concluded that Price subjectively believed that he had permission to touch a sleeping stranger’s breast. I therefore concur in the ultimate judgment reached by the lead opinion.

**INTRODUCTORY NOTE**

Prior to his death in March 2018, Judge Stephen Reinhardt was a member of this panel and prepared a draft opinion holding that the “knowingly” mens rea requirement contained in 18 U.S.C. § 2244(b) should be applied to each element of the offense, including that the sexual contact be without the other person’s permission. Unabashedly, much of this concurrence can be attributed to the portions of Judge Reinhardt’s draft opinion with which I fully agree.

I.

This case requires us to interpret the following statute:

> Whoever, in the special maritime and territorial jurisdiction of the United States, … knowingly engages in sexual contact with another person without that other person’s permission shall be fined under this title, imprisoned not more than two years, or both.

18 U.S.C. § 2244(b) (emphases added). For the following reasons, I disagree with the lead opinion’s conclusion that a
conviction under § 2244(b) does not require the government to prove that the defendant knew that he lacked permission to engage in sexual contact with the other person.

A.

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court interpreted a statute that provided for increased criminal penalties for certain offenses if the offender “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” *Id.* at 648. The Court held that, “[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” *Id.* at 650 (emphasis added). Moreover, “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.” *Id.* at 652; *see also id.* at 660 (Alito, J., concurring) (“I think it is fair to begin with a general presumption that the specified mens rea applies to all the elements of an offense …”).

The statute that we are asked to interpret, just like the one in *Flores-Figueroa*, lists all of the elements of the offense in a single phrase that begins with the word “knowingly,” *Flores-Figueroa* therefore requires us to presume that the word “knowingly” dictates how the defendant must have “performed the entire action” that is, that he knew that he was engaging in sexual contact and that he knew he was doing so without the other person’s permission. *See id.* at 650 (majority opinion). Sexual contact with permission and sexual contact without permission are legally worlds apart.

The Eighth Circuit reached the same conclusion in interpreting a related statute in *United States v. Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc). That statute, 18 U.S.C. § 2242(2), applies to anyone who, in certain extended federal jurisdictions, “knowingly— … engages in a sexual act with another person if that other person is— (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating willingness to engage in, that sexual act.” Pursuant to *Flores-Figueroa*, the Eighth Circuit held that “there is a presumption that ‘knowingly’ in section 2242(2) applies to the circumstances following the conjunction ‘if.’” *Id.* at 758.

The case for applying the *Flores-Figueroa* presumption to § 2244(b) is even stronger than it is for applying that presumption to § 2242(2). In *Bruguier*, the dissent identified three aspects of the text of § 2242(2) that, it argued, counseled against applying the *Flores-Figueroa* presumption: (1) “[t]he requirement of ‘knowingly’ is … set apart by two sets of interruptive punctuation” from the element at issue, (2) the relevant elements in § 2242(2) are contained in a “conditional ‘if’ clause,” and (3) the relevant elements in § 2242(2) are contained in “separate subsections describing the victim’s condition.” *Bruguier*, 735 F.3d at 775–77 (Murphy, J., concurring in part and dissenting in part). None of those facts are true of § 2244(b). If the *Flores-Figueroa* presumption applies to § 2242(2), then it certainly applies to the much simpler and more straightforward phrase defining the offense in § 2244(b).

The lead opinion disagrees, contending that *Flores-Figueroa* is inapposite for two reasons. First, the lead opinion argues that *Flores-Figueroa* does not apply to § 2244(b) because “the phrase in question—‘without that other person’s permission’—is not the object of the sentence but an adverbial prepositional phrase.” *Lead Op.* 14. Even assuming that the lead opinion’s grammatical analysis is correct, the conclusion reached does not logically follow. *Flores-Figueroa* did not turn on whether the element modified the verb or the object, nor did it transform us into “a panel of grammarians.” *Flora v. United States*, 362 U.S. 145, 150 (1960). Rather, it recognized a broadly applicable principle—i.e., that “knowingly” typically tells us how the defendant “performed the entire action.” *Flores-Figueroa*, 556 U.S. at 650.

Second, the lead opinion argues that, “in *Flores-Figueroa*, the mens rea requirement was necessary to ‘separate wrongful conduct from otherwise innocent conduct,’” whereas § 2244(b) without a mens rea requirement for its lack of permission element would not penalize innocent conduct. *Lead Op.* 14. But the lead opinion fails to explain why § 2244(b) would not in fact do exactly that if the government need not prove that the defendant subjectively knew that he lacked permission to engage in sexual contact with the other person.

The inclusion of some mens rea requirement is not necessarily enough to ensure that “a broad range of apparently innocent conduct” is not swept into a criminal prohibition. *Liparota v. United States*, 471 U.S. 419, 426 (1985). If a mens rea requirement is interpreted to require knowledge of only innocent facts, then a person could be convicted despite genuinely believing that his acts were entirely proper. *Staples v. United States*, 511 U.S. 600, 612, 618–19 (1994).

Knowingly engaging in sexual contact is, of course, not illegal. Innocent people do it all the time. The element in § 2244(b) requiring that the sexual contact be “without [the] other person’s permission” is the actual linchpin of the offense. Therefore, if § 2244(b) requires a guilty mind, then the mens rea requirement must apply to the lack-of-permission element. The requirement that the defendant knew that he was engaging in sexual contact per se does nothing to separate innocent from criminal behavior.

Nor does the requirement that the government prove that the sexual contact was objectively without the other person’s permission obviate the need for a second mens rea requirement. *See Lead Op.* 12–13. Again, the element requiring that the sexual contact be “without [the] other person’s permission” is what makes the sexual contact illegal under the statute. This means that “the presumption in favor of a scienter requirement should apply” to the permission element of § 2244(b) because that is the element “criminaliz[ing] otherwise innocent conduct.” *See United States v. X-Citement*
standing presumption . . . that the jurisdictional element of a crime because of its nexus to some aspect of federal juris-
tie to ‘knowingly.’” Lead Op. 13–14. Although the lead opinion is correct in stating that “the in-
quiry into a sentence’s meaning is a contextual one,” Flores-
Figueroa, 556 U.S. at 652, the cases it cites are distinguish-
able from the present case.

In United States v. Jefferson, 791 F.3d 1013, 1016–18 (9th
Cir. 2015), for example, this court determined that Flores-
Figueroa did not apply because the text of the statute before it, 21 U.S.C. § 960(a), was not parallel to the statute at issue in Flores-Figueroa. The Jefferson court held that the “know-
ingly” mens rea requirement did not apply to an element that was contained in a different sentence—indeed, in an entirely separate subsection. Id. at 1015; see also United States v.
Stone, 706 F.3d 1145, 1147 (9th Cir. 2013) (holding that 18
U.S.C. § 924(a)(2)’s mens rea requirement for possessing ammunition did not apply to 18 U.S.C. § 922(g)’s require-
ment that the ammunition travel in interstate commerce);
United States v. Castagna, 604 F.3d 1160, 1166 (9th Cir.
2010) (declining to apply Flores-Figueroa to 18 U.S.C. §
1038(a)(1), but addressing a specific mens rea requirement that formed its own self-contained phrase). Accordingly, the cases cited by the lead opinion do not concern statutes that re-
semble the statute here, where the word “knowingly” is at the beginning of a phrase defining all the elements of the offense.

The lead opinion also cites United States v. Backman, 817 F.3d 662 (9th Cir. 2016), which dealt with a sex-traf-
ficking statute requiring proof that the “[d]efendant ‘know-
ingly’—(I) in or affecting interstate or foreign commerce,
or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, prov-
ides, obtains, or maintains by any means a person.”” Id. at
666–67 (quoting 18 U.S.C. § 1591(a)). This court held that the government need not prove, in addition to proving know-
ing recruitment, that the defendant knew that his acts affected interstate or foreign commerce. It reasoned that “[t]he phrase ‘in or affecting interstate or foreign commerce’ describes the nature or extent of those actions but, grammatically, does not tie to ‘knowingly.’” Id. at 667.

Backman, however, is no more persuasive on the issue before us than is Jefferson, Stone, or Castagna. The Back-
man court addressed a jurisdictional element, an element that turns what would otherwise be a state crime into a federal crime because of its nexus to some aspect of federal jur-
scription. Id. That decision rested in large part on “[t]he long-
standing presumption . . . that the jurisdictional element of a criminal statute has no mens rea,” and thus has no relevance to our analysis in this case of a substantive, rather than juris-
dictional, element. Id. The structure of the sentence at issue in Backman is also markedly different from the one before us. That statute’s jurisdictional element (“in or affecting in-
terstate or foreign commerce”) comes between “knowingly” and the verbs that they both modify, and the element is set off from both by a dash and a comma. Section 2244(b)’s struc-
ture is very different: even if “without that other person’s permission” were read to modify “engages,” it follows the verb and is not set off in any way.

In sum, I find the lead opinion unpersuasive in arguing that the most natural grammatical reading of § 2244(b) does not require the government to prove that the defendant sub-
jectively knew that he lacked permission to engage in sexual contact. The text, in tandem with Supreme Court precedent, strongly suggests otherwise.

B.

In addition to its text, § 2244(b)’s statutory scheme strongly
indicates that the “knowingly” mens rea requirement ap-
plies to the lack-of-permission element of the crime. Section 2244 was adopted as part of the Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87(b), 100 Stat. 3592, 3620B23. Sev-
eral other provisions were also adopted as part of this same
Act, including § 2242 (the statute at issue in Bruguier), §
2241, and § 2243. Each of these sections addresses forms of
sexual assault within certain extended federal jurisdictions.

Most important to our analysis in this case are § 2241(c) and § 2243(a), which deal with sexual acts that are criminal due to the other person’s age. Section 2241(c) applies to any-
one who, in certain extended federal jurisdictions, “know-
ingly engages in a sexual act with another person who has not attained the age of 12 years,” while § 2243(a) applies to any-
one who, in certain extended federal jurisdictions, “know-
ingly engages in a sexual act with another person who—(1) has attained the age of 12 years but has not attained the age of
16 years; and (2) is at least four years younger than the
person so engaging.”

As the Eighth Circuit explained in exhaustive detail when comparing § 2242(2) to § 2241(c) and § 2243(a), the structure of the three provisions is very similar: each bars knowingly
engaging in a sexual act when certain circumstances are also
present. Section 2244(b), the statute in question here, fol-
lows the same structure as the other three sections, although
it addresses sexual contact rather than sexual acts. See United
States v. Bruguier, 735 F.3d 754, 759 (8th Cir. 2013) (en
banc) (charting the parallel structure of §§ 2241(c), 2242(2),
and 2243(a)). Section 2244(a)(1)–(5) provides for criminal
penalties for “knowingly engag[ing] in or caus[ing] sexual
contact with or by another person” when doing so would vio-
late various provisions of §§ 2241–43 “had the sexual contact
been a sexual act,” further confirming the close relationship
between § 2244 and the other three sections. “The interrela-
tionship and close proximity of these provisions of the statute présents a classic case for application of the normal rule of
statutory construction that identical words used in different
parts of the same act are intended to have the same meaning.”  


Sections 2241 and 2243, the two sections addressing sexual contact with minors, include provisions that expressly limit their mens rea requirements. Section 2241(d) provides that “the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years,” while § 2243(d) states that “the Government need not prove that the defendant knew(1) the age of the other person engaging in the sexual act; or (2) that the requisite age difference existed between the persons so engaging.” Neither § 2242(2) nor § 2244(b) contains an analogous provision relieving the government of its burden to prove that the defendant knew the circumstances that make the sexual contact a crime. In § 2242(2), the other person’s incapacity; in § 2244(b), the lack of permission.

Commenting on the lack of any provision analogous to § 2241(d) and § 2243(d) in § 2242(2), the Eighth Circuit invoked the “general rule of statutory construction that ‘where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”  

*Bruguier*, 735 F.3d at 759–60 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)). Thus, the court explained, “reading section 2242(2) in the broader context of the Act, and applying Rodriguez’s presumption that ‘disparate inclusion or exclusion’ of statutory language is intentional, … reinforces the conclusion that ‘knowingly’ in section 2242(2) applies to the victim-incapacity element of the offense.”  

*Id.* at 760. The court went on to say:

Moreover, interpreting the knowledge requirement in section 2242(2) to extend only to knowledge of the sexual act would raise interpretive concerns with sections 2241 and 2243. If section 2242(2)’s knowledge requirement were construed to only apply to knowledge of the sexual act, then this same construction logically should apply to the knowledge requirement in sections 2241(c) and 2243(a). Doing so, however, would render superfluous sections 2241(d) and 2243(d), both of which explicitly narrow the respective statutes’ knowledge requirements. This would run afoul of “the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute.”  

*Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 173 (1997)).

I agree with the Eighth Circuit’s analysis, which applies equally to § 2244(b). The overall structure of these interrelated statutes reflects Congress’s understanding that, unless expressly limited, the “knowingly” mens rea requirements would apply to all the elements of the offense and not to only the sexual act itself, or else Congress would not have included limits on the mens rea requirement in § 2241(d) and § 2243(d). This understanding is apparent not only from the text, but is also expressly stated in the legislative history. In explaining why § 2241(d) was included in the statute, for example, the House Report states that “absent this provision, the government would have had to prove that the defendant knew that a victim was less than 12 years old, since the state of mind required for the conduct—knowing—is also required for the circumstance of the victim’s age.”  


“It is inconceivable that Congress meant to create a strict liability crime by omission in one section of a statute when Congress affirmatively created strict liability crimes by inclusion in [two other] sections of the same statute.”  

*Bruguier*, 735 F.3d at 766–67 (Riley, C.J., concurring) (emphases in original); see also H.R. Rep. No. 99-594, at 15–18 (discussing and justifying the inclusion of the strict-liability age elements); *id.* at 19 (discussing § 2244(b) with no reference to any strict-liability element). Taken together, therefore, the *Flores-Figueroa* presumption and the statutory context clearly establish that the government must prove that the defendant knew that the sexual contact was without the other person’s permission in order to obtain a conviction under 18 U.S.C. § 2244(b).

The lead opinion’s only response to the comparison among § 2244(b), § 2241(c), and § 2243(a) is that § 2241 and § 2243 impose more severe penalties than § 2244 and, therefore, § 2241 and § 2243 require an explicit statement that the government need not prove that the defendant knew the age of the victim in order to overcome the strong presumption of such a mens rea requirement. Section 2244(b), the lead opinion argues, does not give rise to the same strong presumption because of its less severe penalties. Lead Op. 17–18. The lead opinion also distinguished the Eighth Circuit’s decision in *Bruguier* on those grounds because § 2242(2), the statute at issue in *Bruguier*, “has a severe maximum penalty of life imprisonment, unlike § 2244(b).” Lead Op. 18 n.3.

But the lead opinion suggests that the presumption that “some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime,” *Staples v. United States*, 511 U.S. 600, 606 (1994), applies only when the penalty is severe. *Staples*, however, did not hold that the presumption applies only to crimes with high penalties.  

*See id.* at 617–18. If that were the rule, then courts would have to determine what constitutes a “high penalty” versus a “low penalty” in all these type of cases. Surely a defendant charged with a violation of § 2244(b), which carries a penalty of up to two years of imprisonment, would argue that a two-year term of imprisonment is a very high penalty for an offense where, according to the lead opinion, there is no mens rea required for the element of the offense that turns otherwise legal conduct into a crime.

The lead opinion also attempts to use the difference in penalties to suggest that requiring the government to prove that a defendant knew that he lacked permission to engage
in sexual contact under § 2244(b) would produce an absurd result. Lead Op. 19. It notes that § 2244(c), which provides that “[i]f the sexual contact that violates this section … is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section,” does not contain any explicit provision disposing of a mens rea requirement regarding the victim’s age. The lead opinion therefore argues that, under my reading of the statute, the government must prove that the defendant knew that the child was under 12 years old in order to obtain a § 2244(c) conviction. Because § 2244(c) has less severe penalties than § 2241(c) and § 2243(a), and because the latter two statutes explicitly eliminate a mens rea requirement regarding the victim’s age, the lead opinion argues that Congress could not have intended to impose the extra mens rea requirement on defendants charged with violations of the less serious penalties under § 2244(c). Lead Op. 19.

But the less severe penalties of § 2244(c) are explainable regardless of its mens rea requirement. This is because § 2244 criminalizes certain sexual contact, whereas § 2241 and § 2243 criminalize certain sexual acts. “Sexual contact” means “the intentional touching, either directly or through the clothing, of the genitalia of another person who has not attained the age of 12 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

Id. § 2246(2). The difference in penalties between § 2244(c), § 2241(c), and § 2243(a) is therefore warranted, and requiring the government to prove the defendant’s knowledge of the victim’s age for a conviction under § 2244(c) but not under the other two statutes would not produce an absurd result.

Finally, the lead opinion compares § 2244(a) and § 2244(b) in an attempt to demonstrate that the statutory scheme supports its conclusion. Both § 2244(a) and § 2244(b) require that the defendant “knowingly” have “sexual contact” plus one additional element. In § 2244(a), the additional element that the government must prove is that the sexual contact would be punishable by another delineated statute if the sexual contact had instead been a sexual act; in § 2244(b)—the statute under which Price was convicted—the additional element is a lack of permission. The lead opinion argues that because the government is not required to prove that the defendant knew that the second element of § 2244(a)—that the sexual contact he engaged in would have been punished by another law if the contact was a sexual act—was met, the government is also not required to prove that the defendant knew that the second element of § 2244(b)—a lack of permission—was met. Lead Op. 15–17.

But that argument overlooks the longstanding distinction between knowledge of the underlying criminal law and knowledge of the facts that constitute the offense. Courts almost never interpret criminal statutes to require knowledge of applicable criminal law. See, e.g., Cheek v. United States, 498 U.S. 192, 199 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”). On the other hand, as highlighted several times throughout this concurring opinion, courts presumptively do interpret criminal statutes to require knowledge of the facts that constitute the offense. See, e.g., Staples v. United States, 511 U.S. 600, 618–19 (1994) (“Where … dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, … the usual presumption that a defendant must know the facts that make his conduct illegal should apply.”). I therefore find the lead opinion’s comparison of § 2244(a) and § 2244(b) unpersuasive, and conclude that the statutory scheme at hand requires that the “knowingly” mens rea requirement of § 2244(b) be applied to the lack-of-permission element of the crime.

C.

In further support of its argument, the lead opinion highlights two statements from the House Report on the Sexual Abuse Act of 1986 bill. First, the lead opinion says that Congress expected that the Act would “simplify law enforcement activities.” Lead Op. 20 (quoting H.R. Rep. No. 99-594, at 21 (1986)). But that statement has been taken out of context. The House Report does not indicate that Congress sought to achieve the goal of “simplifying law enforcement activities” by eliminating mens rea requirements from certain subsections of the statute. Instead, the Report says that the Act “may simplify law enforcement activities” by “provid[ing] much more specific definitions of federal sexual abuse offenses … [and] mak[ing] conforming amendments to a number of other statutes that currently refer to rape.” H.R. Rep. No. 99-594, at 21. The Report says nothing about the mens rea issue in question here.

The second statement from the House Report that the lead opinion relies on provides that “[w]here the Committee believes it appropriate to the offense to require the prosecution
to show that the conduct was engaged in without the victim’s permission, such a requirement has explicitly been set forth.” Lead Op. 20 (quoting H.R. Rep. No. 99-594, at 13). But that statement says nothing about the defendant’s knowledge “that the conduct was engaged in without the victim’s permission.” See H.R. Rep. No. 99-594, at 13. And only two paragraphs later, the Report explains that proposed § 2243(d) “sets forth a proof requirement concerning the defendant’s state of mind [because] the Committee does not ... believe a corroboration requirement is justified and has, therefore, intentionally not imposed such a requirement.” Id. at 14. The Report, in contrast, says nothing about “a proof requirement concerning the defendant’s state of mind” for § 2244(b). In fact, nothing in the hearings or reports on the Act suggests that any of the participants in its passage had any intention of making 18 U.S.C. § 2244(b) a strict-liability offense.

Other parts of the legislative history actively undermine the lead opinion’s interpretation of the statute. The House Report, for example, explains that “[the Sexual Abuse Act of 1986 was] drafted employing the format, conventions and techniques used in drafting the Criminal Code Revision Act of 1980.” Id. at 13 (citing H.R. Rep. No. 96-1396 (1980)). One such convention was that, “[t]he state of mind required for conduct will apply to circumstances and results unless otherwise specified. This rule makes it unnecessary to distinguish among the components of an offense (conduct, circumstances and results) in order to determine the applicable state of mind.” H.R. Rep. No. 96-1396, at 34. The lead opinion’s argument that “knowingly” applies only to the element of sexual contact, but not to the element of lack of permission, is contrary to this understanding that mens rea would apply equally to every element of the offense.

Rather than confronting the stark difference between the provisions adopted as part of the same Act, the lead opinion instead attributes a broad intention to Congress’s goal of modernizing sexual assault laws “to focus on the defendant’s conduct” rather than the victim’s state of mind. Lead Op. 4. But the goal of focusing on the defendant’s conduct rather than the victim’s state of mind does not support the lead opinion’s position. Price asks us to hold that the government must prove that he knew he was engaging in sexual contact without A.M.’s permission. Reading the statute to include that requirement advances the goal that the government must prove that he knew he was engaging in sexual contact, but not to the element of lack of permission, is contrary to this understanding that mens rea would apply equally to every element of the offense.

As a final thought on this issue, I address the lead opinion’s contention that “[i]f the government were required to prove that the defendant subjectively knew he lacked consent, as Price urges here, every accused sexual predator could defend his admitted sexual contact in the face of no objective sign of permission by asserting a supposed subjective belief that the victim was ‘enjoying herself.’” Lead Op. 4. The government made a similar statement at oral argument, contending that a knowledge requirement would allow defendants to avoid conviction under this statute simply by “get[ting] up on the stand and say[ing], ‘Oh, I didn’t know.’” But the defendant’s subjective knowledge is and always has been an extremely common requirement in criminal statutes, one that the government is almost always required to prove. It typically does this by circumstantial evidence and by asking the jury to reject what the government views as self-serving and incredible claims of innocence. The criminal system has hardly ground to a halt as a result.

In sum, under the interpretive rule recognized in Flores-Figueroa, the plain text of 18 U.S.C. § 2244(b) applies the “knowingly” requirement to each element of the offense, including that the sexual contact be without the other person’s permission. That interpretation is not rebutted by any special context; in fact, the context of the Sexual Abuse Act of 1986 strongly reaffirms the conclusion that “knowingly” applies to every element. I would therefore hold that the “knowingly” requirement applies to the element of the sexual contact being without the other person’s permission. Section 2244(b)’s language and the context provided by the other related provisions compel this result. The legislative history and the weighty presumption against strict-liability offenses further support my conclusion.

II.

Despite my disagreement with the lead opinion’s analysis of 18 U.S.C. § 2244(b), I join its ultimate conclusion for a totally different reason—that the district court’s error in relieving the government of its need to prove that Price subjectively knew he lacked A.M.’s permission to engage in sexual contact with her was harmless. “An error in criminal jury instructions requires reversal unless there is no reasonable possibility that the error materially affected the verdict or, in other words, that the error was harmless beyond a reasonable doubt.” United States v. Pierre, 254 F.3d 872, 877 (9th Cir. 2001) (internal quotation marks and brackets omitted). In the district court’s instructions to the jury, it defined “permission” as “[t]he act of permitting, a license or liberty to do something, or authorization,” explaining that permission can be express or implied, and explaining that implied permission “means permission that is inferred from words or actions.”

Price conceded that A.M. never gave him explicit permission to touch her breasts or vagina. The only remaining question is whether there is any reasonable possibility that the jury could have found that Price subjectively believed he had A.M.’s implicit permission to engage in sexual contact with her. In light of the strong circumstantial evidence showing that Price had to have known that A.M. had not consented to his advances, the answer is no.

By convicting Price, the jury determined that he in fact lacked both explicit and implicit permission to touch A.M.’s breasts and vagina. The jury therefore believed A.M.’s story of what occurred on the flight over Price’s story. And accord-
ing to that story, A.M. was asleep when Price began running his hand up and down her side and her leg. A sleeping person clearly gives no implicit permission to be touched. A.M. then moved her cell phone, thinking that Price might have been trying to steal it, and fell back asleep. She woke up once again when he began touching her breast. In response, A.M. put a blanket over her shoulder and crossed her arms in front of her.

These actions, if anything, negate any implicit permission to be touched. Yet Price continued to touch A.M.’s breast and then moved his hand down to her legs, first over her jeans and finally inside of them, touching her vagina. In a state of shock, panic, and fear, and in a final effort to ward off Price, she turned her body away from him and towards her friend Fujita. Despite A.M.’s negative reaction to Price’s advances, she testified that he “tried to move my body towards” him “[w]ith strong force” and tried to pull her jeans down. A.M., moreover, never spoke to Price while he was touching her nor even looked at him during their encounter. Under all of these circumstances, no reasonable juror could have found that Price subjectively believed that he had permission to touch A.M., especially once A.M. physically turned her back to him and towards her friend.

Price’s statements after the incident further support a finding that he knew he lacked permission to touch A.M. He said that he “knew … it was wrong” to be “engaging like this with somebody who is totally a stranger” without first having had a “proper conversation.” Price also agreed with Special Agent Gates, the FBI agent who interviewed Price, that, at his age, he should have known that it was his “job not to touch” A.M. without her permission. And finally, when the customs officers searched Price’s bags, they found a note that read: “If a man touches you and you don’t want him to always feel free to say no.” Price said that he wrote the note to A.M. after she got up and left her seat, indicating that he knew A.M. had not given him permission to touch her.

I would therefore hold that the error in the district court’s jury instructions was harmless because “it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” See United States v. Anchrum, 590 F.3d 795, 801 (9th Cir. 2009) (internal quotation marks omitted). The government’s evidence, which the jury had to believe in order to find Price guilty, overwhelmingly demonstrated that Price knew that he lacked permission to engage in sexual contact with A.M. See United States v. Cherer, 513 F.3d 1150, 1155 (9th Cir. 2008) (holding that an erroneous jury instruction regarding mens rea was harmless when “the government’s evidence overwhelmingly show[ed] that [the defendant] believed [the victim] was fourteen years old”).

For all of the foregoing reasons, I concur with the lead opinion’s conclusion that Price’s conviction should be affirmed.

Cite as 19 C.D.O.S. 3349

MICHAEL D. CASTRO, an individual, Plaintiff-Appellant,

v.

TRI MARINE FISH COMPANY LLC, an unknown entity; TRI MARINE MANAGEMENT COMPANY LLC, an unknown entity; CAPE MENDOCINO FISHING LP, an unknown entity; CAPE MENDOCINO FISHING LLC, an unknown entity; DOES, 1 through 20, inclusive, Defendants-Appellees.

No. 17-35703

In the Supreme Court of the United States

D.C. No. 2:17-cv-00008-RSL

Appeal from the United States District Court for the Western District of Washington Robert S. Lasnik, Senior District Judge, Presiding

Argued and Submitted November 8, 2018

Seattle, Washington

Filed February 27, 2019

Amended April 15, 2019

Before: M. Margaret McKeown and Michelle T. Friedland, Circuit Judges, and Susan R. Bolton,*District Judge.

Opinion by Judge McKeown

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

COUNSEL

William L. Banning (argued), Banning LLP, Rancho Santa Fe, California; John W. Merriam, Law Offices of John W. Merriam, Seattle, Washington; for Plaintiff-Appellant.

Colin J. Folawn (argued) and David Boyajian, Schwabe Williamson & Wyatt P.C., Seattle, Washington, for Defendants-Appellees.

Svetlana P. Spivak, Holmes Weddle & Barcott P.C., Seattle, Washington, for Amicus Curiae Joint Manning Group.

ORDER

The opinion filed on February 27, 2019, and appearing at 916 F.3d 1191, is amended. On page 13, <flouted> is replaced with <appears to have omitted required aspects of>, and <deviated completely> is replaced with <appears to have deviated>. An amended opinion is filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing.
The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. 36) is denied. The motion to proceed as amicus (Dkt. 37) is granted. No further petitions for en banc or panel rehearing shall be permitted.

OPINION

McKEOWN, Circuit Judge:

Central to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (“New York Convention”), and related federal law is the principle insulating foreign arbitral awards from second-guessing by courts. But this appeal involves an even more fundamental question—whether we are presented with a foreign arbitral award at all. In the mine run of cases, the answer is uncontroversial: when it looks, swims, and quacks like an arbitral award, it typically is. Yet, in this unusual appeal, we have an arbitral award in name only. There was no dispute to arbitrate, as the parties had fully settled their claims before approaching an arbitrator; the purported arbitration consisted of an impromptu meeting in a building lobby; and the “proceedings” disregarded the terms of three arbitration agreements between the parties and the issuing forum’s arbitral rules. We conclude that the resulting order is not an arbitral award entitled to enforcement under the Convention.

BACKGROUND

In late 2012, Michael Castro moved from the Philippines, where he retains citizenship, to American Samoa to live with April Castillo, his fiancée, and her family. Several months later, Castro was working in a Tri Marine warehouse when Tri Marine offered him a crew position aboard the F/V Captain Vincent Gann (the “Vessel”), a fishing vessel with an immigrant departure date. He accepted a position as a deck hand.

The day before departing, Castro visited Tri Marine’s offices to sign employment paperwork. Castro and Tri Marine dispute what was signed that day. Tri Marine contends that Castro signed his employment agreement, which is consistent with the date typed on the agreement itself. Castro insists that before departing he signed only “a half sheet of paper with a few sentences on it including [a] pay rate of $3.00 per ton [of fish caught], the name of the Vessel[,] and a signature line,” and that he did not sign the employment agreement until he appeared before an arbitrator in February 2014. The employment agreement—whenever Castro signed it—contained a mandatory arbitration provision applicable to all disputes or claims arising out of Castro’s employment aboard the Vessel. It required arbitration to occur in and subject to the procedural rules of American Samoa.

On July 30, 2013, approximately two weeks into the fishing trip, Castro fell down a set of stairs and severely injured his knee. Castro requested that Tri Marine return him to American Samoa so he could travel to Hawaii for medical care, but Tri Marine instead arranged for Castro’s transport to and medical care in the Philippines. In mid-August, Castro underwent surgery for a torn anterior cruciate ligament and a torn meniscus, followed by treatment and physical therapy. Tri Marine paid Castro’s medical expenses and monthly maintenance.

Several months into Castro’s rehabilitation, doctors diagnosed his father with kidney cancer and predicted he would die without surgery. Castro and his family could not afford his father’s surgery, so Castro approached Rhodelyn De Torres, a Tri Marine agent in the Philippines, and negotiated a settlement of his disability claims. In exchange for an advance of $5,000, Castro reiterated his assent to the employment agreement’s arbitration and choice of law clauses. Shortly after, Castro agreed in principle to release fully his claims in exchange for an additional $16,160.4

After Tri Marine prepared the settlement paperwork, Castro met De Torres at her office in Manila to finalize the settlement. Castro speaks only rudimentary English—his native tongue is Tagalog—so Castillo, who has a greater proficiency in English, attended the meeting and helped him review the settlement materials. De Torres informed Castro in advance that he would be signing release documents to conclude his case, but not that he would be participating in an arbitration.

De Torres and Castro provide divergent accounts of the meeting. De Torres attests that over the course of two hours, she explained the documents to Castro in “Filipino language” (presumably, Tagalog), Castro indicated that he understood, and Castro signed the release documents. She also indicates that she explained, and Castro agreed, that an arbitrator would review and approve the release documents “to make the settlement legal and binding.” Castro disputes whether De Torres translated documents into Tagalog, explained that he would be foregoing future legal claims by signing them, or informed him that he would be participating in arbitration. According to Castro, De Torres told him they would go to a different office merely to pick up the settlement check and execute paperwork acknowledging receipt.

Although it is disputed when in the day this happened, Castro executed a release of Tri Marine “from any and all liability or claims … arising out of or in any way connected with an illness, incident, and/or incidents aboard the [Vessel] on or about 30 July, 2013.” Castro acknowledged and released his right to future maintenance and cure in exchange for the settlement amount. Like Castro’s employment agree-

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1. Castro sued several entities with alleged interests in the Vessel. For purposes of this appeal, there is no relevant distinction between the entities. We refer to them collectively as Tri Marine.

2. We use variants of the terms “agree” and “settle” for convenience’s sake. We do not suggest any conclusion regarding Castro’s defenses to formation and enforcement of the purported settlement. Those defenses remain open issues on remand.
ment (and as he reiterated when accepting his advance payment), the release provided that disputes over its validity and enforceability would be arbitrated in American Samoa.

After the parties had agreed to the terms of the release, a Tri Marine agent ushered Castro and Castillo to an office building that housed the National Conciliation and Mediation Board. De Torres had led Castro to believe that they would merely pick up the settlement disbursement and acknowledge receipt. Tri Marine now contends that they went to the Board’s office to submit their dispute to arbitration. Gregorio Biareas, an accredited maritime voluntary arbitrator, met the parties in the lobby and introduced himself as a neutral arbitrator.

The meeting was Castro’s first and only interaction with an arbitrator. Seated at a small table in the public lobby, surrounded by strangers entering and leaving the building, Biareas reviewed the settlement paperwork with Castro. Biareas attests that he explained the implications of the release and confirmed in Tagalog that Castro understood the documents. Castro paints a different picture: Biareas “hurriedly flipped through the pages showing [Castro] where to sign,” emphasized that the settlement was favorable to Castro, and misled Castro by characterizing the settlement as “just a first payment” and informing Castro that he is ineligible for protection under the Jones Act.

Although there was no arbitral case filed, Tri Marine provided Biareas a “joint motion to dismiss” pursuant to the parties’ settlement, accompanied by the release paperwork that Castro had already signed. The two-page joint motion to dismiss was the first “filing” in the “case,” which lacks a case number. Biareas signed a one-page document, labeled an “order,” which recognized the settlement, stated that Biareas found the settlement “not contrary to law, morals, good customs and public policy,” and dismissed the “case” with prejudice. The order acknowledges that it is the product of a “Walk In Settlement” and that the release had already been “duly signed by both parties” before meeting with Biareas.

Later treatment revealed that Castro’s initial surgery had failed to graft his anterior cruciate ligament or address his torn meniscus. Facing additional surgery to repair these misadventures, Castro sued Tri Marine in Washington state court to recover the additional expenses. Invoking the New York Convention, the release provided that disputes over its validity and enforceability would be arbitrated in American Samoa.

I. THE NEW YORK CONVENTION

The New York Convention, to which the United States is a party, governs “the recognition and enforcement of arbitral awards made in the territory of” a foreign state. New York Convention, art. I(1) (emphasis added). Through the Convention and implementing legislation, the United States sought “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

The United States codified its Convention obligations in the Convention Act, 9 U.S.C. §§ 201–08. Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1152–53 (9th Cir. 2008). Just as the Federal Arbitration Act (“FAA”) affords considerable deference to domestic arbitral awards, the Convention Act does the same for foreign arbitral awards. Polimaster Ltd. v. RAE Sys., Inc., 623 F.3d 832, 836 (9th Cir. 2010). A court must confirm a foreign arbitral award unless the party resisting enforcement meets its “substantial” burden of proving one of seven narrowly interpreted defenses. Id.; see 9 U.S.C. § 207 (incorporating the Convention’s defenses); New York Convention, art. V (listing defenses). The judicial role in this process is circumscribed: “Confirmation under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm.” Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007).

Yet, before we employ the Convention’s and the Convention Act’s substantial protections, the threshold step is, of course, to ensure they apply. This interpretive inquiry requires our de novo review. CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017) (statutes); Hosaka v. United Airlines, Inc., 305 F.3d 989, 993 (9th Cir. 2002) (treaties). The key question here is whether there is an “arbitral award” to consider. Amazingly, that term is not defined in the Convention Act, which governs only “arbitral award[s] falling under the Convention.” 9 U.S.C. § 207. Congress defined “falling under the Convention,” id. § 202, but not “arbitral award” or “arbitration.” “Arbitration” and “arbitral award” are also undefined in the Convention itself and in the FAA, 9 U.S.C. §§ 1–16. See Polimaster, 623 F.3d at 836 (“When interpreting the defenses to confirmation of an arbitration award under the New York Convention, we may look to authority under the FAA.”).


It sets forth several helpful definitions:

3. Although the membership has not formally approved the full Restatement (Third) of the U.S. Law of International Commercial Arbitration, the American Law Institute has approved Tentative Draft No. 2, which contains the only sections that we consider here. See Discussion of Restatement of the Law Third, The U.S. Law of International Commercial Arbitration, 2012 A.L.I. Proceedings 143 (Am. Law Inst., May 22, 2012).
An “arbitral award” is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, regardless of whether that decision resolves the entire controversy before the tribunal.

An “arbitral tribunal” is a body consisting of one or more persons designated directly or indirectly by the parties to an arbitration agreement and empowered by them to adjudicate a dispute that has arisen between or among them.

“Arbitration” is a dispute resolution method in which the disputing parties empower an arbitral tribunal to decide a dispute in a final and binding manner.

Id. § 1-1(a)–(c).

II. THE PURPORTED ARBITRAL AWARD

In a superficial sense, the order issued here resembles an arbitral award: it was issued by an arbitrator and purports to award Castro a monetary remedy and dismiss the “case” with prejudice. But labels and appearances are not controlling—we evaluate an award by looking to its essence. Id. § 1-1 cmt. a. Several unique aspects of these proceedings lead us to conclude that the order is not an arbitral award within the meaning of the Convention.

To begin, there was no outstanding dispute to arbitrate by the time Castro and Tri Marine sat down with the arbitrator. Id. § 1-1(c) (“‘Arbitration’ is a dispute resolution method …”). Integral to the Convention’s conception of arbitration is the endeavor to resolve a dispute:

[T]he tribunal must be dealing with a genuine disagreement to have jurisdiction. Where parties appoint an arbitral tribunal after a settlement to merely record the decision of the disputing parties—and thereby give the tribunal “powers” from the parties’ assent, Restatement TD No. 2 § 1-1 cmt. c. An “arbitral tribunal” is a body consisting of one or more persons designated directly or indirectly by the parties to an arbitration agreement and empowered by them to adjudicate a dispute that has arisen between or among them.

Beyond fidelity to the terms of the arbitration agreement, an “arbitrator[... ] act[s] pursuant to the arbitration law of the arbitral seat [... ] and any procedural rules that the parties may have adopted.” Restatement TD No. 2 § 1-1 cmt. c. The parties did not “adopt” any procedural rules apart from those set forth in the three written agreements. The meeting also appears to have omitted required aspects of Philippine arbitral procedure. In the Philippines, voluntary arbitration begins upon receipt of a submission agreement signed by both parties. Procedural Guidelines, Rule IV § 4. No submission agreement was filed here. The submission agreement must list the specific issues to be arbitrated. Id., Rule IV § 5. But no arbitrable issues existed here, as the parties had already resolved their dispute. Other Philippine pre-arbitration procedures, such as an initial conference, joint formulation of ground rules, and pleadings, were conspicuously absent.
as well. *Id.*, Rule VI §§ 2, 3, 6, 8. In sum, the procedure here appears to have deviated from typical Philippine procedures. This divergence confirms our understanding that arbitration did not occur.

We conclude that the parties’ free-floating settlement agreement and order did not transform into an arbitral award simply because the parties convened with an arbitrator. Tri Marine may seek to enforce the release as a matter of contract, but the order approving the settlement is not an arbitral award under the Convention.

Importantly, our decision does not encroach on the common practice of reducing settlements reached during arbitration into arbitral awards, frequently termed “consent awards.” Many international arbitral rules empower arbitrators—upon the parties’ request—to enter consent awards. *See Margaret L. Moses, The Principles and Practice of International Commercial Arbitration* 205 (3d ed. 2017). Consent awards encourage settlement by conferring substantial benefits—including the Convention’s protections—upon parties that obtain them. *See Nigel Blackaby et al., Redfern and Hunter on International Arbitration* §§ 9.33, 9.34, 9.36 (Student ed. 2009) (noting that several international arbitral bodies embrace consent awards).

Our decision does not disturb this practice for a simple reason: it did not occur here. “Timing is important for a settlement agreement to become an award. Usually a consent award becomes possible after a tribunal has been constituted. . . . Otherwise the tribunal will have no right to render a consent award.” Kryvoi & Davydenko, 40 Brook. J. Int’l L. at 842–43. *Philippine, American, and broadly applicable international rules impose this temporal limitation on consent awards. Philippine arbitrators may issue a consent award “if the event that the parties finally settle their dispute during the pendency of the arbitration proceedings.” Procedural Guidelines, Rule VII § 4 (emphasis added). Leading American and international arbitral groups espouse the same limitation. *See Am. Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures* R-48(a) (2013); United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*, art. 30(1) (2006). Even the two cases involving consent awards cited favorably by Tri Marine are consistent with this timing requirement. *See United States v. Sperry Corp.*, 493 U.S. 52, 56–57 (1989) (parties initiated arbitration, then settled, and then obtained a consent award); *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, No. CV H-17-2623, 2018 WL 1251924, at *1 (S.D. Tex. Mar. 12, 2018) (same). The timing here was backwards—Castro and Tri Marine settled and then sought to arbitrate. The result is not a consent award.

Finally, we emphasize that our decision does not elevate form over function. Tri Marine protests, for instance, that to obtain a proper consent award, it could have simply initiated arbitral proceedings before finalizing the settlement. Perhaps, but not for nothing. An essential aspect of arbitration is each party’s inability to unilaterally withdraw from proceedings. Restatement TD No. 2 § 1-1 cmt. e. Other, “[c]ollaborative forms of [alternative dispute resolution],” by contrast, “require the parties’ continuing willingness to participate.” *Id.* § 1-1 Reporters’ Note e. Accordingly, “the weight of decisional authority and international consensus” does not treat collaborative processes, such as mediation, as “arbitration” under the Convention. *Id.* Had the arbitrator here balked—for instance, by ordering a hearing on voluntariness or enforcing the venue provision pointing to American Samoa—Tri Marine could have taken its settlement and gone home. Although perhaps a modest hurdle, the modicum of formality required for a proceeding to constitute arbitration is no empty ritual.

### III. REMAND

Because the district court treated the order as a foreign arbitral award, it proceeded in summary fashion under the Convention. For example, it weighed evidence and resolved genuine disputes of material fact in favor of Tri Marine, thereby rejecting out of hand Castro’s coercion defense. In light of our conclusion, the district court’s approach was in error. We vacate in full the order confirming the arbitral award, including the ruling on the validity of the seaman’s release.

At oral argument, Castro suggested for the first time that the absence of an arbitral award calls into question federal jurisdiction. The Convention Act permits removal of cases that “relate[] to an arbitration agreement or award falling under the Convention.” 9 U.S.C. § 205. Although the order here is not an arbitral award, the subject matter of the case may nonetheless “relate[] to an arbitration agreement.” *Id.*; see *Infuturia Glob. Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1138 (9th Cir. 2011) (“‘The phrase ‘relates to’ is plainly broad . . .’”).

In light of the parties’ failure to brief this issue on appeal, we take no position on the ultimate disposition of this jurisdictional question. We remand for the district court to assess jurisdiction and—as appropriate—venue and any defenses to enforcement.

### CONCLUSION

We review foreign arbitral awards deferentially, but we do not blind ourselves to reality when presented with an order purporting to be one. To cloak its free-floating settlement agreement in the New York Convention’s favorable enforcement regime, Tri Marine asked an arbitrator to wave his wand and transform the settlement into an arbitral award. That is not sufficient to produce an award subject to the Convention. **REVERSED IN PART, VACATED IN PART, AND REMANDED.**

Tri Marine shall bear costs on appeal.
California Courts of Appeal

Cite as 19 C.D.O.S. 3354

THE PEOPLE, Plaintiff and Respondent,
v.
KEVIN JEROME EASTER, Defendant and Appellant.

No. A148197
In The Court of Appeal of the State of California
First Appellate District
Division Two
(Contra Costa County Super. Ct. No. 5-140725-3)
Filed March 13, 2019
Certified for Publication April 11, 2019

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on March 13, 2019, was not certified for publication in the Official Reports. For good cause, the request for publication by Defendant and Appellant is granted.

Pursuant to California Rules of Court, rules 8.1105 and 8.1120, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports.

Acting P.J.

COUNSEL

Attorneys for Appellant: Peter F. Goldscheider, under appointment by the Court of Appeal, for Defendant and Appellant.

Attorneys for Respondent: Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, René A. Chacon, Supervising Deputy Attorney General, Bruce Ortega, Deputy Attorney General

OPINION

A March 2014 information charged defendant Kevin Easter with the August 2013 murder of his wife. In May, his attorney expressed a doubt about his competency to stand trial, and the criminal proceeding was suspended pending resolution of the competency issue. In July and August, defendant was evaluated by two medical professionals, one finding him competent to stand trial, the other finding him incompetent. In April 2015—eight months after the evaluations—a jury found defendant competent to stand trial, and the homicide case resumed. Six months later, on the eve of trial, defense counsel again expressed a doubt regarding defendant’s present competency. Two different judges declined to reinstate competency proceedings, finding that defense counsel failed to present substantial evidence of a substantial change of circumstances or new evidence casting doubt on the prior competency finding. The criminal case proceeded, resulting in a jury verdict of guilty on the first degree murder charge with a personal use of a firearm enhancement, a bench finding of guilty on a felon in possession of a firearm charge, and a sentence of 65 years eight months to life in state prison.

Defendant contends the trial court erred in failing to reinstate competency proceedings because his counsel had presented substantial evidence that he was experiencing new and worsened symptoms constituting a substantial change of circumstances in his mental condition. He also alleges numerous evidentiary and instructional errors, as well as sentencing issues raised in supplemental filings with the court. We agree with defendant that the trial court erred in failing to reinstate competency proceedings, and thus reverse on that ground. As such, we do not reach his evidentiary, instruction, and sentencing claims.

PROCEDURAL BACKGROUND

On the night of August 7, 2013, Janice Easter, defendant’s wife of five years, was shot to death in the living room of the home she shared with defendant. Defendant was arrested shortly after the murder. A March 26, 2014 information charged him with murder with a firearm enhancement and felon in possession of a firearm, further alleging he had three prior serious felony convictions and three prior strikes.

As will be detailed at length below, in May 2014, defense counsel declared a doubt regarding defendant’s competency to stand trial, and the criminal proceeding was suspended pending the outcome of a Penal Code section 1368 competency proceeding. In April 2015, a jury found defendant competent to stand trial, and the homicide case resumed.

In October 2015, after defense counsel twice unsuccessfully renewed the issue of defendant’s competency, defendant was tried before a jury, which found him guilty of first degree murder and found true the personal use of a firearm allegation. Following a bench trial, the trial court found defendant guilty on the firearm possession charge and found true the prior serious felony conviction allegations. He was sentenced to 65 years eight months to life in state prison.

Defendant filed a timely appeal, asserting that the trial court erred in three particulars: (1) failing to reinstate competency proceedings; (2) allowing inadmissible evidence that undermined an inference that the crime was second degree, rather than first degree, murder; and (3) instructing the jury on flight and suppression of evidence.

On February 20, 2018, defendant filed a petition for writ of habeas corpus raising three ineffective assistance of coun-

1. Per the prosecutor, because defendant had not waived a jury trial on the strike allegations and the jury had been discharged, those allegations were moot.
B. Jury Trial on Defendant’s Competency

On April 6, 2015—more than eight months after Drs. Berger and Kirkland evaluated him—the matter of defendant’s competency came on for a jury trial before the Honorable Barry Baskin. The evidence consisted of testimony from Dr. Berger on behalf of the defense, and Dr. Kirkland and Contra Costa County Deputy Sheriff Joseph Smith on behalf of the prosecution. The testimony was as follows:

Dr. Berger is a physician board-certified in psychiatry and forensic psychiatry. His private practice focuses on forensic psychiatry, and he has conducted approximately 100 Penal Code section 1368 evaluations. He is also employed by the Department of Corrections and Rehabilitation, providing psychiatric treatment for inmates at San Quentin State Prison, and is on the clinical faculty at the University of California, San Francisco.

Prior to interviewing defendant, Dr. Berger reviewed police records in the present case and medical records for treatment defendant received in jail dating back to 2012. The records reflected a criminal history beginning in the 1980s, including convictions for robbery, assault with a firearm, and domestic violence. They also reflected a documented history of mental illness, with symptoms consistent with schizoaffective disorder as far back as defendant’s childhood. Defendant had experienced psychotic symptoms such as hallucinations and disorganized behavior, and also had a history of depression with suicide attempts.

When conducting a Penal Code section 1368 evaluation, Dr. Berger typically contacts the defendant’s attorney since one of the elements of competency is whether the defendant can rationally work with his or her attorney. Accordingly, Dr. Berger obtained information from Mr. Kelly regarding his experience with defendant. He did not contact Ms. Gleason because he has never received a response when he has contacted prosecutors in the past.

Dr. Berger interviewed defendant for one hour 50 minutes, during which time he had no significant difficulty communicating with him. Defendant was a reliable reporter in terms of providing general information about his symptoms and medications, although he was unable to recall certain specifics. Dr. Berger did not observe any shaking, fidgeting, or “physical acting out.” If anything, defendant displayed “more slowing of motor activity which can sometimes be observed in some individuals with certain disorders such as depression or other psychotic disorders.” His thought process was linear and coherent though somewhat impoverishing, which describes someone who “doesn’t seem to have much in the way of spontaneous thoughts . . . .” He did not exhibit gross cognitive impairment, or “impairments in thinking, in attention or memory . . . .”

Dr. Berger diagnosed defendant with schizoaffective disorder bipolar type and polysubstance dependence. Schizoaffective disorder is a combination of schizophrenia, in which a person can experience delusions and “thinking that’s jumbled,” and a mood disorder, in defendant’s case bipolar.
disorder, which is characterized by fluctuations between depression and hyperactivity. Polysubstance dependence occurs when an individual has used multiple types of illicit substances, leading to significant impairment.

Dr. Berger administered a Miller Forensic Assessment Test (MFAST) to assess whether defendant was malingering. A score of six or higher suggests malingering, although some individuals who score six or higher may not be malingering, while some who score below six may be malingering. Defendant received a score of five. Dr. Berger did not believe further testing was necessary because his observations of defendant, defendant’s medical records, and defendant’s description of his symptoms were all consistent with a schizoaffective disorder.

Dr. Berger confirmed that when he asked defendant who raised the competency issue, defendant said he had. Defendant also said that he told Mr. Kelly he wanted to plead not guilty by reason of insanity, but Mr. Kelly did not “want to go this route,” which was why defendant did not trust him. When Dr. Berger asked defendant if he knew what evidence the police had against him, defendant said he did not,claiming he had not seen any police reports and despite that he had sat through a preliminary hearing. He also told Dr. Berger he could not read or write, which Dr. Berger agreed was an exaggeration because defendant’s medical records contained requests for medical treatment defendant himself had written.

Dr. Berger believed that at the time he evaluated defendant, defendant was incompetent to stand trial. Mr. Kelly had told Dr. Berger that defendant was initially able to focus and assist in his defense, but in the two to three months preceding the evaluation had become more symptomatic, withdrawn, and internally preoccupied and was having difficulty communicating. Defendant had expressed to Dr. Berger paranoid belief that Mr. Kelly was working against him and described hearing voices reinforcing his belief that Mr. Kelly was not working in his best interests. Dr. Berger believed defendant was having difficulty “challenging those thoughts in order to be able to effectively work with his attorney.” Defendant told Dr. Berger his counsel had only met with him one time, which seemed unlikely for an experienced defense attorney in a homicide case and was inconsistent with what Mr. Kelly had reported to Dr. Berger. Dr. Berger interpreted this as a reflection of defendant’s “distortions” and the paranoia he felt towards Mr. Kelly. Additionally, Dr. Berger attempted to explain various parts of the legal process, but defendant had difficulty understanding and retaining some of the information.

Dr. Berger acknowledged that at the time of the competency trial (which occurred approximately eight months after his evaluation of defendant), he did not know whether defendant was competent to stand trial and agreed he could have gotten better or worse since the time of his evaluation. According to Dr. Berger, the symptoms of defendant’s disorder could wax and wane month to month, week to week, and even day to day. Because of this, it was possible defendant improved over the month between his and Dr. Kirkland’s evaluations. And it was possible for an individual to be incompetent to stand trial but to be competent in another setting, such as functioning properly in jail and following instructions given to him by the jail staff.

Dr. Kirkland, who has a Ph.D. in psychology, has been a licensed psychologist for 16 years, and has done approximately 300 forensic evaluations, testified that she received a referral to evaluate defendant in August 2014. The minute order she received contained the charges against defendant and a release to obtain his health records from the jail. She had difficulty obtaining the records, however, so she interviewed defendant before receiving them. After the interview, she received several hundred pages of defendant’s jail medical records and a probation report. She did not contact defense counsel because she was court-appointed and did her best to remain neutral. She agreed the critical issue in determining defendant’s competency to stand trial is his or her ability to assist defense counsel in preparing the defense, but she nevertheless does not communicate with defense counsel for fear it might influence her report. She generally only contacts counsel for either side when she cannot obtain information from defendant or there are no medical records.

Dr. Kirkland interviewed defendant on August 20, 2014 for approximately one hour. She began by explaining she had been appointed by the court to find out how he was doing and that she was going to write a report for the court and the attorneys, and defendant appeared to understand what she was saying. Although visibly anxious, he was able to answer her questions, providing information about his background, medical conditions, current symptoms, and medication history. He was also able to define certain legal terms. Dr. Kirkland asked defendant about the different plea options, and he responded, “[N]ot guilty, or guilty, or not guilty by reason of insanity.” Defendant told her he wanted to plead not guilty by reason of insanity, but his attorney “wouldn’t go for it … .”

When Dr. Kirkland asked defendant who the public defender was, defendant said the public defender was supposed to be on his side but was actually on the district attorney’s side. He believed the district attorney and public defender were working together, but Dr. Kirkland did not believe that stemmed from paranoia. Dr. Kirkland asked defendant how he got along with his attorney, and defendant said he “never really talked to the guy. All he really … says is you got another court date. I know as much as I knew when I got arrested.” Most of his communications were with Mr. Kelly’s investigator. From other things defendant said, however, Dr. Kirkland believed he had more contact with Mr. Kelly than he suggested.

During the interview, Dr. Kirkland saw some instances of defendant embellishing his responses. He spent a lot of time talking about his symptoms of psychosis, although she never witnessed any symptoms other than anxiety. Defendant also told her he could not read or write, which was inaccurate, as his medical records contained approximately 34 handwritten requests for medical treatment.
Dr. Kirkland administered the MFAST, and this time defendant received a score of 11. Because he scored a five a month and a half earlier, she spent more time reviewing his medical records.

Dr. Kirkland concluded defendant had a mental disorder of a psychotic nature. While she had insufficient time with him to diagnose his precise disorder, his records reflected prior diagnoses of “psychotic disorder NOS,” schizoaffective disorder, bipolar disorder, and schizophrenia. When she asked defendant how he was doing with his mental health symptoms, he responded, “As long as I take my medication, I’m cool. I still have my mood swings, but I take Depakote, Zyprexa, Abilify. So, I’m cool.”

Dr. Kirkland ultimately concluded defendant was psychiatrically stable and competent to stand trial. He did not display any signs of active psychosis, was able to pay attention to what she was saying, engage appropriately, answer her questions without any real difficulty understanding her, and express himself. She felt like he could communicate and cooperate with his attorney, ask for clarification if he did not understand, advocate for himself, maintain his relationship with the investigator, and formulate strategies with respect to his defense.

Contra Costa County Deputy Sheriff Joseph Smith, who worked at the county jail where defendant was incarcerated, testified he first met defendant in October 2013, and from January through March 2014 worked in the module where defendant was housed. He did not have any negative interactions with defendant, who was able to carry on conversations with him, follow his orders, and request medical attention. At one point when defendant’s cellmate was released, defendant requested of Deputy Smith that his new cellmate not be loud, follow his orders, and request medical attention. At any time in the last couple of weeks, I would say three to four weeks in particular. The problems that I’ve noticed are difficulties with personal hygiene, which before now had not been a serious issue. Incomprehensible paranoid responses to certain questions is what the psychologist[s] sometimes refer to it as the word salad.

“He is, in my opinion—obviously, I’m not a psychologist—but what I’ve noticed is responding actively to external stimuli, that is to say, auditory hallucinations. This was a problem in the past, but it has become more acute.

“At this point, trying to speak with Mr. Easter alone in a room is like trying to speak with Mr. Easter with a third person in the room and was asking him asking [sic] at the same time that I’m asking him questions. At any rate, given the decompensation—and what I’m suggesting is decompensation—from the level of July of last year, I don’t feel I can in good conscience go forward with the trial. In particular, Mr. Easter, because of the mental infirmity, is unable to assist me in his defense at trial and, frankly, is unable to testify on his own behalf at this point at least in a constructive manner.”

Ms. Gleason, the prosecutor, objected, citing defendant’s alleged tendency to malinger and desire to avoid trial. She argued that a subsequent competency hearing is required only when there has been a substantial change of circumstances or when new evidence casts serious doubt on the validity of the prior finding, a burden she contended Mr. Kelly had not met. Mr. Kelly responded that “he’s worse and he can’t help me.”

Ms. Gleason asserted that these were the same concerns raised in the initial competency proceeding, but Mr. Kelly disagreed: “I am alleging new symptoms, particularly, the hygiene problem and the word ‘salad.’ Although auditory hallucinations were a problem in the past, I was still able to communicate with him. I’m saying at this point it’s hit and miss. It’s very difficult. And by hit and miss, I mean sometimes I can communicate with him, sometimes I can’t, so that’s worse. And I am suggesting a couple of new problems that either weren’t in existence before or that I didn’t notice before. So I believe it’s incorrect to suggest that the issues that I brought up today have already been litigated.” Mr. Kelly believed defendant’s medications had been changed in recent months, which he suspected would explain what was going on, although he did not yet have the records.

Ms. Gleason pointed out that over the previous month, defendant had appeared in court and was able to respond to the judge, such as when asked if he waived time. Mr. Kelly countered that “I don’t think saying ‘yeah’ when the judge asked if you waive time is particularly helpful. I mean, let’s cut to the chase. The idea here is that we don’t want defense attorneys declaring a doubt to avoid trial or to delay trial. All I can tell you is that I’m not doing that. There’s been a substantial change. He’s—I’ve got a stack of records so it’s not like suggesting he has psychological problems [is] something new. Prison and jail records go back to when he was in the system in juvenile status. So he’s been on medication and under treatment for many, many, many years. I don’t think it’s difficult to understand that his condition goes up and down. Respond[s or] doesn’t respond to medication. And as I say, I’m stating for the record as an officer of the court that there’s been a substantial change in recent weeks and he’s useless to me right now.”
After an off-the-record discussion, Judge Berger transferred the matter to Judge Baskin since he had presided over the competency trial.

The following day, the parties appeared before Judge Baskin. After confirming the applicable law, Mr. Kelly described in detail his concerns about defendant’s behavior:

“Since we were last in court, it’s gotten much, much worse, or substantially worse I guess would be the proper term. I think Kelly, also allows for different symptoms. That is to say, although the term substantial is used, Kelly also talks about rather than a worsening of previously known conditions, the emergence or discovery of new conditions, when what I’m alleging is both.

“I have noticed a substantial worsening . . . . [¶] . . . [¶] So, what I’m suggesting is that I am seeing new symptoms. I’m seeing a serious decline in personal hygiene, which can be an indication of mental illness. And I believe in this case it is. [¶] I don’t want to play amateur psychologist. I’m not offering a diagnosis. But it would seem to me that I’ve seen it as a symptom, for example, of depression and bipolar disorder, enough that it’s alarming to me, at least.

“I also for the first time am seeing what psychologists describe as word salad, a mixture of appropriate and inappropriate logical and fanciful responses to questions. In other words, it’s as if the answer however formulated in the individual’s mind is on Scrabble tiles, it’s tossed up and comes down however it comes down. If you have enough time and patience, you can sometimes figure out what’s relevant, what is and what’s responsive, and what is not.

“I am not at that stage with Mr. Easter. I am unable, really, to get the gist of what he’s telling me quite often. I also am noting, and this is a substantial difference from a previously existing condition, that I believe the psychologists who evaluated Mr. Easter more than a year ago, even though trial was in April, I remember one of the glaring weaknesses in my case, that the psychologist had last seen him in July of the previous year that is that responding to auditory hallucinations.

“I don’t know if it’s linked or how it’s linked to what I described as word salad, but it’s certainly worse. That is to say that it’s clear on many occasions Mr. Easter, while he was trying to pay attention to what I’m saying, he’s also trying to pay attention to what I would say is an imaginary person in the room, but at any rate, is some sort of stimuli in the room that I don’t see.

“So, as I think we have auditory hallucinations that are substantially worse than they were when last examined, and I would also state for the record, if it’s relevant, are worse than they were at the time of jury verdict in the previous trial.

“I have new symptoms which cause me concern, and I find as much as I would like Mr. Easter to testify in the coming trial, that’s simply not possible given his condition at the moment in addition to that, because that’s a rather higher standard. I think although that’s a Constitutional right. So, it’s an interesting question, but I would say he’s unable to assist at that point because he can’t really follow a logical conversation with me.

“So, the problem is I would say I’ve reviewed recent medical records from the jail. I’ve noticed some recent changes in medication. I don’t know if it’s significant or not. I can’t point to anything with my lack of expertise that is the cause, if I’m not sure an expert can either, but I assume they can, but I would say that we’re in a situation where I’m asking you to have a doctor look at him, and I’m relying simply on me.”

Judge Baskin queried “how this hearing is supposed to look?”: “[I]s Mr. Kelly supposed to take the stand to testify under oath? Is he supposed to bring an expert in to testify under oath? Or is it just going on offer of proof, like we’re doing here?” Ms. Gleason opined that the court was not required to hold an evidentiary hearing but merely “a hearing for the defense to present enough evidence as a threshold matter for the Court [to] determine whether or not there’s been a substantial change . . . .” She then suggested that to make such a demonstration, “perhaps if the defense had had an expert go into the jail in the meantime and speak to Mr. Easter, the Court doesn’t have that. If the defense had the medical records that he was able [sic: unable] to get yesterday to provide for us, we don’t have that.” As to what in fact was before the court, she argued that the only new issue was the hygiene concern:

“With respect to the word salad issue, I would note that Dr. Berger had originally put into his report that that was not necessarily the terminology that Mr. Kelly used, but that Mr. Kelly had been having difficulty communicating with Mr. Easter. That was a condition or one of the factors that Dr. Berger took into consideration.

“The speaking to voices, that was also something that Mr. Kelly had complained about to Dr. Berger, however, and that the defendant actually complained to both doctors, but neither doctor saw any signs of that occurring during their . . . evaluations of Mr. Easter. And that was something that was also brought up during the trial.

“So, I think that the one change really has been a personal hygiene issue that has deteriorated within the past

month, and I do not believe that that . . . symptom is the substantial evidence that we’re discussing.

“I would say that, you know, that the case law goes so far as to say more is required than just bizarre actions, or bizarre statements, or statements that defense counsel says that the defendant is incapable of cooperating in his defense. That there has to be something more. And I don’t believe that your Honor has that at this point.”

Mr. Kelly responded that the communication difficulties he experienced before had to do with defendant’s attention span. The communication problem this time, however, had a “different origin.” He elaborated:

“I think this is based on experience over the years as a lawyer, obviously, I don’t have a psychology degree, I think has to do with Mr. Easter’s diagnosed schizophrenia. . . . [¶] Is it reasonable for me to suggest that in the more than year that has passed since he was last examined by doctors there may have been a worsening of symptoms and there may be new symptoms? I think that is reasonable. Whether or not it’s true, of course, is something to be determined. I do think it’s unreasonable to say that I should [hire] an expert in order to ask the Court for an expert, which is essentially what I’m doing when I declare a doubt. [¶] My hope is that the Court will appoint an expert who can interpret these changes, first of all. Obviously, they’ll investigate them and see whether they find these symptoms are present. I believe that they will, and they can interpret them and give us—”

Judge Baskin interrupted Mr. Kelly to ask, “Do I have the power to do that? I thought I only have the power to do that if . . . the Court adopts your invocation of [Penal Code section] 1368.” Further dialogue ensued on that question, with Mr. Kelly observing, “[W]hat Miss Gleason is saying, in essence, I don’t mean to make light of it, you need to get an expert to tell the Court that we need an expert. And that’s—to me, that’s nonsensical, I think.”

Judge Baskin responded, “I think what I’m hearing Miss Gleason say is that you need an expert to say that these differences in the way you are experiencing the auditory hallucinations and the difference in the way you now are observing the personal hygiene, together with changes in the medication, amount to some change in his fundamental competence as previously opined by doctors. [¶] And I would say, you know, hypothetically if you had an expert here saying what I just said, I think Miss Gleason would have a tougher time then to say that is not the change in circumstances that puts in question the jury verdict.”

While Mr. Kelly agreed, he reiterated that “it’s unreasonable because of duplicative efforts and because of the expenses that are associated it with [sic]. There is a mechanism in place for me if I’m having serious problems and I would tell you from a lawyer’s perspective, I am stating that there is a substantial change.” Or as Mr. Kelly alternatively put it, “[E]ssentially I’m the expert telling you that from a lawyer’s standpoint—and, you know, I’ve actually testified to this in other trials before. I mean, I think you would agree—everybody [would] agree both Miss Gleason and I have a lawyer’s perspective on these issues. [¶] From a lawyer’s perspective, I think also from a legal perspective, what we’ve seen since the last time this gentleman was diagnosed is substantial change, that is to say, a worsening in addition to symptoms that were either unrecognized or not present.”

Ms. Gleason clarified that she was not suggesting that in order to reinstate competency proceedings, defendant first had to be reevaluated by a medical expert. However, she submitted: “[I]f Mr. Kelly had a doctor’s report that said that the defendant was incompetent, it wouldn’t be this Court’s role to the[n] review that doctor’s report to see if you agreed with it. We would have to suspend proceedings and then proceed through the normal course of action, because that would, I think, admittedly be a significant change in circumstances such that the Court would necessarily have to suspend proceedings.”

Judge Baskin then took a recess, after which he declined to reinstate competency proceedings, finding that Mr. Kelly’s offer of proof did not establish a substantial change of circumstances or new evidence casting a serious doubt on the validity of the prior finding of competency.

D. Second Renewed Concern Regarding Defendant’s Competency

Six days later, at an October 15 pre-trial hearing before the Honorable Lewis Davis, the issue of defendant’s competency once again surfaced, when Mr. Kelly advised Judge Davis that defendant had filed a Marsden4 motion and “I’ve tried to discuss it with him and explain it to him and find that he just does not get it,” and that “because of mental illness or cognitive difficulties, he is unable to understand the proceedings and participate in an effective defense.”

Ms. Gleason informed Judge Davis that during a hearing on motions in limine, defendant was able to assist Mr. Kelly by pointing out that there had been a parole violation hearing.

In response to Judge Davis’s question about what differed from what had been presented to Judge Baskin the previous week, Mr. Kelly responded: “The inability of Mr. Easter to understand the bifurcation of a charge and the significance of a waiver of jury trial. My guess is that there’s something going on with medication because two days ago he seemed okay to me. Yesterday there was real problems, clear to me he wasn’t understanding me. But after further conversation with him, that problem seemed apparent. So that’s why I am bringing it up again. . . . [¶] . . . And what’s happened is we’ve

come up upon a trial issue that Mr. Easter doesn’t comprehend and can’t enter a waiver.”

Ms. Gleason reiterated her position that “those are the same types of issues, while not specific, that Judge Baskin was aware of and made a decision based upon and also that the jury had contemplated and made their decision on.”

After further discussion, the matter was put over to the next day to allow for receipt of the transcript of the hearing before Judge Baskin.5

The following day, discussion regarding defendant’s competency resumed. Judge Davis summarized the applicable legal authorities, including that pursuant to People v. Jones (1991) 53 Cal.3d 1115 (Jones), the trial court’s personal observations may be relevant. He noted that during a hearing that week on a motion in limine, defendant had offered that there had been a parole violation hearing, a fact relevant to the motion. This was significant to the judge because in order to provide that information to Mr. Kelly, defendant must “have been understanding exactly what we were talking about in court, and second, understood the significance of there having been a hearing at which there might have been a tape recording that could be used to assist him in his defense. [¶] I don’t think there is a better indicator of someone being able to follow the proceedings and assist his counsel, which he clearly was doing by providing that information to Mr. Kelly than what we have with what Mr. Easter provided to Mr. Kelly.”

Judge Davis asked Mr. Kelly to confirm what he was claiming as the change in circumstances. Mr. Kelly stated he did not believe defendant was understanding him, which was a change from a few days earlier when defendant was understanding him “just fine . . . .” He also pointed to a comment by defendant that “‘they’re poking me with a hot iron,’ ” and he reiterated a concern that the changes in defendant’s circumstances may be related to a change in his medications.

After further discussion of applicable cases, Judge Davis declined to reinstate competency proceedings:

“So in reading the transcript of the proceedings last week, the information about medication was presented. [¶] . . . [¶] What was not presented was the statement ‘They are poking me with a hot iron,’ and not presented was the difficulty that you described for us about you being able to follow what the defendant was saying, along with the portion of that that I mentioned where the defendant was following very closely and gave you information which you then provided to the Court, and that’s on the record.

“So it seems to me that the legal question is do these two, or to be—well, Judge Baskin decided the issue with respect to medication change. But even if I include that in what’s new, I don’t believe I can make a finding that—under Jones that I am being presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the April 2015 jury’s finding of competence. [¶] . . . [¶] . . . So that will be my order. So I am not going to suspend criminal proceedings, and the trial will proceed for the moment, but there is a pending Marsden motion which I need to deal with now . . . .”

Judge Davis then held an in camera hearing on defendant’s Marsden motion, which he denied. Once back in open court, he stated for the record: “I understood everything Mr. Easter said. He followed everything very closely and understood, from what his responses were, and was listening to what I said and listening to what he said. So today at least, I find complete tracking of everything that is going on. So I hope that continues.”

2. Judge Baskin Erred in Refusing to Reinstate Competency Proceedings

In Jones, supra, 53 Cal.3d 1115, the California Supreme Court summarized the applicable law, which is not in dispute: “A defendant who, as a result of mental disorder or developmental disability, is ‘unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,’ is incompetent to stand trial. ([Pen. Code.,] § 1367.) When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] Evidence is ‘substantial’ if it raises a reasonable doubt about the defendant’s competence to stand trial. . . . [¶] When a competency hearing has already been held and the defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second competency hearing unless it ‘is presented with a substantial change of circumstances or with new evidence’ casting a serious doubt on the validity of that finding.” (Id. at pp. 1152–1153; accord, People v. Rodas (2018) 6 Cal.5th 219, 230–231 (Rodas); Kelly, supra, 1 Cal.4th at pp. 542–543, quoting Jones.)

The evidentiary standard by which the trial court evaluates defense counsel’s showing is substantial evidence: if counsel presents substantial evidence demonstrating a substantial change of circumstances or new evidence giving rise to a serious doubt about the validity of the original competency finding, the trial court must suspend the criminal proceedings and reinstate competency proceedings. (Rodas, supra, 6 Cal.5th at p. 231; People v. Rogers (2006) 39 Cal.4th 826, 846; People v. Weaver (2001) 26 Cal.4th 876, 954; People v. Medina (1995) 11 Cal.4th 694, 734; People v. Kaplan (2007) 149 Cal.App.4th 372, 376, 384.)

We review for substantial evidence the trial court’s finding of no substantial change of circumstances or no new evidence casting serious doubt on the initial competency determination (People v. Huggins (2006) 38 Cal.4th 175, 220), and we review its decision not to reinstate competency proceedings for an abuse of discretion. (People v. Marshall (1997) 15 Cal.4th 1, 33.) Applying the foregoing standards here, we conclude Judge Baskin’s finding that Mr. Kelly had not demonstrated a substantial change of circumstances in defendant’s compe-
tency is unsupported by substantial evidence—and the decision not to reinstate competency proceedings was thus an abuse of discretion.

At the hearing before Judge Baskin, Mr. Kelly identified new symptoms defendant was experiencing and a worsening of pre-existing symptoms. As to new symptoms, he detected a “serious decline in [defendant’s] personal hygiene.” He also cited defendant’s “word salad” communications, which he described as “a mixture of appropriate and inappropriate logical and fanciful responses to questions. In other words, it’s as if the answer however formulated in the individual’s mind is on Scrabble tiles, it’s tossed up and comes down however it comes down.” In addition to these two new symptoms, Mr. Kelly also described a “substantial” worsening of defendant’s auditory hallucinations from when he was examined more than a year earlier. We need not address the hygiene and auditory hallucination issues because the new word salad symptom alone constituted a substantial change of circumstances that necessitated another competency proceeding.

Fundamental to the ability to assist counsel is defendant’s mental capacity to “consult with his lawyer with a reasonable degree of rational understanding.” (Dusky v. United States (1960) 362 U.S. 402.) And as the United States Supreme Court has observed, “defense counsel will often have the best-informed view of the defendant’s ability to participate in his defense.” (Medina v. California (1992) 505 U.S. 437, 450.) According to Mr. Kelly—who had represented defendant since his arrest shortly after his wife’s murder—defendant’s recent communications consisted of jumbled words and fanciful responses like Scrabble tiles tossed up and landing in random order. As a result, defendant could not hold a logical conversation, consult with Mr. Kelly with a rational degree of understanding, or assist in his own defense or testify at trial. This is precisely the deficient mental state Penal Code section 1367 is aimed at addressing. And the situation was different than anything described by Dr. Berger or Dr. Kirkland—and was not presented to the jury in April 2015.

The California Supreme Court’s recent opinion in Rodas, supra, 6 Cal.5th 219, filed after oral argument in this case, is instructive. In Rodas, defendant, who had a long history of mental illness, was found incompetent to stand trial on multiple murder and attempted murder charges. (Id. at p. 224.) He was subsequently restored to competence with the assistance of medication, and a medical report advised that he should remain on his medication regimen in order to maintain his competency. (Id. at pp. 225–226.) His case proceeded to trial, but before opening statements defense counsel advised the court that she had developed a doubt about defendant’s present competence, describing statements he made that did not make sense, and speech that she described as a “‘word salad’ ….” According to counsel, defendant was not taking his medication and she was having difficulty understanding him because she did not know “what he’s saying” and “what he wants ….” (Id. at p. 227.)

The court then engaged in a colloquy with defendant, after which it told defense counsel it was “‘impressed with [the] clarity of [defendant’s] speech and apparent clarity of reasoning in addressing the court. He understands the charges. He says he’s willing to help you.’ ” The court asked defendant if he thought it was okay to proceed with the trial, and defendant responded affirmatively. After follow-up questions with defendant about his medication, the court told counsel they should move forward with the trial. (Rodas, supra, 6 Cal.5th at pp. 228–229.) The trial thus proceeded, with the jury ultimately finding defendant guilty of one murder charge with a special circumstance and two attempted murder charges. (Id. at p. 230.)

The Court of Appeal affirmed, rejecting defendant’s argument that the trial court erred in failing to suspend proceedings when his counsel raised a doubt about his competence. In concluding that counsel’s description of defendant’s behavior “‘did not necessarily constitute substantial evidence of defendant’s incompetence,’ ” the court relied heavily on defendant’s responses to the trial court’s questions, which it believed suggested competence: “‘[Defendant] knew he was in a jury trial; he recited the charges against him with precision; he knew that [defense counsel] was defending him; he was willing to help her; he wanted to go forward with trial; and he apologized for his “obstructive” and “belligerent” behavior. The record therefore shows that [defendant] understood the nature of the criminal proceedings and could assist counsel in the conduct of a defense in a rational manner.’ ” (Rodas, supra, 6 Cal.5th at p. 230.)

The Supreme Court reversed, agreeing with defendant that the trial court erred in failing to suspend the criminal proceeding and initiate a formal competency inquiry. (Rodas, supra, 6 Cal.5th at p. 232.) In reaching this result, the court relied in part on Pate v. Robinson (1966) 383 U.S. 375, 383 U.S. 375, where, according to Rodas, “the high court made clear that when substantial evidence of incompetence otherwise exists, a competency hearing is required even though the defendant may display ‘mental alertness and understanding’ in his colloquies with the trial judge. [Citation.] The [Pate] court explained that while the defendant’s in-court behavior ‘might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.’ ” (Rodas, at p. 234.) The Rodas court pointed out that it had followed the same principle in People v. Lightsey (2012) 54 Cal.4th 668, 703–704 and People v. Pennington (1967) 66 Cal.2d 508, 518, where it recognized that “[w]hen faced with conflicting evidence regarding competence, the trial court’s role under Penal Code section 1368 is only to decide whether the evidence of incompetence is substantial, not to resolve the conflict. Resolution must await expert examination and the opportunity for a full evidentiary hearing.” (Rodas, at p. 234.)

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6. We requested briefing on the significance of Rodas. Both parties submitted letter briefs as requested.
The Supreme Court then turned to a discussion of Jones, supra, 53 Cal.3d 1115. It noted that in Jones it had stated that “the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant’s mental state,” particularly if the defendant has “actively participated in the trial” and the trial court has had the opportunity to observe and converse with the defendant. (Jones, at p. 1153; Rodas, supra, 6 Cal.5th at p. 234.) That said, it then went on to explain the limitations of what it would call “the Jones rule”: “This rule does not . . . alter or displace the basic constitutional requirement of Pate, supra, 383 U.S. at pages 385 to 386, and People v. Pennington, supra, 66 Cal.2d at page 518, which require the court to suspend criminal proceedings and conduct a competency hearing upon receipt of substantial evidence of incompetence even if other information points toward competence. The effect of the Jones rule is simply to make clear that the duty to suspend is not triggered by information that substantially duplicates evidence already considered at an earlier, formal inquiry into the defendant’s competence; when faced with evidence of relatively minor changes in the defendant’s mental state, the court may rely on a prior competency finding rather than convening a new hearing to cover largely the same ground.” (Rodas, at pp. 234–235.)

Rodas is significant for two fundamental reasons. First, the evidence of the new symptom there—defendant’s “word salad”—was similar to the evidence of the new symptom here, and in both cases defense counsel informed the court that this change in defendant’s mental state, likely linked to his medication, prevented counsel from understanding what defendant was attempting to communicate. That, according to the Supreme Court, was sufficient to mandate a renewed competency proceeding. (Rodas, supra, 6 Cal.5th at pp. 233, 235.) Second, Rodas’s explanation of “the Jones rule” makes clear that Judge Davis’s later observations regarding defendant’s mental state during a hearing on a motion in limine and a Marsden hearing could not obviate the necessity of a renewed competency hearing in the face of the evidence of new symptoms presented by Mr. Kelly to Judge Baskin.

The Attorney General’s fundamental position here is essentially the same as Ms. Gleason’s below. That is, the only new symptom was the hygiene issue, which was not a substantial change in circumstances and did not warrant a new hearing. Ms. Gleason claimed that the word salad symptom was not new because Dr. Berger had considered it, although he had expressed it in terms of defendant having “difficulty” communicating with Mr. Kelly. But defendant having difficulty communicating is a far cry from his thoughts coming out like “mixed up Scrabble tiles.” And, Mr. Kelly explained, the communication difficulties were different: previously, the issues had to do with defendant’s attention span, while this time the communication problem had a “different origin.” While sometimes it was possible to “figure out what’s relevant . . . and what is not,” Mr. Kelly was generally unable to understand the gist of what defendant was trying to communicate. The record thus does not support the position that the “word salad” issue had been considered by Drs. Berger and Kirkland.

The Attorney General also argues that “while evidence of incompetence may emanate from demeanor or irrational behavior, ‘bizarre actions or statements’ by the defendant are not enough to raise a doubt of competency.” This is indeed correct. (People v. Marshall, supra, 15 Cal.4th at pp. 33; People v. Danielson (1992) 3 Cal.4th 691, 727.) But Mr. Kelly described more than bizarre actions or statements; he described an inability of defendant to engage in a logical conversation.

The Attorney General also suggests that the requisite showing could only be met with the opinion of a medical professional. For example, as to Mr. Kelly’s representation that defendant’s auditory hallucinations had worsened, the Attorney General says this: “Counsel’s claim that appellant’s auditory hallucinations had become substantially worse—absent the qualified opinion of a psychiatrist or psychologist that those symptoms left appellant incapable to understand the proceedings against him or incapable of assisting counsel—was insufficient evidence of a substantial change of circumstances or new evidence casting serious doubt on the validity of the jury’s competency verdict. Defense counsel’s statements, without more, are insufficient to raise a doubt as to the defendant’s competence.” The only authority the Attorney General cites in claimed support of this assertion—People v. Laundermilk (1967) 67 Cal.2d 272, 285—is unpersuasive. First, Laundermilk involved an initial determination of competence and thus a completely different standard than here. Second, Laundermilk simply did not hold, as the Attorney General implies, that “Defense counsel’s statements, without more, are insufficient to raise a doubt as to the defendant’s competence.” Third, the Laundermilk court recognized the importance of defense counsel’s representations regarding defendant’s mental state: “Although not evidence strictly speaking, we have also included within the scope of our scrutiny the statements of defense counsel already referred to.” While we intimate no rule ascribing probative value to such statements in all instances, nevertheless in the present situation counsel was describing and representing to the court his own personal experiences with and observations of his client. We regard these statements of a responsible officer of the court as tantamount to sworn testimony.” (Id. at p. 286; accord, Medina v. California, supra, 505 U.S. at p. 450 [statements by counsel are relevant to issue of defendant’s competency].)

Judge Baskin grappled with what form Mr. Kelly’s showing had to take in order to warrant a second competency proceeding. As noted, he queried “how this hearing is supposed to look”—whether Mr. Kelly’s representations were sufficient, whether he needed to testify under oath, whether he needed to present the opinion of a medical professional. While Ms. Gleason claimed she was not suggesting that “in
order to reinstate [Penal Code section] 1368 proceedings, that a new expert … has to go into the jail and evaluate someone,” she and Judge Baskin adhered to the notion that if Mr. Kelly had arranged for a medical professional to re-evaluate defendant and opine as to his mental state, that could have satisfied the standard for reinstating competency proceedings. But no authority requires an expert opinion at this stage, and, as Mr. Kelly rightly put it, it would be nonsensical to require defense counsel “to get an expert to tell the Court that we need an expert.” Jones, supra, 53 Cal.3d 1115, which the Attorney General submits supports Judge Baskin’s ruling, touched on the issue of expert opinion at this stage, but nowhere did it suggest such evidence was required.

In Jones, supra, 53 Cal.3d 1115, after defendant had initially been found competent in an uncontested court trial, defense counsel again raised the issue of defendant’s present competency, generally representing that he had been unable to assist in his defense and that a psychiatrist who was present would so testify. Without hearing from the psychiatrist, the trial court denied the request to reinstate competency proceedings. (Id. at pp. 1152–1153.)

The Supreme Court affirmed, concluding the trial court did not err when it denied defense counsel’s request without hearing from the psychiatrist, because defense counsel’s offer of proof provided no reason to believe the psychiatrist’s testimony would demonstrate a substantial change of circumstances. (Jones, supra, 53 Cal.3d at p. 1154.) This was so because defense counsel offered only a general description of the psychiatrist’s proposed testimony, making no attempt to detail how the testimony would show a change in circumstances or cast doubt on the previous finding of competence. In the absence of a more specific offer of proof, the court could not assume that the psychiatrist’s testimony would establish a need to conduct a new competency hearing. Moreover, defense counsel’s offer of proof did not establish that the psychiatrist had “sufficient opportunity to examine” defendant. (Ibid.) Significantly, nowhere in the court’s discussion of the attorney’s offer of proof or the psychiatrist’s proffered testimony did it suggest that the opinion of a medical expert was mandatory at that stage. And Rodas, supra, 6 Cal.5th at pp. 233, 235 implicitly confirmed that an expert opinion was not necessary by recognizing that defense counsel’s statements alone were sufficient to necessitate a renewed competency proceeding.

The circumstances of this case also distinguish it from other cases in which the appellate court found no error in the trial court refusing to reinstate competency proceedings. (See, e.g., People v. Taylor (2009) 47 Cal.4th 850, 864 [deficits in defendant’s “common sense reasoning and abstract thinking abilities” and his “disturbingly inept” defense of himself during penalty phase did not cast serious doubt on the trial court’s finding that he knew what he was charged with and the nature of the trial]; People v. Huggins, supra, 38 Cal.4th 175, 219–220 [psychiatrist conceded defendant satisfied the competency requirements in 1990 and testified that there had not been a substantial change in defendant’s mental condition since then]; People v. Marshall, supra, 15 Cal.4th at p. 33 [statements that defendant made at trial were insufficient to compel trial court to sua sponte make a renewed inquiry regarding defendant’s competency because “[m]ore is required than just bizarre actions or statements by the defendant to raise a doubt of competency”]; Kelly, supra, 1 Cal.4th 495, 543 [evidence defendant cited on appeal to show his incompetence during trial was the same defense counsel recited when they initially expressed doubts about defendant’s competency]; People v. Oglesby (2008) 158 Cal.App.4th 818, 828 [nothing suggested defendant’s organic brain impairment had worsened since a report found him competent three months earlier, and his guilty plea was due to dissatisfaction with his defense counsel rather than a lack of understanding regarding the proceeding].)

Unlike the above cases, Mr. Kelly provided unequivocal specifics about recent changes in defendant’s mental health, changes that in Mr. Kelly’s opinion as an experienced deputy public defender rendered defendant incapable of aiding in his defense. While the heightened “substantial change in circumstances” standard is necessary to ensure defendant is not seeking a perceived advantage by unnecessarily delaying trial, there is no indication that was occurring here. And Mr. Kelly’s description of defendant’s new “word salad” symptom—especially in the context of defendant’s lengthy history of psychiatric issues, the amount of time that had passed since his initial evaluations, and an apparently recent change in his medications that could have accounted for his new psychiatric issues—warranted the suspension of the criminal proceedings and the appointment of a medical professional to evaluate defendant’s competency.

As to the appropriate remedy, Rodas, supra, 6 Cal.5th 219 guides us on that issue as well. There, the Supreme Court discussed when, upon a finding of error for failure to hold a competency hearing, the matter can be remanded for a retrospective competency hearing. (Id. at pp. 238–241.) As the court explained, “[T]he critical question in determining whether a retrospective competency hearing is feasible is whether there is ‘sufficient evidence to reliably determine the defendant’s mental competence when tried earlier.’” (Id. at pp. 239–240.) And, given “the fluctuating nature of defendant’s symptoms, the passage of time, and the lack of contemporaneous expert evaluations,” the court concluded a retrospective hearing “would neither be fair nor produce a reliable result.” (Id. at p. 240.) Likewise here, where the expert evaluations were performed in July and August 2014 and defense counsel renewed his doubt—and defendant was tried—13 months later. Under these circumstances, a retrospective competency hearing could not place defendant “in a position comparable to the one he would have been placed in prior to the original trial.” (People v. Ary (2011) 51 Cal.4th 510, 520.)
We reverse the judgment of conviction and remand the matter to the trial court for further proceedings consistent with this opinion.

Richman, Acting P.J.

We concur: Stewart, J., Miller, J.

THE PEOPLE, Plaintiff and Respondent,

v.

WARREN OLEG MORRISON, JR.,
Defendant and Appellant.

No. A154092
In The Court of Appeal of the State of California
First Appellate District
Division Five
(San Mateo County Super. Ct. No. SF400896A)
Filed April 11, 2019

COUNSEL

Hey and Hey, Randy Hey for the Defendant and Appellant.

George Lawrence Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Eric D. Share, and Alisha Carlile, Deputy Attorney, for Plaintiff and Respondent.

OPINION

Appellant Warren Oleg Morrison, Jr. was tried before a jury and convicted of the first degree murder of Jarmal Magee with an enhancement for personally and intentionally discharging a firearm causing death. (Pen. Code, § 187, subd. (a), 12022.53, subd. (d).) In this appeal from a sentence of 50 years to life after a recall of the sentence under section 1170, subdivision (d)(1), appellant contends the trial court misunderstood the scope of its discretion under recent amendments to section 12022.53, which allow the court to strike an enhancement imposed under its provisions. We agree the court had the discretion to impose a lesser firearm enhancement and remand the case for resentencing so it can exercise its discretion.

I. BACKGROUND

Due to the limited nature of the issue raised in this appeal, it is not necessary to discuss the facts at length. Briefly, on October 25, 2015, appellant shot Magee several times during an argument. Magee’s girlfriend at the time testified that appellant pulled the gun from his own waistband and continued to shoot even after Magee was disabled. Appellant claimed Magee pulled the gun from his (Magee’s) waistband and it

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

2. Appellant has separately appealed from the judgment of conviction, which we affirm by separate opinion filed this same date. (People v. Warren Morrison (April __, 2019, A152440) [nonpub. opn.].)
initially discharged during their struggle; he continued to shoot Magee after gaining control of the gun because he was angry and afraid. The jury convicted appellant of first degree premeditated murder and found a firearm enhancement true under section 12022.53, subdivision (d).

Appellant was sentenced to prison for 50 years to life on September 7, 2017—25 years to life on the murder count and 25 years to life for the firearm enhancement. On December 6, 2017, appellant filed a request to recall the sentence pursuant to section 1170, subdivision (d)(1), based on recent amendments to section 12022.53 that gave the court the discretion, effective January 1, 2018, to strike a firearm enhancement under its provisions. The court held a hearing on January 3, 2018 in which it recalled the sentence but denied the request to strike the firearm enhancement. In a hearing held on February 8, 2018, at which appellant was personally present, the court reimposed the original sentence of 50 years to life, consisting of 25 years to life for the murder count and 25 years to life for the firearm enhancement.

II. DISCUSSION

Appellant argues the case should be remanded for resentencing because the court did not understand the scope of its discretion. He acknowledges that the trial court acted properly in declining to strike the enhancement completely. But he argues the court had the discretion to modify the enhancement from that established by section 12022.53, subdivision (d), which carries a term of 25 years to life, to a “lesser included” enhancement under section 12022.53, subdivision (b) or (c), which carry lesser terms of 10 years or 20 years, respectively.

“Section 12022.53 sets forth the following escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies, including [l] murder: a 10-year prison term for personal use of a firearm, even if the weapon is not operable or loaded (id., subd. (b)); a 20-year term if the defendant ‘personally and intentionally discharges a firearm’ (id., subd. (c)) and a 25-year—to life term if the intentional discharge of the firearm causes ‘great bodily injury’ or ‘death, to any person other than an accomplice’ (id., subd. (d)). For these enhancements to apply, the requisite facts must be alleged in the information or indictment, and the defendant must admit those facts or the trier of fact must find them to be true.” (People v. Gonzalez (2008) 43 Cal.4th 1118, 1124–1125.) Section 12022.53, subdivision (f) provides, “Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment . . . .”

The information in this case originally charged appellant with three firearm enhancements: personal use of a firearm, personal discharge of a firearm, and personal discharge of a firearm causing death. (§ 12022.53, subdivision (b)–(d).) At trial, the prosecutor amended the information to remove the enhancements for personal use and discharge of a firearm under section 12022.53, subdivisions (b) and (c), leaving only the enhancement for personal discharge causing death under section 12022.53, subdivision (d). The jury found this enhancement allegation to be true.

At the time of sentencing in this case, in September 2017, trial courts did not have the discretion to strike enhancements under section 12022.53. (Former § 12022.53, subd. (h).) On October 11, 2017, Governor Brown signed Senate Bill 620 (2017–2018 Reg. Sess.), which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. (Stats 2017, ch. 682.) Senate Bill 620 added the following language to both statutes: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats 2017, ch. 682, §§ 1(c)–2(h).)

Courts now may “strike or dismiss” an enhancement under section 12022.53, subdivision (d) in the interests of justice under section 1385. In a case where the jury had also returned true findings of the lesser enhancements under section 12022.53, subdivisions (b) and (c), the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice. But what if, as here, enhancements under section 12022.53, subdivisions (b) and (c) were not also alleged? May the court impose one of those lesser enhancements in lieu of the greater enhancement under section 12022.53, subdivision (d) if the court finds it is in the interests of justice to do so?

Case law has recognized that the court may impose a “lesser included” enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence. (People v. Fialho (2014) 229 Cal. App.4th 1389, 1395–1396 (Fialho) [enhancement for personal use of a firearm under section 12022.5, subdivision (a) was authorized although it was not charged when defendant was convicted of voluntary manslaughter as a lesser included offense of murder, to which section 12022.53, which was found true by the jury, does not apply]; People v. Strickland (1974) 11 Cal.3d 946, 961; People v. Lucas (1997) 55 Cal. App.4th 721, 743; People v. Allen (1985) 165 Cal.App.3d 616, 627 [arming enhancement under section 12022 imposed when section 12022.5 did not apply to conviction]; People v. Dixon (2007) 153 Cal.App.4th 985, 1001–1002 [substitution of deadly weapon enhancement under section 12022, subd. (b) for section 12022.53, subd. (b) enhancement, when BB or pellet gun did not qualify as “firearm” under statute].) This is so regardless of section 1170.1, subdivision (e), which
requires all enhancements to be pleaded and proved in the accusatory pleading. (Fialho, at pp. 1397–1399.)

Under these cases, the court could impose an uncharged enhancement under section 12022.53, subdivision (b) or (c) in lieu of an enhancement under section 12022.53, subdivision (d) if it was unsupported by substantial evidence or was defective or legally inapplicable in some other respect. We see no reason a court could not also impose one of these enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385. This conclusion is further buttressed by People v. Marsh (1984) 36 Cal.3d 134, 143–144, in which the court remanded for resentencing and held the court could strike allegations of ransom and great bodily harm to make the defendant eligible for a Youth Authority3 commitment. “In discussing the scope of section 1385, we do not mean to suggest that the court’s only choices are to strike both the bodily harm and ransom allegations for YA eligibility or to deny the motion entirely and sentence defendant to prison for life without possibility of parole. Although those were the only alternatives urged at the time of sentencing, we note that there is a broad range of sentencing options between those extremes. For example, the court could strike only the bodily harm allegation, thereby reducing the kidnaping sentence to life with possibility of parole, which carries a minimum parole eligibility term of seven years. [Citation.] … [¶] In sum, the court has a wide range of sentencing choices short of imposing the imprisonment without possibility of parole.” (Id. at p. 144.)

The court had the discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385. The Attorney General urges us to affirm the trial court’s decision regardless, arguing that it is clear from the court’s comments it would not exercise its discretion even if it had the power to do so and that a remand would be futile. (People v. McDaniels (2018) 22 Cal. App.5th 420, 425.) We disagree.

The court denied the motion to strike the 25-year-to-life enhancement, noting: “The two things that seem to me the most critical in terms of the decision, the two factors were the vulnerability of the victim and the defendant’s lack of really, in my view, [of] meaningful remorse but, particularly, the brutal nature of the crime and the vulnerability of the victim. The fact that the defendant stood over the victim when he was absolutely helpless and shot him three times, in my mind, was an extremely vicious crime.” This showed that the court thought a firearm enhancement was appropriate, but it does not show which firearm enhancement it believed was best suited to this case. Although the court stated adequate reasons for declining to strike the lifetime enhancement un-

3. The Youth Authority is now known as the Division of Juvenile Facilities, which is part of the Division of Juvenile Justice, which in turn is part of the Department of Corrections and Rehabilitation. (In re D.J. (2010) 185 Cal.App.4th 278, 280, fn. 1.)
under Senate Bill 620 and the amended version of section 12022.53, subdivision (h) only arises in cases where those enhancements have not been charged in the alternative and found true, making remands on this ground considerably less “cumbersome and costly” than the wholesale remand of silent record Three Strikes cases considered in Fuhrman. (Id. at p. 946.) And after the publication of our decision today, the usual presumption that a sentencing court correctly applied the law will apply and will ordinarily prevent remand where the record is silent as to the scope of a court’s discretion. (See Fuhrman, supra, 16 Cal.4th at p. 945.) Additionally, the “lesser firearm enhancement” issue only arises when the court has been asked to strike a greater enhancement under section 12022.53, making it unreasonable to infer, as in Fuhrman, that in many cases the issue was not mentioned simply because the parties thought an exercise of discretion unlikely. (Cf. Fuhrman, supra, 16 Cal.4th at pp. 945–946.) Assuming Fuhrman would be decided the same way today, it presents different circumstances than the case before us.

III. DISPOSITION
The case is remanded for resentencing. The judgment is otherwise affirmed.

NEEDHAM, J.
We concur. JONES, P.J., SIMONS, J.

COUNSEL
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Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

ORDER
The Office of the Orange County District Attorney requests that our opinion filed on March 21, 2019, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is GRANTED.

The opinion is ordered published in the Official Reports.

IKOLA, J.
WE CONCUR: ARONSON, ACTING P. J., FYBEL, J.

OPINION
A jury convicted defendant of human trafficking (Pen. Code, § 236.1, subd. (b); count 1); 1 kidnapping to commit a sex offense (§ 209, subd. (b)(1); count 2); two counts of forcible rape in concert (§ 264.1, subd. (a); counts 3 & 4); two counts of forcible oral copulation in concert (§ 288a, subd. (d)(1); counts 5 & 6); second degree robbery (§§ 211/212.5, subd. (c); count 7); two counts of pimping (§ 266h, subd. (a); counts 8 & 11); and two counts of pandering (§ 266i subd. (a); counts 9 & 12). The jury also found that in the commis-

1. All further statutory references are to the Penal Code unless otherwise stated.
sion of the crimes charged in counts 3, 4, 5 and 6, defendant
kiddapped the victim within the meaning of section 667.61,
subdivisions (a) and (d)(2). Defendant admitted he had a pri-
or strike (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)
(1)), a prior serious felony conviction (§ 667, subd. (a)(1)),
and three prison priors (§ 667.5, subd. (b)).

The court sentenced defendant to state prison for 205
years to life plus 28 years. The sentence was comprised of
the following: 50 years to life on the principal count — count
3 (rape in concert with kidnapping); a consecutive term of 50
years to life on count 4 (rape in concert with kidnapping); a
consecutive term of 50 years to life on count 5 (oral copula-
tion in concert with kidnapping); a consecutive term of
50 years to life on count 6 (oral copulation in concert with
kidnapping); a consecutive term of 28 years on count 1 (hu-
man trafficking), which was the 14-year-midterm, doubled
because of defendant’s prior strike; a concurrent term of six
years on count 7 (robbery), which was the three-year mid-
term doubled because of defendant’s strike; two concurrent
terms of eight years on counts 8 and 11 (pimping), which
was the four-year midterm doubled because of defendant’s
strike; and a consecutive five-year term for the prior seri-
ous felony. The court imposed a seven-year term on count 2
(kidnapping to commit sex offense) but stayed execution of
sentence pursuant to section 654. The court also stayed ex-
ecution of sentence on counts 9 and 12 (pandering) pursuant
to section 654. The court struck the three one-year terms for
the prison priors.

Defendant kidnapped a victim, raped her, then forced her
into prostitution. On appeal defendant contends the evidence
was insufficient to show forcible rape because the two rapes
at issue were accomplished by threats, a lesser offense, not
force. Defendant also contends he cannot be liable for rape
in concert because there was no evidence the victim’s “cus-
tomer” (the john) was aware the intercourse was without the
victim’s consent. Thus, the argument goes, the john did not
commit rape, and defendant, therefore, cannot have com-
mitted rape in concert with the john. We conclude substantial
evidence supports the verdict on both fronts.

Defendant also argues there was instructional error. He
contends the instructions on forcible rape were unclear, but
he forfeited that objection by failing to raise it at trial. He
also contends the jury should have been instructed on mis-
take of fact as to the john’s belief about the victim’s consent.
That was not his theory at trial, however, and there was no
evidence to support mistake of fact. To the contrary, the un-
controverted evidence was that the victim told the john she
did not want to have intercourse. Accordingly, the court had
no sua sponte duty to instruct the jury on mistake of fact.

Finally, defendant raises various sentencing issues. First,
defendant contends the court misunderstood it had discre-
tion to impose the sentences on counts 3, 4, 5, and 6 either
consecutively or concurrently. We agree. Second, we agree
with defendant that the sentence on count 8 (pimping) should
have been stayed pursuant to section 654. Third, the people
concede defendant is entitled to two additional days of credit
for time served, and we concur. Fourth, defendant argues he
was entitled to conduct credit. There, we disagree. Finally,
in a supplemental brief defendant contends he is entitled to a
remand so the court may exercise its newly granted discretion
to strike the five-year enhancement imposed pursuant to sec-
tion 667, subdivision (a)(1). The People concede that issue,
and we agree. We will remand the matter for resentencing.

FACTS

Yolanda (Counts 1-9)

In July 2015 the victim, Yolanda, and her boyfriend, who
were homeless, were walking on either Beach Boulevard or
Garden Grove Boulevard in Stanton at approximately 5:00
p.m., when defendant and his female companion, Destiny,
offered them a ride. Yolanda reluctantly accepted and defend-
dant dropped them off at a motel. A short while later, Yolanda
and her boyfriend were “out and about” and got into an argu-
ment. Yolanda was walking back to the motel alone when she
heard Destiny calling to her. Destiny invited Yolanda and her
boyfriend to go with her and defendant to watch fireworks
and offered to get them marijuana. Yolanda’s boyfriend did
not want to go but told Yolanda to go so she could get the
marijuana. Yolanda went with defendant and Destiny.

After they watched fireworks and got marijuana, Yolanda
told defendant and Destiny that she wanted to go home. But
instead of taking Yolanda back to the motel, defendant drove
to a parking lot in a loading dock area where they drank al-
cohol and smoked marijuana. Yolanda did not want to drink
the alcohol but defendant made her drink it anyway. Yolanda
again told defendant that she wanted to go home. Defendant
told her she was not going home.

While they were in the car, Destiny began to orally copu-
late defendant. Yolanda told them “that was gross.” At some
point while Destiny was doing this to defendant, defendant
began touching Yolanda’s legs and breasts. Yolanda felt very
uncomfortable and asked defendant to stop several times.
Defendant ordered Yolanda to take off her clothes. When
Yolanda refused, defendant told Destiny to get “the gun,”
and Destiny complied. Defendant held the gun to Yolanda’s
side and said, “Bitch, take off your clothes.” Yolanda got un-
dressed. Yolanda was afraid of defendant because he had a
gun and was bigger than her. The “gun” was actually a phone
charger, but Yolanda believed it was a real gun. It was dark
inside the car.

Defendant got out of the car and got into the back seat
with Yolanda and put on a condom. He then ordered Yolanda
to orally copulate him. She did not want to do this and told
defendant she did not want to, but she complied “because of
the gun that was in the car.” Yolanda was crying and gagging
as she orally copulated defendant. Defendant ordered Yolana-
da to lay down on the back seat and he raped her. Yolanda
cried and told defendant to stop several times. When Destiny
said it was her turn, defendant and Destiny pinned Yolanda
in the back seat and had sex on top of her. Defendant ordered Yolanda to put her mouth on Destiny’s breasts.

After that, defendant got out of the car, opened the trunk and told Yolanda that she was “going to get dolled up.” He told her she was going to be an escort and “vaguely explained” to her what that meant. Yolanda told defendant that she did not want to have sex with other men or be an escort. Defendant ignored her. At some point, defendant ordered Yolanda to remove her engagement ring and necklace and told her that she belonged to him now. Destiny told Yolanda that if Yolanda tried to get help or run away, she would beat her. Yolanda was afraid of defendant and Destiny. Destiny dressed Yolanda in leggings and a see-through blouse and defendant drove them to Harbor Boulevard in Santa Ana, which was an area known for prostitution. Yolanda “made it clear [to defendant and Destiny] several times” that she did not want any of this to happen.

Yolanda and Destiny got out of the car and began walking down the street. When an Asian man (the john) approached them for sex, Destiny “was doing all the talking” and “agreed for” Yolanda. The john drove Yolanda and Destiny to a neighborhood and parked his minivan. As soon as they parked, Destiny ordered Yolanda to remove her clothes and to give the john a condom. The john gave Yolanda $60.00 and she gave the money to Destiny. The john then orally copulated Yolanda. Yolanda did not want the john to do this to her. After the john finished orally copulating Yolanda, he put on the condom and had sexual intercourse with her. As he did so, Yolanda told Destiny that she did not want this to be happening. Yolanda testified that she told Destiny, who was in the car with her, “before it happened, after it happened, [and] during” that she did not want this to happen.

When the john was finished, he drove them back to the area where he had picked them up. Destiny called defendant and asked if they could return to his car because she was tired. Destiny and Yolanda then walked to where defendant was parked. It was approximately 1:00 a.m. They all fell asleep in the car and when Yolanda woke up in the morning, defendant and Destiny were still asleep. The car door was locked with a child lock so Yolanda could not open it from inside of the car. She slowly rolled down the window and opened the door from the outside. Yolanda ran to a nearby automotive repair shop and called 911. Yolanda did not try to escape earlier because she was afraid that if defendant caught her, she “would die.”

Alexandra E. (Counts 10-12)

Alexandra E. was a prostitute in March 2013 when she met defendant. From that day on, Alexandra was in “a relationship” with defendant for the next two years. During that time, Alexandra worked as a prostitute for defendant. Defendant also had four or five other girls working for him. On occasion, defendant would hit Alexandra, and one time he gave her a black eye. On one occasion when Alexandra did not want to work as a prostitute because it was too cold, defendant pushed and kicked her out of the car.

Caroline D. (Uncharged Event)

Caroline D. testified about an uncharged event under Evidence Code section 1108. In May, 2009, she was in a rehabilitation center for alcohol abuse. One day she “fell off the wagon” and drank hairspray, which has alcohol in it, and checked herself out of the rehabilitation facility. She blacked out shortly thereafter and that night collapsed on the street. When she woke up, she was in a hotel room and defendant was on top of her, raping her. A woman was also present, and was holding Caroline down and also performing oral sex on her. Caroline blacked out again. When she awoke in the morning, defendant told her he was a pimp, that she would be working for him, and that she was essentially his prisoner. Caroline then went with defendant and the woman to a different location. Defendant made Caroline ingest crack cocaine. Defendant sodomized Caroline while Caroline screamed and cried. The woman told defendant to do it harder. Caroline was in pain. After the attack, Caroline attempted to jump off the ninth floor balcony, but defendant grabbed her and took her back inside. When a neighbor opened the door and asked what was going on, Caroline escaped.

DISCUSSION

Defendant raises several issues falling into three broad categories: sufficiency of the evidence, instructional errors, and sentencing errors. We address each in turn.

Sufficiency of the Evidence

“When reviewing a challenge to the sufficiency of the evidence, we ask “‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” [Citations.] Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for “‘substantial evidence—that is, evidence which is reasonable, credible, and of solid value’” that would support a finding beyond a reasonable doubt.” (People v. Banks (2015) 61 Cal.4th 788, 804.)

Defendant contends the evidence was insufficient as to counts 3 (forcible rape in concert; § 261.4, subd. (a)), 4 (forcible rape in concert), and 6 (oral copulation in concert by force or fear). Count 3 charged defendant with directly raping Yolanda. Count 4 charged defendant with raping Yolanda in concert with the john. Count 6 involved oral copulation in concert with the john.

The Forcible Rape in Concert Counts

As to the forcible rape counts, defendant contends the evidence was insufficient because the rapes were accomplished by a threat of force, rather than actual force.
“Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:” “Where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” (§ 261, subd. (a)(2).) Section 264.1 provides enhanced penalties for rape in concert, “in which the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, committed an act described in Section 261, 262, or 289, either personally or by aiding and abetting the other person … ” (Italics added.) Defendant contends the requirement of force or violence under section 264.1 defines a subset of ordinary rape under section 261, subdivision (a)(2), in which rape may be accomplished by means of fear alone.

“The term ‘force’ as used in the rape statute is not specifically defined.” (People v. Griffin (2004) 33 Cal.4th 1015, 1022 (Griffin.)) “[N]o specialized legal meaning was ever intended for that term.” (Id. at p. 1023.) Indeed, in Griffin our high court specifically rejected a definition of force that was “‘substantially different from or substantially greater than’ the physical force normally inherent in an act of consensual sexual intercourse.” (Ibid.) “Whereas, prior to the 1980 amendment of section 261, conviction of forcible rape required that the accused employ that degree of force necessary under the circumstances to overcome the victim’s resistance [citation], under the modern rape statute, the jury no longer evaluates the element of force in terms of whether it physically prevents the victim from resisting or thwarting the attack. As one court observed, ‘By eliminating the resistance requirement, the Legislature clearly intended to change prior law with regard to the use of force in rape.’ [Citation.]” (Id. at p. 1025.) “The fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman’s will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman’s will and sexuality, the law of rape does not require that ‘force’ cause physical harm. Rather, in this scenario, ‘force’ plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim’s will.” (Id. at p. 1025.)

Accordingly, the Griffin court concluded, “the degree of force utilized is immaterial.” (Id. at p. 1025.) “The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim’s will, can support a forcible rape conviction.” (Griffin, supra, 33 Cal.4th at p. 1027.)

This is just such a case. Here, defendant used his entire body to pin Yolanda down in a cramped area in the back seat of a car. The jury could certainly conclude that this use of force helped overcome Yolanda’s lack of consent to accomplish the rape. In Griffin, the court found the element of force satisfied where the defendant pinned the victim’s arms down during intercourse. (Griffin, supra, 33 Cal.4th at p. 1029.) If pinning a woman’s arms suffices, surely pinning her whole body does too.

Additionally, defendant pressed what Yolanda thought was a gun up against her side. That physical force, though not particularly powerful in pure physical terms, surely helped induce the fear needed to overcome Yolanda’s will. (See Griffin, supra, 33 Cal.4th at p. 1028 (“the reviewing court … looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence of a conviction [of forcible rape]”).

The same reasoning applies to count 4, involving the john. That rape also involved the john pressing Yolanda down in the back seat of a car. And the fear induced by defendant physically pressing a fake gun against Yolanda’s side was still effectively overcoming her lack of consent to the intercourse.

The John Counts

As to the counts involving the john (4 and 6), defendant contends there was no evidence the john was aware of Yolanda’s lack of consent, and consequently, there was no evidence the john was guilty of rape. (People v. Mayberry (1975) 15 Cal.3d 143, 155 (“If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite … to a conviction of … [citation] . . . rape by means of force or threat [citation].”)) And if the john did not commit rape, the argument goes, defendant cannot be liable for committing rape in concert with him.

Aside from the logical flaw in this argument (which we address below), this argument simply does not comport with the evidence. Yolanda testified that she expressed to Destiny, who was in the front seat of the john’s car, “before it happened, after it happened, [and] during” that she did not want this to happen. A jury could certainly conclude from this evidence that the john was aware of her lack of consent. Defendant’s only response is, “Yolanda never specified how she told Destiny; whether it was done in a manner in which the john could hear or done so in [a] way that would inform the john about her predicament.” But if Yolanda said it loud enough for Destiny to hear in the front seat, it is reasonable to infer that the john, who was pressed up against her, could hear. Any doubt about that is not a reasonable doubt.

Instructional Error

Defendant raises two claims of instructional error. First, in connection with counts 4 and 6 (the john counts of forcible rape in concert and oral copulation by force or fear), he contends the court should have instructed the jury on mistake of
Mistake of Fact

Defendant did not rely on a mistake-of-fact defense at trial, nor did he request such an instruction. Nonetheless, “‘it is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence’” and “‘necessary for the jury’s understanding of the case.’” [Citations.] It is also well settled that this duty to instruct extends to defenses “if it appears ... the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’” (People v. Brooks (2017) 3 Cal.5th 1, 73.)

It is equally well settled that, “[i]f believed by the fact finder, a defendant’s honest and reasonable, albeit mistaken, belief in the victim’s consent is a complete defense to a charge of ... rape.” (People v. Brooks, supra, 3 Cal.5th at p. 74.) Defendant, of course, cannot claim this defense personally, as he clearly knew Yolanda had not consented to acting as a prostitute. Nonetheless, defendant reasons that if thejohn could raise such a defense, then defendant cannot be found guilty of aiding and abetting a crime, as no crime occurred. We alluded earlier to the flaw in this argument, which we now explain.

As relevant here, rape under section 261, subdivision (a) (2), requires sexual intercourse against the victim’s will accomplished by means of force or violence. The evidence supports those elements, as we have already seen. Because nearly every crime requires a mens rea, however, our courts have held that a defendant must have intended to have sex against the victim’s will. (People v. Mayberry, supra, 15 Cal.3d at p. 154.) If a defendant held an honest and reasonable belief that the victim consented to sex, he cannot be found guilty of rape. The elements of section 264.1 are that the defendant must be acting in concert with another person when committing an act described in section 261, even if just as an aider and abettor.

All elements of section 264.1 are met here. Defendant acted in concert with Destiny and the john to accomplish sexual intercourse with Yolanda, against her will, by means of force or violence. What about the mens rea? Here is defendant’s error: even if the john did not have the mens rea to personally be found guilty of rape, defendant did. This is not a situation where the rape of Yolanda was an innocent mistake. Defendant intended it. We see no reason, against all logic and common sense, to impute the john’s mental state to defendant. In other words, the statutory elements are satisfied, and the implied mens rea requirement is also satisfied. Accordingly, the john’s alleged mistake of fact would be no help to defendant. The court did not err in omitting the instruction.

Moreover, even if defendant could benefit from the john’s mens rea, there was not substantial evidence that the john honestly and reasonably believed Yolanda consented. The john did not testify. The evidence defendant relies on is, essentially, the absence of any evidence from which the john could infer lack of consent. But Yolanda testified she communicated her lack of consent before, during, and after the intercourse. Between that, and the fact that Destiny was chauffeuring her the whole time, the circumstances were not such that the john could entertain an honest and reasonable belief that Yolanda consented.

Force

The jury was instructed on rape in concert as follows: “The defendant is charged in Counts 3 and 4 with Committing Rape by Acting in Concert with Destiny G. in violation of Penal Code section 264.1. [¶] To prove that a defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission; [¶] To decide whether the defendant committed rape, please refer to the separate instructions that I have given you on that crime. To decide whether the defendant or Destiny G. aided and abetted rape, please refer to the separate instructions that I have given you on aiding and abetting. You must apply those instructions when you decide whether the People have proved rape in concert. [¶] To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape.”

The rape instruction, to which the rape in concert instruction refers, provided that rape can be accomplished by “force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.” It explained what each of those terms mean, including the following explanation of force: “Intercourse is accomplished by force if a person uses enough physical force to overcome the woman’s will.”

Defendant argues that instructing the jury that it had to find “forcible rape” is insufficient because the reference back to the rape instruction included language about not only force, but also threats of force and fear that would not satisfy the elements of section 264.1. In other words, defendant contends the instruction is unclear or confusing.

Defendant forfeited this argument by failing to object at trial. “A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal [citation].” (People v. Lee (2011) 51 Cal.4th 620, 638.) As we already noted above, the word “force” does not have a technical legal meaning in this context, and is instead used in its ordinary sense. Accordingly,
the court was only required to tell the jury that the rape had to be by force. It did so by telling the jury the rape had to be “forcible.” If defendant wanted further clarification, he was obligated to object at trial.

Sentencing Issues

Defendant raises three sentencing issues. First, he contends his concurrent sentence on count 8 (pimping) should have been stayed pursuant to section 654 because he was already punished for the same activity in count 1 (human trafficking). Second, he contends the court incorrectly believed it had to run the punishment on counts 5 (oral copulation in concert) and 6 (same) consecutively to counts 3 (forcible rape in concert) and 6 (same). Third, defendant contends the court incorrectly counted his time-served credits and erroneously denied him conduct credits.

Section 654

Section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (People v. Kwock (1998) 63 Cal.App.4th 1236, 1253.)

“Decisions since Neal [v. State of California (1960) 55 Cal.2d 11] have limited the rule’s application in various ways. Some have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but consecutive objectives permitting multiple punishment. (E.g., People v. Harrison [1989] 48 Cal.3d 321, 334–338 [multiple sex crimes each have the separate objective of achieving additional sexual gratification]; People v. Perez [1979] 23 Cal.3d 545, 551-554 [similar]; People v. Trotter (1992) 7 Cal.App.4th 363, 368 [‘each shot [fired at the same victim] evinced a separate intent to do violence’].) [¶] Other cases have found separate, although sometimes simultaneous, objectives under the facts. (E.g., People v. Coleman (1989) 48 Cal.3d 112, 162 [assault of robbery victim had separate intent and objective than the robbery]; People v. Nguyen (1988) 204 Cal.App.3d 181, 189-193, 196 [harming of unresisting robbery victim a separate objective from the robbery itself]; People v. Booth (1988) 201 Cal.App.3d 1499, 1502 [‘dual objectives of rape and theft when entering the victims’ residences’ supported separate punishment for burglaries and rapes]; People v. Porter (1987) 194 Cal. App.3d 34, 37-39 [robbery and kidnapping the same victim for a later, additional, robbery had separate objectives].) Additionally, even Neal itself made clear that crimes of violence against multiple victims were separately punishable.” (People v. Latimer (1993) 5 Cal.4th 1203, 1211-1212.)

The jury was instructed on the following elements of human trafficking: “1. The defendant either deprived another person of personal liberty or violated that other person’s personal liberty; [¶] AND [¶] 2. When the defendant acted, he intended to commit or maintain a felony violation of Pimping and Pandering.” The jury was instructed on the following elements of pimping: “1. The defendant knew that Yolanda S. was a prostitute; [¶] AND [¶] 2. The money/proceeds that Yolanda S. earned as a prostitute supported defendant, in whole or in part.”

As charged under the facts of this case, the human trafficking and pimping were part of the same criminal “intent and objective” (Neal v. State of California (1960) 55 Cal.2d 11, 19), and thus the court was required to stay the sentence on the pimping count. The human trafficking charge literally has an element of an intent to pimp. There was only a single pimping activity relevant to counts 1 and 8. The human trafficking charge, therefore, necessarily was part of the same criminal “intent and objective” as the pimping charge. (Ibid.) The intent to pimp was not independent of or merely incidental to the human trafficking. It was an essential element of human trafficking, as charged in this case.

In arguing otherwise, the People rely on People v. Deloach (1989) 207 Cal.App.3d 323 (Deloach), which we find distinguishable. There, the defendant was charged with pandering, forcible oral copulation, oral copulation with a minor and sexual intercourse with a minor. (Id. at p. 331.) The defendant mother forced her daughter into prostitution by threatening to “bear [her] ass” if she refused. (Id. at p. 329.) The daughter went with a john who orally copulated her notwithstanding her protests that she was scared and needed to leave. (Id. at pp. 329-330.) Addressing the application of section 654 to those facts, the Deloach court acknowledged that “It is necessarily part of the aim, objective and intent of a panderer that the person who is the object of the pandering become a prostitute.” (Id. at p. 337.) Thus the pandering and unlawful sexual intercourse charges could not be separately punished. (Id. at pp. 337-338.) “On the other hand, the forcible oral copulations … were different in kind. While a panderer’s specific intent may be to cause another to become a prostitute, the aim of forcing someone to submit to sex acts against their will is not an element of pandering and is not necessarily or generally intended by the panderer. Although acts of prostitution — sex for money — may be incidental to and indivisible from the specific objective of pandering, forcible sex acts are not.” (Id. at p. 338.) “The element of force or violence may, under the facts of a given case, render certain such criminal acts severable from the overall criminal transaction of which they are a part or during which they take place; such acts may, by virtue of their forcible or violent nature, constitute additional offenses for which additional or greater punishment may be given.” (Ibid.)
The People vaguely urge us to conclude that because force was used here, a different criminal intent arose. But there is no broad rule that any crime involving force is exempt from section 654. Each case must be analyzed on its own facts. The present case is distinguishable from Deloach on the ground that, there, forcible sex acts were not necessarily entailed in pandering, even though the pandering itself was by means of threats of force. The mother in Deloach may have intended the daughter, once forced into prostitution, to willingly comply with a john’s demands. In other words, her intent and objective was not necessarily to have her daughter subjected to forcible sex acts. Here, by contrast, defendant could not possibly have committed human trafficking without the intent to pimp. Again, the intent to pimp was an element of the human trafficking charge.

In this sense, human trafficking is analogous to a burglary charge, which involves entering a structure with the intent to commit another felony. In such cases, the defendant may not be punished for both the burglary and the crime that was intended. (E.g. People v. Radil (1977) 76 Cal.App.3d 702 [burglary with intent to assault]; People v. McElrath (1985) 175 Cal.App.3d 178, 191 [burglary with intent to commit sex offense]; People v. Jaramillo (1962) 208 Cal.App.3d 620 [burglary with intent to commit theft].) Accordingly, the human trafficking and pimping constituted a single course of conduct with one and the same intent and objective, and thus the court was required to stay the punishment for the pimping charge.

**The Court’s Discretion to Sentence Count 5 Concurrently with Count 3 and Count 6 Concurrently with Count 4**

Next, defendant contends the court erred in sentencing him consecutively on counts 3 (forcible rape in concert), 4 (forcible rape in concert [with the john]), 5 (oral copulation in concert) and 6 (oral copulation in concert [with the john]) based on its comment that they are “required to be consecutive,” and “[t]here’s no discretion.” The People acknowledge the court’s assertion was incorrect. It did, in fact, have discretion to run counts 3 and 5 concurrently, and counts 4 and 6 concurrently. Nonetheless, the People argue we should affirm on the ground that the record makes clear the court would have run them consecutively regardless, and thus to remand would be “an idle act.” We conclude a remand is appropriate.

Under section 667.61, subdivision (i) (the One Strike Law), the court is required to impose consecutive sentences for multiple violations where “the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.” Section 667.6, subdivision (d), provides, “In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether,

between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.”

In applying this standard, courts have held, for example, the offenses of placing a finger in the victim’s vagina, kissing her genitals and then placing his penis in her vagina were but a single occasion. (People v. Solis (2012) 206 Cal.App.4th 1210, 1216-1217 (Solis), discussing People v. Corona (1988) 206 Cal.App.3d 13, 15-16.) Similarly, where a defendant raped the victim, then “‘got off of her, twisted her by the legs violently, and orally copulated her,’” the offenses occurred on a single occasion. (Solis, at p. 1217, discussing People v. Pena (1992) 7 Cal.App.4th 1294, 1299.)

In contrast, where the offenses are interrupted by the defendant’s non-sexual activity, they occur on a separate occasion. (Solis, supra, 206 Cal.App.4th at pp. 1217-1218.) Where a defendant left a car after a bout of sexual assault, but returned 15 minutes later and raped the victim a second time, the second rape occurred on a separate occasion. (Id. at pp. 1217-1217, discussing People v. Corona, supra, 206 Cal.App.3d at pp. 17-18.) Where the defendant moved the victim from one place to another, and also stopped an assault to listen to the victim’s answering machine before resuming, the offenses occur on separate occasions. (Solis, at pp. 1217-1218, discussing People v. Plaza (1995) 41 Cal.App.4th 377, 380-381.) Where the defendant’s assault was interrupted by the outside event of an observer driving by, but then resumed the assault, it indicated reflection by the defendant, and the second assault occurred on a separate occasion. (Solis, at p. 1219, discussing People v. King (2010) 183 Cal.App.4th 1218, 1235.)

Here, the evidence does not reveal any significant break between defendant forcing Yolanda to orally copulate him and then proceeding to rape her. Likewise, the evidence does not reveal any significant break between the john doing the same. The People concede as much.

We disagree that the court’s exercise of its discretion regarding whether to run the counts concurrently is a foregone conclusion. The People rely on the fact that the court recited aggravating factors in justifying the various sentencing decisions it made. However, the court did not run all of the counts consecutively, and the court selected the midterm for several of the offenses. In other words, the court was not uniformly imposing the maximum possible punishment, but instead exercised its discretion. We cannot say with any certainty how the court would have decided to punish defendant if it had been aware of its discretion to run counts 3 and 5, and 4 and 6, concurrently. Accordingly, we will remand for resentencing. (See People v. Brown (2007) 147 Cal.App.4th 1213, 1228 [“Generally, when the record shows that the trial court
proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing”.)

Credits

Finally, defendant contends the court erred in allotting credits for time served and good conduct. The People concede that defendant is entitled to two additional days of credit for time served. Defendant was arrested on July 5, 2015. He was sentenced on March 16, 2017. The sentencing court should give credit for the day of arrest, the day of sentencing, and all days in between. (People v. Bravo (1990) 219 Cal.App.3d 729, 735.) There are 621 days between July 5, 2015 and March 16, 2017, when the days of arrest and sentencing are included. Defendant was given 619 days of credit. Accordingly, appellant is entitled to two additional days of credit for actual time served.

Where the parties differ is whether defendant is entitled to conduct credits. The court held he is not entitled to conduct credits. The People contend the court was correct, relying on section 667.61, the One Strike Law, which says nothing about credits. A prior version of the One Strike Law allowed up to 15 percent of actual credits as conduct credits, but the Legislature amended the statute in 2006 by removing that provision. (Stats. 2006, ch. 337, § 33.) The People argue this evinces an intent to eliminate conduct credits for violations of the One Strike Law. Defendant contends that in the absence of any express statement in section 667.61, the issue is governed by section 2933.1, which limits conduct credits to 15 percent for convictions involving violent felonies.

The court in People v. Adams (2018) 28 Cal.App.5th 170 recently addressed this issue and sided with the People. We concur in its analysis. The court reasoned: “Section 667.61 was amended in 2006 ... to eliminate the existing section 667.61, subdivision (j) and any reference to presentence conduct credits. [Citation.] It is uncertain on its face whether the amendment was intended to eliminate presentence conduct credit for defendants sentenced under section 667.61, or to authorize full conduct credit under section 4019. We turn, therefore, to the legislative history. Committee reports evidence the Legislature’s intent to eliminate conduct credit for defendants sentenced under section 667.61, the so-called ‘One-Strike Law.’ The Senate Committee on Public Safety’s analysis of Senate Bill No. 1128 (2005-2006 Reg. Sess.) unambiguously states: ‘Elimination of Sentencing Credits for One-Strike Inmates [¶] Existing law provides that a defendant sentenced to a term of imprisonment of either 15 years to life or 25 years to life under the provisions of the “one-strike” sentencing scheme shall not have his or her sentence reduced by more than 15% by good-time/work-time credits. [Citation.] [¶] This bill eliminates conduct/work credits for inmates sentenced under the one-strike law.’ (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended Mar. 7, 2006, p. N, underscoring omitted; accord, id. at p. W [‘This bill eliminates sentencing credits that under existing law can reduce a defendant’s minimum term by up to 15%’ (underscoring omitted)]; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended May 26, 2006, pp. 8–9 [Sen. Bill No. 1128 eliminates eligibility ‘for credit to reduce the minimum term imposed’]; Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis 3d reading analysis of Sen bill No. 1128 (2005-2006 Reg. Sess.) as amended May 30, 2006 p. 9 [same].) In Couzens and Bigelow, Sex Crimes: California Law and Procedure (The Rut-ter Group 2015) paragraph 13:15, page 13-78, the authors conclude: ‘Section[] ... 667.61 (One Strike law) ... [was] amended in 2006 to eliminate the provision that allowed such crimes to accrue 15% conduct credits, whether before or after sentencing.] Now there are no conduct credits allowed against the minimum term.’ We hold, therefore, that defendants given indeterminate terms under section 667.61 are not entitled to any presentence conduct credit.” (Id. at p. 182.)

Senate Bill 1393

Effective January 1, 2019, section 1385 was amended to eliminate the prohibition against striking a five-year enhancement for a prior serious felony under section 667. The result is courts now have discretion to strike a five-year enhancement. The amendment applies retroactively to all cases not final on its effective date. (People v. Garcia (2018) 28 Cal.App.5th 961, 973.) The People concede the amendment applies retroactively here and requires us to remand for the court to exercise its discretion. We agree.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for resentencing to allow the court to exercise its discretion in determining: (1) whether to run the sentences for counts 3 (forcible rape in concert) and 5 (oral copulation in concert) concurrently or consecutively; (2) whether to run the sentences for counts 4 (forcible rape in concert [with the john]) and 6 (oral copulation in concert [with the john]) concurrently or consecutively; and (3) whether to strike the five-year enhancement pursuant to section 1385. The court is also directed to stay execution of sentence on count 8 (pimping) pursuant to section 654, and to grant defendant two additional days of presentence custody credit.

IKOLA, J.

WE CONCUR: ARONSON, ACTING P. J., FYBEL, J.
THE PEOPLE, Plaintiff and Respondent,

v.

ROBERTO IGNACIO FLORES, Defendant and Appellant.

No. D073215
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. SCN371306; SCN374425)
APPEALS from judgments of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Reversed.
Filed April 12, 2019

COUNSEL

Kurt David Hermansen, by appointment of the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski, Kristen Kinnaird Chenelia and Yvette M. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

It is a fact of human nature that people can be their own worst enemies. But in McCoy v. Louisiana (2018) ____ U.S. ___, [138 S.Ct. 1500] (McCoy), the United States Supreme Court held that fundamental principles of personal autonomy inherent in the Sixth Amendment afford criminal defendants the right to tell their own story and define the fundamental purpose of their defense at trial, even if most other accused persons in similar circumstances would pursue a different objective and accordingly adopt a different approach. In this case, during his trial for the attempted murder of a police officer, defendant Roberto Ignacio Flores repeatedly objected to his counsel’s decision to admit Flores was driving the car that seriously injured the officer. In his professional judgment, counsel elected to concede the act of driving and instead assert that Flores never formed the premeditated intent to kill necessary for first degree murder. Similarly at a subsequent trial on weapons possession charges, Flores objected when his counsel decided to concede that Flores possessed certain firearms, instead arguing that the possession was not “knowing” because Flores did not understand the prohibited nature of the weapons.

On appeal, Flores asks that we reverse his two convictions, asserting that under McCoy it was structural error for counsel to take a factual position at odds with Flores’s insistence that he did not commit the criminal acts alleged by the prosecution. Among other arguments, the People contend that the disagreement between Flores and his lawyer amounted to a strategic dispute about how to best achieve an acquittal—traditionally the province of counsel—rather than an intractable conflict about Flores’s goal of maintaining his factual innocence of the charged crimes, purportedly the narrow scope of the McCoy holding.

Based on our reading of McCoy, however, we are unable to characterize Flores’s statements as presenting a mere dispute over trial strategy where counsel’s judgment trumps that of the client. In McCoy, counsel for the defendant did not admit guilt of the charged first degree murder; he conceded the killing (actus reus) and argued that McCoy was not guilty because he lacked the necessary intent (mens rea) for the offense in light of his serious mental and emotional issues. (McCoy, supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1507].) According to the Supreme Court, cases in which a defendant insists on maintaining his innocence of the alleged acts—despite counsel’s advice to admit the acts but deny the necessary mental state—amount to intractable disagreements about the fundamental objective of the defendant’s representation. (Id. at p. 1510.) Under McCoy, criminal defense lawyers must allow their clients to dictate the fundamental objective at trial, and thus must not concede the actus reus of a charged crime over their client’s objection.

The record before us demonstrates that counsel overrode Flores’s stated goal of maintaining his innocence of the alleged acts. Instead, in pursuit of the understandable objective of achieving an acquittal, he conceded the actus reus of the charged crimes at both trials. Although any reasonable lawyer might agree with counsel’s judgment, McCoy instructs that this is a decision for the client to make. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Arrest for Weapons Possession

In March 2017, Hilary,1 the sister of Flores’s girlfriend Elizabeth, alerted law enforcement to a cache of weapons behind a bookshelf in an old bedroom at her and Elizabeth’s family home, where Flores and Elizabeth were living at the time. The collection included guns and gun parts, a hacksaw, toolbox, body armor, Kevlar helmet, and cell phones. One gun was a semiautomatic pistol modified to have many characteristics of an automatic rifle weapons system. It was a 26.5-inch-long center fire weapon, modified to accept a detachable magazine outside of the pistol grip and to release the magazine without a bullet button. Hilary recognized the gun as one Flores had been building in the backyard a few months earlier. Elizabeth’s and Hilary’s father had also seen the gun and asked Flores to get rid of it.

Shortly thereafter, on the same day his and Elizabeth’s newborn son was brought home from the hospital, Flores was

1. We use first names for individuals like Hilary and Elizabeth, intending no disrespect.
arrested on weapons possession charges. He called Elizabeth several times from jail and expressed anger towards the law enforcement officers that arrested him, swearing that when he was released he would go after the people who were responsible. He said the officers harassed and mocked him and discriminated against him. He also asked Elizabeth to claim ownership of the guns and the rest of the property because she did not have a felony conviction and would not be liable. Flores was eventually released on bail.

B. Arrest for Attempted Murder

While out on bail, Flores drove a Dodge Neon automobile into a police officer while the officer was conducting a traffic stop on another vehicle for an expired registration sticker. A few minutes earlier, after initiating the stop, the officer got off his motorcycle and approached the driver’s side window of an Acura vehicle in full uniform, including his helmet. According to the driver of the Acura, the Dodge Neon struck the officer, causing him to fly through the air as the Dodge accelerated through the collision and sped away. Other witnesses saw the motorcycle officer slam onto the windshield and tumble up and over the car while, in a single burst of acceleration, the Dodge drove away. The Dodge had plenty of room to drive past without hitting the officer or the Acura, which was scraped in the collision. The officer’s injuries were grave and life threatening, but fortunately he survived.

Flores quickly abandoned the car and ran towards a nearby light rail Sprinter Station, discarding a hat and beer can along the way. He was stopped by police officers in the station’s parking lot, but he continued to resist. After he was arrested, officers observed Flores’s “droopy” appearance with eyes “rolling in the back of his head,” as well as glass on his hands and clothing. Analysis of a blood sample taken at 3:00 p.m. showed methamphetamine in his system. The Dodge Neon had a shattered windshield, with the motorcycle officer’s radio embedded in it and significant damage to the passenger side and roof. Several empty cans and bottles of beer and propane were found inside the car.

The night Flores was arrested, law enforcement placed an undercover Sheriff’s detective and a confidential informant in a jail cell. Flores was then placed in the cell with them. For about an hour he talked freely and openly about the events leading to his arrest and his attitude toward law enforcement. For example, while complaining about the police, he offered that “[t]he only thing you can do is rob them . . . [or] kill ‘em, one by one, or all by one[,]” The undercover agent responded, “Just like you did today, right? I mean one thing at a time.” Flores laughed and responded, “That motherfucker gotta be in a wheelchair.” Such comments are typical of the lengthy conversation.

C. Trials and Sentencing

From the outset, Flores expressed considerable discontent with his representation, which was provided by the public defender’s office. At the first Marsden hearing, Flores said he wanted a new attorney because “they are trying to make me admit to something that I don’t want to admit.” (See People v. Marsden (1970) 2 Cal.3d 118.) He acknowledged counsel told him that the evidence against him included a video of him in the car that hit the motorcycle officer, but Flores still disagreed with their approach: “They are trying to make me admit to guilt.” The court denied Flores’s request for a new attorney. Flores repeated these claims the following day when he again asked for a Marsden hearing and complained about the “kangaroo court.”

At the trial on attempted murder charges, Flores’s counsel pursued a lack-of-premeditation defense, arguing that while the evidence showed Flores was driving the car that hit the officer, he acted in “the spur of the moment” “especially in light of his intoxicated state.” The prosecution, in turn, emphasized that his acceleration through the impact, on a street with considerable room to maneuver, was more than sufficient to demonstrate Flores’s premeditation and intent. “When you accelerate your car at another human being, what are you doing? You are intending to kill. That’s plain old-fashioned common sense.”

At the separate trial on the weapons charges, Flores’s lawyer similarly decided to concede possession given the weight of the evidence. But with respect to the charge for manufacturing an assault weapon, counsel contested whether the specific modifications rendered it an assault weapon and argued that Flores did not “reasonably believe[ ] . . . this was [an] illegal weapon as defined as an assault weapon.” During this trial, too, Flores expressed his firm disagreement with counsel’s decision-making, arguing that counsel was “incriminating me, saying that [the weapon at issue] is mine.”

In October 2017, in case No. SCN374425, a jury found Flores guilty of willful, premeditated and deliberate attempted murder of a peace officer (Pen. Code, §§ 187, subd. (a), 664, 189, 664, subds. (c)–(f); count 1), and assault with a deadly weapon upon a peace officer (§ 245, subd. (c); count 2). It also found as to both counts that Flores inflicted great bodily injury (§ 12022.7, subd. (a)) and that he used a vehicle to commit the offenses (Veh. Code, § 13351.5). In a bifurcated proceeding, the jury also found true that Flores had a prison prior (§§ 667.5, sub. (b), 668), and committed the current offenses while out on bail (§ 12022.1, subd. (b)). The following day, in case No. SCN371306 after a separate trial, a jury found Flores guilty of manufacturing an assault weapon (§ 30600, subd. (a); count 1), and being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 2).

The court sentenced Flores to a total term of 29 years to life in prison for the convictions from both trials. It imposed a term of eight years for manufacturing an assault weapon, a stayed two-year term for possession of a firearm by a felon, and stayed sentence on the prison prior. It also imposed a consecutive term of 15 years to life for attempted murder, three
years for the great bodily injury enhancement, two years for the on-bail enhancement, and one year for the prison prior. The sentence on count 2 (assault with a deadly weapon) and its enhancements were stayed.

**DISCUSSION**

The Sixth Amendment guarantees to individuals accused of crimes the right to the assistance of legal counsel in preparing and presenting their defense. (See U.S. Const. Amend. VI; *Gideon v. Wainwright* (1963) 372 U.S. 335.) In defining the contours of this right, the United States Supreme Court has noted that the term “‘[a]ssistance’ of [c]ounsel” as it appears in the Sixth Amendment “contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.” (*Gannett Co. v. DePasquale* (1979) 443 U.S. 368, 382, fn. 10.) These decisions trace a line between decisions the accused controls and the choices counsel may make. The case law generally allocates trial management decisions to counsel—such as whether to object to certain evidence—and reserves weightier, fundamental choices for the accused—including how to plead and whether to testify, among others. In *McCoy,* the Supreme Court further clarified the basis for this dividing line, explaining that “autonomy to decide that the objective of the defense is to assert innocence” belongs with other fundamental choices in the latter category. (*McCoy,* supra, ___ U.S. at p. ___; see *People v. Eddy* (Mar. 26, 2019, C085091) ___ Cal.App.5th ___ [2019 Cal.App. Lexis 257, at p. *4] (*Eddy* [applying *McCoy* in reversing a conviction for first degree murder in a noncapital case].)

The People suggest that after the pleading stage, the objective of every defense is to seek an acquittal, and that as a result, when counsel reasonably decides that the most effective way to achieve an acquittal is to concede the acts reus, they may properly do so. But counsel’s role is to assist, not to control. Under *McCoy,* defense lawyers must allow their clients to dictate the fundamental objective at trial, and must not concede the acts alleged as the actus reus of a charged crime over a client’s objection.

**A. The Supreme Court’s McCoy Decision**

In 2008, law enforcement officers arrested Robert Leroy McCoy in Idaho, just a few days after three of his estranged wife’s family members—her mother, stepfather, and son—were shot and killed in Louisiana. (*McCoy,* supra, ___ U.S. at p. ___; [138 S.Ct. at pp. 1505–1506].) After he was extradited to Louisiana, McCoy was appointed counsel from the public defender’s office. (*Id.* at p. 1506.) A grand jury indicted him on three counts of first degree murder, and the prosecutor sought the death penalty. (*Ibid.*) McCoy pleaded not guilty. He insisted throughout the proceedings that he was not in Louisiana at the time of the killings and that corrupt police murdered the victims after a failed drug deal. (*Ibid.*)

Before trial, McCoy asked the court for leave to represent himself until he could engage new counsel, citing an irreconcilable conflict in the relationship with his assigned attorney. (*McCoy,* supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1506].) The court agreed and granted the motion. Shortly thereafter, McCoy retained Larry English as his new lawyer. (*Ibid.*)

The evidence against McCoy was overwhelming. About two weeks before trial, English decided that given the strength of the evidence, the only way to avoid the death penalty was to concede the killings in the guilt phase of the proceedings. (*McCoy,* supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1506].) English’s approach also included arguing that McCoy should be convicted only of second degree murder because of his mental incapacity, although this argument was complicated by Louisiana’s prohibition on evidence of diminished capacity absent entry of a plea of not guilty by reason of insanity. (*Id.* at p. 1506 & fn. 1.)

When English told McCoy about his plans for the defense, McCoy was “furious” and told him “‘not to make that concession.’ “ (*McCoy,* supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1506].) English was fully aware of McCoy’s “‘complet[e] oppos[ition] to [English] telling the jury that [McCoy] was guilty of killing the three victims.’ “ (*McCoy,* at p. 1506.) Two days before trial was set to start, McCoy sought to terminate English’s representation, and English asked to be relieved if McCoy secured other counsel. (*Ibid.*) English presented this dispute to the court, but the court denied the eleventh-hour request, explaining that counsel must “‘make the trial decision of what [they] are going to proceed with.’ “ (*Ibid.*)

At the beginning of his opening argument, English told the jurors there was “no way reasonably possible” for them to hear the prosecution’s evidence and reach “any other conclusion than Robert McCoy was the cause of these individuals’ death.” (*McCoy,* supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1506]; see *id.* at pp. 1512–1513 [dis. opn. of Alito, J.]) McCoy again protested his counsel’s concession. Out of earshot of the jury, McCoy told the court that English was “‘selling [him] out’ “ by conceding that McCoy “‘murdered [his] family.’ “ (*Id.* at p. 1506.) The court warned him against “‘any other outbursts.’ “ (*Id.* at p. 1507.) English continued down this same path, asserting multiple times in his opening and closing arguments that McCoy committed the killings. (*Ibid.*) English again conceded the killings at the penalty phase and

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4. First, McCoy’s estranged wife was under police protection at the time of the murders because McCoy had threatened to kill her. (*McCoy,* supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1512].) Second, after calling 911, McCoy’s mother in law was heard screaming McCoy’s name and saying, “‘[s]he ain’t here, Robert...I don’t know where she is. The detectives have her. Talk to the detectives. She ain’t in there, Robert.’ “ (*Id.* at p. 1513.) Moments later, a gunshot was heard, and the call was disconnected. (*Ibid.*) Furthermore, McCoy was arrested with the weapon identified as the one used to shoot the victims, and surveillance footage showed McCoy buying the ammunition on the day of the killings. (*Ibid.*)

5. A court-appointed sanity commission examined McCoy and found him competent to stand trial. (*McCoy,* supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1506].) English disagreed and asserted several times that McCoy was not competent to stand trial. (*Id.* at p. 1509 & fn. 3.)
urged mercy in view of McCoy’s “serious mental and emotional issues.” (Ibid.) The jury returned three death verdicts. (Ibid.)

The Louisiana Supreme Court affirmed the judgment, concluding that Louisiana Rule of Professional Conduct 1.2(a) (2016) required English to refuse McCoy’s request to maintain his innocence of the killings. (McCoy, supra, ___ U.S. at p. ___. [138 S.Ct. at pp. 1509–1510].) According to the court, presenting McCoy’s alibi defense would have implicated English in perjury.8 In light of a split among state courts of last resort as to the constitutionality of allowing defense counsel to concede guilt over the client’s objection, the Supreme Court granted certiorari. (Ibid., citing Cooke v. State (Del. 2009) 977 A.2d 803, 842–846 (Cooke) [counsel’s pursuit of a “guilty but mentally ill” verdict over defendant’s “vociferous and repeated protestations” of innocence violated defendant’s “constitutional right to make the fundamental decisions regarding his case”]; State v. Carter (2000) 270 Kan. 426, 440 (Carter) [counsel’s admission of client’s involvement in murder when client adamantly maintained his innocence contravened Sixth Amendment right to counsel and due process right to a fair trial]; Weaver v. Massachusetts (2017) 582 U.S. ___ [137 S.Ct. 1899] [certiorari].)

In an opinion by Justice Ginsburg, the Supreme Court reversed McCoy’s conviction, holding that the Sixth Amendment’s guarantee of the right to the assistance of counsel precluded his lawyer from admitting McCoy’s guilt of the acts alleged as the actus reus of a charged crime over his objection. (McCoy, supra, ___ U.S. at p. ___. [138 S.Ct. at pp. 1505, 1509].) It was for the client—not the lawyer—to determine the objective of the client’s defense, and McCoy had a right to insist that he did not kill the victims. He was thus entitled to a lawyer who would represent and attempt to further the object of the defense that McCoy had established. Justice Ginsburg’s opinion further explained that defense counsel’s actions amounted to structural error requiring a new trial for “at least” two reasons. (Id. at p. 1511.) First, the error interfered with McCoy’s right to make fundamental choices about his own defense. Second, its effect “would be immeasurable, because a jury would almost certainly be swayed by a lawyer’s concession of his client’s guilt.” (Ibid.)

As the Court explained, “[t]he right to defend is personal, and a defendant’s choice in exercising that right ‘must be honored out of “that respect for the individual which is the lifeblood of the law.’ “ (McCoy, supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1507].) According to the Court, the same respect for the individual that affords each person the autonomy to decide whether to plead guilty in the face of overwhelming evidence, or even reject the assistance of legal counsel altogether, also allows criminal defendants the right to set the fundamental objective of their own defense. (Id. at p. 1508.)

The Court specifically referenced opinions from state courts of last resort discussing circumstances where, as in McCoy, “the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel’s preferred course: concession of the defendant’s commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses.” (McCoy, supra, ___ U.S. at p. ___. [138 S.Ct. at p. 1510], citing People v. Bergerud (Colo. 2010) 223 P.3d 686, 691 [“Although defense counsel is free to develop defense theories based on reasonable assessments of the evidence, as guided by her professional judgment, she cannot usurp those fundamental choices given directly to criminal defendants by the United States and the Colorado Constitutions.”]; Cooke, supra, 977 A.2d 803; Carter, supra, 270 Kan. 426.) According to Justice Ginsburg’s opinion, these clashes “were not strategic disputes about whether to concede an element of a charged offense, . . . they were intractable disagreements about the fundamental objective of the defendant’s representation.” (McCoy, at p. 1510.)

B. Because Flores Repeatedly Objected to Counsel’s Concessions and Expressed His Desire to Maintain His Innocence, McCoy Controls and Compels Reversal.

Flores’s objective at both trials was express and unambiguous: to maintain his innocence of the acts alleged as the actus reus of the charged crimes—i.e. driving the car and possessing the weapons—irrespective of the weight of the evidence against him.7 At his Marsden hearing, Flores said his counsel is “trying to make me admit to something that I don’t want to admit to.” “[Defense counsel] is . . . saying that I’m driving. And I don’t want none of that.” “[H]e is saying that I should say that I was the one driving” Defense counsel “are trying to make me admit to guilt.” Later, Flores again repeated: “He (defense counsel) is not assisting me correctly. He has admitted to some things that I told him not [to].” Rather than follow Flores’s direction, counsel’s approach was to admit guilt of the alleged acts and argue lack of premeditation: “Was it willful, deliberate, premeditation? Or is it more of just an opportunity that popped up and was taken advantage of?”

6. The Supreme Court ultimately rejected this rationale, noting that English “harbored no doubt that McCoy believed what he was saying” and that “English simply disbelieved McCoy’s account in view of the prosecution’s evidence.” (McCoy, supra, ___ U.S. at p. ___. [138 S.Ct. at pp. 1509–1510].) In such circumstances, the Court identified no authority “requiring English to admit McCoy’s guilt over McCoy’s objection.” (Ibid., citing 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 11.6(c), p. 935 (4th ed. 2015) ["A lawyer is not placed in a professionally embarrassing position when he is reluctantly required . . . to go to trial in a weak case, since that decision is clearly attributed to his client."]))

7. For both attempted murder of a peace officer (count 1) and assault on a peace officer likely to produce great bodily injury (count 2), the prosecution argued that Flores committed the actus reus of the crimes by driving the Dodge Neon into the officer: “He did act with the intent [to] kill. His act is driving the car.” At the second trial, the charges required showing, among other elements, that Flores acted by possessing an assault weapon and assembling it.
Flores also expressed his desire to maintain his innocence at his weapons-charges trial, telling the court, “I told him not to incriminate me.” Flores’s attorney then interjected that “this might be, again, more of a *Marsden* hearing type issue. Mr. Flores’s issue is with [defense counsel’s] strategy to say whether or not I’m—.” Flores interrupted: “He is incriminating me. I told him I had nothing to do with the property.” “He is incriminating me saying that [the weapon] is mine.” While Flores did not specifically reference the manufacturing or assembling element of the manufacturing-an-assault-weapon charge, we infer from his statement regarding the threshold question of possession that he also wished to maintain that he did not assemble the weapon.

At the trial for weapons possession, Flores’s counsel nearly followed *McCoy* and maintained Flores’s innocence. In closing, the lawyer asserted that the jury would not hear him discuss count 2 (possession of a firearm by a felon; § 29800, subd. (a)(1)). “I’m only going to talk about [c]ount 1. That’s what we’re here for.” With respect to the possession element of count 1 (manufacturing assault weapon; § 30600, subd. (a)), counsel noted, “I’m not going to discuss that,” though he then added, “The evidence will lead you to [a] clear answer.” Later, counsel briefly raised the possession element again: “And for Mr. Flores to be guilty, he must in addition to actually possessing what is proven to be an assault weapon, . . . [h]e must know or reasonably have known that this was not just a firearm, but knew it was an assault weapon.” A few minutes later he continued, “[E]ach of these elements [has to be] proven beyond all reasonable [doubt]. So for instance, if you believe Mr. Flores possessed it beyond all reasonable doubt, okay, you got one of three.” But the lawyer also expressly conceded that Flores worked on the gun himself and “would not have treated [the weapon] the way he did around his girlfriend’s family” if he thought it were an assault weapon. Counsel stated, “We know Mr. Flores has at least not hidden this gun *because he has worked on the gun at his house*.” (Italics added.) Thus, counsel’s experience-based approach for achieving an acquittal overrode Flores’s objective of maintaining innocence of possessing the weapon altogether.

It was not unreasonable for counsel to conclude that conceding the actus reus offered Flores the best chance to achieve an acquittal at either trial. In fact, it might have been the only reasonable course given the considerable evidence against him. On the attempted murder charge, the jury heard multiple eyewitnesses testify that the vehicle accelerated through the impact, and it saw photos and other evidence tracing his movements while fleeing from the vehicle to the Sprinter station, where he was found with glass from the crash on his person. Likewise, the evidence at his trial for weapons possession was overwhelming, including eyewitness testimony by family members that Flores possessed and assembled the weapon. But the required analysis is not affected by the reasonableness of counsel’s approach or the competency of their representation. (See *McCoy, supra*, ___ U.S. at p. ___, [138 S.Ct. at pp. 1510–1511]; see also *Eddy, supra*, [2019 Cal.App. Lexis 257, at p. *11*] [the choice belongs to the defendant “even in the face of counsel’s better judgment and experience”].) Instead, we assess whether the record shows that Flores expressed his objective to maintain innocence of the alleged acts and whether counsel acted in accord with that objective.

The People propose several arguments here for why *McCoy* should not apply. First, they suggest that *McCoy* broke little, if any, new ground and merely confirmed a defendant’s right to plead not guilty: “*McCoy* confirmed that ‘a defendant has the right to insist that counsel refrain from admitting guilt.’ “ (Italics added.) Consistent with this reasoning, the People suggest that Flores merely “viewed counsel’s suggested strategy to concede that he was driving the vehicle as admitting his guilt.” But in making this argument, the People repeat the same error addressed by *McCoy*. They fail to acknowledge that pleading “not guilty” is not the same as maintaining innocence of the alleged acts throughout trial, which as *McCoy* explains a defendant is entitled to do under the Sixth Amendment. (*McCoy, supra, ___ U.S. at p. ____ [138 S.Ct. at p. 1510].)

Second, the People “presume[]” that Flores’s objective was an acquittal, not maintaining innocence of the alleged acts. They argue that Flores “may have disagreed on certain factual concessions his counsel wanted to strategically make, but he never suggested an alternative defense or demonstrated the concessions were in direct conflict with his objective.” To make such an argument, however, one must ignore all of Flores’s repeated, specific objections. The argument also disregards *McCoy’s* discussion of plausible objectives that a defendant might have at trial, among others the avoidance of the “opprobrium that comes with admitting [one] killed family members.” (*McCoy, supra, ___ U.S. at p. ____ [138 S.Ct. at pp. 1508–1509], citing Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. Rev. 1147, 1178 (2010) [for some defendants, “the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence”]); cf. *Jae Lee v. United States* (2017) 582 U.S. ___, [137 S.Ct. 1958] [recognizing that a defendant might reject a plea and prefer “ ‘taking a chance at trial’ “ despite “ *[a] lmost certai[n]’ “ conviction].)

Third, the People suggest that *McCoy* may not apply outside of trials for capital offenses. But while the Supreme Court discussed the capital nature of the case before it, it did not limit its holding to trials for capital offenses, and several aspects of the majority opinion confirm that the same right to dictate one’s trial objective applies outside of trials for capital offenses—and perhaps with even greater strength. (See *Thompson v. Cain* (2018) 295 Ore.App. 433 [vacating non-capital defendant’s judgment under *McCoy*]; see also *Eddy, supra, ___ Cal.App.5th ___* [2019 Cal.App. Lexis 257] [reversing conviction in noncapital murder case].) The Court singled out capital cases to emphasize that the autonomy
of the defendant is of such paramount importance that the Sixth Amendment protects it “even when” the decision sets the stage for a trial that will determine life or death. In the Court’s words, “We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” (McCoy, supra, ___ U.S. at p. ___, [138 S.Ct. at p. 1505], italics added.) From that perspective, the principles guiding the Court in McCoy have greater force outside of the capital context, because respect for a seemingly-irrational defendant’s desire to maintain innocence would have the same benefit at a lesser cost. 8 Along these same lines, the Court noted, “With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense …” (McCoy, at p. 1505, italics added.)

In light of our conclusion, based on McCoy, that the violation of Flores’s Sixth Amendment rights constitutes structural error requiring reversal of his convictions, we need not reach his alternative arguments claiming Miranda and due process violations as well as prosecutorial error in closing argument.

**DISPOSITION**

The judgments are reversed.

**COUNSEL**

Ferguson Case Orr Paterson, Wendy C. Lascher for Plaintiff and Appellant.

Horvitz & Levy, Curt Cutting and Emily V. Cuatto; Veatch Carlson, Mark A. Weinstein and Mark M. Rudy for Defendants and Respondents.

**OPINION**

This case presents two issues: does the nonmarital biological child of an absentee father who never openly held her out as his own have standing under Code of Civil Procedure section 377.60 (section 377.60) to sue for his wrongful death if she failed to obtain a court order declaring paternity during his lifetime? If she does not have standing, does section 377.60 violate the state or federal equal protection clauses?

We conclude the child does not have standing under the circumstances presented here, and we find no equal protection violation. As explained below, the legislative history of California’s wrongful death statute establishes that standing to sue for wrongful death turns on whether the plaintiff has a right to inherit from the decedent under California’s intestate succession statutes. In this particular case, the child has no right to inherit from the decedent because he never openly held her out as his own and because she never obtained a court order declaring paternity during his lifetime. It follows that she does not have standing to sue for his wrongful death. Notably, a contrary conclusion would deprive the decedent’s parents and siblings of standing to sue for his wrongful death.

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8. This assumes that the costs of the Sixth Amendment’s protection of individual autonomy are the outcomes where adherence to the defendant’s objective increased their sentence.

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1. Prior opinions have used the term “illegitimate children.” We use the term “nonmarital children” instead because we do not wish to suggest that children born to unmarried parents are in any way inferior to children born to married parents. This opinion uses the term “nonmarital children” in the same sense that prior opinions have used the term “illegitimate children.”
We cannot imagine the Legislature intended to confer wrongful death standing on a child who had no relationship whatever with the decedent to the exclusion of the decedent’s other family members with whom he did have a relationship.

We also reject the appellant’s equal protection argument. California’s wrongful death standing rules do not categorically exclude nonmarital children. They confer standing on a variety of children — both marital and nonmarital — if they satisfy certain criteria concerning their relationship with the decedent during his lifetime. This is not a case where the state has created an insurmountable barrier to nonmarital children; to the contrary, a nonmarital child has multiple statutory avenues for establishing he or she has a right to inherit from the decedent under California’s intestate succession laws and thus has wrongful death standing.

Nor do California’s wrongful death standing rules illegally discriminate on the basis of gender. A state may validly impose different requirements for establishing natural parent status for birth mothers and biological fathers because mothers and fathers are not similarly situated when it comes to their role in becoming parents.

We therefore affirm the judgment dismissing the complaint for lack of standing.

I. FACTS

This case arises out of the death of Amine Britel, who was killed by a texting drunk driver at the age of 41. (Estate of Britel, supra, 236 Cal.App.4th at p. 134.) Britel never married, and he died intestate. (Ibid.) He was survived by his mother and his two adult sisters.

A.S. is Britel’s biological child, as confirmed by DNA testing conducted after his death. A.S. was conceived during a brief relationship between Britel and A.S.’s mother, appellant Jacqueline Stennett (Jackie), when they were both graduate students. (Estate of Britel, supra, 236 Cal.App.4th at pp. 132-133.) Several months after they parted ways, Jackie informed Britel of her pregnancy. (Id. at p. 133.) Britel felt he never could tell his family about having a child out of wedlock, and he told Jackie that he wanted no contact with her or the baby. (Ibid.)

Jackie decided she wanted Britel “‘to participate when he was ready and by his own choice,’” so she never sought a court order declaring paternity during Britel’s lifetime. (Estate of Britel, supra, 236 Cal.App.4th at p. 134.) A.S. was 10 years old when Britel died in February 2011. She never met Britel or had any relationship with him. (Ibid.) After Britel’s death, Jackie filed a petition to have A.S. declared Britel’s heir under the Probate Code’s intestacy provisions. (Estate of Britel, supra, 236 Cal.App.4th at p. 132.) Acting as A.S.’s guardian ad litem, Jackie also filed a wrongful death complaint against the driver who killed Britel and the driver’s parents (collectively, the Millers), among others. The wrongful death action was stayed pending the heirship litigation in the probate court.

The probate court held that A.S. did not qualify as Britel’s heir, and a different panel of this court affirmed that ruling. (Estate of Britel, supra, 236 Cal.App.4th at pp. 132, 134.) As this court explained, if an intestate decedent has no surviving spouse or domestic partner, as was the case here, the estate passes to the decedent’s “issue,” that is, his or her lineal descendants as determined by the statutory definitions of parent and child. (Id. at pp. 135-136 [citing Prob. Code, §§ 50, 6402].) These definitions provide that a parent-child relationship exists “between a person and the person’s natural parents, regardless of the marital status of the natural parents.” (Ibid. [citing Prob. Code, § 6450, subd. (a)].) Probate Code section 6453 governs “whether a person is a ‘natural parent’” and provides, among other things, that a natural parent-child relationship may be “established by clear and convincing evidence that the parent has openly held out the child as his own.” (Prob. Code, § 6453, subd. (b).)

Applying these provisions, this court concluded Britel did not openly hold out A.S. as his own and therefore A.S. did not qualify as his heir under Probate Code section 6453, subdivision (b)(2). (Estate of Britel, supra, 236 Cal.App.4th at pp. 137-140.) This court also rejected A.S.’s equal protection challenge to subdivision (b)(2), although it refrained from deciding the constitutionality of the wrongful death statute. (Id. at pp. 145-148, fn.12.)

After Estate of Britel was decided, the Millers moved for judgment on the pleadings against A.S. in the wrongful death action. The trial court granted their motion and dismissed the complaint for lack of standing. It reasoned that standing for wrongful death hinges on whether a plaintiff qualifies as the decedent’s heir under California’s intestate succession statutes. It also rejected Jackie’s equal protection challenge to the wrongful death statute. Jackie appealed.

II. DISCUSSION

A. Standard of Review

We review de novo questions of statutory construction and the determination of a statute’s constitutionality. (Lee v. Hanley (2015) 61 Cal.4th 1225, 1232; Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward (2011) 200 Cal.App.4th 81, 90.)

B. A.S. Lacks Standing to Sue for Wrongful Death

1. General Principles Guiding Our Analysis

In California, a wrongful death cause of action “is wholly statutory in origin.” (Steed v. Imperial Airlines (1974) 12 Cal.3d 115, 119-120 (Steed).) As our Supreme Court has ex-
plained, “the Legislature intends to occupy the field of recovery for wrongful death.” (Justus v. Atchison (1977) 19 Cal. 3d 564, 575 (Justus), disapproved on other grounds in Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171.) “Because it is a creature of statute, the cause of action for wrongful death ‘exists only so far and in favor of such person as the legislative power may declare.’” (Ibid.)

Thus, “the right to bring such an action is limited to those persons identified” in the wrongful death statute, section 377.60. (Scott v. Thompson (2010) 184 Cal. App. 4th 1506, 1510 (Scott); see Steed, supra, 12 Cal. 3d at p. 119 [“It is well settled that the right to bring an action for the wrongful death of a human being is limited to the persons described in [the statute].”].) The category of persons eligible to bring wrongful death actions is strictly construed. (Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 865 (Cheyanna M.).)

The wrongful death statute provides in pertinent part: “A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons … [¶] (a) The decedent’s surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.” (§ 377.60, subd. (a), italics added.)

This appeal turns on the meaning of the word “children” and whether A.S. qualifies as Britel’s “child” under section 377.60, subdivision (a). This is a question of statutory interpretation.

“In determining the meaning of the section, we are guided by the following established principles: ‘[O]ur first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, [we] must look first to the words of the statute themselves, giving to the language its usual, ordinary import … . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citation.]’” (Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268.)

“'[I]f the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.”’ (Scott, supra, 184 Cal. App. 4th at p. 1513.) However, “[i]f the statutory language is susceptible of more than one reasonable interpretation, we must look to additional canons of statutory construction to determine the Legislature’s purpose. [Citation.] ‘Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.”’ (McCarther v. Pacific Telesis Group (2010) 48 Cal. 4th 104, 110.)

Committee reports and interpretive opinions of the Law Revision Commission are also entitled to great weight in discerning that intent. (Hale v. Southern Cal. IPA Medical Group, Inc. (2001) 86 Cal. App. 4th 919, 927.)

2. The Term “Children” Is Ambiguous

Section 377.60 does not define the term “children.” Jackie interprets “children” to mean the decedent’s biological children, whereas the Millers argue the term “children” is ambiguous.

The word “children,” by itself, at first blush appears to be unambiguous: it is commonly understood to refer to one’s offspring. Because we must construe the text as a whole, however, we also must consider the context in which the word “children” is used. (K Mart Corp. v. Cartier, Inc. (1988) 486 U.S. 281, 291 [“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”].) Harmonizing the statutory language within the context of the law and its evident purpose is not reliance on an extrinsic source, but merely the best way to learn the meaning of a word.

The statute’s overall purpose is to provide standing for specified persons most likely to have suffered damages from the loss of the decedent’s companionship or financial support. (Lattimore v. Dickey (2015) 239 Cal. App. 4th 959, 968 (Lattimore).) With this in mind, various questions arise concerning the precise meaning of the word “children.” For example, does “children” refer only to biological children? What about adopted children? Stepchildren? Nonadopted stepchildren?

Did the Legislature intend to confer standing to a decedent’s biological children who were adopted by another person?

Do the biological children of a decedent have standing if the decedent’s parental rights were terminated? Does the statute confer standing to biological children of an absentee parent or biological children of a sperm or egg donor? Would adopting Jackie’s argument exclude persons with whom the decedent had no biological relationship, but whom the decedent supported financially and emotionally and openly held out as his or her own children? What about the decedent’s “natural child” — i.e., a child with whom the decedent had a parent-child relationship as defined by statute? Where exactly did the Legislature intend to draw that line? Answering that question requires more than a reference to how the word “child” is “commonly understood.”

It bears noting that our Legislature has not always used the term “child” in a purely biological sense. The statutory definitions of “natural parent” and the parent-child relationship in Probate Code sections 6450, 6451, and 6453, which govern intestate succession, and Family Code sections 7601, 7611,
3. The Statute’s Legislative History Confirms Wrongful Death Standing Remains Linked to Intestacy Laws

As discussed below, the legislative history confirms that when the Legislature used the term “children” in section 377.60, it referred to persons entitled to take from the decedent under California’s intestate succession laws.

California’s first wrongful death statute was enacted in 1862. (Stats. 1862, ch. 330, §§ 1–4, pp. 447-448.) In 1872, the statute was codified as former section 377 of the Code of Civil Procedure (section 377). (See Historical and Statutory Notes, 14 West’s Ann. Code Civ. Proc. (2004 ed.) § 377, p. 104.) At the time of its repeal in 1992, section 377 provided in relevant part: “(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs … may maintain an action for damages against the person causing the death. … [¶] (b) For the purposes of subdivision (a), ‘heirs’ means only the following: [(¶)] (1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code…” (i.e., the intestacy laws). (Stats. 1983, ch. 842, § 12, pp. 3022-3023; italics added, repealed by Stats. 1992, ch. 178, § 19, p. 890; see Historical and Statutory Notes, 14 West’s Ann. Code Civ. Proc., supra, § 377, at p. 104.)

Former section 377’s use of the word “heirs” prompted disputes over whether a decedent’s child could sue for wrongful death even if the decedent’s entire estate passed to the surviving spouse under community property laws. Courts faced with this question found that the word “heirs,” as used in former section 377, “denotes those who are capable of inheriting from the deceased person generally.” (Redfield v. Oakland C. S. Ry. Co. (1895) 110 Cal. 277, 289-290 [fact that decedent’s sole “heir” was her surviving spouse per community property laws did not preclude her two minor children from recovering in a wrongful death action]; Fiske v. Wilkie (1945) 67 Cal.App.2d 440, 444 [fact that decedent’s husband was alive at the time of her death and did not die until several months later did not bar decedent’s daughters from suing for wrongful death].)

In other words, the term “heirs” in former section 377 was “construed in accordance with the laws of succession” as referring to “that narrow class of persons who would have been eligible to succeed to a decedent’s estate had he died intestate.” (Steed, supra, 12 Cal.3d at pp. 119, 123.) Thus, persons with standing under former section 377 included the decedent’s “issue,” the decedent’s “adopted children,” any “illegitimate children from their mother,” and nonmarital children “from their father if acknowledged by him.” (Id. at p. 119 [decedent’s stepchild, whom he never formally adopted, could not sue for wrongful death because he had no ability to inherit from decedent under laws of succession].)

Because of these cases, the California Law Revision Commission recommended the Legislature change “heirs” to “children,” noting it was unclear whether former section 377 precluded “the decedent’s issue … from joining in the [wrongful death] lawsuit if the decedent leaves a surviving spouse.” (Annual Report for 1992, Appendix 5, Tentative Recommendation, Standing To Sue for Wrongful Death, 22 Cal. Law Revision Com. Rep. (1992) p. 959.) The Law Revision Commission explained that the “statute has been broadly construed to permit suit by those who would be intestate takers regardless of the character of the decedent’s property, i.e., both the surviving spouse and [the] issue” (citing Fiske v. Wilkie, supra, 67 Cal.App.2d 440) and noted that “[t]he wrongful death statute would be clearer, and would conform to case law, if revised to codify this rule.” (Id. at pp. 959-960.)

Following that recommendation, in 1992 the Legislature repealed section 377 and enacted the present wrongful death

4. Citing a dictionary definition, our dissenting colleague interprets the word “children” under the wrongful death statute to mean the biological son or daughter of human parents. (Dis. opn., post, at p. 6.) Courts must exercise ‘great caution’ when relying on a dictionary definition of a common term to determine statutory meaning because a dictionary ‘is a museum of words, an historical catalog rather than a means to decode the work of legislatures.’” (United States v. Costello (7th Cir. 2012) 666 F.3d 1040, 1043.) “[It] makes no sense to declare a unitary meaning that ‘the dictionary’ assigns to a term. There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word.” (Id. at p. 1044.) Indeed, Black’s Law Dictionary (7th Ed.) includes four different definitions of “child” and over a dozen subentries for related terms, such as “natural child,” “foster child,” and “nonmarital child.” Courts should not simply pick the particular dictionary definition yielding the desired result when interpreting a statute.

The dissent purports to give the statute a “commonsense” reading (dis. opn., post, at p. 1.), but ignores the context and purpose of the wrongful death statute as a whole. “The idea that semantically unambiguous sentences—sentences clear ‘on their face’—sentences whose meaning is ‘plain’—can be interpreted without reference to purpose inferred from context is fallacious. Take that clearest of directives: ‘Keep off the grass.’ Read literally it forbids the groundskeeper to mow the grass. No one would read it literally.” (Marazsan v. United States (7th Cir. 1988) 852 F.2d 1469, 1482 (conc. opn. of Posner, J.).)
This court previously held in *Estate of Britel,* supra, this court previously held in *Phraner,* supra, that *A.S.* has no right to inherit from Britel under California’s intestate succession statutes because Britel never “‘openly held out [A.S.] as his own” within the meaning of Probate Code section 6453, subdivision (b)(2). (*Estate of Britel, supra,* 236 Cal. App. at pp. 135-140.) Jackie does not challenge that holding here or otherwise argue A.S. has a right to inherit from Britel under other statutory grounds.

Because A.S. has no right to inherit from Britel under California’s intestacy statutes, it follows that she does not have standing under section 377.60 to pursue a wrongful death action for his death. Simply put, the fact that Britel is her biological father, without more, is not enough to create wrongful death standing. (*See Phraner, supra,* 55 Cal.App.4th at pp. 168-171.) Thus, A.S., “‘like any number of other persons who, in particular cases, may suffer … personal loss by the death of an individual, is without legal recourse absent specific statutory remedy.”’ (*Id.* at p. 170.)

Of course, that is not to say that nonmarital children with absentee fathers never have standing to sue for a parent’s wrongful death. Quite the contrary. A nonmarital child can establish he or she is entitled to take from the decedent under California’s intestate succession laws — and thus establish standing to sue for his or her biological father’s wrongful death — in a number of different ways: (1) by showing the father openly held out the child as his own (§ 377.60, subd. (a); Prob. Code, § 6453, subd. (b)(2)); (2) by showing it was impossible for the father to hold out the child as his own during his lifetime (e.g., if the father died before the child was born) and establishing paternity by clear and convincing evidence (§ 377.60, subd. (a); Prob. Code, § 6453, subd. (b)(3); *Cheyanna M., supra,* 66 Cal.App.4th at p. 877); (3) by showing the child resided with the father for at least 180 days immediately before his death and was dependent on the father for at least half of his or her support (§ 377.60, subd. (c)); or (4) by producing a court order entered during the father’s lifetime declaring paternity (§ 377.60, subd. (a); Prob. Code, § 6453, subd. (b)(1)).

Our holding would be different if Jackie had obtained a court order declaring paternity during Britel’s lifetime. But Jackie knowingly elected not to obtain a paternity declaration in the 10 years after A.S. was born. Had Jackie done so, A.S. certainly would have standing to sue for Britel’s wrongful death. (§ 377.60, subd. (a); Prob. Code, § 6453, subd. (b)(1).) A.S. also would have standing if Britel had died before A.S. was born, and if A.S. established paternity by clear and convincing evidence. (Prob. Code, § 6453, subd. (b)(3).) And she would have standing if Britel had held A.S. out as his own. (Prob. Code, § 6453, subd. (b)(2).) None of those statutory prerequisites occurred here, however. Jackie’s decision not to pursue a paternity declaration “carried the risk that [Britel] could die … while she waited for him to grow into fatherhood.” (*Estate of Britel, supra,* 236 Cal.App.4th at p. 144.)

5. We are sympathetic to A.S.’s plight. Nevertheless, we must leave to the Legislature the question of whether to expand the relatively short list of persons who have wrongful death standing to include the nonmarital biological child of an absentee father who never openly
The decision of the legislature as to how far it will extend the right to maintain a wrongful death action is conclusive.” (Marks v. Lyerla (1991) 1 Cal.App.4th 556, 561.) Our Supreme Court has declared, “the limitation on those who may bring the action is one which is imposed by the Legislature and, absent a constitutional basis for departure from a clear expression of legislative intent, we are bound thereby.” (Steed, supra, 12 Cal.3d at p. 120.) “This is not to say that in all instances persons who are not in the class may not suffer equal or greater losses than some who are within the class, but the Legislature is not compelled to anticipate and provide for such persons.” (Id. at p. 124.)

There is a good reason for this. In crafting standing rules for wrongful death actions, the Legislature can engage committees to review proposed legislation, hold hearings to investigate the policy implications of the contemplated legislation, hear from interested parties, debate various proposals, forge compromises, and entertain recommendations from the Law Revision Commission. We can do none of this. Adopting Jackie’s position would unravel that democratic process, especially where, as here, the Legislature has implicitly declined to adopt the position now urged upon us by appellant. “In the exercise of a judicial function, we should not assume the prerogative of making changes in a statute when the Legislature, by strong implication, has elected not to do so.” (Steed, supra, 12 Cal.3d at p. 121.)

Jackie argues A.S. should have standing because she lost the potential for enjoying Britel’s companionship and support in the future. This is a policy argument that the Legislature presumably has weighed and rejected. The argument furnishes no basis for standing because it is based on mere speculation. (See Corder v. Corder (2007) 41 Cal.4th 644, 661 [damages available for wrongful death include “‘the financial benefits the heirs were receiving at the time of death [and] those reasonably to be expected in the future’”’ (italics added.)] The mere possibility A.S. might have one day qualified as Britel’s “heir” had she sought a paternity decree or had Britel decided to hold her out as his own is not enough to confer wrongful death standing. (See Garcia v. Douglas Aircraft Co. (1982) 133 Cal.App.3d 890, 893 [decedent’s fiancée, who was engaged to marry decedent eight days after his death and who had cohabited with him, lacked standing to bring wrongful death action].)

4. A Contrary Holding Would Wreak Havoc on the Legislative Scheme

Adopting Jackie’s argument that A.S. is entitled to standing based solely on a purely biological tie to the decedent would wreak havoc on the carefully crafted scheme the Legislature has adopted. The Legislature limited wrongful death standing to the persons entitled to take from the decedent under California’s intestate succession laws. Those persons, “as a class, stand in the closest relationship to a deceased” and often “suffer the greatest loss upon [the deceased’s] wrongful death.” (See Steed, supra, 12 Cal.3d at p. 124.) Biological children who had no relationship whatsoever with the decedent during his lifetime do not fall within that class.

Under Jackie’s interpretation of the statute, a decedent’s biological child would have standing even if a court had terminated the decedent’s parental rights or even if the child had been adopted by another. That would directly conflict with existing precedent from this court. (See Phraner, supra, 55 Cal.App.4th at pp. 168-171 [adopted child had no standing to sue for death of her biological mother, notwithstanding genetic relationship, because adoption legally severed the parent-child relationship for intestate succession].)

Granting A.S. standing also would be patently unfair because it would categorically deprive Britel’s mother and siblings of standing to sue for his wrongful death. Section 377.60 confers standing to “[t]he decedent’s surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.” (Italics added.) Thus, a decedent’s parents and siblings do not have standing to sue for wrongful death unless the decedent leaves behind no “children.” (Ibid.; see Chavez v. Carpenter (2001) 91 Cal.App.4th 1433, 1440 [“where a decedent leaves issue, ‘his parents would not be his heirs at all [citations] and therefore [are] not entitled to maintain this wrongful death action at all’”]; see also Scott, supra, 184 Cal.App.4th at p. 1511 [wrongful death “standing” among multiple claimants is determined by statutory rank.”].) We cannot imagine the Legislature intended that A.S. — who had no relationship whatsoever with Britel — would have standing to sue for his wrongful death to the exclusion of Britel’s other family members, with whom he did have a relationship. Yet that is precisely the result Jackie requested in the trial court, where she claimed A.S. “‘outrank[ed]’” Britel’s other family members and was “the only person permitted under California law to pursue wrongful death claims.” (Italics added.)

The dissent suggests granting standing to A.S. would be of minimal consequence because she still “would ultimately have to prove damages.” (Dis. opn., post, at p. 5.) But granting standing to A.S. also would cut off the ability of Britel’s mother and siblings to sue for his wrongful death. The notion

6. To further illustrate the unforeseen and presumably unintended consequences of this interpretation, suppose the biological child of an absentee father had her own child and then died. Under Jackie’s reading of the statute, that child — the absentee father’s grandson — would have standing to sue for his wrongful death to the exclusion of the decedent’s parents and siblings, despite having nothing more than a genetic tie to the decedent. That cannot possibly be what the Legislature intended.
that a person who almost certainly suffered no cognizable damages from the decedent’s death could, simply by filing suit, prevent persons who likely did suffer such damages from ever having their day in court, is wholly incongruous and contrary to the legislative purpose of section 377.60.

In closing, “the cause of action for wrongful death ‘exists only so far and in favor of such person as the legislative power may declare’” (Justus, supra, 19 Cal.3d at p. 575), and we must interpret a statute in a manner that “‘effectuate[s] [its] purpose.’” (Union Bank of California v. Superior Court (2004) 115 Cal.App.4th 484, 488.) The logical extension of Jackie’s argument in favor of standing — that a purely biological tie to the decedent, without more, is enough — would frustrate the Legislature’s decision to limit standing to persons entitled to take from the decedent under California’s intestate succession laws, and would “expand the category of people able to recover for the loss beyond that which was contemplated by the Legislature in drafting the statute. We decline to do so.” (Phraner, supra, 55 Cal.App.4th at p. 170.)

C. Jackie’s Equal Protection Challenges Fail

Jackie next argues that the wrongful death standing statute, as interpreted here, violates the equal protection clauses of the state and federal Constitutions by discriminating on the basis of illegitimacy and gender. We disagree.

“The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, ‘[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’” [Citation.] “This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’” [Citation.]” (People v. Valencia (2017) 3 Cal.5th 347, 376 (Valencia).)

As to this first step, we conclude the standing rules do not distinguish between marital and nonmarital children; at most they draw a distinction between nonmarital children whose parents took the steps necessary to establish a parent-child relationship during the father’s lifetime and children whose parents did not. The creation of a parent-child relationship makes it likely the child suffered emotional or financial harm from the decedent’s death. Providing standing where no parent-child relationship exists would frustrate the statutory purpose of compensating those most likely to have suffered harm. These two categories of persons therefore are not similarly situated when considering the purpose of the wrongful death standing rules.

“The second step [of the equal protection analysis] is determining whether there is a sufficient justification for the unequal treatment. The level of justification needed is based on the right implicated.” (People v. Flint (2018) 22 Cal.App.5th 983, 990.) Intermediate scrutiny applies to discriminatory classifications based on illegitimacy and gender. (Clark v. Jeter (1988) 486 U.S. 456, 461 (Clark); Estate of Britel, supra, 236 Cal.App.4th at p. 145 [explaining why strict scrutiny does not apply to illegitimacy classifications].) “‘To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.’” (Estate of Britel, supra, 236 Cal.App.4th at p. 145.) Here, that objective is limiting wrongful death standing to those persons most likely to have had a relationship with the decedent.

1. Illegitimacy

a. The Wrongful Death Standing Rules Do Not Exclude Nonmarital Children

California’s wrongful death standing rules do not categorically exclude nonmarital children. They confer standing on a variety of children — both marital and nonmarital — if certain criteria pertaining to their relationship with the decedent are met. Specifically, wrongful death standing exists if: a natural parent-child relationship (and thus heirship status) can be established (§ 377.60, subd. (a); Prob. Code, § 6453); a real or putative stepparent-stepchild relationship plus financial dependence can be established (§ 377.60, subd. (b)); or a longstanding, financially dependent relationship can be established (§ 377.60, subd. (c)).

As for the first option, a natural parent-child relationship can be established under the Probate Code “regardless of the parents’ marital status. [Citation.] That is, the distinction between legitimate and illegitimate children has been eliminated.” (Lozano v. Scalier (1996) 51 Cal.App.4th 843, 846 (Lozano); see Prob. Code, § 6450, subd. (a) [“The relationship of parent and child exists between a person and the person’s natural parents, regardless of the marital status of the natural parents”].) As already noted, Probate Code section 6453 provides a variety of methods to establish a natural parent-child relationship, none of which hinges exclusively on the parents’ marital status. For example, if the decedent openly held out the child as his own, that alone would be sufficient to create standing. (Prob. Code, § 6453, subd. (b)(2).)

To be sure, if this case involved a “classification[ ] that burden[ed] illegitimate children for the sake of punishing the illicit relations of their parents,” we would reach a different result “because ‘visiting this condemnation on the head of an infant is illogical and unjust.’” (Clark, supra, 486 U.S. at p. 461.) But this is not such a case. As explained above, a nonmarital child has multiple ways of establishing heirship, and thus wrongful death standing. “There is in California no ‘insurmountable barrier’ to the right of a legitimate or an illegitimate child to succeed to the estate of its natural parent [or] to bring an action for the wrongful death of such parent.” (Steed, supra, 12 Cal.3d at p. 125.)

In support of her equal protection challenge, Jackie relies on United States Supreme Court decisions mandating equal legal treatment of marital and nonmarital children in a broad range of substantive areas. However, these cases involved laws that denied rights to a dependent child based solely on
his or her parents’ marital status, and are thus inapposite. (See \textit{Gomez v. Perez} (1973) 409 U.S. 535, 538 [Texas law that allowed only marital children to obtain financial support from fathers was “invidious” discrimination]; \textit{Weber v. Aetna Casualty & Surety Co.} (1972) 406 U.S. 164, 165, 170 [Louisiana could not treat employee’s dependent unacknowledged nonmarital children differently than his marital children or acknowledged nonmarital children for workers’ compensation benefits]; \textit{Levy v. Louisiana} (1968) 391 U.S. 68, 72 [Louisiana could not prevent dependent children from suing for their mother’s wrongful death merely because they were born out of wedlock; children were dependent on mother and “in her death … suffered wrong in the sense that any dependent would”]; see also \textit{Arizmendi v. System Leasing Corp.} (1971) 15 Cal.App.3d 730, 737 [\textit{Arizmendi} \textsuperscript{7} [children cannot be prohibited from suing for biological father’s wrongful death solely on the basis they are nonmarital].]

Unlike those cases, the existing statutory framework does not create an insurmountable barrier to nonmarital children based on their parents’ marital status, nor does it deprive nonmarital children of a fundamental right, as Jackie suggests. At most, it draws a distinction between nonmarital children whose parents took the steps necessary to establish a parent-child relationship during the father’s lifetime and children whose parents did not. That is not a suspect classification, particularly when viewed in the context of the purpose of the wrongful death standing rules. (See \textit{Valencia, supra}, 3 Cal.5th at p. 376.)

\textbf{b. The Wrongful Death Standing Rules Are Substantially Related to Important Governmental Objectives}

Even if this case involved a suspect classification (which it does not), the statutory framework at issue is substantially related to the statute’s ultimate purpose: conferring wrongful death standing on specified persons whom our Legislature deems most likely to have suffered damages from the loss of the decedent’s companionship or financial support. (See \textit{Lattimore, supra}, 239 Cal.App.4th at p. 968 [“purpose is to compensate specified persons — heirs — for the loss of companionship and for other losses suffered as a result of a decedent’s death”]; \textit{Quiroz v. Seventh Ave. Center} (2006) 140 Cal. App.4th 1256, 1263 [statute “limits the right of recovery to a class of persons who, because of their relation to the deceased, are presumed to be injured by his [or her] death’’’]; see also \textit{Steed, supra}, 12 Cal.3d at p. 124 [“the class of those who suffer the greatest loss upon a wrongful death are the heirs of the deceased’’].) Wrongful death standing bears a close tie to the presumed existence of some sort of supportive relationship with the decedent — emotional or financial — during his lifetime, and the statute aims to compensate those persons for the loss of support. The fact that a different subdivision of the wrongful death statute, subdivision (c), confers wrongful death standing on any minor who (a) resided with the decedent in his household for 180 days before his death and (b) was dependent on the decedent for at least one-half of his or her support, illustrates this point. (§ 377.60, subd. (c).)

Requiring the existence or establishment of a parent-child relationship during the decedent’s lifetime is consistent with that statutory purpose. Unlike marital or nonmarital children who were dependent on or had some sort of relationship with their father, nonmarital children who never knew and were never supported by their absentee father — whose sole tie to their father was genetic — are unlikely to suffer any compensable loss of companionship or financial support in the event of his death. They are thus precluded from suing unless they obtained a court order of paternity before his lifetime. (Prob. Code, § 6453, subd. (b)(1).)

As one court observed, “[t]he state has a legitimate interest in preferring “a man who has undertaken the obligations of marriage and family [over] a man whose only connection with the child is biological.” (\textit{Rodney F. v. Karen M.} (1998) 61 Cal.App.4th 233, 239 [holding statutory presumption of husband’s paternity does not violate biological father’s equal protection rights].) So, too, does the state have a legitimate interest in limiting wrongful death standing to marital and nonmarital children who likely had a relationship with their father.

Apparently taking issue with the statutory requirement that Jackie obtain a paternity order “during the parent’s lifetime” (Prob. Code, § 6453, subd. (b)(1), italics added), Jackie suggests our holding unfairly penalizes A.S. for her mother’s inaction. But our laws routinely put the onus on the parent or guardian to assert rights for or otherwise act on behalf of a minor child in a variety of contexts, and “there is a presumption that fit parents act in the best interests of their children.” (\textit{Traxel v. Granville} (2000) 530 U.S. 57, 68.) Here, Jackie knowingly decided not to pursue a paternity declaration, despite having 10 years to do so before Britel died, and she acknowledged her decision not to try to force Britel to accept paternity meant losing financial support for her child. We must assume she acted in A.S.’s best interests.

Further, the statutory requirement that the paternity order be “entered during the [parent’s] lifetime” has survived earlier equal protection challenges. (\textit{Estate of Sanders} (1992) 2 Cal.App.4th 462, 475-477, italics added (\textit{Sanders} \textsuperscript{7} [court was “fully cognizant” of former Probate Code § 6408, subd. (c) (2)’s “harsh effect on children born out of wedlock,” but nevertheless found no equal protection violation].) In upholding

\textsuperscript{7} At the time \textit{Arizmendi} was decided, former Probate Code section 255 prevented nonmarital children from inheriting from their father unless they were either legitimated (by subsequent marriage of their parents or by reception into their father’s home) (former Civ. Code, §§ 215, 230) or acknowledged “in writing, signed in the presence of a competent witness.” In 1975, as part of a major overhaul recommended by the Law Revision Commission, former section 255 was repealed, and the Uniform Parentage Act was adopted, abolishing the distinction between marital and nonmarital children. (\textit{Lociano, supra}, 51 Cal.App.4th at p. 847.) Under this new scheme, even if paternity is not presumed, a nonmarital child with an absentee father may nevertheless establish heirship status by obtaining a judicial decree of paternity, as noted above. (\textit{Ibid}.).
the statute’s constitutionality, the Sanders court relied largely on Lalli v. Lalli (1978) 439 U.S. 259 (Lalli).

Lalli involved a constitutional challenge to a New York statute that allowed a nonmarital child to inherit from an intestate father only if a court had issued a paternity decree during the father’s lifetime. (Lalli, supra, 439 U.S. at pp. 261-262.) A divided Supreme Court held the statute was “substantially related to the important state interests the statute is intended to promote” and therefore found no violation of the equal protection clause. (Id. at pp. 275-276 (plur. opn. of Powell, J.).) Justice Powell’s plurality opinion observed that the statute was intended “to ensure the accurate resolution of claims of paternity … [i]n order to minimize the potential for disruption of estate administration,” and to permit a man to defend his reputation against unjust paternity claims. (Id. at p. 271.) The plurality held the statute did not violate equal protection because it bore a substantial relationship to those purposes: “The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation in a matter of judicial record before the administration commences.” (Ibid.)

Although Lalli dealt with intestate succession laws, the analytical framework for evaluating equal protection violations applies here with equal force. Lalli observed “few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results.” (Lalli, supra, 439 U.S. at p. 273.) But the Court explained, “[o]ur inquiry under the Equal Protection Clause does not focus on the abstract ‘fairness’ of a state law, but on whether the statute’s relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.” (Ibid.)

Here, the requirement that a paternity order be entered during the deceased’s lifetime is substantially related to the important governmental objective of limiting wrongful death standing to those persons most likely to have had a supportive relationship with the decedent. In its most basic sense, wrongful death standing for a nonmarital child hinges on establishing that he or she had some sort of supportive relationship (emotional or financial) with his or her biological father during his lifetime, or alternatively obtained a paternity decree during his lifetime. “A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained” (Mathews v. Lucas (1976) 427 U.S. 495, 514 (Mathews)) and thus supports an inference that a relationship was formed during the father’s lifetime.

In short, even if the wrongful death standing rules created classifications based on illegitimacy (which they do not), we would find no equal protection violation. The statute’s limitations on wrongful death standing are substantially related to the important governmental objective of limiting recovery to those individuals most likely to have suffered losses from the decedent’s death. (See Steed, supra, 12 Cal.3d at p. 124 concluding former section 377 was “reasonably drawn to limit recovery to those intestate heirs who suffer loss by the fact of a wrongful death”); see also Mathews, supra, 427 U.S. at p. 513 [classifications conditioning eligibility of certain nonmarital children for a surviving child’s insurance benefits upon a showing of paternity and support are permissible because they are reasonably related to the likelihood of dependency at death].)

2. Gender

Jackie alternatively argues that section 377.60, as interpreted here, discriminates on the basis of gender in that it creates more hurdles for a nonmarital child suing for the wrongful death of a father than for the wrongful death of a mother. While an unmarried birth mother typically qualifies as the child’s natural parent at birth, an unmarried father does not necessarily qualify as the child’s natural parent unless additional circumstances are present, such as a declaration of paternity or evidence the father openly held out the child as his own. Jackie concludes the different requirements for becoming a natural parent violate equal protection.8 To prevail, Jackie must show mothers and fathers are similarly situated in establishing the requisite relationship that nonmarital children must show for standing. This she cannot do.

It is not impermissibly discriminatory to have different requirements for establishing natural parent status for birth mothers and biological fathers because mothers and fathers are not similarly situated when it comes to their role in becoming parents. The mother carries the baby to term and gives birth; the father does not. Only a mother’s parental relationship is established at birth. As such, “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to mothers and fathers is neither surprising nor troublesome from a constitutional perspective.” (Nguyen v. INS. (2001) 533 U.S. 53, 63; see Sessions v. Morales-Santana (2017) 137 S.Ct. 1678, 1694 [‘imposing a paternal-acknowledgment requirement on fathers [is a] justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth’]; Lehr v. Robertson (1983) 463 U.S. 248, 267-268 [‘If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights’].)

In sum, we find no merit to Jackie’s equal protection challenges. The equal protection “‘doctrine is not intended “to make it necessary that the legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should by the same act declare that

8. The logical extension of Jackie’s argument is that the various statutes governing how a nonbirth mother establishes natural parent status are also unconstitutional. (See, e.g., Prob. Code, § 6453; Fam. Code, §§ 7611, 7630.)
all persons who may suffer damages from injuries of that character shall also have such right of action.”’’’ (Phraner, supra, 55 Cal.App.4th at p. 170.)

III.
DISPOSITION
The judgment is affirmed. The Millers shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ARONSON, J.
I CONCUR: BEDSWORTH, ACTING P. J.

Moore, J., Dissenting.

I respectfully dissent. Due to modern DNA testing, a nonmarital child can easily establish whether he or she is a “child” of a decedent (even after the parent’s death). But under the majority’s interpretation of the wrongful death statute, a nonmarital child must overcome burdens to establish standing that are not required of other children. The nonmarital child must rely on the father to declare parentage during his lifetime, or rely on the mother to fortuitously file a paternity action before the father’s death. These burdens are not substantially related to an important government purpose, given the ready access and reliability of modern DNA testing. Thus, I would hold that the wrongful death statute, as it is being applied here, violates the equal protection clause.

I would find that under these circumstances the plain meaning of the word “children” in the wrongful death statute should control. There is a conclusive DNA test that proves the decedent Amine Britel was the father of A.S. In this case it is not necessary to rely on intestacy laws in order to interpret the wrongful death statute. (See Estate of Cleveland (1993) 17 Cal.App.4th 1700, 1705-1706 [the purpose of intestacy laws is to correctly determine intestate succession].) Thus, I would hold that A.S. has standing to sue for her father’s wrongful death.

Equal Protection

Persons may not be denied equal protection of the laws under both the state and federal Constitutions. (Cal. Const., art. I, § 7 (“A person may not be … denied equal protection of the laws”); U.S. Const., 14th Amend. (“No State shall … deny to any person within its jurisdiction the equal protection of the laws”).) Because the two constitutional provisions guarantee substantially similar rights, courts generally evaluate equal protection claims under the same analytical framework. (Garcia v. Four Points Sheridan LAX (2010) 188 Cal. App.4th 364, 382.)

When challenged under the equal protection clause, laws are subject to one of three levels of “scrutiny”: strict scrutiny, intermediate scrutiny, or rational basis review. Strict scrutiny applies when a law discriminates against a suspect class, such as a racial group, or interferes with fundamental rights. (See, e.g., Grutter v. Bollinger (2003) 539 U.S. 306, 326.) Intermediate scrutiny applies when a law discriminates against other suspect classes, specifically nonmarital children and women (or men). (See Clark v. Jeter (1988) 486 U.S. 456, 461 (Clark).) Rational basis review applies in all other cases. (Fitzgerald v. Racing Association (2003) 539 U.S. 103, 106-107.)

In order to withstand strict scrutiny, the government must prove that the law is necessary to achieve a compelling government purpose. (Palmore v. Sidoti (1984) 466 U.S. 429, 432-433.) Under intermediate scrutiny, the government must prove that the law is substantially related to an important government purpose. (Craig v. Boren (1976) 429 U.S. 190, 218.) Under rational basis review, courts will uphold a law if it is rationally related to a legitimate government purpose. (Pennell v. San Jose (1988) 485 U.S. 1, 14.)

Heightened scrutiny is certainly appropriate when a law discriminates against nonmarital—formerly “illegitimate”—children. (See Weber v. Aetna Casualty & Surety Co. (1972) 406 U.S. 164, 175-176.) “The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.” (Ibid., italics added, fn. omitted.)

Because modern DNA testing can readily establish parentage, laws that discriminate against nonmarital children are now seldom justified. 9 (See, e.g., Clark, supra, 486 U.S. 456.) In Clark, a mother filed a support claim on behalf of her nine-year-old child. (Id. at p. 457.) In the complaint, the mother named respondent as the father. “The court ordered blood tests, which showed with a 99.3% probability that” the respondent was the father. Pennsylvania courts dismissed “the complaint on the ground that it was barred by a 6-year statute of limitations for paternity actions.” (Id. at p. 458.) The United States Supreme Court reversed: “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.

9. Equal protection analysis is not static, courts can properly take into account changing circumstances. (See National Coalition for Men v. Selective Service System (S.D. Tex., Feb. 22, 2019, No. H-16-3362) 2019 U.S. Dist. Lexis 28851, p. *25 [“while historical restrictions on women in the military may have justified past discrimination, men and women are now ‘similarly situated for purposes of a draft or registration for a draft’”]; see also Obergefell v. Hodges (2015) __ U.S. __ [135 S.Ct. 2584, 2589] [“When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed”].)
Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because ‘visiting this condemnation on the head of an infant is illogical and unjust.’” (Id. at p. 461.)

Under the Pennsylvania law, “an illegitimate child must prove paternity before seeking support from his or her father, and a suit to establish paternity ordinarily must be brought within six years of an illegitimate child’s birth. By contrast, a legitimate child may seek support from his or her parents at any time.” (Clark, supra, 486 U.S. at p. 457.) On review, the Supreme Court found “that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child. [Citation.] This scientific evidence is available throughout the child’s minority, and it is an additional reason to doubt that Pennsylvania had a substantial reason for limiting the time within which paternity and support actions could be brought.” (Id. at p. 465.) Further, the Court reasoned that: “The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or … from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born.” (Id. at p. 463.) The Court concluded that the paternity statute, which resulted in the disparate treatment of nonmarital children “does not withstand heightened scrutiny under the Equal Protection Clause.” (Id. at p. 465.)

Here, had Jacqueline Stennett (hereinafter “Jackie,” A.S.’s mother) and Britel been married when A.S. was born, there is no question that A.S. would have standing to file a cause of action under the wrongful death statute. Due to modern DNA testing, we know that A.S. is unquestionably Britel’s “child.” (Code. Civ. Proc., § 377.60, subd. (a).) The word “children” is not an indicator of its intent because “it is the language of the statute itself.” (Clark, supra, 486 U.S. at p. 463.) If the statute’s meaning is plainly understood, the language controls. (Security Pacific National Bank v. Wozab (1990) 51 Cal.3d 991, 998.) That is, if the meaning of the statute is clear and unambiguous, we need not refer to its legislative history or other extraneous interpretive aids. (Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal.3d 736, 743.)

The Legislature’s chosen language is the most reliable indicator of its intent because “‘it is the language of the statute itself that has successfully braved the legislative gauntlet.’” [Citations.] We give the words of the statute ‘a plain and commonsense meaning’ unless the statute specifically defines the words to give them a special meaning. [Citations.] If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction. [Citation.] In such a case, there is nothing for the court to interpret or construe.” (Maclsaac v. Waste Management Collection & Recycling, Inc. (2005) 134 Cal.App.4th 1076, 1082-1083.)

Under California’s wrongful death statute, “children” have standing to file: “A cause of action for the death of a person caused by the wrongful act … of another … .” (Code Civ. Proc., § 377.60, subd. (a).) The word “children” is not defined within the statute, but the word “children” is simply the plural form of the word “child.” (Meriam-Webster’s 11th Collegiate Dict. (2007) p. 214, cols. 1-2.) The word “child” is defined as the “son or daughter of human parents.” (Ibid.; see also Wasatch Property Management v. Degrade (2005) 35 Cal.4th 1111, 1121-1122 [“When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.”].)
Here, it is undisputed that A.S. is Britel’s “child.” Therefore, she has standing to file a cause of action for his alleged wrongful death under the plain meaning of the statute. The majority’s holding that the word “children” can be interpreted by reference to intestacy laws is, as a general proposition, well supported by case law. (See, e.g., *Cheyanna M. v. A.C. Nielsen Co.* (1998) 66 Cal.App.4th 855, 864-865 [“standing to bring a wrongful death action remains linked to the intestacy laws”].) But under these circumstances, I cannot reconcile the majority’s interpretation of the wrongful death statute with the equal protection guarantees for nonmarital children.

**MOORE, J.**