**NINTH CIRCUIT COURT OF APPEALS**

- **United States v. Briones**
  - AZ
  - Criminal Law
  - 4662
  - No error in imposition of life sentence on juvenile gang leader (Rawlinson, J.)

- **Planned Parenthood Federation of America, Inc. v. Center for Medical Progress**
  - N.D. CA
  - Civil Procedure
  - 4671
  - Rule 12(b)(6) properly applied in ruling on motion to strike under California’s anti-SLAPP statute (Gould, J.)

**SUPREME COURT OF CALIFORNIA**

- **People v. Ruiz**
  - C.A. 5th
  - Criminal Law
  - 4677
  - Criminal laboratory analysis and drug program fees properly imposed for conviction for conspiracy to transport controlled substance (Chin, J.)

- **People v. Rodriguez**
  - C.A. 5th
  - Criminal Law
  - 4686
  - Uncorroborated accomplice testimony necessitated reversal of conviction (Liu, J.)

- **People v. Perez**
  - Order modifying opinion
  - 4690

**CALIFORNIA COURTS OF APPEAL**

- **People v. Vannesse**
  - C.A. 2nd
  - Criminal Law
  - 4691
  - Failure to advise arrestee of statutory right to choose between breath and blood test does not warrant suppression of test results (Yegan, Acting P.J.)

- **Yeager v. Holt**
  - C.A. 3rd
  - Legal Malpractice
  - 4694
  - Attorney malpractice action not subject to anti-SLAPP motion (Duarte, J.)

- **People v. Espinoza**
  - C.A. 1st
  - 4699
  - Order modifying opinion

---

**California Forms Books**

- Business Litigation
- Employment Law
- Insurance Defense
- Medical Malpractice
- Products Liability

**TRIED. TRUSTED. TRUE.**

Available online, on CD, and in print.

Download sample forms FREE at: [http://at.law.com/books](http://at.law.com/books)

---

The California Daily Opinion Service contains all opinions by:

- U.S. SUPREME COURT
- U.S. NINTH CIRCUIT COURT OF APPEALS AND BANKRUPTCY APPELLATE PANEL
- CALIFORNIA SUPREME COURT
- CALIFORNIA COURTS OF APPEAL (ALL DISTRICTS)
- CALIFORNIA ATTORNEY GENERAL

All content in the California Daily Opinion Service is property of The Recorder and shall not be republished or photocopied without express written consent. Copyright 2018. ALM Media Properties, LLC. All rights reserved.

Before citing the California Daily Opinion Service, counsel should verify the continuing publication status of a case. Exhibits and appendices to opinions will be included whenever possible if they are reproducible and merit inclusion. While every effort is made to report accurately, minor errors may occur. To report errors, or for other inquiries, please contact: casesums@alm.com.
SUMMARIES

Civil Procedure

Rule 12(b)(6) properly applied in ruling on motion to strike under California’s anti-SLAPP statute (Gould, J.)

Planned Parenthood Federation of America, Inc. v. Center for Medical Progress

9th Cir.; May 16, 2018; 16-16997

The court of appeals affirmed a district court order. The court held that the district court properly applied Rule 12(b)(6) in ruling on a motion to strike a complaint under California’s anti-SLAPP statute where that motion focused solely on the legal sufficiency of the underlying complaint.

Planned Parenthood and others sued Center for Medical Progress and others, alleging that defendants used fraudulent means to obtain entrance to plaintiffs’ conferences and to gain meetings with plaintiffs’ staff in order to create false and misleading videos that they then disseminated on the internet.

Defendants moved to strike plaintiffs’ claims under California’s Strategic Lawsuit Against Public Participation (anti-SLAPP) statute, arguing that plaintiffs’ state law claims arose out of defendants’ undercover investigative journalism, which fell within the scope of the anti-SLAPP statute. They further argued that plaintiffs did not have a reasonable probability of prevailing on any of their state law claims because defendants were entitled to “judgment as a matter of law.” Applying F. R. Civ. Proc. Rule 12(b)(6), the district court denied the motion.

The court of appeals affirmed, holding that the district court properly applied Rule 12(b)(6) in denying defendants’ motion. In their motion to dismiss, defendants’ relied on the legal insufficiency of plaintiffs’ claims. Plaintiffs responded in kind, defending the legal sufficiency of their pleading. On this record, the district court properly declined to evaluate the factual sufficiency of the complaint. Judge Gould concurred in his own opinion, joined by Judge Murguia, writing separately to challenge the appropriateness of the court’s interlocutory review of district court denials of anti-SLAPP motions to strike.

Criminal Law

Uncorroborated accomplice testimony necessitated reversal of conviction (Liu, J.)

People v. Rodriguez

Cal.Sup.Ct.; May 16, 2018; S239713

The California Supreme Court affirmed in part and reversed in part judgments of conviction and sentence and remanded. The court held that a defendant whose conviction was based on uncorroborated accomplice testimony was entitled to a judgment of acquittal.

In 2004, Ernestina Tizoc was killed in a drive-by shooting in a park. Police apprehended Mario Garcia, who later testified that he, Edgar Barajas, Jesus Rodriguez, and two others had driven through the park looking for rival gang members. When they saw the victim and others, they identified them as rival gang members because they were wearing red. Barajas shouted a gang slogan and fired multiple shots, killing the victim. Barajas and Rodriguez, who were 16 and 15 years old, respectively, at the time of the shooting, were tried together on charges of murder, conspiracy to commit murder, and participation in a criminal street gang. The jury found them guilty. The trial court imposed sentences of 50-years-to-life.

On appeal, both defendants argued that their sentences were unconstitutional. Barajas additionally argued, and the Attorney General conceded, that the accomplice testimony on which the jury’s verdict against him was based was not sufficiently corroborated.

The California Supreme Court reversed the judgment against Barajas, holding that the only evidence that specifically implicated him in the crime was the uncorroborated accomplice testimony of Garcia and Rodriguez. None of the other evidence, including the eyewitness testimony about the shooting or the physical evidence recovered from the scene, tended to connect Barajas to the commission of the crime.

The court accordingly remanded to the trial court with direction to enter a judgment of acquittal. As to Rodriguez, the court remanded to the trial court with directions to provide him with an opportunity to make a record of information deemed relevant under Penal Code §§3051 and 4801 for purposes of an eventual youth offender parole hearing. As in People v. Franklin (2016) 63 Cal.4th 261, however, Rodriguez’s constitutional challenge to his 50-years-to-life sentence was moot in light of the enactment of §§3051 and 4801 and the court’s remand to facilitate proper discharge of the Board of Parole Hearings’ obligations under those statutes. Liu, J., joined by Cantil-Sakauye, C.J., and Chin, Corrigan, Cuéllar, Kruger, and Blease, sitting by assignment, JJ.

Criminal Law

Criminal laboratory analysis and drug program fees properly imposed for conviction for conspiracy to transport controlled substance (Chin, J.)

People v. Ruiz

Cal.Sup.Ct.; May 17, 2018; S235556
The California Supreme Court affirmed a court of appeal decision. The court held that criminal laboratory analysis fees and drug program fees were punitive in nature and were thus properly imposed based on a conviction for conspiracy to commit a drug trafficking offense.

Felix Ruiz pleaded no contest to conspiracy to transport a controlled substance, in violation of Health & Saf. Code §11379(a). He was sentenced to prison and ordered to pay various fees and fines, including a $50 criminal laboratory analysis fee under §11372.5(a) and a $100 drug program fee under §11372.7(a).

Ruiz appealed, arguing that his conspiracy conviction did not support imposition of fees under §§11372.5 and 11372.7. The court of appeal affirmed as corrected, holding that the fees were properly imposed.

The California Supreme Court affirmed, holding that there was no error. In upholding the imposition of the fees, the court of appeal relied on Penal Code §182(a), which provides that persons convicted of conspiring to commit a felony “shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony.” In light of this provision, the court of appeal reasoned, because these fees must be imposed for a conviction of transporting a controlled substance, they must also be imposed for a conviction of conspiracy to transport a controlled substance. The Supreme Court agreed. At issue was whether the fees were part of the “punishment” “provided for” the underlying target felony—transporting a controlled substance in violation of §11379(a)—as those terms are used in §182(a). Looking to both the language of the statutes and the legislative intent, the court found that the answer was yes. The legislative record clearly evinced an intent to punish. Defendant’s arguments to the contrary were unpersuasive. Chin, J., joined by Cantil-Sakauye, C.J., and Corrigan, Liu, Cuéllar, Kruger, and Ashmann-Gerst, sitting by assignment, JJ.

Criminal Law

Failure to advise arrestee of statutory right to choose between breath and blood test does not warrant suppression of test results (Yegan, Acting P.J.)

People v. Vannesse

C.A. 2nd; May 16, 2018; B283857

The Second Appellate District affirmed a trial court order. The court held that an arresting officer’s failure to advise an arrestee that he had a choice between a breath test and a blood test did not warrant suppression of the subsequently obtained blood test results.

Alexander Vannesse was arrested for driving under the influence. The arresting officer advised Vannesse that he was required to submit to a chemical blood test and that a failure to do so would result in the suspension of his driver’s license. The officer did not advise Vannesse that he had the option of choosing a breath test instead of a blood test. He also did not advise Vannesse that he could refuse to provide any sample. Vannesse verbally agreed to provide a blood sample and signed a consent form that gave him the option of refusing consent.

Vannesse moved to suppress the results of the blood test, arguing that because the admonition given him was flawed, he could not be deemed to have freely and voluntarily consented to the blood draw. The trial court denied the motion.

The court of appeal affirmed, holding that the officer’s failure to advise Vannesse of his statutory right to choose between a breath and blood test did not render his subsequent consent involuntary. Courts have consistently rejected the proposition that a failure to advise an arrestee of the tests available or to honor the arrestee’s choice of a particular test amounts to a constitutional violation. Such a failure thus does not mandate suppression. Further, here, the blood test result would in any event have been admissible under the inevitable discovery doctrine because the arresting officer could and would have required Vannesse to submit to a blood test pursuant to Veh. Code §23612(a)(2)(C), which provides that “a person who chooses to submit to a breath test may also be requested to submit to a blood test if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug…” In such a circumstance, the officer “shall advise the person that he or she is required to submit to…a blood test.” The trial court accordingly properly denied Vannesse’s motion to suppress.

Criminal Law

No error in imposition of life sentence on juvenile gang leader (Rawlinson, J.)

United States v. Briones

9th Cir.; May 16, 2018; 16-10150

The court of appeals affirmed a district court judgment. The court held that the district court did not err in imposing a life sentence on a juvenile gang leader who orchestrated and participated in multiple violent crimes, including a cold-blooded murder.

In 1994, 17-year old Riley Briones and fellow gang members robbed a Subway restaurant, shooting and killing the lone employee. Briones, who participated in planning the robbery, acted as the getaway driver and never entered the restaurant. Briones later participated in or helped to plan several other violent gang-related crimes. Upon being arrested, he refused to take a plea deal and was convicted in all charges. Finding Briones to be the leader of the gang, the district
court imposed the then-mandatory guidelines sentence of life imprisonment without parole on the felony murder count, along with concurrent sentences on various non-homicide counts.

Following the Supreme Court’s decision in *Miller v. Alabama* (2012) 567 U.S. 460, Briones moved to vacate his life sentence. The district court granted the motion, but, after hearing, once again imposed a sentence of life imprisonment.

The court of appeals affirmed, holding that the district court did not err in imposing sentence consistent with the applicable Guidelines range. Further, the district court did not err by failing to “appropriately consider the factors” identified in *Miller* for sentencing juvenile offenders. The record disclosed that the district court repeatedly and explicitly considered the factors identified in *Miller*, but nonetheless determined that a more lenient sentence was unwarranted. In light of Briones’ steadfast refusal to express remorse for his actions, this determination did not constitute plain error. Judge O’Scannlain dissented in part, finding that the district court failed adequately to consider Briones’s claim that he was not in that class of rare juvenile individuals constitutionally eligible for a life-without-parole sentence.

Legal Malpractice

Attorney malpractice action not subject to anti-SLAPP motion (Duarte, J.)

*Yeager v. Holt*

C.A. 3rd; May 16, 2018; C079897

The Third Appellate District affirmed a trial court order. The court held that a complaint alleging an attorney’s professional malpractice did not attack protected expressive conduct or free speech so as to be subject to an anti-SLAPP motion.

Attorney Peter Holt represented Charles and Victoria Yeager in litigation against AT&T. He thereafter successfully sued Victoria Yeager for some $11,000 in unpaid legal fees. The Yeagers subsequently sued Holt and his law firm for breach of fiduciary duty, misrepresentation, breach of oral contract, and professional negligence. The complaint alleged that Holt failed to communicate about the costs and risks of litigation, concealed facts, acted negligently in discharging professional obligations, misrepresented his abilities, and breached a promise to perform some or all of the work in the AT&T case on a pro bono basis. The Yeagers also stated a claim for misappropriation of name, based on Holt’s alleged use of General Yeager’s name on the firm’s website without permission.

Holt filed a special motion to strike the complaint, in its entirety, as a SLAPP suit, arguing that the Yeagers filed the complaint in retaliation for Holt’s prior successful action to recoup his legal fees. The trial court denied the motion.

The court of appeal affirmed, holding that Holt failed to show that any of the claims asserted by the Yeagers were based on protected expressive conduct or free speech. Although it was possible that the Yeagers may have brought this lawsuit to recover all or part of the fees previously recovered by Holt, that potential did not make this an anti-SLAPP case. A typical attorney malpractice suit is not subject to the anti-SLAPP procedures. Further, it was difficult to see how suing an attorney for malpractice, breach of contract, and using a client’s name or likeness for commercial purposes, could be deemed an attack on expressive activity for anti-SLAPP purposes, particularly when some of the alleged improper conduct occurred after the prior lawsuit was tried. Finally, the fact that General Yeager is famous did not mean his claim of misappropriation of his name or likeness was itself a matter of public interest.
We must decide whether the district court appropriately rejected a juvenile offender’s argument that he should not receive a sentence of life without parole.

I

A

Riley Briones, Jr. was a founder and leader of a gang styled the “Eastside Crips Rolling 30’s.” Briones was involved in and helped to plan a series of violent crimes committed by the gang on the Salt River Indian Reservation. As a result of these crimes, on October 23, 1996, Briones and four other members of the gang were indicted on federal charges including felony murder, arson, assault, and witness tampering.

The most serious of the crimes was a murder committed on May 15, 1994, when Briones was seventeen. According to evidence presented at trial, Briones and fellow gang members planned to rob a Subway restaurant knowing that there would be only one employee present. Briones drove four other gang members to the restaurant, including one armed with a gun, and parked his car outside while the other four went in to rob the store. They ordered food from the lone employee, and while it was being prepared, the gunman returned to the car to speak with Briones, then went back into the restaurant, shot the clerk in the face, and then shot him several more times on the floor. With the cash register locked, the gang members were able to steal only a bag with $100 and the food they had ordered. One of the gang members, who eventually cooperated with the government, testified that after they got back in the car, Briones looked for a maintenance man whom he thought had seen them. According to the cooperating witness, Briones instructed the other gang members to shoot the maintenance man.

Three weeks later, Briones helped plan to firebomb a rival gang member’s home and prepared the Molotov cocktails to be used. Although Briones was not the one to throw them, a fellow gang member did, setting fire to a house with a family inside, including an eleven-year-old girl. Fortunately, the child was not harmed. Several months later, the gang decided to try firebombing the same home again. Briones once more provided Molotov cocktails and drove other gang members to a kindergarten and an abandoned trailer house to set diversionary fires. Briones then drove them to the rival gang member’s home, which they firebombed. Again, fortunately, the family was unharmed. Another month later, Briones helped plan a drive-by shooting of the same home, although he was neither the driver nor the shooter.

Over the next year, Briones continued to participate in gang-related crimes. He pistol whipped a member of his gang who revealed he knew about the Subway murder. That gang member managed to escape and eventually cooperated with authorities. When other gang members committed another drive-by shooting of a home with a mother and child inside, Briones made sure the culprits disposed of their clothes and accounted for the shell casings. At trial, the government also presented evidence that Briones discussed escaping from custody, that he carved gang graffiti into the door of a jail cell, and that he discussed plans to blow up the Salt River Police Department and to kill a tribal judge, federal prosecutors, and Salt River Police investigators.

Briones was arrested on December 21, 1995. He was one of five co-defendants, each of whom was made a plea offer of twenty years in prison. Briones declined the offer, in part because his father (one of the co-defendants) would not take the deal. Ultimately, Briones was convicted of all charged offenses. At the original sentencing in July, 1997, Briones
continued to deny responsibility for the crimes. As part of its sentencing determination, the district court found that Briones was the leader of the gang, and imposed the then-mandatory guidelines sentence of life imprisonment without parole on the felony murder count. Briones was also sentenced to ten and twenty years, respectively, to run concurrently on the non-homicide counts, which he has since served.

B

Fifteen years after Briones’s original sentencing, the Supreme Court held in *Miller v. Alabama* that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” 567 U.S. 460, 479 (2012) (citation omitted). In light of that holding, a sentencing judge is required “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480 (footnote reference omitted). On the basis of *Miller*, Briones filed a motion under 28 U.S.C. § 2255 to vacate his original mandatory life sentence, which the district court granted in July, 2014.

At his resentencing, Briones requested a sentence of 360 months’ imprisonment rather than a life sentence. He argued that the sentencing guidelines, which recommend a life sentence, should be set aside in light of *Miller*. Invoking the “hallmarks of youth” identified by *Miller*, Briones argued that a life sentence was inappropriate in his case. He argued that his gang participation was a product of youthful immaturity and a desire to have a “feeling of banding together.” He pointed to a dysfunctional childhood environment, including parental drug and alcohol abuse, a history of family criminality (both his father and brother were also in the gang and were co-defendants), dropping out of school in the tenth grade, and difficulties as a Native American attending school off the reservation. He said that he was poorly situated to aid in his own defense or to contradict his father when he refused to take a plea deal that would have resulted in a much lower sentence. To mitigate his culpability in the crime, he observed that the robbery scheme was not his idea and that he was not the shooter. Finally, he pointed to evidence of rehabilitation, including that in all his time in prison, he had no gang involvement, that he had been working continuously, and that he married his girlfriend with whom he has a now-adult child, and that he sees his wife regularly.

Both Briones and his wife testified at the resentencing hearing and discussed the difficulties of his childhood. Briones testified that he started drinking around age 12 and as a teenager was regularly drunk in addition to using cocaine and LSD. He wrote a letter to express “[g]rief, regret, sorrow, pain.” He stated:

I don’t know how but I know I have to apologize for everything and I apologize all the time to my family because they’re there, and my apology goes out to also to the [victim’s] family and to all the families, not just for what happened but for the other changes that occurred in my life.

Although Briones told the court that he “want[ed] to express remorse” and “want[ed] to express grief,” he never actually took responsibility for any of the crimes of which he was convicted.1

The government countered that Briones deserved a life sentence. The government acknowledged that under *Miller*, “a life sentence for a juvenile is inappropriate in all but the most egregious cases,” but argued that “this is the most egregious case.” Despite recognizing that Briones was “really doing well in prison,” the government noted that Briones expressed remorse, but failed to accept responsibility, and continued to minimize his role in the murder and in the gang. Specifically, the government contended that it was not credible that Briones was unaware of the gang members’ intention to murder the Subway clerk, and circumstantial evidence suggested Briones himself may have ordered the murder, because the gunman shot the clerk immediately upon reentering the restaurant after speaking with Briones outside. The prosecutor described Briones’ gang as “the most violent gang that I have ever been involved in prosecuting,” including the Hells Angels. Finally, the government pointed out that although Briones was a juvenile, he was only barely—he was over seventeen years and eleven months old when the murder occurred—and he continued to commit violent crimes for another year and a half, stopping only when he was arrested.

After hearing from the parties, and “[u]sing the guidelines as a starting point,” the district court calculated a sentencing range of life imprisonment for Briones’s felony murder conviction without objection from counsel. The court noted that, “in addition to the presentence report, I’ve considered the Government’s sentencing memorandum, the defendant’s sentencing memorandum[,] . . . the transcript of the [original] sentencing[,] . . . the victim questionnaire and the letters on behalf of the defendant.” The court found that “[a]ll indications are that defendant was bright and articulate, he has improved himself while he’s been in prison, but he was the leader of a gang that terrorized the Salt River Reservation community and surrounding area for several years. The gang was violent and cold-blooded.” Briones “appeared to be the pillar of strength for the people involved to make sure they executed the plan [to murder the victim],” and he “was involved in the final decision to kill the young clerk.”

The court expressed that “in mitigation I do consider the history of the abusive father, the defendant’s youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs, and he’s been a model inmate up to now. However, some decisions have lifelong consequences.”

1. The dissent’s statement that Briones “expressed remorse repeatedly and at length,” *Dissenting Opinion*, p. 30, is simply not supported by the record.
Ultimately, the district court announced that, “[h]aving considered those things and all the evidence I’ve heard today and everything I’ve read . . . it’s the judgment of the Court that Riley Briones, Jr. is hereby committed to the Bureau of Prisons for a sentence of life.”

Because the federal system does not permit parole or early release from life sentences, see 18 U.S.C. § 3624, Briones’s sentence is effectively for life without the possibility of parole. See United States v. Pete, 819 F.3d 1121, 1126, 1132 (9th Cir. 2016).

Briones timely appealed.

II

The district court’s sentencing decision is reviewed for abuse of discretion, and “only a procedurally erroneous or substantively unreasonable sentence will be set aside.” United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (citing Rita v. United States, 551 U.S. 338, 341 (2007)). The factual findings underlying the sentence are reviewed for clear error. United States v. Stoterau, 524 F.3d 988, 997 (9th Cir. 2008). “When a defendant does not raise an objection to his sentence before the district court, we apply plain error review. . . .” United States v. Hammons, 558 F.3d 1100, 1103 (9th Cir. 2009) (citation omitted).

A

Briones first contends that the district court erred by calculating and using the sentencing guideline range. He argues that, in light of Miller, “a court should no longer start with a life sentence and work down, which is precisely what the district court did here.” Instead, says Briones, “a court must start from the presumption that a life sentence should be uncommon” so that using the guidelines as “the starting point was error that entitled Mr. Briones to a new sentencing.”

As the Supreme Court has repeatedly held, however, “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” and “[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” Gall v. United States, 552 U.S. 38, 49 (2007) (emphasis added) (citing Rita v. United States, 551 U.S. 338, 347–48 (2007)). Although “[t]he Guidelines are not the only consideration,” and a sentencing court “may not presume that the Guidelines range is reasonable,” the district court’s “individualized assessment based on the facts presented” must follow a correct guidelines calculation.

Briones can point to no language in Miller or subsequent case law that overrules those clear instructions. We therefore see no error in the district court following the sentencing process prescribed by the Supreme Court. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that precedent is controlling unless subsequent authority has “undercut the theory or reasoning underlying the prior . . . precedent in such a way that the cases are clearly irreconcilable.”).

B

Briones next argues that the district court erred by failing to “appropriately consider the[ ] factors” identified in Miller for sentencing juvenile offenders. He asserts that the district court “merely recite[d] ‘youth’ as a mitigating circumstance” when it was in fact required substantively to “consider the mitigating quality of youth.” He argues that the court failed to give the evidence of his rehabilitation “the weight Miller requires” and instead “focused on the facts of the case.” Briones contends that “[t]he critical question should have been whether Mr. Briones had the capacity to change” and that the district court gave “short shift” to “the evidence of [his] maturation and change in demeanor.” He also points to evidence he presented of his immaturity, dysfunctional family environment, and inability to aid in his own defense, which he says the district court “failed to properly assess” in evaluating “the hallmarks of youth that must be considered before sentencing a juvenile to spend the rest of his life in prison.”

In Miller, the Supreme Court held unconstitutional mandatory life-without-parole sentences for juvenile offenders and, in so doing, enumerated a series of factors sentencing courts should consider:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with you—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

567 U.S. at 477–78.

In Montgomery v. Louisiana, the Supreme Court elaborated upon the Miller holding to clarify that it “did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological Justifications for life without parole collapse in light of “the distinctive attributes of you.” 136 S. Ct. 718, 734 (2016) (quoting Miller, 567 U.S. at 472). Therefore, “[e]ven if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.” Id. (citation and internal quotation marks omitted). The Court concluded that “sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corrup-
tion” and that Miller “bar[s] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” Id. (citation and internal quotation marks omitted). “Miller made clear that ‘appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.’” Id. at 733–34 (quoting Miller, 567 U.S. at 479).

In light of Miller and Montgomery, we agree with Briones that the district court had to consider the “hallmark features” of youth before imposing a sentence of life without parole on a juvenile offender. We also agree that, as part of its inquiry into whether Briones was a member of the class of permanently incorrigible juvenile offenders, it had to take into account evidence of his rehabilitation. However, we disagree that the district court failed to do so.

We resolve these issues through the lenses of plain error and abuse of discretion review—plain error review because Briones failed to object at sentencing, and review for abuse of discretion because of the “significant deference” we afford district courts’ sentencing determinations. United States v. Martinez-Lopez, 864 F.3d 1034, 1043 (9th Cir. 2017) (citation omitted). Nothing in Miller or Montgomery altered these longstanding principles.

In order for a decision to constitute plain error, the error must be so obvious that a district court judge should be able to avoid the error without the benefit of an objection. See United States v. Klinger, 128 F.3d 705, 712 (9th Cir. 1997).

In the sentencing context, a district court judge abuses his discretion “only if the court applied an incorrect legal rule or if the sentence was illogical, implausible, or without support in inferences that may be drawn from facts in the record.” Martinez-Lopez, 864 F.3d at 1043 (citation omitted). Briones’ claim cannot survive this double layer of deferential review.2

The gist of Briones’s appeal is that the district court failed to make an explicit finding that Briones was “incorrigible,” that the district court failed to adequately consider the “hallmarks of youth” discussed in Miller, and that the district court did not adequately consider Briones’s rehabilitation. We are not persuaded.

There is no doubt that the “hallmarks of youth,” as they related to Briones, were considered by the court because the record is replete with references to those hallmarks, reflected in the following statements from Briones’s counsel, and encompassing rehabilitation:

• [I]f we look at the Miller hallmark of youth . . . Briones . . . showed immaturity . . .

• So what we have here is classic immaturity, the feeling of banding together to—with his friends to form a gang is—. . . something that happens to especially young guys when they are 15, 16, 17 years old, and that is a toxic thing when you deal with impetuosity and the failure to appreciate risk and consequences.

. . .

This is a hallmark of youth, the decision to join a gang, to go along with your buddies . . .

• And what is one of the hallmarks of . . . young guys as they start to mature . . . is the finding of your place in the world, and not only that finding, your identity . . . [H]e was already struggling with his identity as a Native American and how that fit beautifully on to the reservation and not so well on to the Mesa school system.

• And so part of this hallmark of youth . . . is something that either he—was not explained properly or he didn’t understand it, which indicates that—an inability to deal with the case.

. . .

So he was making bad choices because he was a teenager who didn’t understand the risks and consequences of his behavior.

. . .

Finally the Miller hallmark of youth is that a mandatory life sentence disregards the potential for rehabilitation.

. . .

So in a sense prison has been good to Riley Briones because it has changed him, allowed him to change himself, but he does not need to die in prison, Judge. He has rehabilitated himself.

(Emphases added).

Defense counsel also emphasized to the court that Briones had no write-ups in prison, and had become a family man.

The government acknowledged that Briones was “doing well in prison,” but expressed disappointment that Briones had never accepted responsibility. From the government’s perspective, Briones minimized both his role in the Subway murder and his role in the gang. The government recounted in detail testimony from co-defendants explaining that Briones was a leader of the gang, and instructed them to find and kill a potential witness to the Subway murder.

The government also pointed out that Briones was only twenty-two days shy of his eighteenth birthday when the Subway murder was committed, that Briones continued his crime spree for another eighteen months, and that Briones

2. Our colleague in dissent criticizes the majority for following this rule. See Dissenting Opinion, p. 30 (objecting to the reference to reasonable inferences from the record).
scraped gang graffiti into his cell door three years after the Subway murder. According to the government, Briones’s actions were “not indicative of an individual who is so immature that he didn’t know what he was doing.” The government argued that Briones’s conduct was not sufficiently mitigating to warrant a change in Briones’s sentence.

After hearing from defense counsel and the government, the court demonstrated that it had heard and considered all the information presented and remarks made during the sentencing hearing, stating:

Well, in mitigation I do consider the history of the abusive father, the defendant’s youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs, and he’s been a model inmate up to now.3

Nevertheless, the judge determined that after considering “all the evidence . . . and everything the judge had read,” a life sentence for Briones was warranted.

Admittedly, the district court did not explain at length why consideration of Briones’s youth failed to persuade the court to impose a sentence of less than life imprisonment. But he was not required to do so. Nothing in the Miller case suggests that the sentencing judge use any particular verbiage or recite any magic phrase. See Montgomery, 136 S. Ct. at 735 (noting that Miller did not require trial courts to make a finding of fact regarding a child’s incorrigibility). Rather, in the Supreme Court’s own words, the sentencing judge is “require[d] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Miller, 567 U.S. at 480. We can rest assured that the district court judge followed this mandate because he said so on the record—that he had considered everything he heard and read in conjunction with the sentencing hearing, including counsel’s impassioned arguments regarding how the “hallmarks of youth” particular to Briones counseled against imposition of a life sentence.4

Fairly read, Briones’s statements could reasonably be interpreted as not taking responsibility for his prior criminal activity, in contravention of one of the basic tenets of rehabilitation. See, e.g., In re Arrotta, 208 Ariz. 509, 515 (2004) (en banc) (“Accepting responsibility for past misdeeds constitutes an important element of rehabilitation. . . .”). As we explained in United States v. Carty, 520 F.3d 984, 995 (9th Cir. 2008) (en banc), when the district court has listened to and considered all the evidence presented, the district court is not required to engage in a soliloquy explaining the sentence imposed.

In Rita, 551 U.S. at 355, the Supreme Court, also recognized that brevity does not equal error in the sentencing context. Upholding a sentence against a challenge that the judge’s statement of reasons was too brief, the Supreme Court observed:

In the present case the sentencing judge’s statement of reasons was brief but legally sufficient. . . . The record makes clear that the sentencing judge listened to each argument. The judge considered the supporting evidence [and] simply found these circumstances insufficient to warrant a [lower sentence]. . . . He must have believed that there was not much more to say.

Id.

The Supreme Court “acknowledge[d] that the judge might have said more” but explained that where “the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.” Id. at 359.

Reviewing for plain error, we conclude that the sentencing remarks in this case fell well within the contours articulated by the Supreme Court in Rita, reflecting the judge’s consideration of and reliance upon the record. See id. at 358–59; see also United States v. Kleinman, 880 F.3d 1020, 1041 (9th Cir. 2018), as amended (“A sentencing judges does not abuse its discretion when it listens to the defendant’s arguments and then simply finds the circumstances insufficient to warrant a [lower sentence]. The court listened to [defendant’s] arguments, stated that it reviewed the statutory sentencing criteria, and imposed a within-Guidelines sentence; failure to do more does not constitute plain error.”)5 (citations and internal quotation marks omitted).

On this record, we cannot honestly say that the district court’s imposition of a sentence of life imprisonment was “illogical, implausible, or without support in inferences that may be drawn from facts in the record.” Martinez-Lopez, 864 F.3d at 1043 (citation omitted). In other words, no error occurred and without error there can be no plain error. See Puckett v. United States, 556 U.S. 129, 135 (2009) (explaining that “there must be an error” before plain error review is invoked).

Perhaps the outcome of this appeal would be different if we were reviewing de novo. But we are not reviewing de novo. We are reviewing through the doubly deferential prisms

3. These detailed arguments definitely rebut the dissent’s “suggestion” that the “district court may have misunderstood the nature of the inquiry Briones was asking it to make.” Dissenting Opinion, p. 29. Our colleague would have preferred different phrasing from the district court, see id., pp. 29–30, but no such requirement can be gleaned from Miller or Montgomery.

4. Our colleague in dissent would have the district court expound more on its reasoning, to the extent of remanding for the district court to do so. See Dissenting Opinion, pp. 31–32. Tellingly, no case authority is cited to support this proposition. Indeed, Miller and Montgomery stand for the exact opposite premise. See Montgomery, 136 S. Ct. at 735 (noting that Miller imposed no factfinding requirement).

5. This authority negates the dissent’s argument that the sentencing judge “failed to provide an adequate explanation of its sentence under the same standard that would apply to any sentencing.” Dissenting Opinion, p. 35. Under the applicable standard, the sentencing judge’s remarks were adequate. See Kleinman, 880 F.3d at 1041.
May 18, 2018

CALIFORNIA DAILY OPINION SERVICE

NINTH CIRCUIT COURT OF APPEAL

4667

of abuse of discretion and plain error standards of review.\(^6\)

With those standards of review firmly in mind, we conclude that the district court’s pronouncement of sentence was adequate.\(^7\) See Rita, 551 U.S. at 358; see also Carty, 520 F.3d at 995; Kleiman, 880 F.3d at 1041.

Our colleague in dissent relies upon the unpublished disposition of United States v. Orsinger, 698 F. App’x 527 (9th Cir. 2017) to support the argument that the district court should have said more. Not only is this case non-precedential and non-binding, it is not even persuasive. In Orsinger, we affirmed a sentence for the same reason we should affirm the sentence in this case—because of the deference we afford sentencing courts under the abuse of discretion standard of review. See id. at 527 (referencing the judge’s choice between “two permissible views of the evidence”); see also Gall v. United States, 522 U.S. 38, 51 (2007) (discussing the deference due to a district court’s sentencing decision).

Ultimately, the majority is of the view that affirming the sentence imposed by the district court conforms to our precedent and that of the United States Supreme Court. In the cogent words of our esteemed colleague Judge Farris, “[m] y [colleague] and I differ on what is the appropriate appellate function. He would retry. I am content to review.” Li v. Ashcraft, 378 F.3d 959, 964 n.1 (9th Cir. 2004).

III

Briones makes two further arguments that he is categorically ineligible for a life-without-parole sentence, implying that we should instruct the district court on remand that he may not receive that sentence under any review of the record. First, he argues that a life sentence may not be imposed “on a juvenile offender who did not actually kill,” so he may not receive that sentence because he was not the gunman. Second, he argues that the Eighth Amendment prohibits life sentences for juvenile offenders entirely.

Both arguments are foreclosed by Miller and Montgomery. Montgomery specifically observed that “Miller . . . did not bar a punishment for all juvenile offenders,” and that although life without parole is now limited to “the rare juvenile offender,” those rare offenders “can receive that . . . sentence.” Montgomery, 136 S. Ct. at 734. Miller itself involved a defendant who did not fire the bullet that killed the victim. Miller, 567 U.S. at 478. The Supreme Court did not say that he could not be sentenced to life without parole, but only that “a sentence should look at” mitigating facts of youth “before depriving [the defendant] of any prospect of release from prison.” Id. Given that Miller and Montgomery expressly envision that some juveniles may be sentenced to life without parole, including those who did not actually “fire the bullet,” the district court could still constitutionally sentence Briones to life in prison.

AFFIRMED.

O’SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

As the majority opinion’s detailed recitation of the facts makes clear, Riley Briones, Jr., participated in a cold-blooded murder and was a leader in a vicious gang, see Majority Op. Part I.A, so it is not difficult to understand why the district court considered a severe sentence appropriate. Notwithstanding the grievous nature of the crimes, however, the court was required to follow the Supreme Court’s holding that the Eighth Amendment bars life-without-parole sentences “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (citing Miller v. Alabama, 567 U.S. 460 (2012)).

I agree with the majority that nothing in Montgomery or Miller indicates that Briones is categorically ineligible for a life sentence simply because he is a juvenile who did not pull the trigger, see Majority Op. Part III, and I agree that the district court was correct to begin its sentencing process by calculating the Sentencing Guidelines range, see id. Part II.A. I cannot agree, however, with the majority’s holding that the district court sufficiently considered Briones’s claim that he was not in that class of rare juvenile individuals constitutionally eligible for a life-without-parole sentence. See id. Part II.B.

The majority reads too much into the district court’s cursory explanation of its sentence, and it divines that the district court must have adopted the rationale for its sentence suggested by the government on appeal. Although a sentencing court need not pedantically recite every fact and legal conclusion supporting its sentence, it must provide enough explanation for a court of appeals to evaluate whether or not the decision to reject a defendant’s argument is consistent with law. The sparse reasoning of the district court in this case gives me no such assurance.

I respectfully dissent from Part II.B of the opinion and would remand for the limited purpose of permitting the district court properly to perform the analysis required by Miller and Montgomery.

I

The difficult question raised in this case is whether Briones is in fact one of those “rarest of juvenile offenders . . . whose
crimes reflect permanent incorrigibility.” Montgomery, 136 S. Ct. at 734. Without any evident ruling on that question, the district court imposed a life sentence on Briones. As the majority indicates, because there is no parole in the federal system, that “sentence is effectively for life without the possibility of parole.” Majority Op. at 10.

A

The majority is comfortable deferring to the district court’s sentence because the court considered some of the “hallmark features” of youth identified by the Supreme Court in Miller, 567 U.S. at 477; see Majority Op. at 13–15. I agree that the court did so, which we know because it expressly said it considered “the defendant’s youth, immaturity, [and] his adolescent brain at the time [of the crime].”

But to leave the analysis at that is to misunderstand the nature of Briones’s challenge to a life sentence and the importance of Montgomery’s clarification of Miller. In Miller, the Supreme Court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” explaining that a sentencing court must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” 567 U.S. at 479–80. Left at that, Miller could be understood merely as a procedural requirement, mandating that sentencing courts must consider certain hallmark characteristics of youth and that they must be permitted to impose a sentence less than life. If that were all Miller meant, the district court likely would have complied with its dictates.

But the Supreme Court made clear in Montgomery that Miller stood for more. Beyond procedural boxes to check, Miller recognized a substantive limitation on who could receive a life sentence:

Miller . . . did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.

Montgomery, 136 S. Ct. at 734 (emphasis added) (internal quotation marks and citation omitted). In light of Montgomery, we know that “sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption” and that Miller “bars life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” Id. (emphasis added) (internal quotation marks omitted).

The heart of Briones’s argument before the district court was that he could not be sentenced to life because he is not irreparably corrupt or permanently incorrigible. The “critical question” before the district court, then, was whether Briones had the “capacity to change after he committed the crimes.” United States v. Pete, 819 F.3d 1121, 1133 (9th Cir. 2016).

B

Unfortunately, we cannot know whether the district court answered that question because there is nothing in the record that allows us to confirm that the court even considered it.

A sentencing court must, “at the time of sentencing, . . . state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c). In elaborating on that statutory command, the Supreme Court has explained that “[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” Rita v. United States, 551 U.S. 338, 356 (2007). “[W]here the defendant or prosecutor presents nonfrivolous reasons for imposing a [non-Guidelines] sentence, . . . the judge will normally . . . explain why he has rejected those arguments.” Id. at 357; see also United States v. Carty, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) (“A within-Guidelines sentence ordinarily needs little explanation unless a party has . . . argued that a different sentence is otherwise warranted.” (emphasis added)).

I

Unlike the majority, I am not satisfied that the district court “set forth enough to satisfy the appellate court that he has considered the parties’ arguments.” Rita, 551 U.S. at 356. If anything, the record suggests that the district court misunderstood the applicable legal rule of Miller.

In explaining its decision to impose a life sentence, the district court indicated that it had “consider[ed] the history of [Briones’s] abusive father, [Briones’s] youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs, and that he’s been a model inmate up to now.” The court seemingly found those facts—which it considered to be “mitigation”—outweighed by the awfulness of the murder, Briones’s role in it, and his leadership in a “violent and cold-blooded” gang. “Having considered those things,” the district court imposed a “sentence of life.”

All of those considerations are indeed relevant to selecting a proper sentence based on the sentencing factors of 18

8. Montgomery was decided only two months before the district court resen...
U.S.C. § 3553(a). But they are not directly responsive to Briones’s argument arising out of Miller that he is not within the class of the rare juvenile offenders who are permanently incorrigible and hence constitutionally eligible for a life sentence. The question is not merely whether Briones’s crime was heinous, nor whether his difficult upbringing mitigated his culpability. It is whether Briones has demonstrated “irreparable corruption,” Montgomery, 136 S. Ct. at 734 (quoting Miller, 567 U.S. at 479–80), which requires a prospective analysis of whether Briones has the “capacity to change after he committed the crimes,” Pete, 819 F.3d at 1133.

Nothing in the district court’s explanation of its sentence bears directly on the question of whether Briones is irreparably corrupt. If anything, the sentencing transcript reveals factual findings that suggest Briones has demonstrated a capacity to change. The district court observed that Briones has “been a model inmate” and that he “has improved himself while he’s been in prison.” Perhaps, despite that promising behavior, the district court could have determined that countervailing evidence indicated that Briones is permanently incorrigible. But the transcript does not indicate that the district court made such determination.

More troubling, the transcript suggests that the district court may have misunderstood the nature of the inquiry Briones was asking it to make. Miller “rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth,” which the Supreme Court has instructed includes “the vast majority of juvenile offenders.” Montgomery, 136 S. Ct. at 734. Yet the district court only considered the Miller hallmarks of youth as “mitigation,” suggesting that it started from the inverted assumption that most juvenile offenders are eligible for life sentences and that Briones’s evidence could only mitigate from that. If the district court fully grappled with Miller’s rule, one would think it would have spoken of “aggravating” evidence rather than “mitigation.” Moreover, in explaining that Briones’s crime justified a life sentence because “some decisions have lifelong consequences,” the district court suggested it misunderstood Miller entirely. The point of Miller is that “juveniles have diminished culpability and greater prospects for reform.” 567 U.S. at 471. That is why the sentencing analysis must be forward-looking and address the “capacity to change,” Pete, 819 F.3d at 1133, not the static characteristics of the juvenile defendant at the moment of his criminal decisions. In fact, there are no forward-looking statements at all from the district court in its sentencing colloquy; the stated basis for the sentence was entirely retrospective.

To cure the deficiencies in the district court’s explanation of the sentence imposed, the government asks us to infer that the district court must have found Briones incorrigible based on a lack of candor when he testified at the resentencing hearing. The majority jumps at this invitation, adopting the government’s position to observe that “Briones’ statements could reasonably be interpreted as not taking responsibility for his prior criminal activity, in contravention of one of the basic tenets of rehabilitation.” Majority Op. at 19 (emphasis added).

The equivocal nature of the majority’s statement is telling. Perhaps the district court could have thought that Briones failed to take responsibility for his actions, but nowhere in the district’s court’s statement of reasons for the sentence did it say as much. Although the government and the majority offer one plausible interpretation of Briones’s testimony, it is hardly the only one. In fact, when I read the transcript, I see much that could support a contrary finding that Briones expressed remorse repeatedly and at length.

Briones expressed regret for his actions. He admitted the key facts of the murder and subsequent crimes and admitted that “it’s probably my fault when I thought about it.” He explained that he regularly asks himself “why didn’t I do something at that time, why . . . didn’t I stop myself way before that, why didn’t I do something at the court?” He explained that “the thing that haunted me so much about just living in prison was that” the murder victim was “a young Christian man,” and that it “haunts me to have that on my hands.” And he said, “I want to express remorse, I want to express grief.”

Briones also expressed sympathy for those he had harmed. For instance, he explained that he did not believe the victim’s family could ever forgive him because he was responsible for “a great offense that . . . is unrepaired.” He explained that “now that I’m older . . . I witness not just in my own life people murdered and their killers get to go home,” and he can “see[] people in pain when they’ve gone through their loss, [and] all of this had made me not only sympathize but to empathize with all of it.” He said, “I know I have to apologize for everything and I apologize all the time to my family . . . , and my apology goes out . . . to the [victim’s] family.”

I do acknowledge that there are portions of the transcript from which one could infer a lack of candor. It is true that Briones’s testimony was not crisp and eloquent. And it is true that he continued to say that he “didn’t think myself a leader” in the gang and that he continued to deny that the plan from the beginning was to murder the Subway clerk.

Perhaps, hearing all the testimony and weighing the countervailing inferences, the district judge could have concluded that Briones was insufficiently honest or that he failed to take responsibility for his crimes. Perhaps those findings could be evidence of incorrigibility.

But the district court never said any of that. All the reasons that it did give for the sentence were about the nature of the crime, not the subsequent lack of remorse or acceptance of responsibility. Reading a cold transcript, the majority is willing to conclude that Briones “never actually took responsibility for any of the crimes of which he was convicted.” Majority Op. at 8. I am not willing to reach such a critical factual conclusion based on an ambiguous transcript, especially when the district court made no such factual finding.
The majority accuses me of retrying Briones’s case rather than reviewing it as an appellate court should. See Majority Op. at 22. But it is the majority that has invented a basis for the sentence which cannot be found in the record. The reason courts of appeals accord great deference to a district court’s sentencing decision is that “[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than . . . the appeals court.”

Rita, 551 U.S. at 357–58. Unlike the majority, I would take advantage of that expertise by remanding for an actual determination of Briones’s incorrigibility rather than attempting to divine one by reading a transcript through squinted eyes.

C

Another aspect of this case that gives me pause is that it is not obvious whether or not Briones fits within the class of juvenile offenders constitutionally eligible for a life sentence. If the only plausible reading of the record were that Briones is incorrigible, I could more easily assure myself that the district court reached that conclusion even though it did not specifically respond to the Miller argument. Looking at the record holistically, however, I cannot say that it necessarily betrays permanent corruption.

After Graham v. Florida, 560 U.S. 48 (2010), the only juvenile offenders eligible for a life sentence are those who committed a homicide. Criminal homicides will invariably be odious crimes, but the Supreme Court nonetheless instructed that only “the rarest of juvenile offenders” may receive a life sentence under the Eighth Amendment. Montgomery, 136 S. Ct. at 734. Here, we have a juvenile felony murder offender who helped to plan a robbery-murder, who drove the getaway car, and who then was a leader in a series of subsequent violent crimes. But like one of the defendants in Miller itself, Briones “did not fire the bullet that killed” the victim; and like the other defendant in Miller, although he was involved in “a vicious murder,” Briones had a difficult upbringing replete with substance abuse. 567 U.S. at 478–79. Moreover, in this instance, we have a defendant whom even the district court called a “model inmate,” which surely goes to the question of “whether [the defendant] has changed in some fundamental way since” the crime. Pete, 819 F.3d at 1133. The evidence on incorrigibility is therefore mixed, and we are ill-suited as an appellate court to say that a finding of incorrigibility is the only reasonable one.

D

As a secondary basis for affirming, the majority leans heavily on the highly deferential plain error standard of review. See Majority Op. at 20. In arguing that such review should apply to this case, the majority analogizes to cases involving defendants making purely procedural arguments on appeal that district courts insufficiently explained otherwise permissible sentences.

But here, Briones is not objecting merely to a deficient explanation. Rather, his claim is substantive: that he is constitutionally ineligible for a particular sentence under Miller, a claim he did squarely argue before the district court, at length. The court’s failure properly to explain its sentence requires remand not because it was procedural error, but rather because such failure prevents us from being able properly to review Briones’s substantive claim. As the majority acknowledges, a district court’s sentence is invalid “if the court applied an incorrect legal rule.” United States v. Martinez-Lopez, 864 F.3d 1034, 1043 (9th Cir. 2017) (en banc); see Majority Op. at 14. Because the record does not allow us to determine whether the court did apply the correct legal rule, we should remand for that limited purpose.

II

A

I share the majority’s concern that we ought not to conjure procedural sentencing hurdles unsupported by law. I am especially cognizant of this concern because other courts have read Miller and Montgomery to impose special procedural requirements well beyond what those opinions actually require. E.g., Commonwealth v. Batts, 163 A.3d 410, 415–16 (Pa. 2017) (“recogniz[ing] a presumption against the imposition of a sentence of life without parole for a juvenile offender” that may be rebutted only if the government proves, “beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation”).

But the district court’s explanation of the sentence may be faulty without requiring that it utter any “magic phrase” to justify its sentence, Majority Op. at 18, and we need impose no special procedures simply because Briones was a juvenile when he committed the murder. Instead, I would simply enforce the requirements of 18 U.S.C. § 3553(c) so that we may properly evaluate Briones’s Miller claim on appeal.

The error here was not that the district court failed to apply some procedure special to juvenile offenders. Rather, the court failed to provide an adequate explanation of its sentence under the same standard that would apply to any sentencing. It erred because Briones argued that he could not constitutionally be given a life sentence, his arguments were “not frivolous,” and the court did not squarely “address any of them, even to dismiss them in shorthand.” United States v. Trujillo, 713 F.3d 1003, 1010 (9th Cir. 2013). Remanding for a new sentencing here would have no bearing on a weighted the 18 U.S.C. § 3553(a) sentencing factors, our case law is not clear regarding what the proper standard of review would be. As the majority contends, in some of those cases, we have reviewed for plain error. See, e.g., United States v. Kleinman, 880 F.3d 1020, 1040–41 (9th Cir. 2017); United States v. Valencia-Barragan, 608 F.3d 1103, 1108 (9th Cir. 2010). As happens too often, however, our court has not been consistent. See, e.g., United States v. Trujillo, 713 F.3d 1003, 1008–11 & n.3 (not applying plain error review in a case where “[t]he district court did not address” the defendant’s sentencing arguments). Because these cases are not relevant to considering Briones’s substantive claim, however, we need not resolve this potential intra-circuit split.

9. Even if Briones were making a purely procedural objection based on the sufficiency of the district court’s explanation of how it
case in which the defendant does not present a credible argument under *Miller* or one in which the district court explicitly confronted a *Miller* argument about the defendant’s incorrigibility.

**B**

Comparing this case to another illustrates that we can reasonably expect more of the district court at sentencing without our being overly pedantic. In another case raising a *Miller* claim, submitted to our panel the same day that Briones’s case was argued, the defendant-appellant had committed four murders as a juvenile—including two while facing trial—and in the process had disfigured or dismembered and then buried the victims’ bodies. See United States v. Orsinger, 698 F. App’x 527, 527 (9th Cir. 2017) (unpublished). Two of the victims were a 63-year-old grandmother and her nine-year-old granddaughter, and the defendant had killed the little girl by hand, crushing her head with rocks. We affirmed the life sentence because the district court made clear it had grappled with the *Miller* claim. See id.

The fact that another defendant committed even more monstrous crimes than did Briones does not ameliorate the tragedy of an innocent clerk’s death or the terror that Briones’s gang inflicted on his community. But in that second case with four gruesome murders, and where the defendant had continued to exhibit violence while incarcerated, the sentencing judge nevertheless properly evaluated the objection to a life sentence under *Miller*. That judge “recognize[d] that *Miller* permits life sentences for juvenile offenders only in ‘uncommon’ cases” and “made a finding that [the defendant] did indeed fit within that ‘uncommon’ class of juvenile offenders” to justify imposition of a life sentence. *Id.* (quoting *Miller*, 567 U.S. at 479).

That is not to suggest that the district judge in Briones’s case could not justifiably impose the same sentence. It only demonstrates that—even in a case that much more obviously compels a conclusion that the defendant is incorrigible—a district judge can properly address a *Miller* claim without invoking any magic phrase. I would require the same of the district court in this case.

**III**

Although I concur in Parts I, II.A, and III of the majority opinion, I must respectfully dissent from Part II.B and the ultimate judgment. I would vacate the judgment of the district court and remand for resentencing.
Concurrence by Judge Gould


COUNSEL

Charles S. LiMandri (argued), Paul M. Jonna, Teresa L. Mendoza, and Jeffrey M. Trissell, Freedom of Conscience Defense Fund, Rancho Santa Fe, California; Horatio Mihet (argued), Liberty Counsel, Orlando, Florida; Catherine W. Short, Life Legal Defense Foundation, Ojai, California; Thomas Breicha and Peter Breen, Thomas More Society, Chicago, Illinois; Nicolaie Cocis, Law Office of Nic Cocis and Associates, Murrieta, California; for Defendants-Appellants.


OPINION

GOULD, Circuit Judge:

Plaintiffs1 sued Defendants2 in the federal district court for the Northern District of California alleging that Defendants had used fraudulent means to enter their conferences and gain meetings with their staff for the purpose of creating false and misleading videos that were disseminated on the internet. Defendants moved to dismiss Plaintiffs’ claims under Federal Rule of Civil Procedure 12(b)(6) and under California’s Strategic Lawsuit Against Public Participation (“anti-SLAPP”) statute. The district court denied both motions, and Defendants appeal the denial of the anti-SLAPP motion.3 We affirm.

In the district court, Defendants the Center for Medical Progress (CMP), BioMax Procuement Services LLC (BioMax), Daleiden, and Lopez moved to strike Plaintiffs’ claims under California Code of Civil Procedure § 425.16, commonly known as the anti-SLAPP law. On their motion to dismiss for failure to state a claim, Defendants argued that Plaintiffs had not alleged enough factual content to state the necessary elements for each of their named claims. On their motion based on the anti-SLAPP law, Defendants argued that Plaintiffs’ lawsuit is an attempt to silence and punish CMP and other Defendants for gathering information and publishing their findings. Defendants argued that Plaintiffs’ state law claims arise out of their undercover investigative journalism, which falls within the scope of the anti-SLAPP statute. They further argued that Plaintiffs did not have a reasonable probability of prevailing on any of their state law claims because Defendants were entitled to “judgment as a matter of law.”

The district court denied both Defendants’ motion to strike under the anti-SLAPP law and their motion to dismiss for failure to state a claim. Because Defendants appeal only denial of their anti-SLAPP motion, we address only that issue on this interlocutory appeal.

In ruling on and denying Defendants’ motion to strike, the district court assumed that Plaintiffs’ lawsuit arose from acts in furtherance of Defendants’ rights to free speech, but found that Plaintiffs showed a probability of succeeding on the merits. To succeed on their anti-SLAPP motion, Defendants had to show both that their acts arose from behavior aimed at furthering their First Amendment speech rights, and also that Plaintiffs had shown no probability of success on their claims. Because Defendants failed to prevail on the second element, they lost their anti-SLAPP motion.

The district court reasoned that “defendants repeat the identical arguments they made on their motions to dismiss,” and that Defendants made no evidentiary-based argument to undermine Plaintiffs’ probability of success other than the declaration from Daleiden. Daleiden’s declaration only discusses his work as an investigative journalist. The district court said that because Defendants attacked “pleading deficiencies” and argued that Defendants were entitled to “judgment as a matter of law,” it limited its review to the adequacy of Plaintiffs’ pleadings. The district court therefore denied Defendants’ motion to strike for the same reasons it had denied Defendants’ motion to dismiss. The district court also rejected the evidentiary-based arguments Defendants made

1. Plaintiffs are Planned Parenthood Federation of America, Inc. (PPFA); Planned Parenthood: Shasta-Diablo, Inc., dba Planned Parenthood Northern California (Planned Parenthood Northern California or PPNC); Planned Parenthood Mar Monte, Inc. (PPMM); Planned Parenthood of the Pacific Southwest (PPPSW); Planned Parenthood Los Angeles (PPLA); Planned Parenthood/Orange and San Bernardino Counties, Inc. (PPOSBC); Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties, Inc. (PPSBVSLO); Planned Parenthood Pasadena and San Gabriel Valley, Inc. (PPPSGV); Planned Parenthood of the Rocky Mountains (PPRM); Planned Parenthood Gulf Coast (PPGC); and Planned Parenthood Center For Choice (PPCFC) (collectively Planned Parenthood).

2. Defendants are the Center for Medical Progress (CMP), BioMax Procurement Services LLC (BioMax), David Daleiden (aka “Robert Sarkis”) (Daleiden), Troy Newman (Newman), Albin Rhomberg (Rhomberg), Phillip S. Cronin (Cronin), Sandra Susan Merritt (aka “Susan Tennenbaum”) (Merritt), and Gerardo Adrian Lopez (Lopez).

3. Defendants also argue that Plaintiffs did not sufficiently allege the fifteen claims of their complaint. Those arguments and our conclusions related thereto are addressed in a separate contemporaneously filed memorandum disposition.
for the first time in their Reply brief supporting their motion to strike.

The district court found that Merritt’s separate motion to strike raised two evidence-based arguments: (1) that the location of the lunch meetings with Drs. Nucatola and Gatter preclude a finding that the communications in those meetings were “confidential” and (2) that Merritt is exempt from liability for violations of California Penal Code §§ 632 and 634 because she reasonably believed that Plaintiffs were committing crimes of violence against unborn babies. The district court concluded that there were questions of fact regarding whether there was a reasonable expectation of privacy at the lunch meetings with Drs. Nucatola and Gatter. The district court also concluded that Merritt’s exemption defense was an affirmative defense and that the parties’ competing citations to Merritt’s deposition demonstrated that there was a question of fact as to the reasonableness of her beliefs. The district court denied Merritt’s anti-SLAPP motion. This appeal timely followed.

II

We review dismissals under Federal Rule of Civil Procedure 12(b)(6) and the district court’s conclusions of law de novo. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003); Metabolife Intern., Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). We have jurisdiction to review the denial of an anti-SLAPP motion under the collateral order doctrine. Hilton v. Hallmark Cards, 599 F.3d 894, 900 (9th Cir. 2010).

III

Defendants argue that, once they had shown that Plaintiffs’ suit arose from Defendants’ acts in furtherance of their rights of petition or free speech, Plaintiffs were required to demonstrate a probability of prevailing on the challenged claims, and that Plaintiffs did not meet this burden because they did not provide rebutting evidence. Plaintiffs argue that for Defendants to succeed on their anti-SLAPP motion, Defendants had to show that Plaintiffs did not allege a legally sufficient claim or that Plaintiffs did not produce evidence showing a probability that Plaintiffs would prevail. Plaintiffs contend that Defendants’ anti-SLAPP motion challenged the legal sufficiency of Plaintiffs’ complaint and was correctly denied on those grounds, using the Federal Rule of Civil Procedure 12(b)(6) standard. Plaintiffs specifically argue that for the anti-SLAPP requirement of showing a probability of prevailing by evidence to apply, Defendants had to challenge their complaint on factual grounds.

In California, “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b)(1). The district court, in making its decision, considers the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. Id. (b)(2). In discussing how to conduct this analysis, we have held:

Once it is determined that an act in furtherance of protected expression is being challenged, the plaintiff must show a “reasonable probability” of prevailing in its claims for those claims to survive dismissal: § 425.16(b); Wilcox v. Superior Court, 27 Cal.App.4th 809, 33 Cal. Rptr.2d 446, 455 (1994). To do this, the plaintiff must demonstrate that “the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” Wilcox, 33 Cal.Rptr.2d at 454.

Metabolife, 264 F.3d at 840. We there concluded that a defendant’s anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for his or her claims or when no sufficiently substantial evidence exists to support a judgment for him or her. Id.

The degree to which the anti-SLAPP provisions are consistent with the Federal Rules of Civil Procedure has been hotly disputed. Metabolife emphasized that some portions of California’s anti-SLAPP law have been found to not conflict with the Federal Rules of Civil Procedure—such as § 425.16(b) allowing a special motion and § 425.16(c) providing fees and costs. 264 F.3d at 845. But, Metabolife also explained that courts in our circuit have found that § 425.16(f), requiring filing 60 days after the complaint was filed or later within the district court’s discretion, and § 425.16(g), issuing an automatic stay of discovery, conflicted with the Federal Rules of Civil Procedure. 264 F.3d at 845–46 (comparing U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 970–73 (9th Cir. 1999) with Rogers v. Home Shopping Network, Inc., 97 F.Supp.2d 973, 980 (C.D. Cal. 1999)). The Metabolife court concluded that an automatic stay on discovery would conflict with Federal Rule of Civil Procedure 56, and was inapplicable in federal court. Id. at 846 (“the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspect of Rule 56” and therefore, § 425.16(f) and (g) could not apply in federal court.).

In Z.F. v. Ripon Unified School District, a non-precedential unpublished opinion, we stated: “If a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the analysis is made under Fed. R. Civ. P. 8 and 12 standards; if it is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted.” 482 F. App’x 239, 240 (9th Cir. 2012). Although we are not bound by Z.F., we conclude that its reasoning is persuasive and we hereby adopt it. In order to prevent the collision of California state procedural rules with federal procedural rules, we will review anti-SLAPP motions to strike under different standards depending
on the motion’s basis. Our interpretation eliminates conflicts between California’s anti-SLAPP law’s procedural provisions and the Federal Rules of Civil Procedure. *Id.* Taken together, *Metabolife* and our ruling today adopting the rule of *Z.F.* support the idea that if Defendants’ anti-SLAPP motion was based on legal deficiencies, Plaintiffs were not required to present prima facie evidence supporting Plaintiffs’ claims. Requiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-SLAPP law into a motion for summary judgment without providing any of the procedural safeguards that have been firmly established by the Federal Rules of Civil Procedure. That result would effectively allow the state anti-SLAPP rules to usurp the federal rules. We could not properly allow such a result.

Before the district court, Defendants agreed that an anti-SLAPP motion “may be premised on legal deficiencies inherent in the plaintiff’s claim, analogous to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).” “If a defendant makes a special motion to strike based on alleged deficiencies in the plaintiff’s complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney’s fee provision of § 425.16(c) applies.” *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 983 (C.D. Cal. 1999). We agree with the reasoning and result in the district court’s Rogers decision. Defendants’ Motion to Strike explicitly incorporated by reference the arguments in Defendants’ Motion to Dismiss. Defendants must have understood that the district court would be conducting a Rule 12(b)(6) analysis and supported their motion with arguments regarding Plaintiffs’ pleading. Plaintiffs responded in kind, defending the legal sufficiency of their pleading.

In their reply before the district court, Defendants argued for the first time that Plaintiffs had not met their burden of presenting evidence showing that their claims have minimal merit. Although we have never ruled on this issue, some district courts have accepted Defendants’ view. *See Carr v. Asset Acceptance, LLC*, No. CV F 11-0890 LJG GSA, 2011 WL 3568338, at *5–6 (E.D. Cal. Aug. 12, 2011) (“piercing” the pleadings and requiring an evidentiary showing at the pleading stage to survive an anti-SLAPP motion). Conversely, some other district courts have gone the opposite way, rejecting Defendants’ view that Plaintiffs had to submit evidence showing the merit of their claims when the challenge was only as to the sufficiency of the pleadings. In any event, having now considered this issue in-depth, and having carefully reviewed the record, we reject Defendants’ view. In defending against an anti-SLAPP motion, if the defendants have urged only insufficiency of pleadings, then the plaintiff can properly respond merely by showing sufficiency of pleadings, and there’s no requirement for a plaintiff to submit evidence to oppose contrary evidence that was never presented by defendants.

Echoing the point we made earlier in adopting the rule of *Z.F.*, we hold that, on the one hand, when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. And, on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court. A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure while in a federal district court. In this context, if there is a contest between a state procedural rule and the federal rules, the federal rules of procedure will prevail. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (“The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law.”); *Metabolife*, 264 F.3d at 845 (“Procedural state laws are not used in federal court if to do so would result in a ‘direct collision’ with a Federal Rule of Civil Procedure.”). We conclude that the district court correctly applied a Rule 12(b)(6) standard to Defendants’ Motion to Strike challenging the legal sufficiency of Plaintiffs’ complaint, and the district court did not err in declining to evaluate the factual sufficiency of the complaint at the pleading stage.

**AFFIRMED.**

**GOULD, Circuit Judge, with whom MURGUIA, Circuit Judge, joins, concurring:**

Although the procedure followed in this case to allow an interlocutory appeal of a denial of an anti-SLAPP motion is clearly permitted by our past precedent, *Batzel v. Smith*, 333 F.3d 1018, 1025–26 (9th Cir. 2003), I write separately in this concurrence to challenge the appropriateness of our court reviewing denials of anti-SLAPP motions to strike on interlocutory appeal. I limit my comments in this separate concurrence to the issue of the propriety of interlocutory appeal upon a denial of an anti-SLAPP motion.

This case was delivered to us on interlocutory appeal. Although I previously joined in *Batzel, supra*, which permitted this interlocutory appeal procedure, I have since receded from that opinion because I now believe the interlocutory appeal of this issue is incorrect, potentially conflicts with federal procedural rules, and burdens the federal courts with unneeded interlocutory appeals. *See Travelers Cas. Ins. Co. of Am. v. Hirsch*, 831 F.3d 1179, 1186 (9th Cir. 2016) (Gould, J., concurring). In a case such as this, an interlocutory appeal should only occur if the district court certifies the case for interlocutory appeal under the normal federal rule standards. *See 28 U.S.C. § 1292(b); see Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015).
The allowance of an interlocutory appeal here leads to an absurd result: We review denials of anti-SLAPP motions but not grants of anti-SLAPP motions, although the grant of an anti-SLAPP motion is arguably a more final decision by a district court because it rids the case of the stricken claims. See Hyun v. Hummert, 825 F.3d 1043, 1047 (9th Cir. 2016) (not permitting an interlocutory appeal of a grant of an anti-SLAPP motion to strike because there is no loss of a right as accompanies a denial of an anti-SLAPP motion, the right to be immune from suit). But see DC Comics v. Pacific Pictures Corp., 706 F.3d 1009, 1015–16 (9th Cir. 2013) (allowing an interlocutory appeal of the denial of a motion to strike).

Denial of an anti-SLAPP motion does not meet the normal collateral order standard. Collateral orders are a “small class” of rulings that do not conclude litigation, but that resolve claims separable from the action. Will v. Hallock, 546 U.S. 345, 355 (2006) (denying review of an immunity defense on interlocutory appeal because “[t]he judgment bar at issue in this case has no claim to greater importance than the typical defense of claim preclusion.”). To meet the collateral order standard, the district court’s decision being appealed must be (1) conclusive, (2) resolve important questions completely separate from the merits, and (3) render such questions effectively unreviewable on appeal from a final judgment in the underlying action. Batzel, 333 F.3d at 1024–25. These rules are stringent. Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994).

The denial of an anti-SLAPP motion does not resolve important questions completely separable from the merits, it in fact requires the court to directly assess the merits of Plaintiffs’ complaint. See Cal. Civ. Proc. Code § 425.16(b) (requiring a “probability that the plaintiff will prevail” after considering pleadings and affidavits); Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1190–91 (9th Cir. 2013) (Watford, J., dissenting) (“Orders granting or denying anti-SLAPP motions don’t satisfy the second condition of this test, because California’s anti-SLAPP statute requires courts to assess the merits of the action when ruling on a motion to strike.”). California procedure requires us to determine not only whether the facts alleged articulate a plausible claim, but also whether there is probability of success based on plaintiffs’ evidence. That question is inextricably intertwined with the merits of the litigation.

Anti-SLAPP motions are hybrids of motions to dismiss and motions for summary judgment. The denial of either of these motions is generally unreviewable on interlocutory appeal. See Hilton v. Hallmark Cards, 599 F.3d 894, 900 (9th Cir. 2010) (“Denials of motions to dismiss under Rule 12(b)(6) are ordinarily not appealable, even as collateral orders.”); c.f. Swint v. Chambers County Com’n, 514 U.S. 35, 43 (1995) (concluding that the denial of summary judgment was not immediately appealable). We should similarly hold here that we will not permit interlocutory appeals of denials of anti-SLAPP motions.

Not only does the denial of an anti-SLAPP motion to strike not meet the collateral order doctrine and receive special privileges compared to its federal procedural counterparts, the use of anti-SLAPP procedure in federal courts has been squarely rejected by three circuits, the D.C. Circuit, the Seventh Circuit, and the Tenth Circuit. While I do not advocate at this time for wholly removing anti-SLAPP motions practice in federal court, one of the primary drivers for allowing this practice to continue—prevention of a circuit split—has occurred despite our best efforts. See Makaeff v. Trump Univ., LLC, 736 F.3d 1180, 1184 (9th Cir. 2013) (“If we had taken this appeal en banc, and decided the other way (as our colleagues advocate in their concurrences), we would have created an inter-circuit split; a result at odds with Rule 35 of the Federal Rules of Appellate Procedure.”). Compare Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333–37 (D.C. Cir. 2015); Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1042 (N.D. Ill. 2013), aff’d, 791 F.3d 729 (7th Cir. 2015); and Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 672–73 (10th Cir. 2018) with Caba v. Pylant, 814 F.3d 701 (5th Cir. 2016).

The D.C. Circuit considered whether a federal court exercising diversity jurisdiction could apply D.C.’s Anti-SLAPP special motion to dismiss provision. See Abbas, 783 F.3d at 1333–37 (“A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act’s special motion to dismiss provision.”). The D.C. Circuit reasoned that Rule 12 already provided an avenue for a plaintiff to overcome a motion to dismiss. Id. at 1334. While not addressing the precise question I raise here, it stands to reason that if Rule 12 provides the correct procedure for overcoming a motion to dismiss, the collateral order rules we have for appealing the denial of a motion to dismiss should also apply to dismissing a California anti-SLAPP motion a fortiori. Indeed, Abbas came to the D.C. Circuit after a grant of the special motion to strike, which had ended the entire litigation. Id. at 1331–32. Given its reasoning, I do not believe that the D.C. Circuit would have reviewed the district court’s order on interlocutory appeal.

A district court in the Northern District of Illinois considered whether anti-SLAPP laws conflicted with the Federal Rules of Civil Procedure. Intercon Sols., Inc., 969 F. Supp. 2d at 1042. The court there held that “Section 525 [Washington’s anti-SLAPP statute] cannot be applied by a federal court sitting in diversity because it is in direct conflict with Federal Rules of Civil Procedure 12 and 56.” This decision was upheld on appeal to the Seventh Circuit. Intercon Sols., Inc., 791 F.3d at 729. On appeal, the Seventh Circuit noted

4. But even in the Fifth Circuit, there is disagreement about whether Texas’s anti-SLAPP motion should apply. See Caba, 814 F.3d at 720 (“[T]he TCPA [Texas’s anti-SLAPP statute] may not be applied as long as Rules 12 and 56 do not violate the Rules Enabling Act.”) (J. Graves, dissenting).

5. The Washington Supreme Court has since held Washington’s anti-SLAPP statute to be unconstitutional because it established a pre-
that there was debate over whether they could review the district court’s order on collateral review. *Id.* at 731. The court there nevertheless reviewed the case because the district court certified the order to them for interlocutory review, and they accepted. *Id.*

The Tenth Circuit decided this year that New Mexico’s anti-SLAPP statute was solely a procedural mechanism that did not apply in federal court. *Los Lobos Renewable Power, LLC*, 885 F.3d at 673. That court first considered whether the district court’s decision not to apply the anti-SLAPP provision at all was subject to collateral review. *Id.* at 664–65. The Tenth Circuit reasoned that a decision not to apply the statute at all was a decision separate and apart from the merits, but that a decision to deny an anti-SLAPP motion required the court to “determine whether the special motion to dismiss is frivolous or available on its own terms” and that those “determinations necessarily turn on the merits of the lawsuit.” *Id.* at 665. Had the district court denied the anti-SLAPP motion instead of not considering the motion at all, the Tenth Circuit likely would not have reviewed the district court’s decision on interlocutory appeal.

I find further support in a decision of the Second Circuit. The Second Circuit considered whether it had jurisdiction to review a district court’s denial of a Vermont-based anti-SLAPP motion. *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016). That court answered with a resounding “no,” reasoning that the very process by which an anti-SLAPP motion is resolved requires a review of the merits. *Id.* The *Ernst* court noted that Vermont’s anti-SLAPP statute was based on California’s anti-SLAPP statute and concluded that even if the statute was meant to provide immunity, it does not necessarily make the statute appealable. *Id.* at 121. The court held that *Johnson v. Jones*, 515 U.S. 304, 314 (1995), required that in order to meet the collateral order doctrine, the order must be “completely separate from the merits,” and that anti-SLAPP motions necessarily implicate the factual support underlying the claims—they are “inextricably intertwined.” *Id.* at 121–22.

*Intercon Solutions* is instructive here. Defendants do not seek to challenge the district court’s decision not to review its anti-SLAPP motion; they cannot. Instead, Defendants challenge the district court’s decision to deny the anti-SLAPP motion, a motion that required the court to peer into the merits of the appeal. See Cal. Civ. Proc. Code § 425.16(b). Further *Ernst*, makes the point I make here, denial of an anti-SLAPP motion is inextricably intertwined with the merits of the underlying case. Such a decision is not appropriate for interlocutory appeal.

I respectfully suggest that we should take this opportunity to fix this error in our court’s precedent with a call of the case en banc.
Norteño gang members shot at an apartment complex where members of the other gang were known to gather, hitting one person in the chest and another in the leg. In connection with these events, the People filed an information charging defendant with, among other crimes, conspiracy to transport a controlled substance in violation of section 11379, subdivision (a). Pursuant to a plea agreement, defendant pleaded no contest to this charge. As part of his sentence, the court imposed a $50 “criminal laboratory analysis fee” pursuant to section 11372.5, subdivision (a), and a $100 “drug program fee” pursuant to section 11372.7, subdivision (a).

On appeal, defendant argued that these fees were “unauthorized” — and should therefore be stricken — because: (1) he was convicted, not of a drug offense specified in the statute establishing the fees, but of conspiracy to commit one of the specified offenses; and (2) the fees are not “punishment” for purposes of the conspiracy sentencing statute — Penal Code section 182, subdivision (a) — which provides that persons convicted of conspiring to commit a felony “shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony.” (Italics added.) The Court of Appeal disagreed, concluding that the fees constitute “punishment” within the meaning of Penal Code section 182, subdivision (a). We granted defendant’s petition for review to consider this conclusion.2

DISCUSSION

Section 11372.5, subdivision (a), establishes a $50 “criminal laboratory analysis fee” for persons “convicted of a violation of” specified statutes relating to drugs, including section 11379. Section 11372.7, subdivision (a), establishes a “drug program fee,” not to exceed $150, for persons “convicted of a violation of” chapter 6 of division 10 of the Health and Safety Code, which includes section 11379. However, defendant was convicted, not of violating section 11379, but of conspiring to violate that statute, in violation of Penal Code section 182, subdivision (a)(1), which makes it a crime for persons to “conspire to” “commit any crime.” Because, as defendant argues and the People concede, neither fee statute refers to persons convicted of conspiracy to commit a crime, neither statute alone authorizes imposition of a fee for defendant’s conspiracy conviction.

Instead, the parties, like the Court of Appeal, focus on the sanctions provision of the conspiracy statute, which states in relevant part that persons convicted of conspiring to commit a felony “shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony.” (Pen. Code, § 182, subd. (a).) Based on this language,

1. All further unlabeled statutory references are to the Health and Safety Code.

2. In addition to rejecting defendant’s claim on the merits, the Court of Appeal concluded that defendant had forfeited his claim by failing to object in the trial court to the fees’ imposition. However, because defendant contends the fees are “unauthorized” — i.e., as a matter of law, they may not be imposed for his conspiracy conviction — his failure to object below does not constitute a forfeiture. (People v. Dotson (1997) 16 Cal.4th 547, 554, fn. 6 [claim that sentence is “unauthorized . . . may be raised for the first time on appeal”].)
the Court of Appeal reasoned that the dispositive question is whether the fees at issue “constitute” “punishment,” and it concluded that each fee does constitute “punishment.” Defendant agrees with the court’s statement of the dispositive question — whether the fees constitute punishment — but he disagrees with the court’s answer, arguing that the charges constitute, not punishment, but “nonpunitive administrative fee[s] . . . used to offset the costs of drug and crime labs.” In response, the People first assert, quoting from our decision in People v. Athar (2005) 36 Cal.4th 396 (Athar), that because Penal Code section 182, subdivision (a), “requires sentencing to the same extent as the underlying target offense,” the trial court properly imposed the fees “regardless of [their] nature” and whether they are “punitive is irrelevant.” The People alternatively assert that, “[e]ven if characterization of the fees is” relevant, both fees “constitute punishment” and were thus “properly imposed.”

In evaluating these opposing positions, our “fundamental task . . . is to determine the Legislature’s intent so as to effectuate the law’s purpose.” (People v. Murphy (2001) 25 Cal.4th 136, 142.) “Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning.” (Alford v. Superior Court (2003) 29 Cal.4th 1033, 1040; see also Pen. Code, § 4 [provisions of Penal Code “are to be construed according to the fair import of their terms, with a view to effect [the Penal Code’s] objects and to promote justice”].) “If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, whether the fees constitute punishment, their argument runs afoul of these rules of statutory construction. As noted above, subdivision (a) of Penal Code section 182 states in relevant part that persons convicted of conspiring to commit a felony “shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony.” (Italics added.) The plain meaning of this language appears to establish that a consequence prescribed for the offense a defendant conspired to commit — the underlying target offense — may be imposed for a conspiracy conviction only if that consequence constitutes part of “the punishment” for the underlying target offense. (Ibid.) Thus, under the plain language of Penal Code section 182, subdivision (a), whether the trial court properly imposed the fees at issue here depends on whether they are part of “the punishment” for the offense that defendant was convicted of conspiring to commit. (See People v. Hernandez (2003) 30 Cal.4th 835, 865 [“Because” Pen. Code, § 182 “refers generally to the punishment prescribed for murder in the first degree, it incorporates whatever punishment the law prescribed for first degree murder when the conspiracy was committed”]; In re Romano (1966) 64 Cal.2d 826, 829 [“punishment for conspiracy to commit a felony is the same as the punishment for the felony itself”]; People v. Superior Court (Kirby) (2003) 114 Cal.App.4th 102, 105 [language of Pen. Code, § 182 “leads us to the statutes that . . . set forth the applicable punishments for” the underlying target offense].) The People point to no ambiguity in the statutory language or anything in the legislative history that undermines this plain meaning construction.

Instead, as noted above, the People rely on our decision in Athar, but that decision does not support their argument. There, we held that sentence enhancements prescribed for a money laundering conviction apply to offenders convicted of conspiring to commit money laundering. (Athar, supra, 36 Cal.4th at p. 398.) As the People observe, toward the end of the opinion, we stated that Penal Code section 182 “requires sentencing to the same extent as the underlying target offense.” (Id. at p. 406.) However, we made this statement in the context of endorsing People v. Villela (1994) 25 Cal.App.4th 54 as insofar as it looked to whether a prescribed consequence for the underlying target offense “was a punishment” to determine if Penal Code section 182 required imposition of that consequence for conspiring to commit that offense. (Athar, at p. 406.) Moreover, earlier in the opinion, in rejecting the argument that Penal Code section 182 authorizes imposition only of “the base term” for the underlying target offense, we explained: “The statute specifically refers to the ‘punishment of that felony’ [citation] and thus includes all punishment for money laundering, including enhancements.” (Id. at p. 405, italics added.) Notably, the defendant in Athar conceded that the sentence enhancement there at issue constituted “enhanced punishment” for the underlying target offense (id. at p. 404), so the case presented no question as to whether the statute extends further to include consequences of the underlying target offense that do not constitute punishment. For these reasons, Athar does not support the view that whether a consequence constitutes punishment is irrelevant to whether Penal Code section 182 requires imposition of that consequence for a conspiracy conviction.

In light of the preceding, the question here is whether the fees at issue are part of “the punishment” “provided for” the underlying target felony — transporting a controlled substance in violation of section 11379, subdivision (a) — as those terms are used in Penal Code section 182, subdivision (a). Unfortunately, the conspiracy statute itself provides no definition of the term “punishment.” Nor have we found anything in the relevant legislative history elucidating the statute’s use of the term.

Regarding the term’s ordinary meaning, we have observed that “[c]ommonly understood definitions of punishment are intuitive: there is little dispute that additional jail time or extra fines are punishment. [Citation.] However, punishment has historically included a variety of methods limited only by human imagination . . . .” (People v. McVickers (1992) 4 Cal.4th 81, 84.) Dictionaries have typically defined the term
broadly to include any “pain, suffering, loss, confinement or other penalty inflicted on a person for a crime or offense, by the authority to which the offender is subject.” (Gunning v. People (1899) 86 Ill.App. 174, 178.) Similarly, “[a]s a legal term of art, ‘punishment’ has always meant a ‘fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.’” (Helling v. McKinney (1993) 509 U.S. 25, 38 (dis. opn. of Thomas, J), quoting Black’s Law Dict. (6th ed. 1990) p. 1234.)

“[T]he traditional aims of punishment” are “retribution or deterrence.” (People v. Alford (2007) 42 Cal.4th 749, 759.) However, a sanction does not constitute punishment merely because it has some “deterrent or retributive effect.” (In re Alva (2004) 33 Cal.4th 254, 286 (Alva)). As we have explained in the context of applying the state and federal protections against cruel and/or unusual punishments, “a sanction designed and intended only to serve legitimate nonpenal objectives is not punishment . . . simply because it may burden, inconvenience, restrict, or deter in fact.” (Ibid.) On the other hand, that a given sanction may “serve[] remedial purposes” does not establish that it is not “punishment.” (Austin v. United States (1993) 509 U.S. 602, 610 [applying the Eighth Amendment]; see People ex rel. State Air Resources Bd. v. Wilmhurst (1999) 68 Cal.App.4th 1332, 1350 [“Even assuming a fine serves some remedial purpose, it will be considered punishment [for purposes of applying the Eighth Amendment] if it also serves either retributive or deterrent purposes”].) In short, because “sanctions frequently serve more than one purpose” (Austin, at p. 610) and have multiple effects, determining whether a given sanction constitutes “punishment” is often difficult. (Cf. People v. One 1950 Cadillac Club Coupe (1955) 133 Cal.App.2d 311, 318 [“Practically no civil sanction is entirely remedial or entirely intended as a punishment”].)

“[T]he method” courts use to determine “what constitutes punishment varies depending upon the context in which the question arises. But two factors appear important in each case: whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature’s contrary intent.” (People v. Castellanos (1999) 21 Cal.4th 785, 795 (plur. opn. of George, C.J.).) The first factor is generally considered determinative where a court concludes that the Legislature did, in fact, intend the particular sanction to constitute punishment. As we recently explained in the context of applying the constitutional right to a jury trial, “[a]t the outset . . . the inquiry is whether the state legislative authority, in adopting a law allowing a court to impose [a sanction], intended [it] as punishment, or instead meant to adopt a nonpunitive regulatory scheme. [¶] . . . ‘[I]f the intention . . . was to impose punishment, that ends the inquiry.’” (People v. Mosley (2015) 60 Cal.4th 1044, 1063 (Mosley); see People v. Alford, supra, 42 Cal.4th at p. 755 [stating, in the context of applying prohibitions against ex post facto laws, “‘If the intention of the legislature was to impose punishment, that ends the inquiry’.”].) In determining whether the Legislature had an “intent to impose punishment” in passing a statute, courts look to both the statute’s “face” and “its legislative history.” (Alford, supra, 33 Cal.4th at p. 266; see Alford, at p. 756 [“legislative history demonstrates that the court security fee was enacted . . . for [a] nonpunitive purpose”]; see also United States v. Brown (1965) 381 U.S. 437, 476 (dis. opn. of White, J.) [“a punitive purpose has been found when such a purpose clearly appeared in the legislative history”]; Nixon v. Administrator of General Services (1977) 433 U.S. 425, 478 (Nixon) [a “recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish”]; Kennedy v. Mendoza-Martinez (1963) 372 U.S. 144, 169 [“a study of the history” of the statute’s “predecessor,” “coupled with a reading of Congress’ reasons for enacting” the statute, “compels a conclusion that the statute’s primary function is to serve as an additional penalty”].)

Consistent with these principles, defendant focuses in his briefs on the Legislature’s intent in passing sections 11372.5 and 11372.7. He argues that the Legislature’s “clearly discernible . . . intent” is that the fees in question “are not ‘punishment.’” In support of his position, he emphasizes that both statutes use the term “fee” to describe their respective charges rather than the term “fine,” “penalty,” or “punishment.” (§ 11372.5, subd. (a) [“criminal laboratory analysis fee”]; § 11372.7, subd. (a) [“drug program fee”]). But the Legislature’s use of the term “fee” does not necessarily establish that a charge does not constitute “punishment.” (See People v. Graves (Ill. 2009) 919 N.E.2d 906, 909-910 [“charge labeled a fee by the legislature may be a fine, notwithstanding the words actually used by the legislature”]; Mueller v. Raemisch (7th Cir. 2014) 740 F.3d 1128, 1133 [“a fine is a fine even if called a fee”]; People v. Jones (Ill. 2006) 861 N.E.2d 967, 985 [charge “is in fact a fine,” “notwithstanding” that the statute calls it a “fee”].)

Moreover, defendant’s argument ignores the principle that, in determining a statute’s purpose, we consider its language, not in isolation, but in the context of its “entire substance and all of its various parts.” (Alford v. Superior Court, supra, 29 Cal.4th at p. 1040.) After setting forth the “criminal laboratory analysis fee” in the first sentence of section 11372.5, subdivision (a), the Legislature specified in the very next sentence that “[t]he court shall increase the total fine necessary to include this increment.” (Italics added.) The next paragraph of the subdivision provides that, as to specified offenses “for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.” (Ibid., italics added.) Reading the first sentence of the subdivision in the context of the rest of the subdivision, it appears that the Legislature understood and intended “the criminal
laboratory analysis fee’ to be a ‘fine’ and a ‘penalty.’” (Ibid.)

The same conclusion appears from the language of section 11372.7, subdivision (a), which sets forth the “drug program fee” in its first sentence and provides in its second sentence that “[t]he court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law.” (Italics added.) This language is significant because “fines” and “penalties” are commonly understood to be “punishment.” (People v. Alford, supra, 42 Cal.4th at p. 757 [“fines arising from convictions are generally considered punishment”]; County of San Diego v. Milotz (1956) 46 Cal.2d 761, 766 [“‘penalty’ ‘‘is ‘‘often used as synonymous with the word ‘punishment’ ‘‘”]; People v. High (2004) 119 Cal.App.4th 1192, 1199 [“[t]he root word [of penalty], ‘penal,’ means ‘of or relating to punishment or retribution,’” and dictionaries “define[ ] ‘penalty’ as [a] punishment established by law or authority for a crime or offense’ “]; United States v. Reorganized CF&I Fabricators of Utah, Inc. (1996) 518 U.S. 213, 224 [“if the concept of penalty means anything, it means punishment for an unlawful act or omission”]; see People v. Sharret (2011) 191 Cal.App.4th 859, 869 [that statute refers to criminal laboratory analysis fee as “an increment of a fine” supports conclusion that the fee is punitive for purposes of applying Pen. Code, § 654].) 

To the extent the statutory language leaves any uncertainty about the Legislature’s intent, “the legislative record [further] evinces [an] intent to punish.” (Nixon, supra, 433 U.S. at p. 478). The Legislature enacted section 11372.5 in 1980 by passing Senate Bill No. 1535. The 1980 version of the statute provided in subdivision (a) that every person convicted of a specified offense “shall, as part of any fine imposed, pay an increment in the amount of fifty dollars ($50) for each separate offense. The courts shall increase the total fine as necessary to include this increment.” With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court may upon conviction impose a fine in the amount of fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty authorized by law.” (Stats. 1980, ch. 1222, § 1, p. 4140, italics added.) This language made clear that the Legislature considered the $50 payment under the statute to be a “fine,” which was to be “imposed” either “as part of” the offender’s “total fine” or, as to specified offenses for which no fine was otherwise authorized by law, as a separate “fine . . . in addition to any other penalty authorized by law.” (Ibid.)

The legislative history of the 1980 statute confirms this conclusion. The Legislative Counsel’s Digest described the subject of Senate Bill No. 1535 as “Controlled substance offenses: penalty assessments,” and then explained: “This bill would require every person who is convicted of prescribed controlled substance offenses to pay an additional $50 as part of any fine imposed; the total fine would be increased to include the increment. The bill would authorize $50 fines to be imposed for such purpose with respect to offenses for which fines are not presently authorized.” (Legis. Counsel’s Dig., Sen. Bill No. 1535 (1979–1980 Reg. Sess.) 4 Stats. 1980, Summary Dig., p. 401, italics added.) In a report to the Governor recommending that he sign the passed bill, the Health and Welfare Agency explained that the new statute would (1) require those convicted of specified controlled substance offenses to “be fined an additional $50,” (2) “authorize[] $50 fines to be assessed . . . if a fine is not authorized by other provisions of law,” and (3) generate revenue “through the assessment of additional fines.” (Health & Welf. Agency, Dept. of Alcohol & Drug Programs, Enrolled Bill Rep. on Sen. Bill No. 1535 (1979–1980 Reg. Sess.) Sept. 5, 1980, pp. 1-2, italics added.) In another report to the Governor, the Department of Finance explained that the new statute would “provide[] for a special penalty assessment for controlled substance offenses.” (Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 1535 (1979–1980 Reg. Sess.) Sept. 17, 1980, p. 1, italics added.) In a report recommending that the Governor consider a veto, the Department of Legal Affairs likewise explained that the statute “would impose a new, additional, $50 penalty assessment” on those convicted of the specified drug offenses, and then stated that it is “inappropriate to use criminal sanctions solely to raise revenue. Fines should be based upon the proper punishment for the crime committed, not the county’s need for money.” (Governor’s Office, Dept. of Legal Affairs, Enrolled Bill Rep. on Sen. Bill No. 1535 (1979–1980 Reg. Sess.) Sept. 23, 1980, p. 1.)

In resisting the conclusion that the Legislature intended the $50 assessment to constitute punishment, defendant relies heavily on the Legislature’s amendment of the statute in 1983, which replaced the phrase “shall, as part of any fine imposed, pay an increment” (Stats. 1980, ch. 1222, § 1, p. 4140), with the phrase “shall pay a criminal laboratory analysis fee” (Stats. 1983, ch. 626, § 1, p. 2527). According to defendant, by recharacterizing the payment as “a criminal laboratory analysis fee” instead of a “part of any fine imposed,”
the Legislature indicated its intent to treat the payment as “a nonpunitive administrative fee” rather than punishment. In support of his assertion, he quotes from People v. Watts (2016) 2 Cal.App.5th 223, 234 (Watts), which stated: “The elimination of the reference to the fee’s being part of the ‘fine imposed’ and its renaming from an ‘increment’ to a ‘fee’ strongly suggest that the Legislature did not intend the fee to be a ‘fine, penalty, or forfeiture’ ” as those terms are used in in various penalty assessment statutes “because section 11372.5 calls it something else.”

For several reasons, defendant’s argument is unpersuasive. To begin with, it ignores the fact that the Legislature did not substantively change the two sentences in section 11372.5 that immediately followed the revised sentence. Those sentences provided: “The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court may, upon conviction, impose a fine in an amount not to exceed fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.” (Stats. 1983, ch. 626, § 1, p. 2527, italics added.) These sentences indicate that the Legislature viewed the $50 “increment,” even when characterized as a criminal laboratory analysis fee, as a “fine” and a “penalty.”

(¶5) The first sentence also belies the statement in Watts, supra, 2 Cal.App.5th at page 234, that the Legislature “renam[ed]” the payment “from an ‘increment’ to a ‘fee.’” Both the 1980 and 1983 versions of the statute referred to the payment as an “increment” of the “total fine,” as does the current version.

Moreover, the analysis of defendant and the Watts court would produce an anomalous result. In cases where “a fine is not authorized by other provisions of law,” the second paragraph of section 11372.5, subdivision (a), expressly characterizes the $50 “increment prescribed by this section” as “a fine” to be imposed “in addition to any other penalty prescribed by law.” Under the analysis of defendant and the Watts court, the very same “increment” (ibid), when assessed pursuant to the first paragraph of the very same statute — because of the existence of other fines — is simply an administrative fee. Defendant suggests no reason — and we can think of none — why the Legislature would, in a single subdivision, view the same increment differently based on this distinction. “It is an established rule of judicial construction that when a term appears in different parts of the same act, or in related sections of the same code, the term should be construed as having the same meaning in each instance.” (Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1268.) We therefore reject Watts’s anomalous conclusion that the criminal laboratory analysis fee “is by its nature not punishment and therefore not a ‘fine’ or ‘penalty’ except,” as the second paragraph of section 11372.5, subdivision (a), specifies, “in the case of an offense ‘for which a fine is not authorized by other provisions of law.’” (Watts, supra, 2 Cal.App.5th at p. 235.)

Indeed, nothing in the legislative history of the 1983 amendment supports the view that the change in language defendant cites reflects a legislative intent to change the increment from a fine or penalty to an administrative fee. As introduced, the bill that amended the statute — Assembly Bill No. 2044 — proposed: (1) adding new crimes to the list of specified offenses; (2) changing the phrase “shall, as part of any fine imposed, pay an increment in the amount of fifty dollars ($50) for each separate offense” to “shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense whether or not a fine is imposed”; and (3) deleting the rest of section 11372.5, subdivision (a), which, as noted above, directed courts to “increase the total fine as necessary to include this increment” and, as to specified offenses “for which a fine is not authorized by other provisions of law,” authorized courts to “impose” the “increment” as “a fine . . . in addition to any other penalty authorized by law.” (Assem. Bill No. 2044 (1983-1984 Reg. Sess.) as introduced Mar. 7, 1983, § 1.) The Assembly Committee on Public Safety objected to the proposed language imposing the criminal laboratory analysis fee “in all cases whether or not a fine is ordered,” asserting that this language “makes no exception for the defendant’s inability to pay.” (Assem. Criminal Law and Pub. Safety Com., Analysis of Assem. Bill No. 2044 (1983-1984 Reg. Sess.) as amended Apr. 11, 1983.) It suggested that the bill be revised either to “provide an ability to pay exception” or to “return to current law,” which, “by making the fee part of a fine (which the court has the discretion to suspend), contains an implicit means test.” (Ibid.)

Safety Com., Analysis of Assem. Bill No. 2044 (1983–1984 Reg. Sess.) as amended Apr. 11, 1983, p. 2.) Although retaining the new designation of the increment as “a criminal laboratory analysis fee,” the Assembly deleted the proposed phrase “whether or not a fine is imposed” and revived those parts of the 1980 statute that the earlier version would have deleted, by reinserting (with minor revisions (see fn. 4, supra)) the language requiring courts to “increase the total fine necessary to include this increment” and, as to specified offenses “for which a fine is not authorized by other provisions of law,” permitting courts to “impose” the “increment” as “a fine . . . in addition to any other penalty authorized by law.” (Assem. Bill No. 2044 (1983–1984 Reg. Sess.) as amended May 2, 1983, § 1.)

Several analyses of this revised form of the bill explained that (1) existing law requires those convicted of specified controlled substance offenses to “pay an additional $50 as part of any fine imposed,” and (2) the proposed amendment “[s]pecifies that the $50 fine is a criminal laboratory analysis fee.” (Assem. Crim. Law & Pub. Safety Com., 3d reading analysis of Assem. Bill No. 2044 (1983–1984 Reg. Sess.) as amended June 20, 1983, p. 1; see Assem. Conc. Sen. Amends. to Assem. Bill No. 2044 (1983–1984 Reg. Sess.) as amended July 19, 1983, p. 1.) The analysis of the Senate Committee on Judiciary similarly explained that (1) existing law requires those convicted of specified controlled substance offenses “to pay an additional $50 as part of any fine imposed,” and (2) the proposed amendment “would describe that $50 increment as a criminal laboratory analysis fee.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2044 (1983–1984 Reg. Sess.) as amended May 2, 1983, pp. 1-2.) It also described the proposed bill as requiring payment of “a $50 criminal laboratory analysis fee in addition to any other penalty that was imposed” (id. at p. 1, italics added), and explained that the bill would “in effect . . . raise the legal maximum fine” for one of the crimes added to the list of specified offenses (id. at p. 3). In summary, the evolution of the 1983 amendment and the accompanying bill analyses indicate that the Legislature: (1) understood that the 1980 statute established a fine or penalty; and (2) understood and intended that, notwithstanding the new nomenclature for the $50 payment — criminal laboratory analysis fee — the payment would continue to be a fine or penalty. Certainly, nothing in these sources suggests the Legislature either understood or intended that the new nomenclature would transform the existing fine or penalty into an administrative fee.

Subsequent legislative developments are fully consistent with these conclusions. In 1985, the Legislature added new crimes to the statute’s list of specified offenses. (Stats. 1985, ch. 1098, § 5.) In describing this amendment, the Legislative Counsel’s Digest explained: “Existing law requires every person who is convicted of specified controlled substance offenses to pay an additional $50 fine imposed as a criminal laboratory analysis fee . . . . [¶] This bill would include additional specified offenses . . . within these provisions.” (Legis. Counsel’s Dig., Assem. Bill No. 2401 (1985–1986 Reg. Sess.) 4 Stats. 1985, Summary Dig., p. 380, italics added.) Consistent with this description, the Legislative Analyst explained that the 1985 amendment would “[m]ake[] persons convicted of certain acts relating to the manufacture of phencyclidine (PCP), subject to” some of the “existing penalties and punishments that are imposed for other controlled substances violations,” including “an additional $50 fine imposed as a criminal laboratory analysis fee.” (Legis. Analyst, Analysis of Assem. Bill No. 2401 (1985–1986 Reg. Sess.) as amended May 1, 1985, pp. 1-2.) In 1986, the Legislature added new crimes to subdivision (a)’s list of specified offenses and, in the subdivision’s second paragraph, changed the phrase “the court may, upon conviction, impose a fine . . . which shall constitute the increment prescribed by this section” (Stats. 1986, ch. 587, § 1, p. 2527, italics added) to “the court shall, upon conviction, impose a fine . . . which shall constitute the increment prescribed by this section. . . .” (Stats. 1986, ch. 587, § 1, p. 2056, italics added). The Legislative Counsel’s Digest explained that the latter change would make mandatory the “fine” that the subdivision’s second paragraph authorized. (Legis. Counsel’s Dig., Assem. Bill No. 3642 (1985–1986 Reg. Sess.) 4 Stats. 1986, Summary Dig., p. 188.)


Several analyses of the bill that proposed section 11372.7 also referred to section 11372.5. For example, after stating that the proposed statute would “impose[s] a $100 fine on” those convicted of specified controlled substance offenses, the analysis of the Senate Committee on Judiciary explained: “Currently fines for controlled substance offenders are governed by Section 11372.5,” which imposes as a “fine” a “$50 criminal laboratory analysis fee.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 921 (1985–1986 Reg. Sess.) as amended Apr. 11, 1985, p. 4, italics added; see also Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 921 (1985–1986 Reg. Sess.) as amended Aug. 18, 1986, p. 2) [identifying “$50 criminal laboratory analysis fee” as a “fine” imposed “by the Health and Safety Code” on “controlled substance offenders”]; Sen. Select Com. on Drug/Alcohol Abuse, 3d reading analysis of Sen. Bill No. 921 (1985–1986 Reg. Sess.) as amended Apr. 30, 1985, p. 2 [same].) These legislative materials support the conclusion that when the Legislature amended section 11372.5 and enacted section 11372.7 in 1986, it understood and intended that the payments these sections prescribe are fines, penalties, and punishment.


In 1993, the Legislature, through passage of Assembly Bill No. 855, increased the maximum amount of section 11372.7’s drug program fee from $100 to $150. (Stats. 1993, ch. 474, § 1.) As introduced, the bill did not amend section 11372.5, but instead proposed adding a new section that would have required specified offenders to pay “a drug abuse education and prevention penalty assessment in an amount not to exceed fifty dollars.” (Assem. Bill No. 855 (1993-1994 Reg. Sess.) as introduced Feb. 25, 1993, § 1, italics added.) Regarding this proposal, the Senate Committee on Judiciary explained: “[E]xisting law already provides a $100 penalty assessment for the same universe of individuals covered by this bill. Proceeds from this assessment are also to be used only for the support of drug programs within the schools and the community. (H. & S.C. Sec. 11372.7) Thus, in effect, this bill proposes to create a new body of law in order to increase an existing penalty from $100 to $150.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 855 (1993-1994 Reg. Sess.) as amended Mar. 29, 1993, p. 3.) The Senate Committee on Judiciary then posed this question: “Should not the existing penalty assessment for persons convicted of controlled substance offenses be increased by $50 in lieu of creating a new section of the law?” (Ibid.) The Legislature soon followed this suggestion by omitting the new section from the bill and adding an amendment to section 11372.7 that increased the maximum amount of its drug program fee from $100 to $150. (Assem. Bill No. 855 (1993-1994 Reg. Sess.) as amended Aug. 17, 1993, § 1.) These postenactment revisions to section 11372.7 and their legislative history further indicate that the Legislature understands and intends the section’s “drug program fee” to constitute a fine, a penalty, a punishment.

Defendant largely ignores these clear indicators of legislative intent. Instead, he relies on the Court of Appeal’s assertion in People v. Vega (2005) 130 Cal.App.4th 183, 195 (Vega), that “the main purpose” of section 11372.5 “is not to exact retribution against drug dealers or to deter drug dealing . . . but rather to offset the administrative cost of [drug] testing.” Building on this assertion, defendant argues that “because the main purpose” of section 11372.5 “is neither retribution [n]or deterrence, but rather to offset the costs of
laboratory tests in the prosecution of narcotics cases, the fee imposed under that section is simply an administrative fee, not punishment.” He makes a similar argument regarding section 11372.7, asserting that the “fundamental purpose” of the drug program fee “is to offset” the cost of certain government programs.

Initially, neither the language of the statutes nor their legislative history persuades us to adopt defendant’s view of the Legislature’s “main purpose” in establishing these charges. As already explained, both statutes refer to the charges as “fine[s]” and provide that, in some cases, the fine “shall be in addition to any other penalty prescribed by law.” (§ 11372.5, subd. (a); § 11372.7, subd. (a)). In terms of legislative history, several analyses of the legislation that enacted section 11372.7 emphasized that the statute “seeks to provide an enhanced penalty for those convicted of drug violations.” (Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 921 (1985–1986 Reg. Sess.), p. 2, italics added; Sen. Com. on Judiciary, comment on Sen. Bill No. 921 (1985–1986 Reg. Sess.), italics added.) And an analysis of the legislation that amended section 11372.5 in 1983 — by adopting the term “criminal laboratory analysis fee” and expanding the list of offenses subject to that charge (Stats. 1983, ch. 626, § 1, p. 2527) — explained that a purpose of the fee was to “provide an additional reminder to offenders of the true cost of their acts.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2044 (1983-1984 Reg. Sess.) as amended May 2, 1980, p. 4.) This description discloses a legislative intent to promote one of “the traditional aims of punishment” (People v. Alford, supra, 42 Cal.4th at p. 759) — deterrence — “by warning the offender, and others tempted to commit the same violation, of the price to be paid for such actions” (Alva, supra, 33 Cal.4th at p. 288). Thus, the statutory language and legislative history undermine defendant’s claim regarding the Legislature’s “main purpose” in establishing the criminal laboratory analysis and drug program fees.

In any event, even accepting defendant’s assertion, we reject his argument that the criminal laboratory analysis and drug program fees are not “punishment” for purposes of Penal Code section 182. As earlier noted, that section provides that a convicted conspirator is “punishable in the same manner and to the same extent as is provided for the punishment of” the underlying target offense. (Ibid.) As also noted earlier, we held in Athar, supra, 36 Cal.4th at page 405, that the “general plain meaning” of this language renders a convicted conspirator subject to “all punishment for” the underlying target offense. (Italics added.) Where it is clear that one of the Legislature’s purposes in prescribing a sanction is to impose punishment, excluding that sanction based on a finding that its “main” purpose is nonpunitive would preclude courts from complying with Penal Code section 182’s “plain meaning” and would thwart the Legislature’s intent that a convicted conspirator receive “all punishment for” the underlying target offense. (Athar, at p. 405, italics added.) Therefore, even accepting defendant’s assertion that the Legislature’s “main purpose” in prescribing the criminal laboratory analysis and drug program fees was “to offset” the cost of certain government programs, because the Legislature also intended these charges to constitute punishment, they fall within the sentencing scope of Penal Code section 182.

Supporting this conclusion is our decision in People v. Talibdeen (2002) 27 Cal.4th 1151 (Talibdeen), on which the People rely. There, the trial court imposed a criminal laboratory analysis fee under section 11372.5 in connection with a conviction of cocaine possession. (Id. at p. 1153.) On review, the People asked the Court of Appeal to impose additional amounts under Penal Code section 1464 and Government Code section 76000, subdivision (a), which respectively require the levy of an additional state and county “penalty . . . upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses.” (Talibdeen, at pp. 1153-1154.) The Court of Appeal did so, notwithstanding the People’s failure to raise the issue in the trial court, concluding that these additional penalties “were mandatory — and not discretionary — sentencing choices.” (Id. at p. 1153.) We affirmed, reasoning that the statutes “called for the imposition of” the penalties “based on such a fee” (ibid.) — i.e., section 11372.5’s criminal laboratory analysis fee — and that, in the defendant’s circumstances, “imposition of these penalties [was] mandatory” (id. at p. 1155).

As defendant observes, several courts of appeal have stated that Talibdeen is not dispositive of whether section 11372.5, subdivision (a)’s criminal laboratory analysis fee constitutes either a punishment or a penalty. In Vega, supra, 130 Cal.App.4th at page 195, the court concluded that “Talibdeen is not controlling” as to whether section 11372.5’s criminal laboratory analysis constitutes “punishment” for purposes of Penal Code section 182, because Talibdeen “did not address [this] question . . . . Rather, the court and the parties in Talibdeen proceeded under the assumption the fee was a punishment and addressed the question whether the trial court had discretion to waive the penalty assessments.” Taking a similar view, in Watts, supra, 2 Cal.App.5th at page 231, the court declared that Talibdeen is not “authority for the proposition” that the criminal laboratory analysis fee is a “fine, penalty, or forfeiture” within the meaning of Penal Code section 1464 and Government Code section 76000, subdivision (a). The court reasoned: “The defendant in Talibdeen never argued that the assessments were inapplicable, and the Supreme Court never mentioned section 11372.5’s language. Instead, the court focused on whether the statutes establishing the state and county penalties gave a sentencing court discretion to waive those assessments . . . . [Citation.] Thus, the [Talibdeen] court assumed, but never decided, that sentencing courts are required to impose penalty assessments on the crime-lab fee.” (Watts, at p. 231.) Based on these decisions, defendant asserts that Talibdeen does not “compel” the conclusion that the fees here at issue constitute “punishment” for purposes of Penal Code section 182.
Although we agree with defendant that *Talibdeen* is not dispositive, it clearly supports our conclusion. As noted above, the central issue there was whether imposition of the additional penalties was “mandatory” — in which case they could be imposed on appeal notwithstanding the People’s failure to object below — or “discretionary” — in which case they could not be imposed on appeal. (*Talibdeen, supra*, 27 Cal.4th at p. 1153.) A prerequisite to our holding that the penalties were, in fact, mandatory was that section 11372.5’s criminal laboratory analysis fee constituted a “fine, penalty, or forfeiture” within the meaning of Penal Code section 1464 and Government Code section 76000, subdivision (a). Consistent with this fact, as noted above, we affirmatively stated that the statutes there at issue “called for the imposition of” the penalties “based on such a fee,” i.e., “a laboratory analysis fee of $50 pursuant to . . . section 11372.5, subdivision (a).” (*Talibdeen, at p. 1153.) It is true, as Watts and Vega noted, that we did not in *Talibdeen* mention section 11372.5’s language, indicate whether the defendant argued the penalty assessments were inapplicable (as opposed to discretionary), or expressly discuss whether the criminal laboratory analysis fee constitutes a “fine, penalty, or forfeiture” within the meaning of Penal Code section 1464 and Government Code section 76000, subdivision (a). However, it is also true that we made no reference to any “assumption” (*Vega, supra*, 130 Cal.App.4th at p. 195) as the basis for our affirmative statement that the statutes there at issue “called for the imposition of” the penalties “based on” the criminal laboratory analysis fee. (*Talibdeen, at p. 153.) In short, regardless of whether *Talibdeen*, as defendant puts it, “compel[s]” the conclusion that section 11372.5’s criminal laboratory analysis constitutes “punishment” for purposes of Penal Code section 182, as the court stated in *Vega, supra*, 130 Cal.App.4th at page 194, *Talibdeen* surely “support[s]” that conclusion.

By contrast, our decision in *People v. Alford, supra*, 42 Cal.4th 749, on which defendant relies, provides little support for his view. There, we held that the court security fee Penal Code section 1465.8, subdivision (a)(1) imposes on “every conviction for a criminal offense” is not punishment for purposes of constitutional prohibitions against ex post facto laws. (See *Alford*, at pp. 755-759.) We first found that the Legislature, in enacting this statute, did not intend to impose punishment. (*Id.* at pp. 756-757.) We cited the following factors in support of this conclusion: (1) the Legislature referred to the charge as a fee, not a fine; (2) the Legislature did not limit the fee to the criminal context, imposing it also in limited and unlimited civil actions and in probate matters; (3) by requiring the fee’s collection upon posting of bail, the Legislature imposed the fee on arrestees who would never be criminally charged by information, indictment, or complaint; (4) the Legislature required the fee’s imposition when a traffic violation charge was dismissed because the alleged violator attends traffic school; (5) the Legislature enacted the fee statute as part of an emergency budgetary measure, along with 23 other trailer bills that collectively provided a mechanism to implement critical provisions of the state budget for the 2003-2004 fiscal year; and (6) the fee was to go into effect only if the Legislature enacted specified levels of trial court funding. (*Ibid.*) We next concluded that the fee was not so punitive in nature or effect as to negate the Legislature’s intent and transform the fee into a criminal penalty. (*Id.* at pp. 757-759.)

As this discussion makes clear, there are significant differences between the indicia of legislative intent we cited in *People v. Alford* regarding the court security fee and the indicia of legislative intent regarding the charges at issue in this case. Whereas the Legislature referred to the court security charge as a fee, as we have explained, both the statutes and the legislative history refer to the criminal laboratory analysis and drug program fees as fines, penalties, and punishments. Whereas the Legislature did not require a criminal conviction for imposition of the court security fee, and imposed that fee even in the civil context, it provided for imposition of the criminal laboratory analysis and drug program fees *only in the criminal context and only upon conviction*. Finally, unlike the court security fee, the criminal laboratory analysis and drug program fees were not enacted as part of an emergency budgetary measure in order to exactly offset a reduction in General Fund financing for trial courts. Given these differences regarding legislative intent, our conclusion here that the criminal laboratory analysis and drug program fees are punishment for purposes of the conspiracy sentencing statute is not at all in tension with our conclusion in *People v. Alford* that the court security fee is not punishment for ex post facto purposes.

As noted earlier, a finding that the Legislature intended a particular sanction to constitute punishment “ends the inquiry.” (Mosley, supra, 60 Cal.4th at p. 1063.) Because, for reasons explained above, it is clear the Legislature intended the fees at issue here to be punishment, it is “unnecessary to pursue any additional inquiry into their underlying character.” (People v. Hanson (2000) 23 Cal.4th 355, 361 [finding, for purposes of applying the double jeopardy clause, that Legislature intended restitution fines to be "punishment"].) 7

Shortly before oral argument, defendant filed a request to submit supplemental briefing on two additional issues: (1) whether the criminal laboratory analysis fee and the drug program fee are subject to penalty assessments (see fn. 5, ante); and (2) whether a firearm sentence enhancement he received under Penal Code section 12022.53, subdivision (c), was affected by that statute’s recent amendment (Stats. 2017, 8.

---

7. Elsewhere in our opinion, we explained that the 2003 Budget Act reduced General Fund financing for trial courts in the same amount that the fee was projected to generate: $34 million. (*People v. Alford, supra*, 42 Cal.4th at p. 754.)
The People, Plaintiff and Respondent,
v.
Jesus Manuel Rodriguez and Edgar Octavio Barajas, Defendants and Appellants.

No. S239713
In the Supreme Court of California
Ct.App. 5 F065807
Stanislaus County Super. Ct. Nos. 1085319 and 1086536
Filed May 17, 2018

COUNSEL
Cara DeVito, under appointment by the Supreme Court, for Defendant and Appellant Jesus Manuel Rodriguez.
S. Lynne Klein, under appointment by the Supreme Court, for Defendant and Appellant Edgar Octavio Barajas.
Kamala D. Harris and Xavier Becerra, Attorneys General, Dane R. Gillette and Gerald A. Engler, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon, Peter W. Thompson, Rachelle A. Newcomb and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

Defendants Edgar Octavio Barajas and Jesus Manuel Rodriguez were convicted in a joint trial of murder, conspiracy to commit murder, and participation in a criminal street gang. The trial court sentenced each defendant to mandatory terms amounting to 50 years to life. We granted review to consider (1) whether the accomplice testimony in this case was sufficiently corroborated in light of People v. Romero and Self (2015) 62 Cal.4th 1, 36 (Romero and Self), and (2) whether defendants’ constitutional challenges to their 50-years-to-life sentences were rendered moot by recent legislation making them eligible for a youth offender parole hearing during their 25th year of incarceration (Pen. Code, §§ 3051, 4801), even though their cases were not remanded to the trial court to determine whether they had an adequate opportunity to make a record of factors relevant to their eventual parole determinations. (See People v. Franklin (2016) 63 Cal.4th 261, 283–284, 286 (Franklin).)

With respect to Barajas, the Attorney General concedes that the accomplice testimony was not sufficiently corroborated and that his convictions must be reversed. We agree with the Attorney General and therefore reverse Barajas’s convictions and remand with an order to enter a judgment of acquittal. Rodriguez raises only the second issue, and we conclude he is entitled to relief. We remand his case to the Court of Appeal to direct the trial court to provide him with
an opportunity to make a record of information that Penal Code sections 3051 and 4801 deem relevant at a youth offender parole hearing. As in Franklin, Rodriguez’s constitutional challenge to his 50-years-to-life sentence is moot in light of the enactment of those statutes and our remand to facilitate proper discharge of the Board of Parole Hearings’ obligations under those statutes.

I.

On May 26, 2004, Ernestina Tizoc was killed in a drive-by shooting in Oregon Park in Modesto. The park was known as a hangout for members of the Norteño gang. Witnesses saw a white Chevrolet Blazer with broken windows drive slowly around the park and approach a gazebo where an afterschool program was being held. Before the shots were fired at Tizoc, the occupants of the Blazer made gang signs and yelled a cry for a rival gang, the Sureños.

Officers arrived at the scene and received information that people at a residence on Thrasher Avenue were involved in the shooting. Officers went to the location and detained Rodriguez, Barajas, Mario Garcia, and Louis Acosta. At the time, Rodriguez was 15 years old, and Barajas was 16 years old. At trial, a gang expert working with the district attorney’s office testified that he believed all of the arrestees were Sureños gang members. In a subsequent search of the Thrasher Avenue residence, an officer found mail addressed to Acosta, gang-related drawings, and two .22-caliber bullets. Later that day, another officer found the white Blazer in an alley.

Garcia, who had been in the Blazer, testified that he, Rodriguez, Barajas, and two others passed through Oregon Park looking for Norteños, apparently to retaliate for prior aggressions by the Norteños. Garcia thought some of the people by the gazebo were Norteños because they were wearing red. He testified that as the Blazer approached the gazebo, Barajas shouted “puro Sur” and fired multiple shots. When Barajas stopped shooting, the Blazer sped away. Tizoc was hit by the gunshots and died from her injuries.

Rodriguez and Barajas were charged with willful, deliberate, and premeditated murder, conspiracy to commit murder, and active participation in a criminal street gang. The information alleged, as to the murder and conspiracy counts, that at least one principal intentionally and personally used a firearm, causing great bodily injury or death. The information also alleged that the offenses were committed for the benefit of a criminal street gang.

Both defendants entered pleas of not guilty and denied all enhancement allegations. A jury convicted Barajas and Rodriguez of first degree murder (Pen. Code, § 187) and found that the crime was committed for the benefit of a criminal street gang (id., § 186.22, subd. (b)). (All undesignated statutory references are to the Penal Code.) The jury also found that a principal discharged a firearm causing death (§ 12022.53, subds. (d), (e)). Defendants were also convicted of conspiracy to commit murder (§§ 182, 187) and active participation in a criminal street gang (§ 186.22, subd. (a)). On September 12, 2012, the trial court sentenced each defendant to an aggregate term of 50 years to life based on a mandatory term of 25 years to life for first degree murder and a mandatory consecutive term of 25 years to life for the firearm enhancements. The trial court did not expressly consider any youth-related factors at sentencing.

Defendants appealed their convictions on grounds of prosecutorial failure to preserve exculpatory evidence, juror misconduct, insufficient corroboration of accomplice testimony, and instructional error. They also claimed their sentences of 50 years to life violate the Eight Amendment to the United States Constitution. The Court of Appeal affirmed the judgments. We granted review and, after holding the case, transferred it to the Court of Appeal for reconsideration in light of Franklin, supra, 63 Cal.4th 261 and Romero & Self, supra, 62 Cal.4th 1. The Court of Appeal again affirmed the judgments, and we again granted review.

II.

Barajas claims that the evidence was insufficient to support his convictions on all three counts because the only evidence connecting him to the crimes was uncorroborated accomplice testimony. He contends that his convictions should be reversed and a judgment of acquittal should be entered on all charges. The Attorney General concedes that the accomplice testimony was insufficiently corroborated. After reviewing the evidence presented at trial, we agree with the Attorney General, reverse Barajas’s convictions, and order the entry of a judgment of acquittal. Rodriguez concedes that the accomplice testimony against him was sufficiently corroborated.

Section 1111 states: “A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” This statute reflects the Legislature’s determination that “‘because of the reliability questions posed by’” accomplice testimony, such testimony “‘by itself is insufficient as a matter of law to support a conviction.’” (People v. Najera (2008) 43 Cal.4th 1132, 1137.) “Thus, for the jury to rely on an accomplice’s testimony about the circumstances of an offense, it must find evidence that, ‘without aid from the accomplice’s testimony, tend[s] to connect the defendant with the crime.’” (Romero and Self, supra, 62 Cal.4th at p. 32.) “‘The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.’” (Id., quoting People v. Rissman (1957) 154 Cal.App.2d 265, 278.)

Barajas contends that the only evidence that specifically implicated him in the crime was the uncorroborated accomplice testimony of Garcia and Rodriguez. Barajas is correct: None of the other evidence, including the eyewitness testimony about the shooting or the physical evidence of the mur-
under weapon and shell casings fired from the weapon, tended to connect Barajas to the commission of the crime. The only other evidence against Barajas was that he was a Sureño gang member, but as the Attorney General explains, “the gang expert’s testimony failed to personally connect Barajas to the shooting itself, the physical evidence, the accomplices and victims involved, the vehicle used by the perpetrators, or any particular location related to the crime such as Oregon Park, [the Thrasher Avenue] residence, and the areas where physical evidence was found.”

The Court of Appeal observed that the nonaccomplice evidence did corroborate aspects of the accomplice testimony offered against Barajas. But that is not enough. The nonaccomplice evidence must corroborate aspects of the accomplice testimony that “‘tend[ed] to connect the defendant with the crime.’” (Romero and Self, supra, 62 Cal.4th at p. 32.) Such corroborating nonaccomplice evidence was absent here. Our review of the record confirms what the Attorney General recounts in his briefing: “The non-accomplice evidence did not tend to connect Barajas to the accomplice, his codefendant, or the victims. Nor did it tend to connect Barajas to the Chevy Blazer used during the shooting, the murder weapon, or any of the bullets and shell casings that were recovered. There was no evidence tending to connect Barajas to Oregon Park, the . . . Thrasher residence, or any of the locations where relevant evidence was found.

There was also no evidence that Barajas had been involved in any of the prior acts of violence committed by the Norteños against the Sureños that preceded the charged crimes. And other than fights at school, the evidence did not show that Barajas had committed acts of violence against Norteños similar to the shooting at the park. Unlike in People v. Szeto (1981) 29 Cal.3d 20], there was no evidence establishing a personal motive or opportunity to commit the charged crimes. The corroborating evidence that was presented could do no more than establish the crimes occurred and raise a suspicion against every Sureño gang member in Stanislaus County.”

The Attorney General acknowledges that this case is analogous to Romero and Self. In that case, a jury convicted Self of a robbery based on the testimony of an accomplice, Munoz, as to the circumstances of the crime. Other than Munoz’s testimony, there was no other evidence tying Self to the robbery. Although Self’s codefendant, Romero, used Self’s shotgun during the robbery, there was no dispute it was Romero, not Self, who held the shotgun. The victim did not testify to seeing Self. We therefore reversed Self’s conviction as to that robbery. (Romero and Self, supra, 62 Cal.4th at pp. 35–37.)

We hold that the accomplice testimony against Barajas was not sufficiently corroborated and that his convictions must be reversed. Because reversal of his convictions is based on insufficiency of the evidence, the double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution mandate that Barajas be acquitted of the charges. (Monge v. California (1998) 524 U.S. 721, 729 [“We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial.”]; People v. Seel (2004) 34 Cal.4th 535, 542, citing Monge, 524 U.S. at p. 729 [same rule under the double jeopardy clause of the California Constitution]; People v. Belton (1979) 23 Cal.3d 516, 526–527 [defendant was entitled to judgment of acquittal where prosecution’s case failed to satisfy section 1111]; People v. Pedroza (2014) 231 Cal.App.4th 635, 660 [trial court’s determination that prosecution’s case failed to satisfy section 1111 was a finding of insufficient evidence to sustain conviction].) Accordingly, we remand Barajas’s case to the Court of Appeal to enter a judgment of acquittal on the charges against him.

III.

Rodriguez contends that he was not provided an adequate opportunity to make a record of information relevant to a future youth offender parole hearing and that he is entitled to a remand under Franklin. As a preliminary matter, the Attorney General argues that we may not grant Rodriguez relief on this claim because he did not file a petition for review in this court. Our grant of review gave us jurisdiction over the cause, including Rodriguez’s claim, and we exercise our jurisdiction to consider it. (Cal. Const., art. VI, § 12, subd. (b); see Rules of Court, rule 8.512(b)(1); Advisory Com. com., subd. (b) foll. Rules of Court, rule 8.528.) We note, however, that while we have authority to consider such claims, we do not do so as a matter of course; in general, parties are advised to file a petition for review on claims that may entitle them to relief in this court.

In Franklin, we held that a juvenile offender’s Eighth Amendment challenge to his 50-years-to-life sentence was rendered moot by the enactment of Senate Bill No. 260 (2013–2014 Reg. Sess.) (Senate Bill No. 260), which created youth offender parole hearings and made Franklin eligible for such a hearing during his 25th year of incarceration. (Franklin, supra, 63 Cal.4th at p. 280; see §§ 3051, subd. (b) (3), 4801, subd. (c)). Because the Board of Parole Hearings had not yet crafted regulations applicable to youth offender parole hearings when we decided Franklin, we did not opine on “whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law.” (Franklin, at p. 286.) We could not say at that point that the enacted legislation was inadequate to provide juvenile offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation “[s]o long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination.” (Ibid.; see id. at p. 283 [“In directing the Board to ‘give great weight to the diminished culpability of juveniles as compared to adults, the hall-
mark features of youth, and any subsequent growth and increased maturity of the prisoner’ (§ 4801, subd. (c)), the statutes also contemplate that information regarding the juvenile offender’s characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board’s consideration.”]}) Because Franklin was sentenced before the passage of Senate Bill No. 260, we remanded the case for the trial court to determine whether he was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing. (Franklin, at p. 284.)

The Court of Appeal, relying on Franklin, held that Rodriguez’s Eighth Amendment challenge to his sentence was moot in light of his eligibility for a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).) The Court of Appeal further stated: “Information from the probation reports prepared for both defendants, the juvenile fitness hearing reports, their pretrial statements to officers, as well as what was provided at the sentencing hearings, would all be available for consideration at the youth offender parole hearing. (§ 3051, subd. (f).) It appears that Barajas and Rodriguez had ‘sufficient opportunity to put on the record the kinds of information’ deemed relevant to a youth offender parole hearing, although they are not precluded from submitting additional information for review by the parole board. (People v. Franklin, supra, 63 Cal.4th at pp. 283–284.)” The Court of Appeal thus affirmed the judgment against Rodriguez without remanding the matter to the trial court.

Rodriguez, like Franklin, was sentenced before the passage of Senate Bill No. 260, and he argues that he did not have notice and a sufficient opportunity at sentencing to make a thorough record of factors relevant to his eventual youth offender parole hearing. He contends that the record fails to adequately discuss his level of maturity and character traits at the time of the offense, the impact of his childhood addiction to methamphetamines, the impact of his frayed relationship with his family and the physical abuse inflicted on him by his siblings, his frequent exposure to and victimization by gang violence, and his conduct during his incarceration and how it relates to his potential for rehabilitation.

We agree with Rodriguez that he is entitled to remand for an opportunity to supplement the record with information relevant to his eventual youth offender parole hearing. Although a defendant sentenced before the enactment of Senate Bill No. 260 could have introduced such evidence through existing sentencing procedures, he or she would not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process. Without such notice, any opportunity to introduce evidence of youth-related factors is not adequate in light of the purpose of Senate Bill No. 260. (See Franklin, supra, 63 Cal.4th at p. 277 (“For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration.”].) On remand, the Court of Appeal shall direct the trial court to provide Rodriguez and the prosecution an opportunity to supplement the record with information relevant to Rodriguez’s eventual youth offender parole hearing. (Franklin, at p. 284.) In so doing, the trial court may exercise its discretion to conduct this process efficiently, ensuring that the information introduced is relevant, noncumulative, and otherwise in accord with the governing rules, statutes, and regulations.

Rodriguez further contends that his Eighth Amendment claim is not moot because without an adequate opportunity to make a record of youth-related circumstances at the time of his offenses, his eventual parole hearing will not provide him with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (Graham v. Florida (2010) 560 U.S. 48, 75.) Our directive that Rodriguez receive a remand in this proceeding makes it unnecessary to address this claim. “So long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (Franklin, at p. 286.) We expressed no view in Franklin, and we need not express any view here, on whether such a remand is constitutionally required.

IV.

In his request to file supplemental briefs, Rodriguez argues that Senate Bill No. 620 (2017–2018 Reg. Sess.), effective January 1, 2018, applies to his case. That legislation amended section 12022.53, subdivision (h) to read: “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.” Rodriguez contends that as a consequence of this newly passed legislation, the firearm enhancements imposed on his sentence pursuant to section 12022.53, subdivisions (d) and (e), should be struck and he should be resentenced accordingly. On remand, the Court of Appeal shall direct the trial court to consider the applicability of section 12022.53, subdivision (h) to Rodriguez’s sentence.

CONCLUSION

We reverse Barajas’s convictions and remand his case to the Court of Appeal with instructions to enter a judgment of acquittal. We remand Rodriguez’s case to the Court of Appeal with instructions to remand to the trial court to provide the parties with an opportunity to supplement the record with information relevant to Rodriguez’s youth offender parole hearing.
hearing and to consider the applicability of section 12022.53, subdivision (h) to his sentence.

LIU, J.

WE CONCUR: CANTIL-Sakauye, C. J., Chin, J., CORRIGAN, J., Cuéllar, j., KRUGER, J., BLEASE, J.*

* Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cite as 18 C.D.O.S. 4690

THE PEOPLE, Plaintiff and Respondent,

v.

JOSEPH ANDREW PEREZ, JR.,
Defendant and Appellant.

No. S104144
In the Supreme Court of California
Contra Costa County Super. Ct. No. 990453-3
Filed May 16, 2018

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

THE COURT:

The opinion in this matter filed March 1, 2018, and appearing at 4 Cal.5th 421, is modified as follows:

1. At the end of the first full paragraph on page 443, after the sentence ending “they had views on the case,” the following sentence is added: “We likewise conclude that the trial court’s decision did not amount to constitutional error.”

2. At the end of the first paragraph on page 444, after the sentence ending in “discretion in these circumstances,” the following sentence is added: “Nor has Perez established that the time allotted for voir dire violated his constitutional rights.”

These modifications do not affect the judgment.

The petition for rehearing is denied.
California Courts of Appeal

Cite as 18 C.D.O.S. 4691

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER JEFFREY VANNESS, Defendant and Appellant.

2d Crim. No. B283857
In The Court of Appeal of the State of California Second Appellate District Division Six
(Super. Ct. No. 2015000120) (Ventura County)
Filed May 16, 2018

COUNSEL
I Todd W. Howeth, Public Defender, William M. Quest, Snr. Deputy, for Defendant and Appellant.
Gregory D. Totten, District Attorney, Michelle J. Contois, Deputy District Attorney for Plaintiff and Respondent.

OPINION
The Vehicle Code provides that, if a person is lawfully arrested for driving under the influence of a drug or a combination of a drug and alcohol, he shall be advised that he has the choice of submitting to either a blood or breath test. (Veh. Code, § 23612, subd. (a)(2)(b).) Notwithstanding this statutory directive, we hold that if a peace officer advises the arrestee that his only choice is to submit to a blood test, the test results are admissible in a criminal proceeding provided that the arrestee freely and voluntarily consents to a blood test. The failure to advise the arrestee of his statutory right to choose between a breath and blood test does not run afoul of any constitutional restraint.

In a misdemeanor complaint, Alexander Vannesse was charged with driving under the influence of a drug. (§ 23152, subd. (e).) He appeals an order denying his Penal Code section 1538.5 motion to suppress the results of a chemical test of his blood contending that his consent to the blood draw violates statutory and constitutional law.

In an opinion certified for publication, the Appellate Division of the Ventura County Superior Court affirmed the order denying the motion to suppress. On our own motion, we transferred the matter to this court. We affirm.

Section 1538.5 Hearing
Appellant was the driver of a vehicle involved in a collision. Responding to the report of an accident, Officer Quinn Redeker, the first police officer to arrive at the scene, concluded that appellant “was possibly under the influence of drugs or alcohol.” He “requested additional officers to respond for a DUI investigation.”

Officer Matthew Baumann (hereafter the officer), a “certified drug recognition expert,” responded to the scene of the collision. After his preliminary investigation, he arrested appellant “for driving under the influence.” The officer then conducted a “drug recognition evaluation.” He formed the opinion that appellant was under the influence of a “central nervous system depressant.” Both alcohol and some drugs are central nervous system depressants. (See People v. Huynh (2012) 212 Cal.App.4th 285, 292, fn. 2.) The record does not show whether the officer or Officer Redeker smelled the “tell-tale” odor of an alcoholic beverage on appellant’s breath. Neither officer was asked whether appellant’s breath had this odor.

The officer read to appellant “verbatim” an advisement from a Ventura police department form: “Drugs slash — drugs and alcohol: You are required to submit to a chemical test. Implied consent of your blood: A sample of your blood will be taken by nursing staff at the hospital. If you fail to adequately provide a sample, it will result in the suspension of your driving privilege for a period of one year.” The officer did not advise appellant that he could choose whether the chemical test would be of his blood or breath. The officer also did not advise appellant that he could refuse to provide any sample.

Appellant verbally agreed to provide a blood sample and signed a consent form that gave him the option of refusing consent. He was transported to a hospital where a blood draw was performed. After the blood draw, he lost consciousness. The officer did not know the cause of the loss of consciousness.

At the section 1538.5 hearing, defense counsel said that appellant was not challenging “the probable cause for the arrest.” Counsel asserted, “The focus of the motion is really a McNeely issue.” In Missouri v. McNeely (2013) 569 U.S. 141, the Supreme Court applied the Fourth Amendment’s warrant requirement to nonconsensual blood testing in driving under the influence of alcohol cases. The Court held that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” (Id. at p. 165.) “Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.” (Id. at p. 156.)

1. Unless otherwise stated, all statutory references are to the Vehicle Code.

2. The only reasonable inference is that the officer did so because he suspected that appellant had been driving under the influence of a drug or the combined influence of a drug and alcohol.
The People argued that McNeely was inapplicable because “unlike the defendant in McNeely who was subjected to a nonconsensual blood draw, [appellant] freely and voluntarily gave his consent to have his blood drawn.” (See People v. Harris (2015) 234 Cal.App.4th 671, 676, 689 (Harris) [McNeely is inapposite where a motorist freely and voluntarily consents to a warrantless blood test since such consent “is actual consent under the Fourth Amendment,” an exception to the warrant requirement]; Schneckloth v. Bustamonte (1973) 412 U.S. 218, 219 (“one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent”).)

Defense counsel responded: Appellant did not freely and voluntarily consent to the blood draw because the officer “did not give him an admonition that’s in accord with California State Law . . . . [¶] . . . [A] properly given implied consent admonition would give him the option to choose between a breath sample or a blood sample, and it would not say that he is required to give a blood sample.” But defense counsel acknowledged that a breath test would not have shown whether appellant was under the influence of a drug. He further argued that appellant’s consent was not voluntary because he lost consciousness after signing the consent form.

In denying the suppression motion, the trial court impliedly found that appellant had freely and voluntarily consented to the blood draw. It expressly found that he had consented pursuant to the “implied consent law.” We do not dwell upon the latter reason for the court’s ruling. “We may sustain the trial court’s decision without embracing its reasoning. Thus, we may affirm the superior court’s ruling on [appellant’s] motion to suppress if the ruling is correct on any theory of the law applicable to the case, even if the ruling was made for an incorrect reason. [Citation.]” (People v. McDonald (2006) 137 Cal.App.4th 521, 529; see also People v. Smithey (1999) 20 Cal.4th 936, 972.) As we explain below, appellant freely and voluntarily gave both verbal and written consent to the blood draw.

**Standard of Review**

When a defendant moves to suppress evidence pursuant to section 1538.5, the People have “the burden of proving that the warrantless search or seizure was reasonable under the circumstances. [Citations.]” (People v. Williams (1999) 20 Cal.4th 119, 130.) On appeal, “[w]e defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]” (People v. Glaser (1995) 11 Cal.4th 354, 362.)

“In a suppression motion ‘the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court.’ [Citation.] Consequently, if an inference is permissible under the evidence and it upholds the trial court’s decision, we must presume that the trial court drew it. Thus, we must ‘view the facts upon which the suppression motions were submitted in the light most favorable to the People, drawing therefrom all reasonable inferences in support of the trial court’s order denying the motions.’ [Citation.]” (People v. Dominguez (1988) 201 Cal.App.3d 345, 353; see also People v. Woods (1999) 21 Cal.4th 668, 673.)

**Substantial Evidence Supports the Finding that Appellant Freely and Voluntarily Consented to the Blood Draw**

“[A] court may exclude . . . evidence [pursuant to section 1538.5] only if exclusion is . . . mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment.” (In re Lance W. (1985) 37 Cal.3d 873, 896.) There is no Fourth Amendment violation when a motorist freely and voluntarily consents to a warrantless chemical test of his blood. (Harris, supra, 234 Cal.App.4th at pp. 685, 689.) “That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist’s submission to be coerced or otherwise invalid for purposes of the Fourth Amendment.” (Id. at p. 689.) “The voluntariness of consent is a question of fact to be determined from the totality of circumstances. . . . [Citations.]

We must ‘view the facts upon which the suppression motion is based to determine whether the search was in fact voluntary as a product of free choice and not coercion. [Citation.]’” (People v. James (1977) 19 Cal.3d 99, 107.)

Appellant claims that he did not freely and voluntarily consent to the blood draw because the officer failed to give a proper advisement under the implied consent law. Instead of advising him that he was required to give a blood sample, appellant argues that the officer should have advised that he could choose either a blood or breath test.

Appellant relying on section 23612, subdivision (a)(2)(B), which provides, “If the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic...” 3.
beverage and any drug, the person has the choice of whether the test shall be of his or her blood or breath, and the officer shall advise the person that he or she has that choice." (Italics added.)

The officer did not comply with the letter of section 23612, subdivision (a)(2)(B) because he did not advise appellant of his statutory right to choose either a blood or breath test. But this violation did not prejudice appellant and is of no constitutional significance. The administration of a breath test would have been inconclusive because it would not have disclosed whether appellant was under the influence of drugs or a combination of drugs and alcohol. "[A] breath test . . . only tests for alcohol content." (People v. Pickard (2017) 15 Cal.App.5th Supp. 12, 15.)

The failure to give an advisement in compliance with the implied consent law does not mandate the suppression of the test result. As previously noted, evidence may be suppressed pursuant to section 1538.5 only if the defendant’s Fourth Amendment rights were violated and suppression is mandated by the federal exclusionary rule. (In re Lance W., supra, 37 Cal.3d at p. 896.) “[C]ontrol over the arrestee’s choice of a particular test amounts to a constitutional violation. [Citations.]” (Ritschel v. City of Fountain Valley (2006) 137 Cal.App.4th 838, 845; see also Harris, supra, 234 Cal.App.4th at p. 692 [“[F]ailure to strictly follow the implied consent law does not violate a defendant’s constitutional rights”]; People v. Ling (2017) 15 Cal.App.5th Supp. 1, 10 [“although the actions of the arresting officer failed to comply with the requirements of the implied consent law, no court has held that such a failure rises to the level of a constitutional violation, and we do not so hold now”].)

Even if the Fourth Amendment had required the officer to comply with the letter of the implied consent law, the blood test result would have been admissible under the inevitable discovery doctrine. Pursuant to this doctrine, "illegally seized evidence may be used where it would have been discovered by the police through lawful means. . . . The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. [Citation.]” (People v. Robles (2000) 23 Cal.4th 789, 800.) "The test is not whether ‘the police would have certainly discovered the tainted evidence, rather, it is only necessary to show a reasonably strong probability that they would have.’ [Citations.]” (In re Rudy F. (2004) 117 Cal. App.4th 1124, 1136.)

If the officer had complied with the letter of the implied consent law by giving the statutory advisement and appellant had chosen a breath test, the officer could and would have required him to submit to a blood test pursuant to section 23612, subdivision (a)(2)(C), which provides: “A person who chooses to submit to a breath test may also be requested to submit to a blood test if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug and if the officer has a clear indication that a blood test will reveal evidence of the person being under the influence. . . . The officer shall advise the person that he or she is required to submit to an additional test. The person shall submit to and complete a blood test.” Thus, appellant’s blood test result would have been admissible because “it would have been in-evitably discovered independent of the [allegedly] improper police conduct. [Citation.]” (In re Rudy F., supra, 117 Cal. App.4th at p. 1136.)

Moreover, exclusion of the test result is prohibited by the “Truth-in-Evidence” provision of Article I, section 28, subdivision (f)(2) of the California Constitution. “By its plain terms, section 28(d) [now section 28(f)(2)] requires the admission in criminal cases of all ‘relevant’ proffered evidence unless exclusion is allowed or required by an ‘existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 782 or 1103,’ or by new laws passed by two-thirds of each house of the Legislature. (Italics added.)” (People v. Wheeler (1992) 4 Cal.4th 284, 292.) “[S]ection 28(d) supersedes all California [as opposed to federal] restrictions on the admission of relevant evidence except those preserved or permitted by the express words of section 28(d) itself. [Citations.] . . . [Citation.]” (People v. Alvarez (2002) 27 Cal.4th 1161, 1173, second brackets in original.)

We agree with the rule and rationale of Harris, supra, 234 Cal.App.4th 671. There, a sheriff’s deputy arrested the defendant for driving under the influence of drugs and advised him that he was required to take a blood test. “Defendant responded, ‘okay,’ and [the deputy] testified that at no time did defendant appear unwilling to provide a blood sample.” (Id. at p. 678.) On appeal, defendant argued that the deputy’s “admonition under the implied consent law was false” because he said “that a blood test was ‘the only option’ available.” (Id. at p. 691.) Defendant contended that a motorist in his situation “must be given the choice between a blood or breath test and may only be compelled to take a blood test ‘if the officer has a clear indication that a blood test will reveal evidence of the person being under the influence.’” (Veh.Code, § 23612, subd. (a)(2)(B), (C).) (Ibid.) The Harris court decided that, “[u]nder the totality of the circumstances, . . . defendant freely and voluntarily consented to his blood being drawn, and . . . was not coerced or tricked into submitting to the blood test.” (Id. at p. 692.) This is a fair characterization of what happened in the instant case. Appellant has certainly not shown that there is substantial evidence to the contrary.

4. There is a suggestion in the record that Officer Redeker administered a preliminary alcohol screening test (P.A.S.) which showed a .00 blood alcohol level. We do not factor this into our analysis because this evidence was not admitted at the 1538.5 hearing. But this suggestion may explain why the officer did not comply with the letter of section 23612, subdivision (a)(2)(B).
A New Variation on “Diminished Capacity”

Appellant claims that he was in a state of “diminished capacity” and therefore unable to freely and voluntarily consent to the blood draw. His “diminished capacity” allegedly occurred because he “had just been involved in [a] traffic collision.” Appellant observes, “Although the record does not reflect the extent of [his] injuries, [the officer] testified that [he] lost consciousness” after the blood draw.

The “diminished capacity” issue is forfeited because appellant failed to raise it below. (People v. Williams, supra, 20 Cal.4th at pp. 130-131.) Even if the issue were preserved for appeal, there is no evidence in the record that, before losing consciousness, appellant lacked the capacity to give consent. The loss of consciousness could have been a reaction to the blood draw rather than the result of injuries sustained in the collision.

The evidence is insufficient to show that appellant was injured at all. Officer Redeker testified that he had been informed over the police radio “that there was a noninjury traffic collision.” Appellant alleges that he was “required . . . to be transported to the emergency room for treatment [of his injuries].” In fact, he was transported to the emergency room to have his blood drawn. There is no evidence that he was treated in the emergency room for injuries sustained during the collision.

CONCLUSION

The record of the section 1538.5 hearing contains ample evidence that appellant freely and voluntarily consented to a chemical test of his blood. He verbally agreed to a blood draw and signed a consent form that gave him the option of refusing consent.

DISPOSITION

The order denying appellant’s motion to suppress is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, Acting P. J.

We concur: PERREN, J., TANGEMAN, J.
BACKGROUND

The Yeagers are represented on appeal, but were self-represented in the trial court.

The Operative Complaint

The first amended complaint generally alleged that both Peter and Bethany Holt worked together at the Holt Law Firm in some capacity and that all three defendants were responsible for all of the actions and damages alleged.

The first claim, captioned “Breach of Fiduciary Duty,” alleged Holt failed to communicate about the costs and risks of further litigation, concealed facts and acted negligently in discharging professional obligations. As an example, Peter Holt refused to sign a declaration supporting a motion for attorney fees in Yeager v. AT&T Mobility (E.D.Cal., Nov. 21, 2007, No. Civ. 07-2517), although Holt claimed in Holt v. Yeager that he was owed those same fees (inferentially, that he had in fact performed services for Yeager in that matter). This refusal allegedly resulted in Yeager not being awarded those fees in Yeager v. AT&T Mobility.

The second claim, captioned “Misrepresentation,” incorporated prior allegations and alleged Holt misrepresented Holt’s abilities and “the truth about payment” for services Yeager performed for Holt; however, no further details are alleged.

The third claim, captioned “Breach of Oral Contract,” alleges Holt told General Yeager that Holt would pay for “various benefits and services” (otherwise undescribed) from Yeager, but breached this oral contract. It also alleged Holt represented that the firm would work on a pro bono basis, but did not do so.

The fourth claim, captioned “Misappropriation of Name,” alleged that Holt used General Yeager’s name on the firm’s website without permission.

The fifth claim, captioned “Professional Negligence,” alleged negligent representation in Yeager v. AT&T Mobility, but the only specific failing described was the alleged failure to sign the declaration supporting the motion for attorney fees.

Special Motion to Strike

After Holt had venue transferred, Holt filed the instant motion, claiming the suit was based on Peter Holt’s successful suit for fees in Holt v. Yeager, and that his fee litigation was an “exercise of the Constitutional right of petition.” As relevant here, he also alleged Yeager had no probability of success in this suit.

Holt alleged he briefly represented Yeager in 2009 and successfully sued Victoria Yeager in Nevada County for his fees (some $11,000), and defended the judgment on appeal to the Appellate Department of the superior court. Yeager had deposited nearly $17,000 with the court to forestall enforce-
Dissenting opinion, reading the facts as I find them, I conclude that the case is not for trial court disposition as an anti-SLAPP motion. I would affirm the superior court's decision.

The majority holds that the cause of action is based on the defendant's speech or petitioning activity and, therefore, that the plaintiff's complaint is an improper attempt to chill free speech. The majority reaches this conclusion based on the fact that the complaint'sgravamen of the plaintiff's cause of action."[Citations."

To make that determination, we look to the "principal thrust orprotected free speech or petitioning activity." [Citation.] Tois whether the cause of action is based on the defendant's

The trial court denied Holt's motion. The court found Yeager's malpractice claims did not chill Holt's right to sue Yeager. Nor did the misappropriation claim raise an issue of public interest because Yeager's claims of improper use of his fame for Holt's commercial purposes reflect a private dispute. Similarly, breaching an alleged contract to provide pro bono services did not arise from a protected activity. Based on these rulings, the court did not need to address whether Yeager had showed a probability of success.

Holt timely appealed. The appeal lies. (See § 425.16, subd. (i).)

DISCUSSION

The purpose of anti-SLAPP motions is to weed out lawsuits designed to stifle free speech or lawful expressive conduct. There is a two-step analysis. First, the trial court determines whether the movant has shown the action implicates protected speech or conduct. Second, if that has been shown, the court evaluates whether the opponent meets certain criteria, including showing a probability of prevailing. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1017, pp. 426-428; 1 Schwing, Cal. Affirmative Defenses (2d ed. 2017) Lack of Required Certificate etc., § 12:38, pp. 807-855.)

Holt’s motion trips on the first step.

We certainly accept Holt’s point that suing someone is an aspect of the right to petition the government and is therefore a protected activity. (See Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1115; Wolfgren v. Wells Fargo Bank (1997) 53 Cal.App.4th 43, 50-55 [in the vexatious litigant context].) Holt's filing and prosecution to completion of Holt v. Yeager was protected conduct.

But our Supreme Court has emphasized that “a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is assert-
ed.” (Park v. Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1060; see Greco v. Greco (2016) 2 Cal.App.5th 810, 819-820; Ulkarim v. Westfield LLC (2014) 227 Cal.App.4th 1266, 1274.) “In order for a complaint to be within the anti-SLAPP statute, the ‘critical question is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.’” [Citation.] To make that determination, we look to the “principal thrust orgravamen of the plaintiff’s cause of action.” [Citations.]”

(Central Valley Hospitalists v. Dignity Health (2018) 19 Cal. App.5th 203, 217 (Central Valley); see Ulkarim, at p. 1274.)

Holt claims that this suit is based on statements “made injudicial proceedings, and statements made in connection with issues under review by courts.” He makes much of the fact that in ruling on an anti-SLAPP motion the trial court must consider the evidence submitted in connection with the motion, and not merely examine the face of the complaint. The statute does provide that both the pleadings and the evidence shall be considered by the trial court. (§ 425.16, subd. (b)(2); see Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67 (Equilon).) But evidence in this context helps clarify the true nature of the dispute, it does not mean a trial court (or an appellate court) should ignore the gravamen orprincipal thrust of the allegations in the complaint. (See Central Valley, supra, 19 Cal.App.5th at p. 217 [“ [t]he question is what is pled—not what is proven”].) Holt’s evidence may show legal and factual infirmities in this lawsuit, but does not bolster Holt’s anti-SLAPP motion, particularly given that Yeager alleges at least some of Holt’s improper actions were taken after the trial in Holt v. Yeager was conducted.

It is possible that some of Yeager’s malpractice claims might have been alleged in defense of the Holt v. Yeager lawsuit for fees, and the Yeagers may have brought this lawsuit to recover all or part of the fees litigated in Holt v. Yeager. Although these possibilities may raise legal bars for the Yeagers in this case, as Holt urges and as the trial court posited (see fn. 3, ante), that potential does not make this an anti-SLAPP case. Holt insists his refusal to sign a fee declaration for use in federal court was protected activity, but whether that decision was or was not malpractice (or whether the claim is time-barred, as Holt contends) is not resolvable in an anti-SLAPP case. And even if this case is found (in whole or in part) to be frivolous, vexatious, or untimely (based on the date of termination of the attorney-client relationship), as Holt variously contends, that does not mean it chills expressive conduct. Nor does the fact that the complaint is vague

The cases cited by the trial court--and many others--hold that a typical attorney malpractice suit is not subject to the anti-SLAPP procedures. (See Loanvest I, LLC v. Utrecht (2015) 235 Cal.App.4th 496, 504 (“claiming that the attorney breached fiduciary obligations to the client as the result of a conflict of interest or other deficiency in the representation of the client . . . does not threaten to chill the exercise of protected rights and the first prong of the anti-SLAPP analysis is not satisfied”); Castleman v. Sagaser (2013) 216 Cal.App.4th 481, 491 (“A growing body of case law holds that actions based on an attorney’s breach of professional and ethical du-
ties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background”); Coretronic Corp. v. Cozen O’Connor (2011) 192 Cal.App.4th 1381, 1391-1393 [where attorney concealed representation of an adversary in order to obtain damaging sensitive information from plaintiffs, their suit for concealment and fraud was not subject to an anti-SLAPP motion]; PrediWave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal.App.4th 1204, 1226-1227 [“the principal thrust of PrediWave’s causes of action is that defendants simultaneously represented both PrediWave and Qu in matters in which they had an irreconcilable conflict of interest. This conflict of interest allegedly adversely affected defendants’ choice of legal strategy;” suit was not brought “to deter the speech and petitioning activities done by their own attorneys on their behalf but rather to complain about the quality of their former attorneys’ performance”]; Hylton v. Frank E. Rogozienski, Inc. (2009) 177 Cal.App.4th 1264, 1272 [“the gravamen of Hylton’s claims is that Rogozienski engaged in nonpetitioning activity inconsistent with his fiduciary obligations owed to Hylton”]; Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624, 630 [“It does not follow . . . that a legal malpractice action may be subject to a SLAPP motion merely because it shares some similarities with a malicious prosecution action and involves attorneys and court proceedings”]; see also Ulkarim v. Westfield LLC, supra, 227 Cal. App.4th at p. 1281 [suit against landlord did not attack acts of serving and filing a notice of termination, but “the underlying decision to terminate” the tenancy].)

And the fact that General Yeager is famous does not mean his claim of misappropriation of his name or likeness is itself a matter of public interest. (See, e.g., Albanese v. Menounos (2013) 218 Cal.App.4th 923, 934 [rejecting view that “that any statement about a person in the public eye is sufficient to meet the public interest requirement”]; D.C. v. R.R. (2010) 182 Cal.App.4th 1190, 1226 [“No authority supports the . . . broad proposition that anything said or written about a public figure or limited public figure in a public forum involves a public issue”]; Dyer v. Childress (2007) 147 Cal.App.4th 1273, 1280 [defamation and false light action did not raise an issue of public interest; “the representation of Troy Dyer as a rebellious slacker is not a matter of public interest and there is no discernable public interest in Dyer’s persona. Although [the film Reality Bites] may address topics of widespread public interest, defendants are unable to draw any connection between those topics and Dyer’s defamation and false light claims”]; Martinez v. Metabolife Internat., Inc. (2003) 113 Cal.App.4th 181, 187-191 [personal injury suit partly alleging misleading product advertising and labeling was not an anti-SLAPP suit]; Consumer Justice Center v. Trimecina International, Inc. (2003) 107 Cal.App.4th 595, 600-602 [suit about false advertising not a matter public interest].)

Holt points to Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628 (Wollersheim) to support his view that Yeager’s motives to circumvent the judgment in Holt v. Yeager show that this case is an effort to chill his right to sue them.5 Wollersheim is distinguishable from this case.

After bitter litigation opposed by the Church of Scientology in state and federal courts (including suing judges who made adverse rulings against it), Wollersheim won a judgment and defended it on appeal after the Church’s petition for writ of certiorari to the United States Supreme Court was denied. (Wollersheim, supra, 42 Cal.App.4th at pp. 636-637, 640-641.) Meanwhile, the Church had filed a separate suit seeking to set aside that judgment, based on purportedly newly-discovered evidence about judicial bias and misconduct in the underlying case. (Id. at pp. 637-639.) Wollersheim moved to strike under section 425.16, submitting evidence of the Church’s extraordinary efforts to interfere with the judicial process in the underlying lawsuit. This included evidence of Church doctrine that declared its perceived enemies to be “fair game” against whom it was acceptable to use illegal means, including knowingly subverting the judicial system. (Id. at pp. 639-642.) Wollersheim also produced evidence tending to show a Church member drowned a judge’s dog, attempts were made to intimidate jurors, a Church member raided Wollersheim’s lawyer’s trash, and a Church member tried to obtain employment in and thereby infiltrate his law office, all to undermine Wollersheim’s underlying case. (Id. at pp. 643-644.)

Thus Wollersheim involved extra-judicial efforts to derail Wollersheim’s lawsuit, thereby directly interfering with his right to seek redress from the courts. It was with that background that Wollersheim stated: “When a party to a lawsuit engages in a course of oppressive litigation conduct designed to discourage the opponents’ right to utilize the courts to seek redress, the trial court may properly apply section 425.16. We hold that in making that determination, the trial court may properly consider the litigation history between the parties.” (Wollersheim, supra, 42 Cal.App.4th at pp. 648-649.)

We reject Holt’s effort to equate this case with Wollersheim. True, the evidence Holt tendered may ultimately show that Yeager v. Holt is barred at least in part by Holt v. Yeager, as posited by the trial court. (See fn. 3, ante.) And clearly Holt’s evidence shows Yeager is not shy about suing former attorneys. But nothing tendered by Holt shows that Yeager has used extra-judicial means to thwart justice as occurred in Wollersheim; instead, Yeager has filed a single lawsuit against Holt in the exercise of Yeager’s own right to petition, a suit that can be adjudicated in the ordinary manner and that in part alleges conduct occurring after Holt v. Yeager was tried.

Yeager may not have pressed his claims of malpractice and overbilling properly. He might have sought mandatory fee arbitration. (See 1 Witkin, supra, Attorneys, § 229, pp. 301-302 [“Evidence relating to claims of malpractice and

5. Our Supreme Court disapproved Wollersheim to the extent it implied an intent to chill expression is required by section 425.16. (See Equilon, supra, 29 Cal.4th at p. 68, fn. 5.)
professional misconduct may be received by the arbitrators only to the extent the claims bear on the fees or costs to which the attorney is entitled;’’ i.e., affirmative relief against the attorney cannot be awarded].) He might have raised an affirmative defense or cross-claim or both alleging malpractice and so forth in Holt v. Yeager. (Id. at § 202(3) [in a civil suit for recovery of fees “a client may offer evidence of negligence of the attorney by way of reducing the amount recoverable”].) The statement of decision in Holt v. Yeager does not indicate Victoria Yeager (the sole defendant there-in) did any of those things. But we fail to see how the mere fact that the Yeagers instead filed a separate lawsuit alleging malpractice and other claims—including post-Holt v. Yeager claims—against Holt threatens Holt’s expressive rights, the evil against which the anti-SLAPP procedure provides a bulwark. (See Hewlett-Packard Co. v. Oracle Corp. (2015) 239 Cal.App.4th 1174, 1184 [“we have seen far more anti-SLAPP motions in garden-variety civil disputes than in cases actually resembling the [intended] paradigm”]; Gaynor v. Bulen (2018) 19 Cal.App.5th 864, 869-870 [breach of trust litigation]; Greco v. Greco, supra, 2 Cal.App.5th at pp. 824-825.)

Most anti-SLAPP motions (and their attendant appeals) result in delay, because the case is on hold until the SLAPP motion is resolved. (See, e.g., Central Valley, supra, 19 Cal. App.5th at pp. 222-223; Grewel v. Jammu (2011) 191 Cal. App.4th 977, 997-1003; People ex rel. Lockyer v. Brar (2004) 115 Cal.App.4th 1315, 1319 [“the defendant gets a very cheap hiatus in the proceedings”].) As one court aptly stated:


Although there may be sound reasons why this case will not succeed, either in whole or in part, filing an anti-SLAPP motion was not an effective way to litigate it.7

6. The denials of certain kinds of anti-SLAPP motions are no longer subject to the automatic stay that applies to appeals in the ordinary anti-SLAPP case. (See § 425.17; Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 194-196.)

7. Holt points to Bethany Holt’s declaration that she is not involved with the law firm and claims she is being harassed by Yeager. But Victoria Yeager’s declaration contested the point and we cannot resolve that dispute on appeal.

DISPOSITION
The judgment is affirmed. Holt shall pay Charles and Victoria Yeager’s costs of this appeal. (See Cal. Rules of Court, rule 8.278.)

Duarte, J.

We concur: Raye, P. J., Robie, J.
THE PEOPLE, Plaintiff and Respondent,

v.

DONICIA ATHENA ESPINOZA,
Defendant and Appellant.

No. A151039
In The Court of Appeal of the State of California
First Appellate District
Division One
(Solano County Super. Ct. No. FCR325222)
Filed May 16, 2018

ORDER MODIFYING OPINION AND
DENYING REHEARING
NO CHANGE IN JUDGMENT

BY THE COURT:

Appellant Donicia Athena Espinoza’s petition for rehearing is denied.

It is ordered that the opinion filed herein on April 25, 2018, be modified as follows:

The second sentence of the first full paragraph on page 7 should read: “Similarly, Panizzon determined that the appellate waiver required dismissal of the appeal because the defendant knowingly waived his right to appeal the sentence, not because he had failed to obtain a certificate of probable cause.”

There is no change in the judgment.

Humes, P.J.