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NINTH CIRCUIT COURT OF APPEALS

Havensight Capital LLC v. Nike, Inc. Premature filing of motion for reconsideration neither accelerates nor extends deadline for filing of appeal (Rawlinson, J.)	C.D. CA	Civil Procedure	5577
United States v. Edling Nevada convictions for robbery and coercion not crimes of violence under Sentencing Guidelines (Watford, J.)	NV	Criminal Law	5581
Ellis v. Harrison Defense counsel's racist beliefs insufficient to entitle client to habeas relief (Nguyen, J.)	C.D. CA	Criminal Law	5584
National Labor Relations Board v. International Association of Bridge Order	NLRB		5588

CALIFORNIA COURTS OF APPEAL

In re D.B. Juvenile court orders did not obligate minor's parents to reimburse county for minor's legal fees (Schulman, J.)	C.A. 1st	Criminal Law	5593
In re Jenson Outstanding <i>Thompson</i> terms no bar to release of youth offender deemed suitable for parole (Dhanidina, J.)	C.A. 2nd	Criminal Law	5599
Von Becelaere Ventures, LLC v. Zenovic Failure to request stay of lien enforcement action pending arbitration results in waiver of right to arbitrate any pending claims (McConnell, P.J.)	C.A. 4th	Dispute Resolution	5608
In re Marriage of Turfe Order modifying opinion	C.A. 4th		5611

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SUMMARIES

Civil Procedure

Premature filing of motion for reconsideration neither accelerates nor extends deadline for filing of appeal (Rawlinson, J.)

Havensight Capital LLC v. Nike, Inc.

9th Cir.; June 7, 2018; 15-56607

The court of appeals dismissed in part an appeal from a district court judgment and orders, and otherwise affirmed. The court held that plaintiff's premature filing of a motion for reconsideration did not extend the deadline for the filing of an appeal from the underlying judgment.

Havensight Capital LLC sued Nike, Inc. for tortious interference based on Nike's alleged use of its market strength to force out competitors. Nike moved to dismiss. Havensight filed multiple motions for default, arguing that Nike's motion was untimely. Before the district court could rule on the motions, Havensight filed a writ of execution, claiming a default judgment in excess of \$600 million. Because Nike's motion was not untimely, the district court denied the motions for default and ordered the writ of execution stricken. On February 18, 2015, the district court granted Nike's motions to dismiss and for Rule 11 sanctions. Havensight moved for reconsideration the following day. The court denied that motion on April 22. On September 22, the district court granted Nike's motion for attorneys' fees and costs as Rule 11 sanctions.

Havensight filed a notice of appeal on October 15, 2015.

The court of appeals affirmed the district court's September 22 sanction order and otherwise dismissed the appeal as untimely, holding that Havensight's motion for reconsideration of the February 18 order of dismissal did not extend the deadline for the filing of its appeal. Because the order of dismissal was not set out in a separate document, as required under Rule 58, that judgment was first deemed entered 150 days later, on July 18. Havensight had 30 days from that date to file its notice of appeal. Havensight's February 19 motion for reconsideration of the order of dismissal did not accelerate the deadline for the filing of its appeal, but it also did not extend the deadline. Havensight's October 15 notice of appeal was thus untimely as to the order of dismissal, as well as to the district court's other orders, including a vexatious litigant order, all of which, other than the September 22 sanctions order, were filed more than 30 days prior to October 15. The court upheld the sanctions order as amply supported by the record.

Criminal Law

Defense counsel's racist beliefs insufficient to entitle client to habeas relief (Nguyen, J.)

Ellis v. Harrison

9th Cir.; June 7, 2018; 16-56188

The court of appeals affirmed a district court judgment. The court held a defense attorney's extreme animus towards persons of his client's race, standing alone and without evidence either of deficient performance or a resulting breakdown in counsel's relationship with his client, was insufficient to entitle his client to habeas relief.

In 1991, Ezzard Ellis was tried before a jury, convicted of special circumstance murder, and sentenced to life imprisonment. He was represented at trial by attorney Donald Ames. More than 20 years later, a friend sent Ellis a newspaper article describing Ames as "deceptive, untrustworthy, and disloyal to his capital clients." Ellis obtained the declarations of Ames's daughters and coworkers describing Ames' oft expressed and extreme animus towards persons of other races, including his own clients.

After unsuccessfully seeking habeas relief in the state courts, Ellis filed a petition for writ of habeas corpus in the district court, arguing that Ames' racial prejudice created an actual conflict of interest. The court denied the petition.

The court of appeals affirmed, holding that Ellis was required to show he was prejudiced by Ames' racist beliefs, which he failed to do. Although *Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994) held that an appointed attorney's overt racist statements to his client, accompanied by a threat to provide substandard performance, entitled the client to relief without any further showing of prejudice, the Ninth Circuit reached a different conclusion in *Mayfield v. Woodford*, 270 F.3d 915, 924 (9th Cir. 2001), holding that a client represented by racist attorney (notably, the same attorney who later represented Ames) was not entitled to relief absent a showing that counsel's alleged conflicts resulted in substandard performance. To the extent *Frazer* held that defense counsel's racism violated the Sixth Amendment without need to show prejudice, *Mayfield* implicitly overruled that holding. Thus, in order to be entitled to relief, Ames needed to show either that he knew of Ames' racist views during a critical phase of the proceedings, leading to a complete breakdown in communication, or that Ames' racism otherwise adversely affected his performance as counsel. Ellis, who acknowledged not having learned of Ellis' racist views until years later, was unable to make such a showing. Judge Nguyen, writing separately and joined by Judges Hawkins and Tashima, explained that he would have granted Ellis' petition were the court not bound by *Mayfield*.

Criminal Law

Juvenile court orders did not obligate minor's parents to reimburse county for minor's legal fees (Schulman, J.)

In re D.B.

C.A. 1st; June 6, 2018; A149815

The First Appellate District struck in part and modified in part juvenile court dispositional orders. In the published portion of its opinion, the court held that the minor erred in construing the juvenile court's dispositional orders as requiring his parents to reimburse the county for his legal fees.

In June 2015, the juvenile court declared D.B. to be a ward of the court and placed him on probation. Ten months later, in April 2016, the district attorney filed a second wardship petition. At hearing in May 2016, the court continued D.B.'s wardship, again allowing him to remain at home. The district attorney filed a third wardship petition in July 2016. At hearing in September 2016, the court continued D.B.'s wardship, subject to various new terms and conditions.

On appeal, D.B. challenged the juvenile court's inclusion in his written disposition orders the requirement that his parents reimburse the county for his legal fees.

The court modified the May and September dispositional orders, holding that D.B. erred in construing the orders as imposing a payment obligations. The written orders included reference to the probation officer's recommendation that D.B.'s parents reimburse the county for his legal fees, but no such payment obligation could legally be imposed without referral to the county financial evaluation officer for a determination of the parents' ability to pay those costs. Accordingly, although the written orders included the recommendation that the parents be required to reimburse the county, they did not so order. Further, because, while D.B.'s appeal was pending, the Legislature repealed the statutory provision requiring a parent to reimburse the county for the costs of legal services provided to a minor who is subject to the juvenile delinquency system, no such order of reimbursement could now be entered. The court accordingly modified the dispositional orders to clarify that they do not require D.B.'s parents to reimburse the county for D.B.'s legal fees.

Criminal Law

Outstanding *Thompson* terms no bar to release of youth offender deemed suitable for parole (Dhanidina, J.)

In re Jenson

C.A. 2nd; June 6, 2018; B286056

The Second Appellate District granted a petition for writ of habeas corpus. The court held that a youth offender's com-

mission of additional offenses in prison does not preclude his release upon later being deemed suitable for parole at a youth offender parole hearing.

In 1979, then 19-year old Ronald Jenson committed first degree felony murder, for which he was convicted and sentenced to 25 years to life, plus two years. During his first nine years of incarceration, Jenson committed three additional in-prison crimes, for which he was convicted and sentenced to three additional consecutive prison terms, known as "*Thompson* terms." He thereafter remained crime-free. In 2016, the Board of Parole Hearings found Jenson suitable for release on parole at a youth offender parole hearing conducted under Penal Code §3051. The California Department of Corrections and Rehabilitation (CDCR) refused to release Jenson, however, and instead ordered him to serve his remaining *Thompson* term.

Jenson filed a petition for writ of habeas corpus challenging his continued incarceration. Jenson argued that §3051—as the later-enacted and more specific statute—necessarily supersedes §1170.1(c), which governs sentences for in-prison felonies. The People opposed, arguing that the two statutes are not fundamentally inconsistent, and thus both must be given effect.

The court of appeal granted the writ petition, holding that that §§3051 and 1170.1(c) are irreconcilable as they apply to a youth offender who commits an additional crime in prison after the age of 26. Section 3051, which specifically addresses youth offenders, dictates that the youth offender be immediately released upon being found suitable for parole. In contrast, §1170.1(c) would require the same youth offender to serve any applicable *Thompson* term even after being found suitable for release. Because §3051 is both later-enacted and more specific, it supersedes §1170.1(c). Jenson was accordingly entitled to immediate release. Justice Egerton dissented, finding the plain language of the statutes leads to the conclusion that an inmate who is granted parole for a life crime committed when he was younger than 26 must still serve his consecutive term for a new and different offense committed in prison after the age of 25. Justice Egerton reasoned that it could not have been the Legislature's intention to give youth offenders a "free pass" for any and all future crimes committed in prison when they could no longer be considered "youth" by any definition of the word.

Criminal Law

Nevada convictions for robbery and coercion not crimes of violence under Sentencing Guidelines (Watford, J.)

United States v. Edling

9th Cir.; June 8, 2018; 16-10457

The court of appeals vacated a judgment of sentence and remanded. The court held that the Nevada crimes of robbery and coercion do not qualify as crimes of violence for purposes of the federal sentencing guidelines.

Hans Edling pleaded guilty to being a felon in possession of a firearm. The district court determined that Edling had three prior Nevada convictions for crimes of violence: (1) assault with a deadly weapon, (2) robbery, and (3) coercion. Edling was sentenced accordingly.

On appeal, Edling argued that none of these three offenses constituted a “crime of violence” as that term is defined in the Guidelines.

The court of appeals vacated the judgment of sentence, holding that neither the robbery nor the coercion conviction qualified as a crime of violence under the Guidelines’ definition of that term. Under Nevada law, the crime of robbery may be committed by creating fear of injury to property alone. Nevada’s robbery statute thus sweeps more broadly than the Guidelines definition of a crime of violence, the elements clause of which requires the use, attempted use, or threatened use of “physical force against the person of another.” Nor is it a categorical match under the enumerated offenses clause, which includes “robbery” among the offenses that constitute a crime of violence, but references only “generic” robbery, which requires danger to the person, not merely danger to property. Although the crime of extortion was added to the enumerated offenses clause in 2016, the definition of extortion requires the use of “(A) force, (B) fear of physical injury, or (C) threat of physical injury” to take something of value from another. The most natural reading of this definition is that it requires the wrongful use of force, fear, or threats directed against a person, and not against property. To the extent that the definition could be deemed ambiguous, the rule of lenity compelled that the ambiguity be resolved in Edling’s favor. Edling’s conviction for coercion also does not qualify as a crime of violence. Coercion is not one of the offenses listed in the enumerated offenses clause, and it is not a categorical match under the elements clause since it does not have as an element the use, attempted use, or threatened use of violent physical force against the person of another. Because only Edling’s assault conviction qualified as a crime of violence, the district court erred both in its calculation of Edling’s base offense level and in its assessment of criminal history points. The court remanded for resentencing.

C.A. 4th; June 6, 2018; D072620

The Fourth Appellate District affirmed a trial court order. The court held that plaintiff’s failure to request that his action to enforce a mechanic’s lien be stayed pending arbitration resulted in waiver of his right to arbitrate any of the pending claims between the parties.

Von Becelaere Ventures, LLC entered into a construction contract with James Zenovic. The parties’ contract included an arbitration clause. After construction had begun, a dispute arose. Zenovic recorded a mechanics lien on March 20, 2017, asserting Ventures owed \$449,126.96 for work furnished at the property. On April 3, Ventures filed a construction defect complaint, alleging breach of contract and related claims. On April 7, Zenovic filed his own complaint, stating claims, among others, for breach of contract and enforcement of his mechanics lien.

Zenovic later moved to compel arbitration of Ventures’ claims. The court denied the motion, finding Zenovic waived his right to arbitration by failing to comply with Code Civ. Proc. §1281.5(a), when filing his complaint. Zenovic appealed, arguing that §1281.5 applies only to an action to enforce a mechanics lien and should not operate to waive his right to arbitrate the parties’ other contractual disputes.

The court of appeal affirmed, holding that the trial court properly denied Zenovic’s motion to compel arbitration. Section 1281.5 means what it says—a party who files an action to enforce a mechanic’s lien, but who does not at the same time request that the action be stayed pending arbitration, waives any right to arbitration. By its plain terms, the statute permits a contractor to take advantage of the statutory mechanics lien process while preserving the contractual right to arbitrate disputes as provided in the arbitration agreement. However, a party who commences a mechanics lien action without complying with the stay provisions set forth in the statute waives any such right to arbitration. Here, Zenovic neither alleged in his complaint that he intended to seek a stay, nor filed an application for stay. His failure to do so waived his right to arbitrate both his own claim and those filed against him by Ventures.

Dispute Resolution

Failure to request stay of lien enforcement action pending arbitration results in waiver of right to arbitrate any pending claims (McConnell, P.J.)

Von Becelaere Ventures, LLC v. Zenovic

FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 5577

HAVENSIGHT CAPITAL LLC, Plaintiff-Appellant,

v.

NIKE, INC., Defendant-Appellee.

No. 15-56607

United States Court of Appeals for the Ninth Circuit

D.C. No. 2:14-cv-08985-R-FFM

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

Manuel L. Real, District Judge, Presiding

Submitted August 18, 2017*

San Francisco, California

Filed June 7, 2018

Before: Johnnie B. Rawlinson and Jacqueline H. Nguyen, Circuit Judges, and Sarah S. Vance,** District Judge.

Opinion by Judge Rawlinson

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

**The Honorable Sarah S. Vance, United States District Judge for the Eastern District of Louisiana, sitting by designation.

COUNSEL

Benjamin Woodhouse, Pismo Beach, California, for Plaintiff-Appellant.

Sean S. Twomey, Gibson Dunn & Crutcher LLP, Irvine, California; Austin Schwing, Gibson Dunn & Crutcher LLP, San Francisco, California; for Defendant-Appellee.

OPINION

RAWLINSON, Circuit Judge:

This appeal is the latest in an ongoing and bizarre dispute between Havensight Capital LLC (Havensight) and Nike, Inc. (Nike). Throughout these proceedings, Havensight has portrayed its action as a battle between David and Goliath. In reality, however, it is more akin to Don Quixote's tilting at windmills.

The action from which this appeal was brought concerns allegedly wrongful conduct by Nike against Havensight (the tortious interference action). The tortious interference action-

was filed after Havensight's prior action against Nike, alleging infringement upon a soccer brand owned by Havensight (the infringement action), was dismissed with prejudice.

I. BACKGROUND

Although the prior action is not before us on appeal, the two cases are somewhat intertwined. Havensight's infringement action was dismissed with prejudice on November 19, 2014. The following day, Havensight filed the tortious interference action, and six days later filed its Amended Complaint.¹ Attached to the Amended Complaint was an affidavit purportedly reflecting an interview of a sporting goods retailer who reported that Nike used its market strength to force retailers to purchase its goods, thereby excluding competitors like Havensight. After the tortious interference action was reassigned to the same judge who presided over the infringement action, Nike filed a motion to dismiss under Federal Rule of Civil Procedure (FRCP) 12(b)(6).²

At this juncture, Havensight departed sharply from ordinary procedure, filing multiple motions for default on the basis that Nike's motion to dismiss was untimely. Before the district court could rule on the motions, Havensight filed a writ of execution with the Clerk of the Court, claiming a default judgment in excess of \$600 million. Of course, because Nike had timely filed its motion in lieu of an answer, no default judgment was warranted, and the district court ordered the writ of execution stricken.

Nike subsequently filed a Motion for Relief Regarding [Havensight's counsel's] Ethical Violations. Undeterred, Havensight moved to recuse the assigned judge from the tortious interference action and from the (dismissed) infringement action. The judge assigned to Havensight's recusal motions denied both. Nike subsequently sought sanctions under Rule 11 of the Federal Rules of Civil Procedure (Rule 11)³ due to Havensight's false and frivolous filings.

1. Havensight alleged six causes of action: (1) intentional interference with contractual relations; (2) intentional interference with prospective economic relations; (3) negligence; (4) vertical and horizontal price fixing; (5) civil RICO (Racketeer Influenced and Corrupt Organizations) under California law; and (6) unfair competition and trade practices.

2. Rule 12(b)(6) provides: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: ... failure to state a claim upon which relief can be granted..." Fed. R. Civ. P. 12(b)(6).

3. Rule 11 provides in pertinent part:

...

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are

On February 18, 2015, the district court granted Nike's motion to dismiss the Amended Complaint without leave to amend, and imposed sanctions under Rule 11 against Havensight's counsel in the form of attorneys' fees and expenses. No separate judgment was entered for this order. The following day, Havensight filed a motion to vacate the dismissal and the Rule 11 sanctions (motion for reconsideration). Included in Havensight's motion was yet another motion to recuse the judge who decided the earlier recusal motions. Although the judge had previously requested that Havensight refrain from filing further recusal motions, Havensight decided to Just Do It. Understandably, the court did not look favorably upon Havensight's audacity, and denied the motion on April 22, 2015, while issuing an order to show cause why additional sanctions should not be imposed under Rule 11 and 28 U.S.C. § 1927.⁴ These sanctions were imposed on March 31, 2015.

The district court entered a separate order declaring Havensight to be a vexatious litigant, and Nike moved for attorneys' fees and costs pursuant to the Rule 11 sanctions imposed in the February 18 order. The district court granted Nike's motion in full in an order entered on September 22, 2015.

Havensight filed its Notice of Appeal on October 15, 2015. In its notice, Havensight referenced only the dismissal of the Amended Complaint and the granting of the Rule 11 sanctions. Havensight now seeks to expand the scope of rulings of its appeal to include the additional sanctions imposed under 28 U.S.C. § 1927, the vexatious litigant order, the denial of Havensight's motion to strike "Nike's alleged illegal deposition and felonious entry of a confidential customer communication into the public record," and denial of Havensight's Application for Default.

warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Fed. R. Civ. P. 11.

4. 28 U.S.C. § 1927 provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

II. DISCUSSION

A. Standards of Review

We review de novo a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6). *See Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017). A district court's denial of a motion for leave to amend, denial of a motion for reconsideration, imposition of sanctions under Rule 11 and 28 U.S.C. § 1927, and characterization of a party as a vexatious litigant are all reviewed for abuse of discretion. *See Kerr v. Jewell*, 836 F.3d 1048, 1053 (9th Cir. 2016) (denial of motion for reconsideration); *De Dios v. Int'l Realty & Investments*, 641 F.3d 1071, 1076 (9th Cir. 2011) (imposition of sanctions); *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (characterization of party as a vexatious litigant).

B. Jurisdiction

"We have jurisdiction to determine our own jurisdiction." *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) (citation omitted). However, we lack jurisdiction to decide an appeal if the notice of appeal is not timely filed under Rule 4 of the Federal Rules of Appellate Procedure (Rule 4) and the appellee raises the untimeliness as a basis for dismissal. *See Hamer v. Neighborhood Hous. Serv. Of Chicago*, 138 S.Ct. 13, 16–17 (2017); *see also Classic Concepts, Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1284 (9th Cir. 2013). We similarly lack jurisdiction over matters not included in the Notice of Appeal. *See Smith v. Barry*, 502 U.S. 244, 248 (1992).

Rule 4 requires the notice of appeal to be filed "within thirty days after the entry" of the judgment or order being appealed. *Orr v. Plumb*, 884 F.3d 923, 927 (9th Cir. 2018). If the district court did not enter a separate judgment, judgment is deemed entered 150 days after "entry of the judgment or order in the civil docket." FRAP 4(a)(7)(A)(ii).

1. Matters Not Included in the Notice of Appeal

Rule 3 of the Federal Rule of Appellate Procedure provides that "[t]he notice of appeal must . . . designate the judgment, order, or part thereof being appealed." FRAP 3(c)(1) (B). "When a party seeks to argue the merits of an order that does not appear on the face of the notice of appeal, we consider: (1) whether the intent to appeal a specific judgment can be fairly inferred and (2) whether the appellee was prejudiced by the mistake." *West v. United States*, 853 F.3d 520, 523 (9th Cir. 2017) (citation and internal quotation marks omitted).

Havensight's notice of appeal named "the order, and sanctions imposed against the Plaintiff by the Court," referenced "document[s] 123 [order granting Rule 11 sanctions] and 124 [order granting defendant's motion to dismiss the Amended Complaint]," and attached the orders as exhibits. No intent to appeal any other rulings can reasonably be inferred from Havensight's notice of appeal. *See id.* Accordingly, Havensight's appeal is dismissed as to the sanctions imposed under § 1927,

the vexatious litigant order, the denial of Havensight's motion to strike and the denial of Havensight's Application for Default. *See Valadez-Lopez v. Chertoff*, 656 F.3d 851, 859 n.2 (9th Cir. 2011).

2. Dismissal of the Amended Complaint

The district court did not enter a separate judgment after it dismissed Havensight's Amended Complaint on February 18, 2015. Judgment was therefore deemed entered on July 18, 2015, pursuant to Rule 58 of the Federal Rules of Civil Procedure (Rule 58).⁵ Ordinarily, this analysis would resolve the matter—if Havensight filed its notice of appeal after July 18, we would lack jurisdiction to hear the appeal. *See Classic Concepts*, 716 F.3d at 1284. Indeed, Havensight filed its notice of appeal on October 15, well after judgment was deemed entered.

This case, however, presents an unusual wrinkle. One day after the district court dismissed the Amended Complaint, Havensight filed a motion for reconsideration. When a party files a motion for reconsideration, the time period to appeal is tolled pending resolution of that motion. *See United States ex rel. Hoggett v. Univ. of Phoenix*, 863 F.3d 1105, 1107–08 (9th Cir. 2017) (“[I]f a party files one of the motions listed in [Rule] 4(a)(4)(A), the time to file a notice of appeal is tolled during the motion’s pendency...”). Included within this category of motions is a motion to alter or amend the judgment. *Id.* at 1107; *see also* FRAP 4(a)(4)(A)(iv). The title of the pleading does not control this determination. Rather, we “look to the substance” of the pleading “to determine whether it is in substance a motion to alter or amend the judgment.” *Hoggett*, 863 F.3d at 1108. If the motion “involves reconsideration of matters properly encompassed in a decision on the merits,” it is properly characterized as a motion to alter or amend the judgment under Rule 4(a). *Id.* (citations and internal quotation marks omitted).

Although Havensight styled its pleading as a motion to vacate the judgment and re-open the case, the motion actually sought reconsideration of the district court’s decision on the merits as contemplated in Rule 4(a). *See id.* However, the difficulty in applying Rule 4(a) in this case stems from the fact that the motion that would ordinarily toll the time for filing the notice of appeal was resolved prior to entry of

the underlying judgment. The proceedings evolved along the following timeline:

- Dismissal of Amended Complaint – February 18, 2015
- Filing of Motion for Reconsideration – February 19, 2015
- Denial of Motion for Reconsideration – April 22, 2015
- Judgment deemed entered pursuant to Rule 4(a)(7)(A)(ii) – July 18, 2015

We have not previously addressed this precise scenario. More typically, we are called upon to address the timeliness of an appeal when a pending motion for reconsideration is being relied upon to extend the appeal period. *See, e.g., Lolliv v. County of Orange*, 351 F.3d 410, 414 (9th Cir. 2003). In this case, however, there was no motion for reconsideration pending when the judgment was deemed entered pursuant to Rule 4(a)(7)(A)(ii). But, if Rule 4 is interpreted as tolling the appeal period for the sixty-two days during which the motion for reconsideration was pending, the appeal period would expire on October 18, 2015, after adding the thirty days provided for in Rule 4(a)(1)(A) (providing that the notice of appeal must be filed “within 30 days after entry of the judgment or order appealed from”), rendering Havensight’s October 15 notice of appeal timely. *See Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007) (noting that the appellant had “180 days (150 days plus 30 days) from entry of the order” within which to appeal when appealing “a judgment entered by operation of [Rule] 4(a)(7)”).

Although not directly on point, our decision in *ABF Capital Corp. v. Osley*, 414 F.3d 1061 (9th Cir. 2005), is instructive on the interplay between Rule 58 and Rule 4. In *ABF Capital*, orders of dismissal were entered on April 10, 2003, and April 11, 2003, respectively. *See id.* at 1064. When ABF Capital (ABF) moved to alter or amend the judgments, the district court construed the motions as ones to reconsider because no judgments had yet been entered. *See id.* The district court denied the motions in minute orders entered on May 15, 2003, and on July 30, 2003, ABF filed notices of appeal for both cases. *See id.*

Because the court never set forth judgments in a separate document as provided in Rule 58, ABF had 180 days to appeal. *See id.* Although ABF filed its notices of appeal within that 180-day period, the Appellees urged the court to declare ABF’s appeal untimely due to ABF’s premature filing of a motion to alter or amend the judgments. Appellees contended that “the 180-day timetable was shortened” by the filing of the premature motion. *See id.* In rejecting this argument, we noted that the separate document requirement serves to inform the parties with precision “when judgment has been entered and when they must begin preparing post-verdict motions or an appeal.” *Id.* (citation omitted). We noted that

5. Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document ...

...

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

Fed. R. Civ. P. 58(a), (c).

accelerating the appeal period due to the filing of a premature motion to alter or amend the judgments would not be consistent with the considered interplay between Rule 58 and Rule 4, and would lessen the degree of certainty that was the goal of the Advisory Committee when amending the rules. *See id.* at 1064–65.

Because the district court decided Havensight’s motion on April 22, 2015, we are presented with a question not often encountered: when an appellant files a post-judgment motion that is resolved before entry of the underlying judgment, is the time period to file a notice of appeal extended? In *ABF*, we held that a “premature post-judgment motion may not accelerate the deadline for appeal before a separate judgment has been entered.” *Id.* at 1065. We see no principled basis for reaching a different outcome in the converse scenario: when an Appellant seeks to lengthen the period for appeal due to the filing of a premature post-judgment motion.

Although a litigant is not to be penalized for prematurely filing a post-judgment motion, neither should it gain a tactical advantage by doing so. Nor does anything in the text of Rule 4 suggest otherwise. Accordingly, we apply the same rationale we articulated in *ABF* to conclude that Havensight’s premature filing of the post-judgment motion did not extend the otherwise applicable appeal period.

The district court’s judgment was deemed entered on July 18, 150 days after its February 18 order dismissing the Amended Complaint. Although Havensight filed a motion for reconsideration on February 19, the motion was resolved on April 22, well before judgment was deemed entered. Thus, Havensight had thirty days from the entry of judgment, or until August 17, to file its notice of appeal. *See* FRAP 4(a)(1) (A). Nevertheless, Havensight failed to file its notice of appeal until October 15, nearly two months later. Havensight’s appeal is therefore untimely, and we dismiss for lack of jurisdiction its appeal challenging dismissal of the Amended Complaint. *See Classic Concepts*, 716 F.3d at 1284; *see also Hamer*, 138 S.Ct. at 16–17.

C. Imposition of Rule 11 Sanctions

The district court issued its order granting Nike attorneys’ fees as a sanction under Rule 11 on September 22, 2015. This is the only issue for which Havensight’s October 15 appeal was timely.

“District courts can use Rule 11 to impose sanctions on any party that files a motion for an improper purpose or who does so without a legal or factual basis.” *Center for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1102 (9th Cir. 2016) (citation and internal quotation marks omitted).

We defer to the trial court’s factual findings as to whether a litigant’s filings are sufficiently frivolous or abusive such that Rule 11 sanctions would appropriately deter future malfeasance. *See Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (noting that “[t]he district court has broad fact-finding powers with respect to sanctions, and its findings warrant great deference”) (citation and internal

quotation marks omitted). Here, use of Rule 11 sanctions was properly within the district court’s discretion. *See Blixseth v. Yellowstone Mountain Club, LLC*, 854 F.3d 626, 630, n.4 (9th Cir. 2017) (noting that a court may award attorneys’ fees and costs “associated with sanctions proceedings” under Rule 11). As discussed, Havensight filed numerous and voluminous motions despite specific warnings to desist filing these needless pleadings. The district court’s findings were amply supported by the record, and its sanctions order is affirmed. *See id.*

III. CONCLUSION

Havensight’s appeal of the sanctions imposed under 28 U.S.C. § 1297, the vexatious litigant order, the denial of Havensight’s motion to strike, the denial of Havensight’s Application for Default, and the dismissal of the Amended Complaint, is **DISMISSED** for lack of jurisdiction. The order imposing fees as sanctions under Rule 11 is **AFFIRMED**.

DISMISSED in part and AFFIRMED in part.

Cite as 18 C.D.O.S. 5581

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HANS VINCENT EDLING, Defendant-
Appellant.

No. 16-10457

United States Court of Appeals for the Ninth Circuit
D.C. No. 2:15-cr-00300-KJD-NJK-1

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

Kent J. Dawson, District Judge, Presiding

Argued and Submitted January 10, 2018

San Francisco, California

Filed June 8, 2018

Before: Sidney R. Thomas, Chief Judge, and Johnnie B.
Rawlinson and Paul J. Watford, Circuit Judges.

Opinion by Judge Watford

COUNSEL

Cullen O. Macbeth (argued), Amy B. Cleary, and
Cristen C. Thayer, Assistant Federal Public Defenders;
Rene L. Valladares, Federal Public Defender; Office of
the Federal Public Defender, Las Vegas, Nevada; for
Defendant-Appellant.

Elizabeth White (argued), Appellate Chief; William R.
Reed, Assistant United States Attorney; Dayle Elieson,
United States Attorney; United States Attorney's Office,
Reno, Nevada; for Plaintiff-Appellee.

OPINION

WATFORD, Circuit Judge:

Hans Edling pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Under the United States Sentencing Guidelines, the base offense level for that offense varies depending on whether the defendant has one or more prior felony convictions for a “crime of violence.” U.S.S.G. § 2K2.1(a). The district court determined that Edling had three such convictions under Nevada law for the following crimes: (1) assault with a deadly weapon, (2) robbery, and (3) coercion. On appeal, Edling contends that none of these offenses constitutes a “crime of violence” as that term is defined in the Guidelines.

We use the so-called “categorical” approach to decide whether each of the Nevada offenses qualifies as a “crime of violence.” *United States v. Simmons*, 782 F.3d 510, 513 (9th Cir. 2015). Under the categorical approach, we compare the elements of each offense with the federal definition of “crime of violence” to determine whether the Nevada offense criminalizes a broader range of conduct than the federal defini-

tion captures. *Id.* The Sentencing Guidelines define the term “crime of violence” as follows:

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a). (We quote the amended version of § 4B1.2, effective August 1, 2016, because Edling’s sentencing occurred after that date.) The first clause of this definition is known as the “elements clause,” the second as the “enumerated offenses” clause. An offense qualifies as a “crime of violence” if it is covered by either clause.

As explained below, we conclude that assault with a deadly weapon constitutes a “crime of violence,” but that neither robbery nor coercion are covered by the Guidelines’ definition of that term. We therefore vacate Edling’s sentence and remand for resentencing.

I. ASSAULT WITH A DEADLY WEAPON

Edling was convicted of assault with a deadly weapon under Nevada Revised Statutes § 200.471, Nevada’s general assault statute. The statute is divisible into multiple versions of the offense as defined in subsection (2). Under the modified categorical approach, we may consult a limited set of documents to determine which version of the offense Edling was convicted of committing. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Edling’s charging document and plea agreement make clear that he was convicted of an offense defined in subsection (2)(c) of the statute. That offense requires proof, as relevant for our purposes, that the defendant: (1) committed an assault (defined as “[i]ntentionally placing another person in reasonable apprehension of immediate bodily harm”); (2) upon an officer or other designated individual; (3) “with the use of a deadly weapon, or the present ability to use a deadly weapon.” Nev. Rev. Stat. § 200.471(1)(a), (2)(c).

Edling’s offense of conviction qualifies as a crime of violence under the elements clause of § 4B1.2(a). The offense requires that the defendant place a person in reasonable fear of immediate bodily harm. It therefore has as an element the use or threatened use of physical force against the person of another, with “physical force” understood to mean in this context “*violent* force—that is, force capable of causing physical pain or injury to another person.” *Johnson v. United*

States, 559 U.S. 133, 140 (2010). As we have held, “[a] defendant cannot put a reasonable person in fear of bodily harm without threatening to use ‘force capable of causing physical pain or injury.’” *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) (per curiam) (quoting *Johnson*, 559 U.S. at 140). When the defendant puts the victim in fear of bodily harm through the use or threatened use of a deadly weapon, the violent nature of the force employed is even more apparent. See *United States v. Perez-Silvan*, 861 F.3d 935, 943 (9th Cir. 2017); *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010). Because the Nevada assault-with-a-deadly-weapon offense requires proof that the defendant placed the victim in fear of bodily harm through the use of (or present ability to use) a deadly weapon, it necessarily entails the use or threatened use of violent physical force against the person of another. It is therefore a categorical match for a crime of violence under the elements clause of § 4B1.2(a).

II. ROBBERY

Edling was convicted of robbery under Nevada Revised Statutes § 200.380, which renders unlawful the “taking of personal property from the person of another, or in the person’s presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person *or property*, or the person *or property* of a member of his or her family, or of anyone in his or her company at the time of the robbery.” Nev. Rev. Stat. § 200.380(1) (emphasis added). We have italicized the language that is key to our analysis—the fact that robbery under Nevada law may be accomplished by creating fear of injury to property alone. That language is key because under the categorical approach we must determine whether “the least of th[e] acts criminalized” by a state statute is covered by the Guidelines’ definition of “crime of violence.” *United States v. Molinar*, 881 F.3d 1064, 1067 (9th Cir. 2018) (internal quotation marks omitted). Here, the least of the acts criminalized by Nevada’s robbery statute is the taking of someone’s personal property by instilling fear of injury to property.

Turning first to the elements clause of § 4B1.2(a), it is readily apparent that Nevada’s robbery statute sweeps more broadly than that clause’s definition of a crime of violence. The elements clause requires the use, attempted use, or threatened use of “physical force against *the person* of another.” U.S.S.G. § 4B1.2(a)(1) (emphasis added). Force directed against property is not covered, so Nevada’s robbery offense is not a categorical match under the elements clause.

Nor is it a categorical match under the enumerated offenses clause. That clause lists “robbery” among the offenses that constitute a crime of violence, but the version of robbery referred to there is “generic” robbery. Generic robbery requires danger to the person, not merely danger to property. *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008). So again, by allowing a conviction to rest on fear of injury to property alone, Nevada’s robbery statute is not a categorical match for generic robbery.

The enumerated offenses clause also lists “extortion” among the offenses that constitute a crime of violence, and in 2009 we held that the least of the acts criminalized by Nevada’s robbery statute would be covered under the generic definition of extortion. *United States v. Harris*, 572 F.3d 1065, 1066 (9th Cir. 2009) (per curiam). But we based that holding on the fact that, at the time, § 4B1.2(a) did not provide a definition of “extortion,” which meant it was referring to generic extortion. That offense does encompass threats of injury to property, so we held that any conduct criminalized under Nevada’s robbery statute not covered by generic robbery would nonetheless be covered by generic extortion. *Id.*

On August 1, 2016, however, the Sentencing Commission amended the enumerated offenses clause by adding for the first time a definition of “extortion.” That definition provides: “‘Extortion’ is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.” U.S.S.G. § 4B1.2 cmt. n.1. The question posed here is whether this new definition still encompasses threats of injury to property.

We conclude that the Guidelines’ new definition of extortion narrows the offense by requiring that the wrongful use of force, fear, or threats be directed against the person of another, not property. That is the most natural reading of the text of the definition, particularly its reference to “physical injury”—a term that, when used on its own, is typically understood to mean physical injury to a person. See, e.g., Black’s Law Dictionary 906, 1331 (10th ed. 2014) (defining “physical injury” as “bodily injury,” which in turn means “[p]hysical damage to a person’s body”); *Jackson v. Carey*, 353 F.3d 750, 757–58 (9th Cir. 2003); *Moe v. United States*, 326 F.3d 1065, 1068–69 (9th Cir. 2003).

The Guidelines’ use of the term “physical injury” in other provisions confirms this understanding. Throughout the Guidelines, “physical injury” is used to refer to injury to a person, whereas other terms, like “damage” or “destruction,” are used to refer to injury to property. Take, for example, the policy statements contained in §§ 5K2.2 and 5K2.5. Section 5K2.2 applies to “physical injury,” and it makes clear by referring to injury or disability suffered by “the victim” that it covers injury to a person, not injury to property. U.S.S.G. § 5K2.2. Section 5K2.5, by contrast, covers injury to property, which it labels “Property Damage or Loss.” U.S.S.G. § 5K2.5. Other provisions draw the same distinction between physical injury to a person and damage to property. See, e.g., §§ 2C1.1(c)(3) (“physical injury or property destruction”), 2J1.2(b)(1)(B) (“physical injury to a person, or property damage”), 5K2.12 (“physical injury, substantial damage to property or similar injury”). Provisions that refer to “physical injury” standing alone use the term, as does Black’s Law Dictionary, as synonymous with bodily injury to a person. See, e.g., §§ 2B1.1 cmt. (background), 2B3.1 cmt. (background), 5K2.0 cmt. n.3(B)(ii). We have no reason to believe that the drafters of the August 2016 amendment intended to depart from the consistent usage of “physical injury” elsewhere in

the Guidelines when they used the same term in § 4B1.2's definition of extortion.

To the extent any ambiguity remains as to whether the new definition of extortion includes threats of injury to property, we think that ambiguity must be resolved in Edling's favor under the rule of lenity. The rule of lenity "instructs that, where a statute is ambiguous, courts should not interpret the statute so as to increase the penalty that it places on the defendant." *United States v. Hertler*, 776 F.3d 680, 685–86 (9th Cir. 2015) (internal quotation marks omitted). In the face of considerable doubt about whether the Sentencing Commission intended the definition of extortion to capture offenses involving threats of injury to property, the provision should not be read to increase the sentences of defendants in Edling's position. We therefore join the Tenth Circuit in interpreting the new definition of extortion "as excluding injury and threats of injury to property." *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017).

The government contends that, in the wake of *Beckles v. United States*, 137 S. Ct. 886 (2017), we can no longer rely on the rule of lenity to resolve ambiguities in provisions of the Guidelines. Before *Beckles*, our court sitting en banc held that the rule of lenity does apply to the Guidelines, *United States v. Leal-Felix*, 665 F.3d 1037, 1040 (9th Cir. 2011) (en banc), and we have adhered to that holding post-*Beckles*, albeit without discussing the impact of *Beckles* directly. *United States v. D.M.*, 869 F.3d 1133, 1144 (9th Cir. 2017). We do not view the reasoning of *Beckles* as "clearly irreconcilable" with our prior circuit authority, and we therefore remain bound by that authority. See *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

The Court's holding in *Beckles* did not address the rule of lenity. It instead addressed whether Guidelines provisions are subject to vagueness challenges under the Due Process Clause. The Court held that they are not, because the Guidelines do not define criminal offenses or fix the permissible range of sentences. 137 S. Ct. at 892. The Guidelines thus "do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894. Although the rule of lenity serves the same purposes, it is also grounded in separation-of-powers concerns. In particular, the rule of lenity is predicated on the view that courts should be hesitant to impose criminal penalties unless it is clear that the legislature intended such punishment to be available. *United States v. LeCoe*, 936 F.2d 398, 402 (9th Cir. 1991). The Supreme Court's decision in *Beckles* did not undermine the validity of that reason for holding the rule of lenity applicable to the Sentencing Guidelines. See *United States v. Gordon*, 852 F.3d 126, 135–36 n.11 (1st Cir. 2017) (Barron, J., concurring in the judgment).

Robbery under Nevada law is not a categorical match under either the elements clause or the enumerated offenses clause of § 4B1.2(a). The district court therefore erred in treating Edling's robbery conviction as a crime of violence.

III. COERCION

Finally, we address Edling's conviction for coercion under Nevada Revised Statutes § 207.190. We conclude that this conviction does not qualify as a crime of violence either.

Coercion under Nevada law is divisible into at least two separate offenses, punishable by different penalties. The core offense is defined as follows:

1. It is unlawful for a person, with the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing, to:

(a) Use violence or inflict injury upon the other person or any of the other person's family, or upon the other person's property, or threaten such violence or injury;

(b) Deprive the person of any tool, implement or clothing, or hinder the person in the use thereof; or

(c) Attempt to intimidate the person by threats or force.

Nev. Rev. Stat. § 207.190(1). This offense, without more, is punishable only as a misdemeanor. § 207.190(2)(b). However, the statute also creates a felony version of the offense, which arises when the defendant uses "physical force or the immediate threat of physical force" to commit the offense. § 207.190(2)(a). We know from Edling's charging document and plea agreement that he was convicted of the felony version of the offense.

Coercion is not one of the offenses listed in the enumerated offenses clause of § 4B1.2(a), so coercion can qualify as a crime of violence only if it is covered by the elements clause. As discussed above, an offense is covered by the elements clause only if it has as an element the use, attempted use, or threatened use of violent physical force against the person of another, meaning "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. The question for us is whether the "physical force" required to be used or threatened under the felony version of coercion is the kind of violent physical force that satisfies the *Johnson* standard.

The Nevada courts have not definitively answered this question. The closest guidance we have found comes from the Nevada Supreme Court's interpretation of the battery statute, Nevada Revised Statutes § 200.481, which proscribes "any willful and unlawful use of force or violence upon the person of another." Nev. Rev. Stat. § 200.481(1)(a). The Nevada Supreme Court has held that the "force" required to violate that statute "need not be violent or severe and need not cause bodily pain or bodily harm." *Hobbs v. State*, 251 P.3d 177, 179 (Nev. 2011). Nevada courts follow the rule that "when the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense, unless the statutes' context indicates otherwise." *Savage v. Pierson*, 157 P.3d 697, 702 (Nev.

2007) (en banc). We think it likely that Nevada courts would interpret the “physical force” necessary to commit Nevada’s felony coercion offense in the same manner as the “force” necessary to commit battery—in other words, as not requiring the kind of violent physical force necessary to satisfy the *Johnson* standard.

In addition, the Nevada Supreme Court has upheld convictions for felony coercion that involved the use or threatened use of physical force against an object (such as a telephone), rather than against a person. See *Gramm v. State*, 2018 WL 679548, at *2 (Nev. Feb. 1, 2018) (unpublished); *Attwal v. State*, 2016 WL 6902177, at *3 (Nev. Nov. 22, 2016) (unpublished); *Middleton v. State*, 2016 WL 562804, at *1 (Nev. Feb. 10, 2016) (unpublished). These decisions establish a “realistic probability” that a defendant could be convicted of felony coercion without using or threatening to use violent physical force against the person of another, as § 4B1.2(a)’s elements clause requires. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Subsection (1) of the coercion statute specifies three different ways the core offense may be committed. Since none of those alternatives requires the use or threatened use of violent physical force against the person of another, we need not decide whether the coercion statute is further divisible into separate offenses beyond the misdemeanor and felony versions we have already described. It is enough for us to hold that the felony version of the offense is not a categorical match under the elements clause, since it does not have as an element the use, attempted use, or threatened use of violent physical force against the person of another.

Edling’s felony coercion conviction does not constitute a crime of violence under § 4B1.2(a). The district court erred by concluding otherwise.

* * *

We vacate Edling’s sentence and remand for resentencing. On remand, Edling’s base offense level should be 20 rather than 24, as he has only one prior conviction for a crime of violence. U.S.S.G. § 2K2.1(a)(4)(A). In addition, because we have held that his conviction for coercion does not qualify as a crime of violence, he should not be assessed an additional criminal history point under § 4A1.1(e). Our disposition renders it unnecessary for us to reach Edling’s remaining challenge to his sentence.

Edling’s motions to take judicial notice and supplement the record are **DENIED**.

SENTENCE VACATED; REMANDED FOR RESENTENCING.

Cite as 18 C.D.O.S. 5584

EZZARD CHARLES ELLIS, Petitioner-Appellant,

v.

C. M. HARRISON, Warden, Respondent-Appellee.

No. 16-56188

United States Court of Appeals for the Ninth Circuit

D.C. No. 5:05-cv-00520-SJO-JEM

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

S. James Otero, District Judge, Presiding

Argued and Submitted March 7, 2018

Pasadena, California

Filed June 7, 2018

Before: Michael Daly Hawkins,*A. Wallace Tashima, and Jacqueline H. Nguyen, Circuit Judges.

Per Curiam Opinion;

Concurrence by Judge Nguyen

* Judge Hawkins was drawn to replace Judge Reinhardt on the panel following his death. Judge Hawkins has read the briefs, reviewed the record, and listened to the oral argument.

COUNSEL

Mark Abraham Yim (argued), Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellant.

Christine Yoon Friedman (argued), Deputy Attorney General; Daniel Rogers, Supervising Attorney General; Julie L. Garland, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

OPINION

PER CURIAM:

Ezzard Ellis, a California inmate, appeals the district court’s denial of his petition for writ of habeas corpus. He contends that he was denied his Sixth Amendment right to effective counsel because his trial attorney held deeply racist beliefs about African Americans in general and him in particular. Our precedent involving the same attorney and mostly the same evidence requires us to reject this contention. When defense counsel does not express his racist views to his client, no conflict will be presumed, and the defendant must show both deficient performance and prejudice to establish a Sixth

Amendment violation. Since Ellis fails to do so here, we affirm the district court.

I.

Ellis and his co-defendant were charged with the November 1989 murder, attempted murder, and robbery of two men who were waiting in their car at a McDonald's drive-through window. Several witnesses who observed the crime to varying extents testified with corresponding certainty that Ellis looked like the shooter. Although the surviving victim repeatedly failed to identify Ellis in live and photographic lineups, a McDonald's employee who knew Ellis from school testified that he was the shooter.

Attorney Donald Ames, now deceased, was appointed to represent Ellis. Ellis's first two trials ended in mistrials due to witnesses being unavailable. His third and fourth trials resulted in hung juries. At the conclusion of his fifth trial in June 1991, Ellis was convicted of special circumstance murder, attempted murder, and two counts of robbery. He received a sentence of life without the possibility of parole. His conviction became final on May 29, 1996.

In March or April 2003, Ellis's friend sent him a newspaper article about Ames's "lousy" performance as a capital defense attorney. The article described Ames as "deceptive, untrustworthy, and disloyal to his capital clients" (quoting *Anderson v. Calderon*, 276 F.3d 483, 484 (9th Cir. 2001) (Reinhardt, J., dissenting from denial of rehearing en banc)). It recounted the testimony of Ames's adult daughters regarding his "frequent use of deprecating remarks and racial slurs about his clients."

Ellis obtained declarations from two of Ames's daughters in which they described their father's racism. According to one, Ames harbored "contempt for people of other races and ethnic groups" and "especially ridiculed black people, referring to them with racial invectives." The other daughter recalled a May 1990 conversation in which Ames referred to his client Melvin Wade as a "nigger" who "got what he deserved."¹

Ellis also obtained declarations from individuals who worked with Ames. A fiscal clerk at the San Bernardino Superior Court stated in a declaration that Ames employed "racist terms to characterize court personnel, his employees, and his clients."² A legal secretary who worked for Ames from

September 1990 to January 1991 heard Ames talking about a client: "because his client was black," Ames said, "he did not trust him and did not care what happened to him." A secretary in Ames's office from January to June 1991 stated that Ames "consistently refer[red] to his African American employees as 'niggers'" and "his African-American co-counsel as 'a big black nigger trying to be a white man.'" In the fifth trial, which took place during the first half of 1991, Ellis's co-defendant was represented by an African American attorney.

Ellis sought habeas relief in the state courts, arguing that he received constitutionally ineffective assistance of counsel because his counsel's "racial prejudice against African-Americans" created an actual conflict of interest. When that proved unsuccessful, Ellis filed a federal habeas petition pursuant to 28 U.S.C. § 2254. The district court initially denied relief on the ground that Ellis's petition was untimely. We reversed, holding that the petition could be timely if Ellis were entitled to equitable tolling. *Ellis v. Harrison*, 270 F. App'x 721 (9th Cir. 2008). On remand, the district court determined that Ellis was not entitled to equitable tolling and again denied relief. We disagreed and once more remanded for further proceedings. *Ellis v. Harrison*, 563 F. App'x 531 (9th Cir. 2014). Ellis now appeals the district court's denial of his Sixth Amendment claim on the merits.

II.

We have jurisdiction under 28 U.S.C. § 1291 and 2253. Because Ellis's habeas petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we cannot grant relief unless he meets its "demanding standard." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727 (2017) (per curiam). As applicable here, Ellis must show that "the underlying state court merits ruling was 'contrary to, or involved an unreasonable application of, clearly established Federal law' as determined by [the Supreme] Court." *Id.* (quoting 28 U.S.C. § 2254(d)(1)). In making this determination, we look to the last reasoned state court decision, *see Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018), which is the state superior court's order denying Ellis's habeas petition.

Whether the Sixth Amendment's guarantee of effective counsel was satisfied is generally analyzed under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a showing of both deficient performance by counsel and consequent prejudice. *Id.* at 687. In this context, "prejudice" means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is less than a preponderance of the evidence. *See id.* at 693 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.").

1. We overturned Wade's death sentence due to Ames's ineffective assistance at the penalty phase. *See Wade v. Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994). The declarations from Ames's daughters were executed in the 1990s in connection with *Wade*. In the district court proceedings, Ellis submitted more recent declarations from the daughters. In one, Ames's daughter recalls a case from 1990 or 1991 involving "African-American men . . . accused of holding up or robbing someone at a fast food restaurant," in which Ellis "referred to his client . . . with racial slurs" and "commented on how stupid his client was." We cannot consider the updated declarations because the state courts had no opportunity to do so. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

2. Referring to African Americans, Ames stated, "those people

can't learn anything." In a case tried during the summer of 1990, Ames opined that his Hispanic client "deserves to fry" and that the presiding judge was "a fucking Jap" who should "remember Pearl Harbor." The client was convicted and sentenced to death. *See People v. Gutierrez*, 52 P.3d 572 (Cal. 2002).

Not every Sixth Amendment claim requires the same showing of prejudice. When the assistance of counsel is actually or constructively denied altogether, “prejudice is presumed.” *Id.* at 692 (citing *United States v. Cronin*, 466 U.S. 648, 659 & n.25 (1984)). A similar but more limited presumption of prejudice arises “when counsel is burdened by an actual conflict of interest.” *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (1980)). Prejudice is presumed in such cases only if counsel “actively represented conflicting interests” and “an actual conflict of interest adversely affected [the] lawyer’s performance.” *Id.* (quoting *Sullivan*, 446 U.S. at 350, 348).

The Supreme Court has not established the applicable standard of prejudice—*Strickland*, *Cronin*, or *Sullivan*—when counsel is alleged to have performed deficiently on account of racial animus towards a client. The superior court, evidently applying *Strickland*, concluded that Ellis was not prejudiced because “[h]e has not reasonably shown by competent evidence that, absent any or all of [Ames’s] acts, the outcome of the trial would have been more favorable to him.” However, the superior court required “proof of this prejudice” to be “by a preponderance of the evidence,” a standard more stringent than and therefore “contrary to” *Strickland*, *Cronin*, and *Sullivan*. 28 U.S.C. § 2254(d)(1); see *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000) (“If a state court were to reject a prisoner’s claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be [contrary] to our clearly established precedent [under] *Strickland* . . .”). Consequently, the state court decision is not entitled to AEDPA deference, and we review Ellis’s claim de novo. See *Lafler v. Cooper*, 566 U.S. 156, 173 (2012); *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc).

III.

Even under de novo review, any relief for Ellis must be based on a rule that was clearly established at the time his conviction was final. See *Teague v. Lane*, 489 U.S. 288, 310 (1989) (“[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”). This differs from AEDPA review in that we may consider our own as well as Supreme Court precedent in determining which rules are clearly established. See *Williams*, 529 U.S. at 412; *Burton v. Davis*, 816 F.3d 1132, 1142 (9th Cir. 2016).

Before Ellis’s conviction was final, we decided a case concerning “an appointed lawyer who calls [the defendant] to his face a ‘stupid nigger son of a bitch’ and who threatens to provide substandard performance for him if he chooses to exercise his right to go to trial.” *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994). We held that these facts “would render so defective the relationship inherent in the right to trial counsel guaranteed by the Sixth Amendment that [the defendant] would be entitled to a new trial with a different

attorney,” *id.* at 784, and that the constitutional defect was “so egregious . . . that ‘a presumption of prejudice [would be] appropriate without inquiry into the actual conduct of the trial.” *id.* at 785 (quoting *Cronin*, 466 U.S. at 660).

Frazer’s rule of prejudice per se relied in part on the outburst itself. The racial slur combined with the extortionate statement “completely destroy[ed] and negate[d] the channels of open communication needed for the [attorney-client] relationship to function as contemplated in the Constitution.” *Id.* at 785. At the same time, *Frazer* also relied on the attorney’s racial animus, regardless of the defendant’s awareness of it. See *id.* at 782 (“[A]n attorney who adopts and acts upon a belief that his client should be convicted ‘fail[s] to function in any meaningful sense as the Government’s adversary.” (quoting *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988))); *id.* at 784 (“Discrimination within the judicial system is most pernicious because it is ‘a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.” (quoting *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986))).

Seven years later, however, we rejected a claim that “Ames’ racism and his concern that he not be perceived by the San Bernardino bar or bench as requesting too much funding prevented [him] from effectively representing [the defendant].” *Mayfield v. Woodford*, 270 F.3d 915, 924 (9th Cir. 2001) (en banc). The habeas petitioner submitted the same declarations from Ames’s daughters and colleagues upon which Ellis now relies. Analyzing the claim under *Sullivan*, we held that the petitioner “ha[d] not demonstrated that Ames performed poorly *because of* the alleged conflicts” and therefore was not entitled to relief. *Id.* at 925. To the extent *Frazer* held that defense counsel’s extreme animus towards the persons of the defendant’s race violates the Sixth Amendment without need to show prejudice, *Mayfield* implicitly overruled that holding.³

IV.

In order to demonstrate that Ames’s racist views prejudiced him, Ellis must show either that he knew of these views during a critical phase of the proceedings, leading to a complete breakdown in communication as in *Frazer*, or that Ames’s racism otherwise adversely affected his performance as counsel. Ellis concedes that he was unaware of Ames’s

3. It is possible that the en banc court in *Mayfield* was simply unaware of *Frazer*, since neither the majority nor the dissent cites it. See *Mayfield*, 270 F.3d at 925 (“It is by no means clear from precedent that the grounds for conflict alleged . . . are cognizable under ineffective assistance case law.”). In any event, *Mayfield* was a pre-AEDPA case applying the extremely permissive standard for granting a certificate of appealability: whether “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” resolving “any doubt regarding whether to issue a COA in favor of [the petitioner].” *Id.* at 922 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); see *Lambright v. Stewart*, 220 F.3d 1022, 1025 n.4 (9th Cir. 2000) (“[T]he showing a petitioner must make to be heard on appeal is less than that to obtain relief.”).

racism until several years after his conviction was final. And while the relationship between counsel's bigotry and his performance at Ellis's trial is much less attenuated than in *Mayfield*—here, the representation occurred contemporaneously with the statements at issue whereas Mayfield's trial was held approximately a decade earlier— Ellis fails to identify any acts or omissions by Ames that “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688 (1984). We are therefore bound under *Mayfield* to reject his claim.

AFFIRMED.

NGUYEN, Circuit Judge, with whom HAWKINS and TASHIMA, Circuit Judges, join, concurring:

If we were writing on a blank slate, I would vote to grant relief. Of the constitutional rights given to a criminal defendant, none is more important than the Sixth Amendment right to counsel. By allowing Ellis's conviction to stand, we make a mockery of that right.

Ellis's lawyer, Donald Ames, openly and repeatedly expressed contempt for people who look like Ellis based on the ugliest of racial stereotypes. This was not just the depressingly common assumption that criminal defendants of certain races are more likely to be guilty, but something far more sinister: a belief in the inferiority of all people of color—be they support staff, co-counsel, or judge. Most damning of all, Ames made it clear that he did not care what happened to his black clients. It would be impossible for anyone with such views to adequately represent a non-white defendant.

I do not suggest that a conviction should be overturned whenever a racially tinged comment by defense counsel comes to light. Racism has as many shades as race, and we generally assume that counsel can set aside any personal distaste for a client, whatever its motivation, to zealously advocate on his behalf. But when an attorney expresses such utter contempt and indifference about the fate of his minority clients as Ames did here, he has ceased providing the reasonably competent representation that the Sixth Amendment demands. A defendant in such an untenable position may be better off with no counsel at all.

Lawyers today look very different than they did in 1991, when Ellis was tried. Within a generation, diversity among legal practitioners has markedly increased. On appeal in our court, of the three judges and two advocates at oral argument, four were people of color. These changes matter. Minority lawyers' greater representation on the bar has led to a growing acknowledgment and intolerance of racial bias in the practice of law. But it has not ended racism, both subtle and overt. People of color are still underrepresented in the legal profession but overrepresented among criminal defendants and face greater odds of conviction and higher average sentences. *See, e.g., Robert J. Smith et al., Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871, 877–90 (2015).

When examining the reasonableness of counsel's performance, we extend considerable deference to strategic choices. This deference is predicated on the assumption that counsel is acting in the client's best interest. For an attorney as deeply racist as Ames, that assumption is unfounded. It makes no difference that Ellis was unaware of his counsel's beliefs. The deleterious effect of such racism on the outcome is usually impossible to prove and, under these circumstances, we should presume prejudice.

Because I cannot in good faith distinguish Ellis's case from *Mayfield*, I reluctantly concur in the opinion. Had we not been bound by *Mayfield*, I would have granted Ellis's petition.

Cite as 18 C.D.O.S. 5588

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS UNION, LOCAL 433, Respondent.

Nos. 88-07283, 89-70522, 90-70053, 98-70929
United States Court of Appeals for the Ninth Circuit
NLRB Nos. 31-CC-1761, 31-CC-1777, 31-CC-1770, 31-CC-1801-1, 31-CC-2076

On Petition for Review of an Order of the National Labor Relations Board

Argued and Submitted January 9, 2018

San Francisco, California

Filed June 8, 2018

Before: J. Clifford Wallace, Johnnie B. Rawlinson,
and Paul J. Watford, Circuit Judges.

Order;

Separate Statement by Judge Wallace

COUNSEL

Kevin J. Hobson (argued), Trial Attorney; Kevin P. Flanagan, Supervisory Attorney; Contempt, Compliance and Special Litigation Branch, National Labor Relations Board, Washington, D.C.; for Petitioner.

David A. Rosenfeld (argued), Weinberg Roger & Rosenfeld, Alameda, California, for Respondent.

ORDER

This appeal is the latest in a series of disputes between the National Labor Relations Board (NLRB) and the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Union Local 433 (Ironworkers) regarding Ironworkers' right to engage in secondary picketing of government entities under Section 8(b)(4)(ii)(B)¹ of the National Labor Relations Act (NLRA).² Because the constitutionality of the challenged statute is not affected by the decision of the United States Supreme Court in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), we deny Ironworkers' motion to modify the extant consent decree.

I. STATUTORY BACKGROUND

Section 8(b)(4)(ii)(B) describes as an unfair labor practice any action to "threaten, coerce, or restrain any person

engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). Such conduct is regarded as impermissible secondary boycotting, being "directed at parties who are not involved in the labor dispute." See *Retail Property Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 943 (9th Cir. 2014). Section 8(b)(4)(ii)(B) proscribes the creation of "a separate dispute with the secondary employer" in order to coerce the primary employer. *National Labor Relations Bd. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 72 (1964); see also *Constar, Inc. v. Plumbers Local 447*, 748 F.2d 520, 521 (9th Cir. 1984). Section 8(b)(4)(ii)(B) does not preclude picketing that results in an "incidental injury to the neutral [parties]," so long as the picketing was not "reasonably calculated to induce customers not to patronize the neutral parties at all." *National Labor Relations Bd. v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 614 (1980) (citation omitted).

II. FACTUAL BACKGROUND

Before us is a consolidated motion filed by Ironworkers seeking to modify under Rule 60(b)(5) of the Federal Rules of Civil Procedure a prior contempt adjudication. Between 1988 and 1989 the Board issued three orders finding that Ironworkers engaged in impermissible secondary boycotts in violation of the NLRA. See *Ironworkers Local 433 (Chris Crane)*, 288 NLRB 717 (1988); *Ironworkers Local 433 (Chris Crane)*, 294 NLRB 182 (1989); *Ironworkers Local 433(United Steel)*, 293 NLRB 621 (1989). In 1991, Ironworkers entered into a consent decree after we upheld the Board's orders. See *National Labor Relations Bd. v. Ironworkers Local 433*, 169 F.3d 1217, 1218 (9th Cir. 1999). As to each of the Board's orders, Ironworkers agreed to refrain from engaging in further "secondary boycott activities." *Id.*

In 1999, the Board issued a contempt order against Ironworkers after finding that Ironworkers engaged in secondary picketing similar to the conduct addressed by the 1991 consent contempt adjudication. See *id.* We upheld the Board's order and, consistent with Ironworkers' settlement, entered a new consent contempt adjudication enforcing the same prohibitions on secondary picketing as articulated in the prior adjudication. Almost two decades later, Ironworkers filed four separate motions under Rule 60(b)(5) seeking to modify the language contained in the 1991 and 1999 consent contempt adjudications prohibiting secondary picketing under Section 8(b)(4)(ii)(B). In each, Ironworkers argued that in light of the Supreme Court's decision in *Reed*, Section 8(b)(4)(ii)(B) should be analyzed as a content-based restriction on speech that could not survive strict scrutiny review.

We consolidated these four actions and stayed proceedings pending the outcome of *National Labor Relations Board v. Teamsters Union Local No. 70, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 668 F. App'x 283 (9th Cir. 2016), which presented a substantively similar

1. 29 U.S.C. § 158(b)(4)(ii)(B).

2. 29 U.S.C. § 151 *et seq.*

challenge to the NLRA. In *Teamsters*, we held that *Reed* did not undermine the Supreme Court precedent upholding Section 8(b)(4)(ii)(B), and that the Union failed to demonstrate a significant change in the law, as required under *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992). See *Teamsters*, 668 Fed. App'x. at 284. The stay on this consolidated action was lifted in light of the Supreme Court's denial of the petition for a writ of certiorari. See *Teamsters Union Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. N.L.R.B.*, 137 S. Ct. 2214 (2017). Ironworkers subsequently filed a motion that "modifie[d] and substantially narrow[ed] its request" for Rule 60 relief. The modified motion challenges the application of Section 8(b)(4)(ii)(B) to public entities, and requests deletion of the reference to Section 8(b)(4)(ii)(B) from the consent contempt adjudication.

Ironworkers focuses on the following portions of the statute:

"(b) It shall be an unfair labor practice for a labor organization or its agents . . .

(4) . . . (ii) to threaten, coerce, or restrain any *person* engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

. . .

B. Forcing or requiring any *person* to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, . . . Provided, that nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any *primary* strike or *primary* picketing."

29 U.S.C. § 158(b)(4)(ii)(B) (emphases added). The plain wording of the statement evinces a focus on secondary picketing activity. See *id.* Ironworkers contends that the "constitutional infirmity" in the statute arises from the use of the word "person" in the statute that has been interpreted too broadly by encompassing secondary picketing of public entities as "persons." Ironworkers asserts that this specific argument has never been addressed by the Supreme Court or by this court. This "constitutional infirmity" forms the "narrowed" basis upon which Ironworkers seeks to modify the consent decree.

III. STANDARDS OF REVIEW

Rule 60(b)(5) provides that "[o]n motion . . . the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . [when] the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable. . ." In this case, Ironworkers seek to establish that prospective application of the

consent decree is no longer equitable. The movant bears the burden of proving that it is entitled to relief under the rule. See *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011).

We apply the two-part test established in *Rufo*, 502 U.S. at 383–84, when determining whether to modify a consent decree under Rule 60(b)(5). A party seeking to modify a consent decree must initially establish that a "significant change in circumstances" justifies modification of the decree. *Id.* at 383. The "significant change in circumstances" may be legal or factual. *Id.* at 384. A change in the law may warrant modification of a consent decree when the change "make[s] legal what the decree was designed to prevent." *Id.* at 388.

Whether a factual or legal change is asserted, once the party seeking modification has met its initial burden, the party must then propose a modification that is "suitably tailored to the changed circumstance." *Id.* at 383 (footnote reference omitted); see also *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005).

IV. DISCUSSION

The Supreme Court addressed the constitutionality of § 8(b)(4)(ii)(B) under the First Amendment in *Safeco*. The Supreme Court upheld § 8(b)(4)(ii)(B) against a constitutionality challenge. See *Safeco*, 447 U.S. at 616. Nevertheless, Ironworkers contends that *Safeco* did not address whether the restraint is applicable to government entities because that case concerned a labor union's picketing of a private enterprise. However, it has long been held that public entities are "persons" for purposes of the NLRA, see, e.g., *Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, & Apprentices of Local 298, American Federation of Labor v. Door Cty.*, 359 U.S. 354, 358–59 (1959). As Ironworkers acknowledges, there has been no change in the statute that would affect the Supreme Court's decision.

Ironworkers relies heavily on *Reed* to suggest that its right to peacefully picket the government is impermissibly infringed upon if Section 8(b)(4)(ii)(B) applies to government entities. Ironworkers argues that secondary picketing of the government is no different than any other governmental protest, and that Section 8(b)(4)(ii)(B)'s prohibition against such picketing is tantamount to content-based viewpoint discrimination under *Reed*. However, Ironworkers' reading of *Reed* grossly expands its holding. In *Reed*, the Supreme Court held that strict scrutiny applied to a township's permitting ordinance that classified outdoor signs based upon the information conveyed. See 135 S. Ct. at 2224. The Court explained that laws restricting speech are subject to strict scrutiny if the restriction is "content based." *Id.* at 2227 (citation omitted). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. . ." *Id.* (citations omitted). The township's ordinance could not survive strict scrutiny because the ordinance restricted the conveyance of messages based solely upon content, and the township failed to meet its burden of showing that the law served "a compelling gov-

environmental interest and [was] narrowly tailored to that end.” *Id.* at 2231.

The restrictions on speech addressed by *Reed* are not implicated by compliance with § 8(b)(4)(ii)(B). At the outset, not all forms of secondary protest are impermissible under the Section. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 578, (1988) (holding that peaceful distribution of handbills is not proscribed under Section 8(b)(4)(ii)(B)). Indeed, conventional avenues of government protest remain available for Ironworkers, just as they exist for any protestor seeking to express dissatisfaction with the State. *See, e.g. Fogel v. Collins*, 531 F.3d 824, 832 (9th Cir. 2008) (noting that the First Amendment “welcomes and protects” verbal protests against government policy). More importantly, a plain reading of § 8(b)(4)(ii)(B) reflects that the statute regulates conduct rather than content. Section 8(b)(4)(ii)(B) specifically prohibits “threatening, coercing, or restraining any person engaged in commerce.” *Retail Prop. Tr.*, 768 F.3d at 943 (citations, alterations and internal quotation marks omitted). The First Amendment does not afford unbridled protection to these forms of harassing and intimidating conduct. *See O’Brien v. Welty*, 818 F.3d 920, 930 (9th Cir. 2016). In sum, Ironworkers failed to meet its burden of showing that *Reed* changed the legal landscape in the significant way required to modify a consent decree. *See Rufo*, 502 U.S. at 383–84. Consequently, Ironworkers cannot establish that continuing to apply the consent judgments prospectively would be inequitable, as required for relief under Rule 60(b)(5). *See Otter*, 643 F.3d at 283.

V. CONCLUSION

Ironworkers failed to demonstrate a change in the applicable law or in the factual circumstances of this case, as required to merit relief from the prior consent judgments and contempt adjudications entered in this case. *See Rufo*, 502 U.S. at 383–84. Accordingly, we DENY Ironworkers’ consolidated motions for relief.³

MOTIONS DENIED.

WALLACE, Circuit Judge, writing separately:

I agree with the result reached by my colleagues. However, I disagree with their decision to reach the merits and would have instead dismissed Ironworkers’ petition as non-justiciable. In my view, Ironworkers’ constitutional challenge to section 8(b)(4)(ii)(B), cloaked in the guise of a Rule 60(b)(5) motion, is not a proper case or controversy because it is not ripe for judicial review.

³ Ironworkers requested that we take judicial notice of additional documents related to its claims, and moved for a stay of a related proceeding in the trial court. We DENY these matters as moot.

I.

Article III of the Constitution limits the jurisdiction of federal courts to actual “cases” and “controversies.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). One element of the case-or-controversy requirement is that a legal claim must be “ripe” before it can be subject to judicial review. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The ripeness doctrine is primarily “a question of timing” designed “to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action.” *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010) (citations omitted).

Where, as here, the claim involves a pre-enforcement challenge to a statute, ripeness requires the plaintiff to show a “genuine threat of imminent prosecution.” *Id.* at 1058 (quoting *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). We typically look to three factors to determine whether a claimed threat of prosecution is genuine: (1) whether the plaintiff has articulated a “concrete plan” to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (citation omitted). Neither the “mere existence of a proscriptive statute” nor a “generalized threat of prosecution” satisfies the ripeness requirement. *Id.*

II.

Ironworkers contends its challenge to section 8(b)(4)(ii)(B)’s prohibition on secondary picketing is ripe on the ground that it “would like to” picket the William S. Hart Union High School District (District) over the District’s use of a non-union subcontractor, RND, for a high-school construction project. Ironworkers explains that it wants to bring to the District’s attention RND’s alleged safety and wage payment issues in hopes that the District chooses a different subcontractor.

Having considered the relevant *Thomas* factors, I am not convinced Ironworkers’ challenge presents a concrete dispute ripe for court review. As to the first part of the ripeness inquiry, Ironworkers has not articulated a “concrete plan” to violate section 8(b)(4)(ii)(B). *Thomas*, 220 F.3d at 1139. The declarations by Michael Silvey, Ironworkers’ Business Manager, are curiously (and perhaps deliberately) vague on what exactly the union plans to do. Silvey’s initial declaration states that the union “would like to picket the District including its administrators and Board members to bring to their attention the fact that RND has had safety issues and other issues on prior jobs.” I have no reason to doubt Ironworkers’ desire to picket the District, but that desire, without more, is far from a “concrete plan” to do so. *See San Diego County*, 98 F.3d at 1127 (concluding that plaintiffs’ assertion that they

“wish and intend to engage in activities” prohibited by the challenged statute did not establish a concrete plan to violate the law).

Silvey’s supplemental declaration, filed after RND began work on the construction project, is no more definite. Silvey states that “if [the Union] would picket the [District] to bring to the attention of the [District] and the public the Union’s concerns with RND, it could do so.” This statement is unclear as a matter of syntax, but in any event, it is not a concrete plan to violate the law. Ironworkers does not explain where it will engage in picketing, what type of conduct the picketing will entail, or even assert that relevant union officers have, in fact, discussed a potential picket of the District. *See Thomas*, 220 F.3d at 1139. On this record, the most that can be said is that Ironworkers has a motive to picket the District, not that it has a concrete plan to violate section 8(b)(4)(ii)(B)’s secondary picketing prohibition.

Turning to the second part of the test, there is no indication in the record that the Board has issued a “specific warning or threat” to initiate enforcement proceedings against Ironworkers. *Id.* The mere fact that Ironworkers is subject to consent judgments prohibiting secondary picketing under section 8(b)(4)(ii)(B) does not indicate a *specific* threat of enforcement because section 8(b)(4)(ii)(B) applies to all labor organizations, whether subject to a consent judgment or not. Here, the threat of enforcement, if any, is a general one, which is “not enough” to render a pre-enforcement statutory challenge ripe for review. *San Diego County*, 98 F.3d at 1127.

The third and final part of the ripeness test—the history of enforcement under the statute—may weigh in favor of Ironworkers, but only slightly. Although the Board has certainly enforced section 8(b)(4)(ii)(B) in the past, including against Ironworkers, those proceedings overwhelmingly have involved secondary picketing of private, rather than governmental, entities. Ironworkers does not allege it has ever been subject to an enforcement action for engaging in secondary picketing of a governmental entity, and identifies only three cases since Congress passed the current secondary boycott provision in 1959 where the Board has held that a union’s secondary picketing of a governmental entity violated section 8(b)(4)(ii)(B). Therefore, while it is true the Board enforces section 8(b)(4)(ii)(B) as a general matter, the apparently limited history of enforcement in cases involving picketing of governmental entities limits the extent to which this factor indicates a “genuine threat of imminent prosecution.” *Wolfson*, 616 F.3d at 1058; *cf. Thomas*, 220 F.3d at 1140–41 (concluding, in a case involving a pre-enforcement challenge to an Alaska housing discrimination law, that the “past prosecution” factor was “neutral” where “the record of past enforcement [was] limited, was civil only, not criminal, and in any event was in each case precipitated by the filing of complaints by potential tenants”). On balance, then, I would conclude that considering all of

the relevant factors demonstrates Ironworkers’ claim is not ripe for judicial review.

III.

Counsel for Ironworkers suggested at oral argument that because the union’s desire to picket the District implicates free speech concerns, we should evaluate ripeness under the “less stringent” ripeness inquiry applicable to First Amendment claims. *Wolfson*, 616 F.3d at 1058. Our precedent recognizes that “where protected speech may be at stake, a plaintiff need not risk prosecution in order to challenge a statute.” *Id.* at 1060. Rather, in the free speech context, “the plaintiff need only demonstrate that a threat of potential enforcement will cause him to self-censor, and not follow through with his concrete plan to engage in protected conduct.” *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014).

I am unpersuaded that this case calls for the relaxation of ripeness requirements applicable to cases involving protected speech. Ironworkers asserts that picketing the District in violation of section 8(b)(4)(ii)(B) involves First Amendment conduct—but it is well-established that secondary picketing in violation of section 8(b)(4)(ii)(B) is not protected activity under the First Amendment. *See, e.g., Int’l Longshoremen’s Ass’n AFL-CIO v. Allied Int’l, Inc.*, 456 U.S. 212, 226 (1982) (“We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment.”). This is because secondary picketing typically involves not merely speech intended to communicate, but conduct designed to coerce. *See NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 618–19 (1980) (Stevens, J., concurring). Section 8(b)(4)(ii)(B), as a regulation of coercive conduct designed to protect neutral employers from being drawn into labor disputes, “carries no unconstitutional abridgement of free speech.” *Int’l Brotherhood of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951). Therefore, a relaxation of the ripeness inquiry on the ground that Ironworkers’ challenge to section 8(b)(4)(ii)(B) implicates protected speech is unwarranted.

IV.

I can appreciate Ironworkers’ attempt to leverage new developments in case law and legal scholarship to challenge the constitutionality of section 8(b)(4)(ii)(B). But we must take seriously the principle that federal courts “cannot decide constitutional questions in a vacuum.” *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). Without a “concrete factual situation” before us, *id.*, we have “no business” deciding Ironworkers’ petition, “or expounding the law in the course of doing so,” *Cuno*, 547 U.S. at 341. Nor can we assume away the jurisdictional question on the basis that the merits are more readily resolved. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S.

83, 93–94 (1998). Constitutional ripeness is a jurisdictional prerequisite, not a doctrine of convenience.

Here, Ironworkers has not shown a threat of enforcement of sufficient immediacy to satisfy ripeness. I would join my colleagues' order if I thought this case were ripe for review. But because I am convinced Ironworkers' challenge to section 8(b)(4)(ii)(B) is not a proper case or controversy, I conclude we do not have the power to decide the issue.

California Courts of Appeal

Cite as 18 C.D.O.S. 5593

In re D.B., a Person Coming Under the Juvenile Court Law.

THE PEOPLE, Plaintiff and Respondent,
v.

D.B., Defendant and Appellant.

No. A149815

In The Court of Appeal of the State of California

First Appellate District

Division Four

(Napa County Super. Ct. No. JV18047)

Filed June 6, 2018

CERTIFIED FOR PARTIAL PUBLICATION*

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

COUNSEL

Counsel for Defendant & Appellant: Law Office of Anne Mania and Anne Mania, by Court-Appointment through The First District Appellate Project.

Counsel for Plaintiff & Respondent: Xavier Becerra, Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Jeffrey M. Laurence, Senior Assistant Attorney General; Eric D. Share, Supervising Attorney General, Huy T. Luong, Deputy Attorney General.

OPINION

In this appeal, D.B. (Minor) challenges dispositional orders issued on May 2, 2016, and on September 7, 2016, continuing him as a ward of the court. Minor contends the juvenile court erred in the September 7, 2016 order by adding a new probation condition allowing searches of his electronic devices and requiring him to disclose all necessary passwords. Additionally, Minor contends the juvenile court erred by including in the written versions of both orders probation conditions that appeared to require his parents to reimburse the county for his legal fees, although the juvenile court judge did not include those conditions in orally pronouncing the dispositions. We agree that the electronics search condition was constitutionally overbroad and we, therefore, strike it. In the published portion of this opinion, we reject Minor's second challenge, because we do not interpret the May 2, 2016 dispositional order or the September 7, 2016 dispositional

order as imposing a reimbursement obligation on Minor's parents. We also conclude that a 2017 statutory amendment precludes any future reimbursement order.

I. FACTUAL BACKGROUND¹

On May 5, 2015, Minor, then 15 years old, met with the assistant principal of his high school after falling asleep in class. Minor admitted he smoked marijuana the night before but denied having done so on that day. When the assistant principal asked to search him, Minor acquiesced, volunteering that he had a knife. The assistant principal then searched Minor, and found a folding pocket knife with a three-inch blade, rolling papers, and lighters. Minor was arrested, detained, and placed on home detention.

II. PROCEDURAL BACKGROUND

On May 7, 2015, the Napa County District Attorney filed a juvenile wardship petition (first petition) under Welfare and Institutions Code section 602 alleging that Minor violated Penal Code section 626.10, subdivision (a), a misdemeanor, by bringing a folding, locking knife onto school grounds. On May 11, 2015, Minor admitted the offense and the matter was continued for a dispositional hearing.

On May 29, 2015, Minor was arrested and detained after a sheriff's officer discovered him smoking marijuana in violation of the conditions of his release. At the subsequent dispositional hearing, on June 10, 2015, the juvenile court declared Minor to be a ward of the court, placed him on probation, to be served while residing in his mother's home, and imposed various probation conditions, including a prohibition against knowingly using or possessing alcohol or controlled substances, and a requirement that Minor submit to testing that would detect such usage.

Ten months later, in April 2016, the district attorney filed a second wardship petition (second petition), alleging that Minor violated his probation conditions because he tested positive for, and admitted using, marijuana and also tested positive for Xanax. Minor admitted he violated probation. At the dispositional hearing on May 2, 2016, the juvenile court continued his wardship, and allowed him to remain in his mother's home.

Two months later, in July 2016, the district attorney filed a third wardship petition (third petition), alleging that Minor violated his probation conditions by failing to attend school on six dates without a valid excuse, using marijuana, and being discharged from a treatment program for noncompliance. On August 8, 2016, the district attorney amended the new petition to add an allegation that Minor admitted using alcohol. On August 10, 2016, Minor admitted violating probation by using marijuana and alcohol and the other alleged violations were dismissed.²

1. The facts here are undisputed and are taken from the probation officer's detention report.

2. The truancy count was dismissed after the juvenile court determined that Minor voluntarily had enrolled in summer school and that

In advance of the September 7, 2016 dispositional hearing, the probation officer reported Minor most recently had tested negative for controlled substances, was doing well in school, and had begun working as a cashier. The treatment program advised probation that Minor was attending all of his groups and “doing very well.” Minor’s mother told probation she had noticed a positive change in Minor, and Minor himself reported he was more motivated to complete the treatment program and probation. The probation officer observed that Minor appeared “cognizant of his triggers, as he [was] distancing himself from his negative peers.” In his disposition report, the probation officer recommended continuing Minor’s wardship. The juvenile court agreed and, at the September 7, 2016 disposition hearing, continued Minor as a ward of the court, adopting certain terms and conditions.

III. DISCUSSION

[III.A., See FOOTNOTE*, Ante]

B. Reimbursement of County Legal Costs

Minor also contends that written orders the juvenile court issued after the dispositional hearings on May 2, 2016 and September 7, 2016 (collectively, the dispositional hearings) must be corrected because they mistakenly included “recommendations” that appear to require his parents to reimburse the county for a combined total of \$850 in legal fees, although the juvenile court included no such orders in its oral pronouncements. The Attorney General disagrees that these provisions were mistakes; he contends the provisions were properly included in the written orders and are binding. Even if this were not true, however, the Attorney General asserts: Minor lacks standing to challenge the provisions; he is too late in challenging the May 2016 order and, therefore, has forfeited the right to do so; and his parents are responsible for paying the specified legal fees regardless of whether any order directed them to do so. Alternatively, the Attorney General submits, if the juvenile court’s intention regarding imposition of the fees was unclear, this court may remand the matter with a direction that the juvenile court clarify its orders.

We begin by reviewing the record to determine whether the juvenile court in fact ordered Minor’s parents to reimburse the county for legal fees.

1. Background

In advance of the May 2, 2016 dispositional hearing on the second petition, the probation officer filed a dispositional report, attaching a page of recommended terms and condi-

tions. The seventh and last set of recommendations involved reimbursement of certain county costs.

At the May 2, 2016 dispositional hearing, the juvenile court heard argument on a different issue (i.e., the length of Minor’s detention in juvenile hall). The judge then succinctly paraphrased and adopted all of the terms and conditions the probation officer had recommended, making certain modifications, with one exception. The judge did not include the recommended county cost reimbursement terms, and no party raised the omission at the hearing.

The same day (May 2, 2016), the juvenile court issued a written “ORDER AFTER HEARING” signed by the judge. The written order did include the cost reimbursement provisions recommended in the probation officer’s report. As relevant here, the order stated: “**Parent/Legal Guardian recommendations:** [¶] [Minor’s] parent(s) . . . shall [¶] . . . [¶] be required to reimburse the County of Napa for legal costs incurred, including \$250, *in an amount and manner to be determined.* [Minor’s] parent(s), if requested to do so, shall appear before the Financial Hearing Officer.” (Italics added.)

The probation officer later submitted a report for the September 7, 2016 dispositional hearing. As before, the report attached recommended terms and conditions, including a recommendation involving reimbursement of certain county costs. At the subsequent hearing, the juvenile court judge again listed and adopted most of the terms and conditions the probation officer had recommended, paraphrasing them, but did not include the reimbursement recommendations. As before, no party raised the omission at the hearing.

The same day (September 7, 2016), the juvenile court issued a written order signed by the judge. It included the cost reimbursement provisions recommended in the probation officer’s report. As relevant here, the written order stated: “**Parent/Legal Guardian recommendations:** [¶] [Minor’s] parent(s) or legal guardian shall [¶] . . . be required to reimburse the County of Napa for legal costs incurred, including \$600, *in an amount and manner to be determined.* [Minor’s] parent(s), if requested to do so, shall appear before the Financial Hearing Officer; (mandatory) [¶]” (Italics added.)

2. The Juvenile Court Made No Binding Ruling Regarding Minor’s Parents’ Reimbursement Obligations

As noted, Minor contends there is a conflict between (1) the reporters’ transcripts, providing the record of the juvenile court’s oral pronouncements at the dispositional hearings, and (2) the clerk’s transcript, containing the written orders issued after the hearings. The written orders include “‘[r]ecommend[at]ions’” that Minor’s parents be ordered to reimburse the costs of legal services provided to him, Minor points out, and this was error, he asserts, because the juvenile court could have, but did not, include such a requirement in its oral pronouncements at the hearings. The written record does not accurately reflect the juvenile court’s orders, therefore, Minor submits, and the conflict is best resolved

his attendance therefore was not a probation condition. Minor’s mother explained that he missed school because he wanted to work to help his family financially. The count for being discharged from a treatment program was dismissed because Minor returned to the program.

by giving credence to the record contained in the reporters' transcripts. We do not agree.

"The California Supreme Court has . . . stated that 'a record that is in conflict will be harmonized if possible.' " (*People v. Contreras* (2015) 237 Cal.App.4th 868, 880, citing, inter alia, *People v. Harrison* (2005) 35 Cal.4th 208, 226.) If that is not possible, however, "we do not automatically defer to the reporter's transcript, but rather adopt the transcript that should be given greater credence under the circumstances of the particular case. [Citation.]" (*People v. Contreras, supra*, at p. 880.) In his reply brief, Minor cites *People v. Mesa* (1975) 14 Cal.3d 466 (*Mesa*) (superseded by statute on another ground as explained in *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268), contending we must give greater credence here to the reporter's transcript. But the facts in *Mesa* were distinguishable.

In *Mesa*, the Supreme Court struck from a minute order and an abstract of judgment references to a prior felony conviction that the defendant had admitted, because the trial judge did not mention the prior conviction when orally pronouncing the judgment. (*Id.* at pp. 470–471.) The reference in the minute order was not controlling, the court reasoned, because "'[r]endition of judgment is an oral pronouncement,'" while "[e]ntering the judgment in the minutes [is] a clerical function [citation]." (*Id.* at p. 471.) "[A] discrepancy between the judgment as orally pronounced and as entered in the minutes[, therefore,] is presumably a result of clerical error," the court concluded. (*Ibid.*) The abstract of judgment also was not controlling, the court concluded, because "'[b]y its very nature, definition and terms [citation] [the abstract] cannot add to or modify the judgment which it purports to digest or summarize.'" [Citation.]" (*Ibid.*)

The facts here are different because the asserted conflicts are between the conditions of probation that the juvenile court judge orally imposed at the hearings and the conditions of probation that the judge approved in its later written orders. Entry of a written order signed by a judge is not a ministerial act. (*In re Jerred H.* (2004) 121 Cal.App.4th 793, 798, fn. 3.) Consequently, these changes cannot be dismissed as clerical errors. Rather, the record indicates the juvenile court modified its orders imposing probation conditions, which it had authority to do. (*People v. Thrash* (1978) 80 Cal.App.3d 898, 900–901.)

We reject Minor's argument, therefore, to the extent he contends the juvenile court erred in issuing its written dispositional orders in May 2016 and September 2016. We agree with him, however, to the extent he asserts the juvenile court made no binding ruling regarding his parents' reimbursement obligations. That is because we read the dispositional orders in the context of the statutory framework that existed at the time the juvenile court issued them.

In 2016, subdivision (a) of Welfare and Institutions Code³ section 903.1 made a parent liable for costs that a county in-

3. All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

curred in rendering legal services to the parent's child "by an attorney pursuant to an order of the juvenile court." (§ 903.1, subd. (a), as amended by Stats. 2009, ch. 413, § 1;⁴ see *In re S.M.* (2012) 209 Cal.App.4th 21, 26 (*S.M.*)) Section 903.45, subdivision (b), required compliance with a specified procedure, however, before a juvenile court could order a parent to pay such costs. In 2016, section 903.45, subdivision (b) provided in pertinent part as follows:

"[T]he juvenile court shall, at the close of the disposition hearing, order any person liable for . . . the cost of legal services as provided for in Section 903.1, . . . to appear before the county financial evaluation officer for a financial evaluation of his or her ability to pay those costs

"If the county financial evaluation officer determines that a person so responsible has the ability to pay all or part of the costs, the county financial evaluation officer shall petition the court for an order requiring the person to pay that sum to the county A person appearing for a financial evaluation has the right to dispute the county financial evaluation officer's determination, in which case he or she is entitled to a hearing before the juvenile court

"At the hearing, a person responsible for costs is entitled to . . . be heard in person, to present witnesses and other documentary evidence, to confront and cross-examine adverse witnesses, to disclosure of the evidence against him or her, and to receive a written statement of the findings of the court. The person has the right to be represented by counsel, and, if the person is unable to afford counsel, the right to appointed counsel. If the court determines that the person has the ability to pay all or part of the costs, . . . the court shall set the amount to be reimbursed and order him or her to pay that sum" ⁵ (Stats. 2013, ch. 31, § 26 [§ 903.45, subd. (b)].) Under

4. In 2016, section 903.1, subdivision (a) provided in pertinent part as follows: "The father, mother, spouse, or other person liable for the support of a minor . . . shall be liable for the cost to the county or the court, whichever entity incurred the expenses, of legal services rendered to the minor by an attorney pursuant to an order of the juvenile court" (Stats. 2009, ch. 413, § 1.)

5. Similar procedural requirements apply under Penal Code section 987.8 where a criminal defendant is provided legal assistance through the public defender or court-appointed private counsel. (See Pen. Code, § 987.8, subs. (b), (c); *People v. Verduzco* (2012) 210 Cal. App.4th 1406, 1420 [An order that a criminal defendant reimburse the costs of legal assistance provided to him or her "can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has 'the present ability . . . to pay all or a portion' of [those] costs"].) In that context, as here, if a court fails to hold the hearing required by statute, it may not order the person to reimburse the legal costs. (See, e.g., *People v. Gonzales* (2017) 16 Cal.App.5th 494, 505; *People v. Webb* (2017) 13 Cal.App.5th 486, 499, disapproved on another ground in *People v. Ruiz* (2018) ___ Cal.5th ___, 232 Cal. Rptr.3d 714.)

section 903.45, subdivision (d), execution could “be issued on the order in the same manner as on a judgment in a civil action, including any balance remaining unpaid at the termination of the court’s jurisdiction over the minor.” (§ 903.45, subd. (d); Stats. 2013, ch. 31, § 26.)

Nothing in the record before us suggests that the juvenile court complied with this mandatory provision, which both parties omitted to mention in their regular appellate briefs. In particular, there is no indication in the record that the county financial evaluation officer ever held any hearing or made any determination regarding the parents’ ability to pay the costs of legal services provided to Minor, or ever petitioned the court for an order requiring the parents to pay a specific sum. Nor is there any indication the court ever ordered Minor’s parents to pay a specific sum. Rather, considering the juvenile court’s written dispositional orders in the context of the statutory framework, we conclude the dispositional orders are properly interpreted as preliminary findings that the county incurred costs totaling \$850 in providing legal services to Minor (\$250 for the May 2016 dispositional hearing and \$600 for the September 2016 hearing), and—at most—as referrals to the county financial evaluation officer for a determination of Minor’s parents’ ability to pay those costs. Both dispositional orders explicitly stated that the amount of Minor’s parents’ payment obligation remained “*to be determined.*” (Italics added.) Any claim that the juvenile court erred in ordering Minor’s parents to reimburse the county’s legal costs, therefore, was premature and we reject it, because no final order for payment has yet been entered.⁶ The May 2, 2016 and September 7, 2016 dispositional orders must be clarified to establish that the juvenile court’s statements in paragraph 7 of each order do not obligate Minor’s parents to pay Minor’s legal costs.

3. Recent Statutory Amendments Preclude A Future Order Compelling Minor’s Parents To Pay His Legal Costs

Because a question is likely to arise, as a result of this decision, about whether the juvenile court may still require Minor’s parents to pay the legal costs specified in the May and September 2016 dispositional orders, in the interests of judicial economy, we next address that question. The question arises because, while this appeal was pending, the Legislature enacted Senate Bill No. 190 (Stats. 2017, ch. 678),

6. In light of this conclusion, we need not address the Attorney General’s contentions that Minor lacks standing to challenge the asserted orders requiring his parents to pay for legal services provided to him, and that Minor forfeited the right to challenge one of those asserted orders. We also reject the Attorney General’s contention that Minor’s parents were obligated to pay the costs of the legal services even if they were not ordered to do so by the court, because the statutory framework just discussed clearly contemplates and requires an order of the juvenile court following an evaluation of a parent’s ability to pay. (2009, ch. 413, § 1 [§ 903.1]; Stats. 2013, ch. 31, § 26 [§ 903.45].)

which, among other things, amended sections 903.1 and 903.45. (*Id.*, §§ 20, 25.5.) The amendments to section 903.1 repealed the provision requiring a parent to reimburse the county for the costs of legal services provided to a minor who is subject to the juvenile delinquency system. (Legis. Counsel’s Dig., Sen. Bill No. 190, Stats. 2017, ch. 678, par. 4.) Senate Bill No. 190 was enacted in a regular session, and was not passed as an urgency measure, so became effective on January 1, 2018. (See *People v. Douglas M.* (2013) 220 Cal. App.4th 1068, 1076, fn. 5.) We requested supplemental briefing from the parties about whether Minor’s parents could still be held liable for paying the costs of legal services previously rendered to Minor following enactment of Senate Bill No. 190. Minor answered the question in the negative, citing the statutory repeal rule and principles of statutory interpretation and legislative intent. The Attorney General argued the opposite. We agree with Minor.

The Senate Rules Committee Bill digest addressing Senate Bill No. 190 stated that the bill “limit[ed] the authority of local agencies to assess and collect specified fees against families of persons subject to the juvenile delinquency system.” (Sen. Rules Com., Off. of Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 190 (2017–2018 Reg. Sess.) as amended Aug. 28, 2017.)⁷ Among other things, the bill repealed statutory provisions that made parents and others who were responsible for supporting “a ward, dependent child, or other minor person,” liable for reimbursing a wide variety of costs, including: the reasonable costs of transporting a minor to a juvenile facility; the costs of the minor’s food, shelter, and care while in temporary custody at a juvenile facility; the costs of supporting a minor while “placed, detained in, or committed to, any institution or other place” pursuant to law or juvenile court order; the cost of a court-designated alcohol or drug education program; “the cost of probation supervision, home supervision, or electronic surveillance of the minor, pursuant to the order of the juvenile court”; and the cost of a service program. (Legis. Counsel’s Dig., Sen. Bill No. 190, Stats. 2017, ch. 678, par. 4.)

As noted, Senate Bill No. 190 also amended section 903.1, by repealing the provision that held parents and others liable for the cost of “legal services rendered to [a] minor by an attorney pursuant to an order of the juvenile court.” (Legis. Counsel’s Dig., Sen. Bill No. 190, Stats. 2017, ch. 678, par. 4; compare Stats. 2017, ch. 678, § 20, with Stats. 2009, ch. 413, § 1.) Senate Bill No. 190 effected this change by adding a new subdivision (a)(1) to section 903.1. (See Historical and Statutory Notes, 73B Pt. 1 West’s Ann. Welf. &

7. In their supplemental briefs, the parties direct our attention to materials included in the legislative history of Senate Bill No. 190, which are proper sources of legislative intent. (See, e.g., *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169 [discussing Legislative Counsel’s digest, third reading analysis, committee reports, and other sources].) On the court’s own motion, we take judicial notice of the materials that we cite in this decision. (Evid. Code, §§ 452, subd. (c), 459; *Martin v. PacificCare of California* (2011) 198 Cal.App.4th 1390, 1402, fn. 7.)

Inst. Code (2018 supp.) foll. § 903.1, p. 24.) As so amended, the section now states that parents and others are liable “for the cost . . . of legal services rendered to the minor” (subd. (a) (1)(A)), with the exception that the paragraph “*does not apply to a minor who is adjudged a ward of the juvenile court, who is placed on probation pursuant to Section 725, who is the subject of a petition that has been filed to adjudge the minor a ward of the juvenile court, or who is the subject of a program of supervision undertaken pursuant to Section 654*” (subd. (a)(1)(B)(i)).⁸ (§ 903.1, subd. (a), italics added.)

A Senate Third Reading Analysis provided comments from the bill author with the following explanation of Senate Bill No. 190’s purpose: “ ‘A recent study by the Policy Advocacy Clinic at University of California Berkeley School of Law has found that imposing administrative fees to families with youth in the juvenile justice system is harmful, unlawful, and costly. Current California law allows counties to charge administrative fees, which can quickly add up to thousands of dollars, an incredible burden to families with youth in the juvenile justice system. In fact, such criminal justice debt undermines the rehabilitative goals of the juvenile justice system and leads to increased recidivism Most youth in the juvenile justice system come from poor families who cannot afford to pay fees, and counties ultimately obtain minimal returns despite the high fiscal and societal costs associated with collecting fees. Counties cannot continue to balance their books on the back[s] of poor people. *This bill would end the assessment of administrative fees against families with youth in the juvenile justice system. By doing so, it will eliminate a source of financial harm to some of the state’s most vulnerable families, support the reentry of youth back into their homes and communities, and reduce the likelihood that youth will recidivate.*’ ” (Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d Reading Analysis of Sen. Bill No. 190 (2017–2018 Reg. Sess.) as amended Aug. 28, 2017, pp. 3-4, italics added.) In the “Comments” section of its analysis of Senate Bill No. 190, the Assembly Appropriations Committee quoted the Juvenile Court Judges of California: “ ‘Based upon our collective experience, imposing fines and fees upon the family of a young person who is moving through the juvenile justice system is overreaching and punitive upon a population of families that is already facing multiple economic challenges to raise a family in our state.’ ” (Assem. Appropriations Com., Analysis of Sen. Bill No. 190 (2017–2018 Reg. Sess.) as amended July 13, 2017, Comments, ¶ 2.)

Minor contends that the statutory repeal rule applies to preclude any future juvenile court order directing his parents to pay the costs of legal services provided to him in 2016. He cites *Governing Board v. Mann* (1977) 18 Cal.3d 819 (*Mann*). The California Supreme Court there affirmed

“[a] long well-established line of California decisions . . . hold[ing] under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, ‘a repeal of such a statute without a saving clause will terminate all pending actions based thereon.’ [Citation.]” (*Id.* at p. 829; see also, e.g., *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489.) “ ‘*If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.*’ ” (*Mann, supra*, at pp. 822–823, 830–831, italics added, quoting *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11–12.) “ ‘The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.’ [Citation.]” (*Mann, supra*, at p. 829.)

“This general common law rule has been applied in a multitude of contexts,” *Mann* observed, citing a host of cases. (*Mann, supra*, 18 Cal.3d at p. 829; *id.* at pp. 829–830 & fn. 8.) One of those cases, *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315 (*Napa State Hospital*) (modified on another ground in *Napa State Hospital v. Yuba County* (1903) 138 Cal. 378, 380–381), is noteworthy here. As *Mann* observed in a parenthetical, *Napa State Hospital* involved the repeal of a statutory right to charge a parent for services provided to the parent’s child. (*Mann, supra*, at p. 830, fn. 8; see *Napa State Hospital, supra*, at pp. 316–317.) The Legislature had enacted a law for the government of state mental hospitals, and it repealed all existing laws that conflicted with the new law. (*Napa State Hospital, supra*, 134 Cal. at p. 317.) Based on that legislative action, the California Supreme Court affirmed an order sustaining a father’s demurrer to the complaint that a state mental hospital had filed against him. (*Id.* at pp. 316–317.) The complaint relied on an earlier statute, which had required parents to reimburse state mental hospitals for costs the hospitals incurred in caring for the parents’ children following the children’s commitment. (*Id.* at p. 316.) In sustaining the demurrer after the new law was enacted, the Supreme Court reasoned, “It is a rule of almost universal application that where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause. [Citation.] . . . ‘[I]t must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law.’ ” (*Id.* at pp. 317–318; see also,

e.g., *Beverly Hilton Hotel v. Workers’ Comp. Appeals Bd.* (2009) 176 Cal.App.4th 1597, 1602, 1611–1612 [annulling Workers’ Compensation Appeals Board finding that an applicant was entitled to vocational rehabilitation benefits because the statute conferring the benefits was repealed before the judgment became final through the appellate process].)

8. But see § 903.1, subd. (a)(1)(B)(ii) (section 903.1, subdivision (a)(1) does apply “to a minor who is designated as a dual status child pursuant to Section 241.1, for purposes of the dependency jurisdiction only and not for purposes of the delinquency jurisdiction”).

Applying the principles stated in *Mann* and *Napa State Hospital*, *supra*, because no final order was entered in this case requiring Minor’s parents to pay the \$850 in legal costs before Senate Bill No. 190 became effective, we must dispose of this case under the law that is currently in force. (*Mann*, *supra*, 18 Cal.3d at pp. 822–823; *Napa State Hospital*, *supra*, 134 Cal. at p. 317.) That law directs that section 903.1, subdivision (a)(1)(A), which holds parents liable for the cost of legal services provided to their children under order of the juvenile court, “does not apply to a minor who is adjudged a ward of the juvenile court . . . [or] who is placed on probation pursuant to Section 725 . . .” (§ 903.1, subd. (a)(1)(B)(i).) As Minor here has been adjudged a ward of the juvenile court and has been placed on probation, section 903.1, subdivision (a)(1)(A) does not apply to him and his parents may not be held liable for the costs of legal services provided to him.

Without directly addressing the statutory repeal rule in his simultaneously filed supplemental brief, the Attorney General opposes this conclusion, contending Senate Bill No. 190 must be applied prospectively. Even if we were not convinced that the statutory repeal rule applied here, however, we would reject this argument because it relies on a flawed premise. The Attorney General characterizes the juvenile court’s May and September 2016 dispositional orders as determinations that Minors’ parents were obligated to pay the cost of the legal services provided to Minor. Without acknowledging the requirements of section 903.45, subdivision (b), set forth above, the Attorney General implies the parents were immediately responsible for paying the total cost of the legal services provided to Minor in full and outright, even though there is no record the county financial evaluation officer or the juvenile court ever evaluated their ability to pay, as required.⁹ (Stats. 2013, ch. 31, § 26 [§ 903.45, subd. (b) in 2016]; § 903.45, subd. (b)(1)(A).)

As discussed, we interpret the dispositional orders differently, concluding they only established the total cost of the legal services provided to Minor for the May and September 2016 dispositional hearings. Both dispositional orders explicitly confirmed that the “amount and manner” of Minor’s parents’ payment obligations remained “to be determined.” We conclude, therefore, that the orders are best understood as constituting the initial step in the statutory procedure described in section 903.45, and not as final rulings by the juvenile court requiring the parents to pay a specified sum to the county “in a manner that is reasonable and compatible with [their] financial ability.” (Stats. 2013, ch. 31, § 26 [§ 903.45, subd. (b) in 2016]; see also, § 903.45, subd. (b)(5).) Any final ruling the juvenile court might now be asked to make on a petition from the county financial evaluation officer, therefore, necessarily would require a prospective application of Senate Bill No. 190, the law that is now in effect. (See, e.g., *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 [“ ‘The

Legislature ordinarily makes laws that will apply to events that will occur in the future’ ”].)

IV. DISPOSITION

We strike the condition in the juvenile court’s September 7, 2016 dispositional order that Minor must “submit all electronic devices under [his] control to search and seizure by the probation officer . . . [and] disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any of” his electrical devices. Additionally, paragraph 7.b. of the May 2, 2016 dispositional order, and paragraph 7.a. of the September 7, 2016 dispositional order are modified to clarify that they do not require Minor’s parents to reimburse the county for Minor’s legal fees.

Schulman, J.*

We concur: Streeter, Acting P.J., Reardon, J.

* Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

9. Evidence in the record indicated that Minor’s mother previously worked in the fields but had been unemployed for some time.

Cite as 18 C.D.O.S. 5599

In re RONALD E. JENSON, on Habeas Corpus.

No. B286056

In The Court of Appeal of the State of California
Second Appellate District
Division Three
(Super. Ct. No. BH011167)
Petition for writ of habeas corpus. Relief granted.
Filed June 6, 2018

COUNSEL

Marilee Marshall, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Assistant Attorney General, Julie A. Malone, Jill Vander Borgh, and Jennifer O. Cano, Deputy Attorneys General, for Respondent.

OPINION

In 1979, when Ronald Jenson was 19 years old, he committed first degree felony murder, for which he was convicted and sentenced to 25 years to life, plus two years. During his first nine years of incarceration, Jenson committed three additional in-prison crimes, for which he was convicted and sentenced. But, for the last almost 30 years, he has remained crime-free.

In 2016, the Board of Parole Hearings (the Board) found Jenson suitable for release on parole at a youth offender parole hearing conducted under Penal Code¹ section 3051. However, the California Department of Corrections and Rehabilitation (CDCR) did not release Jenson, and instead ordered him to serve an additional sentence for his in-prison offenses.

Jenson has petitioned this court for a writ of habeas corpus, urging that he is being illegally held. We agree, and thus we order his release.

BACKGROUND

A. Jenson's Felony Murder Conviction and Subsequent In-Prison Felonies

In 1979, when Jenson was 19 years old, he committed first degree felony murder, for which he was convicted and sentenced to 25 years to life, plus two years for firearm use. (§§ 187, subd. (a), 12022.5, subd. (a).)²

1. All further undesignated statutory references are to the Penal Code.

2. The jury also found Jenson guilty of two counts of attempted robbery and found true firearm enhancements. The court imposed but stayed sentences on those counts.

While he was incarcerated, Jenson was convicted of three in-prison felonies: prison escape and possession of a weapon, in 1980 when Jenson was 21 years old (§§ 4530, 4502); and assault with a deadly weapon on a peace officer, in 1989 when he was 29 years old (§ 245, subd. (b)). Pursuant to section 1170.1, subdivision (c) (hereafter, section 1170.1(c)), Jenson was sentenced to three additional consecutive prison terms, known as "*Thompson terms*,"³ for the in-prison offenses: sixteen months for the escape, one year for the weapon possession, and five years for the assault with a deadly weapon.

Jenson is now 58 years old. He has not committed a crime since 1989, and he has not been disciplined for a "serious rule violation" in more than 17 years.⁴

B. Youth Offender Parole Hearing; Grant of Parole

Jenson became eligible for parole in 1997. He was denied parole four times between 1997 and 2014. At his fifth hearing in 2014,⁵ the Board recommended parole, but the Governor reversed the Board's decision.⁶

In 2013, the Legislature passed Senate Bill No. 260, which, among other things, added section 3051 to the Penal Code. Section 3051 entitles certain prisoners who committed "controlling offenses" under the specified age of eligibility to youth offender parole hearings and to a "meaningful opportunity for release."

In 2016, the Board conducted a youth offender parole hearing and once again found Jenson suitable for release. In announcing its suitability determination, the Board noted several factors that weighed against suitability, namely that Jenson had committed "an atrocious and cruel act" that "resulted in the death of a human being;" had been convicted of three additional in-prison offenses; had "amassed some 48 115s [CDCR disciplinary reports]," some of which were "serious and violent, stabbing people, spitting on staff, fighting with inmates, attempting to stab staff, possession of weapons;" and had never admitted participating in the commitment offense.⁷ Notwithstanding these factors, the Board found Jen-

3. *In re Thompson* (1985) 172 Cal.App.3d 256, 260, held that when a court imposes consecutive terms for felonies committed while a felon is confined in a state prison, "such terms shall commence from the time such person would otherwise have been released from prison."

4. Jenson did receive "counseling chronos" in 2007 (for ignoring an order to "return to the single line"); 2009 (for refusing to answer a supervisor's question); and 2010 (for failing to show identification in the chow hall).

5. The 2014 parole hearing does not appear to have been held under section 3051 or to have considered the factors in that section.

6. A decision of the Board finding an inmate suitable for parole becomes final as to the Board within 120 days of the date of the hearing. (§ 3041, subd. (b).) The Governor then has 30 days to reverse or to modify the Board's parole decision. (§ 3041.2, subs. (a), (b).)

7. As the dissent notes, at the 2016 parole hearing, Jenson denied committing the 1979 murder. Jenson admitted, however, that he stabbed and "almost killed" an officer in 1989. It was the realization that he could have taken a life that caused him to begin addressing his anger. Moreover, Jenson readily admitted that he had committed a variety of crimes before his 1980 conviction, and that had he not been

son suitable for parole: “[W]e know . . . those are things now in the rearview, and in a distant rearview for you. Given that you’ve been incarcerated 37 years and stayed violation-free for now some 17 years, that’s a chunk of time that you’ve distanced yourself from that other human being—[¶] . . . [¶]—that you were. And it was in fact, a different human being[,] because we see an individual that is soft-spoken, insightful, reflective here today. . . . You were a mere 19 years old when you committed this life crime. A lot of the factors of [Senate Bill No. 260] are applied here . . . [including] your childhood of being [in] foster care and molestations, not believing or not trusting adults, leading to the way your thought process worked back then. So, and now you’re almost to the age of elderly parole, that’s how much time you served in prison. So the age in and of itself does reduce the recidivism rates. But I think more to do with that is how you changed your mannerisms, how you changed your philosophy and life since the time in . . . [1989], where you reflected that act almost took another human being’s life. Since your incarceration, you have in the last about 20 years let’s say, have had positive work assignments, positive performance ratings You received your GED in 2000, vocational training in graphic arts and janitorial. You have been involved in numerous self-help and self-study programs . . . [and] you were able to verbalize and demonstrate why you did what you did, what changes you have made throughout the years, and what tools you have garnered to safeguard against repeating those past mistakes.” Thus, the Board found Jenson no longer posed a risk of danger to society and was suitable for parole.

C. Jenson’s Continued Incarceration

Despite the Board’s suitability finding, the CDCR did not release Jenson, but instead required him to serve his *Thompson* term.⁸ The CDCR has calculated that his earliest possible release date is December 11, 2018, and his maximum release date is September 9, 2021.

Jenson sought a writ of habeas corpus from the superior court, which found that section 1170.1(c) mandated he serve his *Thompson* term for the 1989 assault. Jenson filed a petition for writ of habeas corpus in this court, and we issued an order to show cause.

CONTENTIONS

The dispute over Jenson’s release date implicates two different provisions of the Penal Code: (1) section 1170.1(c), which governs sentences for in-prison felonies; and (2) section 3051, which gives individuals sentenced for certain crimes committed under the age of 26 a “meaningful op-

portunity for release” from prison after serving 15, 20, or 25 years.

Jenson contends that the two statutory provisions are fundamentally inconsistent as they apply to him. He therefore urges that section 3051—as the later-enacted and more specific statute—necessarily supersedes section 1170.1(c). The Attorney General disagrees, contending that the two statutes are not fundamentally inconsistent, and so both must be given effect.

As we now discuss, we conclude that sections 3051 and 1170.1(c) are irreconcilable as they apply to a youth offender who commits an additional crime in prison after the age of 26, because section 3051, which specifically addresses youth offenders, dictates that the youth offender be immediately released upon being found suitable for parole. In contrast, section 1170.1(c) would require the same youth offender to serve any applicable *Thompson* term even after being found suitable for release. Because section 3051 is both later-enacted and more specific, we conclude that section 3051 supersedes section 1170.1(c). Therefore, Jenson need not serve his *Thompson* term and is entitled to be released from prison.

I.

PRINCIPLES OF STATUTORY INTERPRETATION AND STANDARD OF REVIEW

We begin by outlining the principles that govern our review. “We review questions of statutory construction *de novo*. Our primary task ‘in interpreting a statute is to determine the Legislature’s intent, giving effect to the law’s purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.]’ [Citation.] We construe the statute’s words in context, harmonizing statutory provisions to avoid absurd results. [Citation.] If the statutory text is susceptible to more than one reasonable construction, we may consider extrinsic aids such as legislative history to facilitate our interpretative analysis.” (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041.)

Wherever reasonably possible, a court must “ ‘ ‘ ‘harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions.’ ’ ’ ” (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) “ ‘ ‘ ‘ ‘Accordingly, they “must be read together and so construed as to give effect, when possible, to all the provisions thereof.” ’ ’ ’ ’ ” (*Ibid.*) However, “the requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach.” (*Id.* at p. 956.) Thus, if the statutory language compels the conclusion that the statutes are in conflict, “one must be interpreted as providing an exception to the other.” (*Ibid.*) “The rules we must apply when faced with two irreconcilable statutes are well established. ‘If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation],

incarcerated, he “most likely . . . would have continued” to “commit crimes.” Accordingly, the Board noted that while Jenson had “denied the [commitment crime,] which [was his] right to do,” he had admitted his “antisocial and tumultuous social history,” including a lengthy juvenile record, and had not “minimize[d] [his] criminality in the past.”

8. According to the Attorney General, Jenson’s remaining term has been recalculated to reflect only the five-year *Thompson* term for the in-custody offense committed in 1989.

and more specific provisions take precedence over more general ones [citation].’ (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 [99 Cal.Rptr.2d 792, 6 P.3d 713] (*Rumsey*).)’ (*State Dept. of Public Health*, at p. 960; see also *People v. Adelman* (2018) 4 Cal.5th 1071, 1079.)

With these principles in mind, we turn to the language of the statutes at issue.

II.

THE STATUTORY SCHEME

A. Section 1170.1

Section 1170.1, enacted in 1976, governs consecutive terms of imprisonment. As is relevant here, subdivision (c) provides that when a prisoner is sentenced to a consecutive term for a felony committed in state prison, “the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison.” For prisoners serving indeterminate terms, the consecutive sentence for in-prison offenses begins on the date the prisoner is found suitable for parole, not the date he or she completes his base term. (*In re Coleman* (2015) 236 Cal.App.4th 1013, 1016–1022.)

B. Section 3051

In a series of cases, our high courts have recognized that “children are constitutionally different from adults for purposes of sentencing” because of their diminished culpability and greater prospects for reform. (*Miller v. Alabama* (2012) 567 U.S. 460, 471 [132 S.Ct. 2455].) Hence, the Eighth Amendment’s prohibition on cruel and unusual punishment has been held to prohibit imposition of the death penalty on juveniles (*Roper v. Simmons* (2005) 543 U.S. 551); life without possibility of parole (LWOP) on juveniles who commit nonhomicide offenses (*Graham v. Florida* (2010) 560 U.S. 48); mandatory LWOP on juveniles (*Miller, supra*, 567 U.S. 460); de facto LWOP on juvenile nonhomicide offenders (*People v. Caballero* (2012) 55 Cal.4th 262); and a sentence of 50 years to life for juvenile nonhomicide offenders (*People v. Contreras* (2018) 4 Cal.5th 349, 356).

In line with this evolution in how we think about and treat youth offenders, our Legislature enacted Senate Bill No. 260 in 2013 to implement the limitations on juvenile sentencing articulated in these cases. In adopting Senate Bill No. 260, which added section 3051 and amended sections 3041, 3046, and 4801, the Legislature explained that “youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.” (Stats. 2013, ch. 312, § 1.) Thus, the bill’s purpose was “to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity

to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity.” (*Ibid.*)

To this end, section 3051 provides that an offender who committed a “controlling offense” as a youth is entitled to a “youth offender parole hearing” after a fixed period of years set by statute. The “controlling offense” is “the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.” (§ 3051, subd. (a)(2)(B).)

As originally enacted, section 3051 applied only to non-LWOP offenses committed before the offender was 18 years old. (Stats. 2013, ch. 312 (S.B. 260), § 4.) An amendment effective January 1, 2016 raised the age of eligibility to 23 years; and an amendment effective January 1, 2018 raised the age of eligibility to 25 years and included LWOP offenses committed before age 18. (Stats. 2015, ch. 471 (S.B. 261), § 1; Stats. 2017, ch. 675 (A.B. 1308), § 1; Stats. 2017, ch. 684 (S.B. 394), § 1.5.) Thus, section 3051 now provides that an offender who committed a “controlling offense” under the age of 26 is entitled to a “youth offender parole hearing” during his 15th year of incarceration if he received a determinate sentence; during his 20th year of incarceration if he received a life term of less than 25 years to life; and during his 25th year of incarceration if he received a term of 25 years to life. (§ 3051, subd. (b)(1)–(3).) An offender convicted of a controlling offense committed before the age of 18 for which he was sentenced to LWOP is entitled to a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(4).)

The statute defines a youth offender parole hearing as “a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of” youth offenders. (§ 3051, subd. (a)(1).) At the hearing, the Board is required to afford the youth offender “a meaningful opportunity to obtain release,” taking into consideration “the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.” In an appropriate case, the Board “shall release the individual on parole as provided in Section 3041.”⁹ (§ 3051, subs. (d), (e), (f)(1).)

Section 3051 excludes several categories of youth offenders: offenders sentenced under the Three Strikes law (§§ 667, subs. (b)–(i), 1170.12); sex offenders sentenced under Jessica’s Law (§ 667.61); offenders sentenced to LWOP for controlling offenses committed after age 18; and individuals to whom the section would otherwise apply, “but who, subsequent to attaining 26 years of age, commit[] an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.” (§ 3051, subd. (h).)

9. Section 3041 concerns parole release dates. Subdivision (a)(4) of that section provides, “Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date.”

In sum, section 3051 applies to someone who (1) commits a controlling offense when he or she is under the statutory age of eligibility, and (2) does not fall under one of the exclusions in subdivision (h).

C. Application of These Statutes to Jenson

It is undisputed that Jenson was sentenced to a consecutive term for a felony committed while he was in state prison, within the meaning of section 1170.1(c). It also is undisputed that Jenson committed his controlling offense when he was 19 years old and does not come within any of the exceptions to section 3051—that is, he is not a third striker or a sex offender, was not sentenced to LWOP, and did not after age 26 commit a malice aforethought or life crime. (§ 3051, subd. (h).) As such, he unquestionably was entitled to a youth offender parole hearing under section 3051 and was eligible for parole on his commitment offense.

The question before us, therefore, is whether having been granted parole, Jenson must serve his *Thompson* term before being released from prison, as directed by section 1170.1(c), or is entitled to immediate release from prison, as directed by section 3051. We turn to that issue.

III.

SECTION 3051 SUPERSEDES SECTION 1170.1 WITH REGARD TO YOUTH OFFENDERS WHO COMMIT IN-PRISON CRIMES AS ADULTS

A. In re Trejo

Only one published case, *In re Trejo* (2017) 10 Cal. App.5th 972 (*Trejo*), has considered the interaction between sections 1170.1(c) and 3051 as they apply to youth offenders who commit crimes in prison. In that case, defendant Trejo committed second degree murder at age 17, for which he was convicted and sentenced to a prison term of 15 years to life. At age 20, he committed an assault with a deadly weapon on a peace officer while incarcerated. He was sentenced to an additional term of four years, to be served consecutively to his life sentence. (*Id.* at pp. 975–976.)

After 35 years in prison, the Board found Trejo suitable for parole under section 3051. However, it determined that under section 1170.1(c), Trejo could not be released until he served his four-year *Thompson* term for the in-prison assault. (*Trejo, supra*, 10 Cal.App.5th at pp. 975–976.) Trejo filed a petition for writ of habeas corpus, challenging the legality of his continued confinement. The trial court denied the petition; Trejo then filed a petition with the Court of Appeal, which granted relief. (*Id.* at pp. 976, 991–992.)

In granting relief, the appellate court rejected the Attorney General’s argument that section 3051 applies only to sentences imposed for crimes committed prior to incarceration, concluding that the text of the statute “indicates the opposite.” The court explained: “Section 3051 provides for

parole suitability review for inmates whose ‘controlling offense’ was committed before he or she was 23 years old.¹⁰ (§ 3051, subd. (a)(1).) As we have said, ‘controlling offense’ is defined as ‘the offense or enhancement for which *any* sentencing court imposed the longest term of imprisonment.’ (§ 3051, subd. (a)(2)(B), italics added.) . . . By referring to the longest term of imprisonment imposed by ‘any’ sentencing court, the Legislature indicated its intent that the controlling offense used to determine a youth offender’s parole hearing date under section 3051 be selected from *all* sentences imposed upon that offender, regardless of whether they were imposed in one or a number of proceedings or cases. ‘Any sentencing court’ is open-ended: Nothing in section 3051 suggests the only sentences to be considered are those imposed before the offender was incarcerated’ (*Trejo, supra*, 10 Cal.App.5th at pp. 984–985.)

The court also agreed with Trejo that the Legislature’s intent to exempt youth offenders from application of section 1170.1 is inherent in section 3051. It explained that section 1170.1, subdivision (a), “requires that an inmate serve the requisite term for each consecutively sentenced offense and enhancement. Under section 3051, subdivision (b)(1), however, a youth offender sentenced to a determinate term becomes eligible for release in the 15th year of incarceration even if he or she has not yet served the aggregate determinate term. Where a youth offender is sentenced to a lengthy determinate term, then, section 3051 necessarily overrides the requirement of section 1170.1 that an inmate sentenced to consecutive terms not be released on parole before completing all the terms of imprisonment imposed.

“Similarly, section 3051 supersedes section 1170.1 when a youth offender is consecutively sentenced to a life term and a determinate term. Section 1170.1, subdivision (a), incorporates section 669, which provides that when a person is sentenced to a life term and a consecutive determinate term, ‘the determinate term of imprisonment shall be served first and no part thereof shall be credited toward the person’s eligibility for parole as calculated pursuant to Section 3046 or pursuant to any other section of law that establishes a minimum period of confinement under the life sentence before eligibility for parole.’ Under section 3051, however, a person sentenced to a life term and a determinate term becomes eligible for parole after the time specified in section 3051, subdivision (b)(2) or (3), based on the life term, without regard to the determinate term. [Citation.]

“We see no basis for inferring that the Legislature intended section 3051 to override the otherwise applicable provisions section 1170.1 as described above but to have no effect on the application of section 1170.1, subdivision (c).” (*Trejo, supra*, 10 Cal.App.5th at p. 986.)¹¹

10. As noted, until January 1, 2018, section 3051 applied to offenders who committed their controlling offenses before age 23. As of January 1, 2018, the age of eligibility has been raised from 23 to 26.

11. Indeed, our California Supreme agreed that section “3051 and 3046 have thus superseded the statutorily mandated sentences of in-

Finally, the court noted that Trejo had committed his controlling offense at age 17, and that none of the exceptions in section 3051, subdivision (h) applied to him because “[h]e was not sentenced pursuant to the Three Strikes law or section 667.61 or to a term of life in prison without possibility of parole, and his in-prison offense was committed *before* he reached 23 years of age [the then-operative age of eligibility] and neither involved malice aforethought nor resulted in a life sentence.” (*Trejo, supra*, 10 Cal.App.5th at p. 982.) The court thus concluded that Trejo was entitled to release when his parole became effective, notwithstanding the consecutive four-year term imposed for the in-prison conviction. (*Id.* at p. 989.)

B. Trejo’s Reasoning Applies Equally to Youth Offenders Who Commit In-Prison Crimes As Adults

Both parties appear to concede that *Trejo* is controlling law with regard to youth offenders who commit in-prison offenses under the age of 26. We agree. No published case has disagreed with *Trejo*’s holding, and although the Legislature amended section 3051 after *Trejo* was decided, it did not make any changes relevant to in-prison offenses. Indeed, the only change the Legislature has made to section 3051 since *Trejo* was decided was to *broaden* the statute’s reach by increasing the age of eligibility, not to narrow it. We thus presume that the Legislature was aware of, and acquiesced in, the court’s construction of the statute. (See, e.g., *People v. Ledesma* (1997) 16 Cal.4th 90, 100–101 [“ ‘When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts’ construction of that statute.’ ”].)

The Attorney General contends, however, that *Trejo* should not govern the present case because its “holding relies on Legislative intent and policy supporting leniency for youthful offenders that should not extend to sentences for adult in-prison crimes.” Not so. The Court of Appeal’s analysis in *Trejo*, which we have discussed at length above, was grounded in the language of the relevant statutes. And, while *Trejo*’s holding necessarily is limited to its facts, we discern nothing in the court’s thoughtful statutory analysis that would not apply equally to defendants who commit in-prison crimes as adults.

C. Sections 1170.1 and 3051 Cannot Be Harmonized With Regard to Youth Offenders Who Commit In-Prison Offenses As Adults

Our conclusion that *Trejo*’s reasoning applies equally to the present facts is, without more, a sufficient basis for holding that Jenson need not serve his *Thompson* term. But there is another, equally convincing reason to reach this result—namely, that it is compelled by the language of section 3051, subdivision (h), which specifically addresses youth offenders who commit additional in-prison crimes *after age 26*.

Section 3051, subdivision (h) provides: “This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.” In enacting section 3051, therefore, the Legislature anticipated that some youth offenders would commit additional crimes after the age of 26,¹² and it specifically provided when such offenses will cause youth offenders to lose the opportunity for early release—i.e., if (1) malice aforethought is a necessary element of the crime, *or* (2) the crime is punished by life in prison.

Under the principle of “*expressio unius est exclusio alterius*,” an express exclusion from the operation of a statute “indicates the Legislature intended no other exceptions are to be implied. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 [132 Cal.Rptr.377, 553 P.2d 37]; see also 2A Sutherland, *Statutory Construction, supra*, § 47.23, p. 123; 58 Cal.Jur.3d, *supra*, § 115.)” (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 725.) As applied here, this principle suggests that the Legislature intended a youth offender who commits a crime in prison after age 26 to remain eligible for release from prison after serving 15, 20, or 25 years so long as the in-prison crime was *not* a “malice aforethought” crime and was *not* punishable by life in prison.

Section 3051, subdivision (h) thus is irreconcilably in conflict with section 1170.1(c) with regard to youth offenders who, after age 26, commit in-prison crimes for which malice aforethought is not a necessary element and which are not punishable by life in prison. As the present case illustrates, section 1170.1 would require such a person to serve an additional term for the in-prison crime after being paroled on the principal term. In contrast, section 3051 would require his or her immediate release upon a finding of parole suitability.

Sections 1170.1(c) and 3051 also result in entirely different parole hearing dates for some youth offenders who commit crimes in prison. Consider a hypothetical youth offender who, at the age of 18, commits a crime for which he is sentenced to five years in state prison. During his first year of his incarceration, he commits an additional crime and receives a consecutive sentence of 25 years to life. Because

mates” who committed their controlling offenses before the age of 26. (*People v. Franklin* (2016) 63 Cal.4th 261, 278; see *Trejo, supra*, 10 Cal.App.5th at p. 989 [“Respondent maintains that the Board’s consideration of suitability factors is insufficient because it is not ‘the sentence contemplated by the sentencing courts, prosecutors, or the Penal Code.’ But this is true of all sentences affected by section 3051”].)

12. As *Trejo* noted, such crimes necessarily will be committed in prison, since the earliest eligibility for parole under section 3051 is during the 15th year of incarceration, long after a youth offender will have reached age 26. (*Trejo, supra*, 10 Cal.App.5th at p. 985.)

the in-prison crime is a *Thompson* offense, the two terms must be served consecutively under section 1170.1(c), and thus the prisoner will not become parole eligible until he has been incarcerated for 30 years (5 years plus 25 years, without considering credits). Because the in-prison crime is also the controlling offense, however, under section 3051, the prisoner would be parole eligible during his 25th year of incarceration. (§ 3051, subd. (b)(3) [“A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.”].)

As we have said, where two statutes cannot be reconciled, “‘later enactments supersede earlier ones [citation], and more specific provisions take precedence over’ the more general.” (*People v. Adelman*, *supra*, 4 Cal.5th at p. 1079.) Here, section 3051 was adopted in 2013 and specifically addresses parole eligibility for youth offenders. Section 1170.1 was adopted many decades earlier and generally concerns punishment for in-prison crimes, without distinguishing between youth and adult offenders. Because section 3051 thus is both later-enacted and more specific, it supersedes section 1170.1(c) with regard to youth offenders.

The dissent suggests there is no conflict between sections 1170.1(c) and 3051 because a defendant can be “paroled” on one crime but still be required to serve an additional sentence for another. But distinguishing between “parole” and “release” is contrary to the Legislature’s express purpose in enacting section 3051—to give a youth offender “the opportunity to *obtain release* when he or she has shown that he or she has been rehabilitated and gained maturity.” (Stats. 2013, ch. 312, § 1, italics added.) The distinction also is contrary to the plain language of sections 3051 and 3041, which state that a youth offender parole hearing “shall provide for a meaningful opportunity to *obtain release*,” the Board “shall *release*” an offender it determines eligible for parole; and on “a grant of parole, the inmate *shall be released*.” (§§ 3051, subds. (d), (e), 3041, subd. (a)(4), italics added.)

Nothing in section 3051 indicates “release” means release on just the controlling offense so that the prisoner can serve a *Thompson* term. Rather, “release” plainly means “release from incarceration.” Interpreting “release” in this manner accords with the commonsense, plain meaning of the word. (See, e.g., Merriam-Webster’s Collegiate Dict. (10th ed. 1995) p. 987 [release means “to set free from restraint, confinement, or servitude” or “relieve from something that confines, burdens, or oppresses”].) It also accords with the Legislature’s stated intent in enacting Senate Bill No. 260—to give youth offenders a meaningful opportunity to obtain release *when* they reach rehabilitative benchmarks.¹³

13. This phrase—meaningful opportunity to obtain release—has its genesis in *Graham v. Florida*, *supra*, 560 U.S. at page 75 and is

For all of these reasons, we conclude that section 3051 supersedes section 1170.1(c) with regard to youth offenders who commit in-prison offenses as adults.

D. Our Interpretation of Section 3051 Does Not Give Youth Offenders a “Free Pass” to Commit Crimes in Prison

Our interpretation of section 3051 does not give defendants a “free pass” to commit crimes in prison without consequence, as the dissent suggests. Because “serious misconduct in prison” is a parole suitability factor, parole will likely be denied or significantly delayed for a defendant who has committed an in-prison crime. (See Cal. Code Regs., tit. 15, § 2402, subd. (c)(6) [“serious misconduct in prison” is a factor tending to indicate “unsuitability for release”].)¹⁴ Adding an additional *Thompson* term to a defendant’s sentence thus punishes a youth offender sentenced to an indeterminate term *twice* for in-prison offenses, because it can repeatedly delay a grant of parole and then add an additional prison term after parole is granted.

Consider Jenson’s case. Jenson committed his controlling offense, which led to his incarceration, when he was 19, an age our Legislature has deemed of “diminished culpability.” (§ 4801, subd. (c).) He was sentenced to 25 years to life for the murder, plus two years for the enhancement; for his in-prison offenses, he received an additional term of five years. By the time he was found suitable for parole in 2016, he had served in excess of 37 years—more than the mandatory determinate parts of his sentence—and had been denied parole five times, in large part because of “[his] record in prison,” including “three [in-prison] convictions” and “some 48 [disciplinary reports].” In short, the Board (and the Governor) were well aware of Jenson’s in-prison conduct, and explicitly took that conduct into account in granting him parole. Requiring a youth offender like Jenson who has met the stringent benchmarks required for rehabilitation to remain incarcerated to serve a *Thompson* term turns section 3051 into a Pyrrhic victory: Jenson is suitable for release having demonstrated maturity and rehabilitation, but he must remain in prison.

Moreover, no windfall results to Jenson and to similarly situated persons. While the specific outcome in this case is Jenson’s release on parole, the general implication of our decision is not a wholesale release of prisoners. Our decision merely means that youth offenders who commit nonlife crimes or crimes for which malice aforethought is not an element while in prison after attaining the age of 26 are still entitled to a youth offender parole hearing and to a meaningful opportunity for release. *A hearing and an opportunity*. Nothing more. At that hearing, the Board will evaluate the

unique to our youth offender statutory scheme, as it is not found in other parole-related statutes.

14. For this reason, the dissent’s hypothetical inmate, who is convicted of a sexual assault 20 years into his prison term, cannot expect to be granted parole five years later at a youth offender parole hearing. (See also Cal. Code Regs., tit. 15, § 2402(c)(4) [commission of a sadistic sexual offense demonstrates unsuitability for parole].)

prisoner holistically—any *Thompson* crimes being part of the whole. Such crimes may militate against a grant of parole. (See also *Trejo, supra*, 10 Cal.App.5th at p. 988.) Our decision thus does not encourage bad behavior in prison. The youth offender who continues to commit crimes while incarcerated only sabotages the chance of a good outcome at his or her parole hearing. A youth offender parole hearing offers a meaningful opportunity for release. It is not a guarantee of one.

DISPOSITION

Jenson is ordered released on parole. His release date shall be amended to be September 9, 2016, and the days of incarceration he has served since that day shall be deducted from his parole period. In the interests of justice, this opinion shall be deemed final immediately upon filing. (Cal. Rules of Court, rule 8.387(b)(3)(A).)

CERTIFIED FOR PUBLICATION

DHANIDINA, J.*

I concur: EDMON, P. J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EGERTON, J., Dissenting.

I respectfully dissent. In my view, we can and should reconcile Penal Code section 1170.1, subdivision (c), with section 3051. The plain language of the statutes, read with the Legislature's purpose in enacting each in mind, leads to the conclusion that an inmate who is granted parole for a life crime committed when he was younger than 26 must still serve his consecutive term for a new and different offense committed in prison when he was no longer youthful by any definition.

1. Jenson's 1979 murder of L.C. Walker, his 1989 assault on an officer with a knife, and the 2016 parole hearing

In 1979 a jury convicted petitioner Ronald Jenson of the first degree murder of L.C. Walker with a shotgun. The presiding commissioner at Jenson's April 2016 parole hearing summarized the facts of the crime: "A 64-year old male victim was fatally shot at a gas station. It was reported that he was visiting the gas station attendant who was sitting inside the gas station watching television. According to the attendant, four males entered the gas station with weapons in their possession. Mr. Jenson, who had a shotgun, pressed the weapon into the victim's side, and another suspect was holding a handgun nearby. The victims were told to sit down and not move. The victim who was killed had a revolver in

his pocket, and told the suspects why don't you kids go on away from here. And his hand came out of his pocket with the handle of the gun visible, at which point the shotgun was fired striking the victim. . . . The victim died from his injuries." The trial court sentenced Jenson to life with a minimum eligible parole date of 27 years (25 years to life for the first degree murder plus two years for his use of a firearm under the then-applicable version of Penal Code section 12022.5¹⁵).

While in prison, Jenson committed three more felonies. He committed two of those crimes—escape without force and manufacture or possession of a deadly weapon by an inmate—during his first year in prison. Jenson was 21 at the time. Then, in 1989, Jenson was charged with assault with a deadly weapon on a peace officer.¹⁶ Jenson was 29 when he committed that offense. Jenson spoke about the crime at his April 2016 parole hearing. Jenson said the officer had used a racial slur in referring to Jenson's mother and his wife. The officer "told [Jenson] what he was going to do to them sexually." Jenson continued, "And unfortunately at that time, I lost my cool and I went and got a knife, and I stabbed him and he almost lost his life."

The Marin County District Attorney filed charges. On November 29, 1989, Jenson entered into a plea agreement with the People. Jenson pleaded guilty to the charge. The court sentenced him to the agreed-upon term of five years in the state prison, to be served consecutively to the life term. The People struck an enhancement on the assault with a deadly weapon count and dismissed a second count as part of the plea deal.

In late 2014, the parole board granted Jenson parole. However, in March 2015, Governor Brown reversed the board's decision. The Governor described Jenson's murder of Walker as "senseless." The Governor continued, "Mr. Jenson's conduct in prison demonstrates an inability to control his temper and abide by the rules. He has been disciplined for serious misconduct 48 times and less serious misconduct 42 times. Ten of his serious disciplinary actions were for violent behavior including stabbing a correctional officer in the neck, attempting to stab staff, assaulting an inmate, stabbing an inmate, spitting in staff members' faces, fighting with another inmate, and possession of inmate-manufactured weapons." The Governor commended Jenson for his "efforts to improve himself during his 36 years of incarceration." However, in reversing the board's decision to parole Jenson, the Governor noted Jenson's "extensive criminal history and many violent acts while incarcerated." This court denied Jenson's petition for a writ of habeas corpus challenging the Governor's decision.

15. Under current law, a perpetrator's intentional discharge of a firearm causing death or great bodily injury adds 25 years to a first degree murder sentence under Penal Code section 12022.53, subdivision (d).

16. At the time, that crime constituted a violation of Penal Code section 245, subdivision (b). Now, section 245, subdivision (c), is the applicable provision for that crime.

As noted, Jenson had another parole hearing on April 29, 2016. At the hearing, Jenson insisted he did not commit the 1979 murder of Walker. He had been, he said, falsely accused and wrongly convicted. Jenson stated a man named James Downey had fingered him for the crime because of a dispute over a woman. Jenson also said Walker's friend, eyewitness Walter Diggs, had not positively identified him and had been led by the prosecutor in his testimony at trial.¹⁷ In addition, Jenson blamed his co-defendant for testifying against him.

At the 2016 parole hearing, the deputy district attorney representing the People asked the commissioners to question Jenson about custodial counseling chronological documentations (so-called CDC-128-A's) he received in 2007, 2009, and 2010 for disobeying direct orders of corrections personnel. The district attorney argued against parole for Jenson, stating, "[Jenson] has continued since he was a youth through the transition period into adulthood to violate rules in prison. He has an extremely, for a long time, bad record in prison. I would argue 2007, 2009, 2010 are a continuation."

2. Discussion

Jenson's writ petition presents a question of statutory interpretation. In construing statutes, " 'our fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' " (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321.)" (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135; see also *Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 5 ["Our obligation is to interpret the statute 'to effectuate the purpose of the law.' ([] *Santa Barbara County Taxpayers Assn. v. County of Santa Barbara* (1987) 194 Cal.App.3d 674, 681 [239 Cal.Rptr. 769].") "[S]tatutes must be construed in a reasonable and common sense manner consistent with their apparent purpose and the legislative intent underlying them—one practical, rather than technical, and one promoting a wise policy rather than mischief or absurdity." (*Herbert Hawkins Realtors, Inc. v. Milheiser* (1983) 140 Cal.App.3d 334, 338.) "As always, we start with the language of the statute, 'giv[ing] the words their usual and ordinary meaning [citation], while construing them in light of the statute as a whole and the statute's purpose [citation].'" (*Pineda [v. Williams-Sonoma Stores, Inc.]* (2011) 51 Cal.4th [524,] 529–530.)" (*Apple*, at p. 135.) " 'We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' (*Coalition of Concerned Communities,*

Inc. v. City of Los Angeles (2004) 34 Cal.4th 733, 737 [21 Cal. Rptr. 3d 676, 101 P.3d 563].)" (*In re Coleman* (2015) 236 Cal.App.4th 1013, 1018 (*Coleman*).)

Penal Code section 1170.1, subdivision (c)—enacted in 1976 and amended many times since—provides, "In the case of any person convicted of one or more felonies committed while the person is confined in the state prison . . . and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison." These consecutive terms commencing on what otherwise would have been the inmate's release date have come to be known as *Thompson* terms, after *In re Thompson* (1985) 172 Cal. App.3d 256. The reason the Legislature enacted Penal Code section 1170.1, subdivision (c), is obvious and sound: to deter inmates from committing more crimes while in prison. "It is well established the Legislature intended that 'in-prison crimes . . . be punished more severely than crimes committed 'on the outside.' " ([*People v.*] *White* [(1988)] 202 Cal. App.3d [862,] 869.)" (*Coleman, supra*, 236 Cal.App.4th at p. 1022.) "Commencing the consecutive sentence for the custodial offense on the date the prisoner otherwise actually would have been released on parole is consistent with the Legislature's intent to punish and deter criminality in prison." (*Ibid.*)

Penal Code section 3051—enacted in 2013 and amended several times since—grants a youth offender (now defined as an inmate who committed his controlling offense before he was 26 years old) a parole hearing after 15, 20, or 25 years, depending on the controlling offense. An inmate like Jenson, who was convicted of first degree murder committed when he was 19 years old, is entitled to a youth offender parole hearing after 25 years. (Pen. Code, § 3051, subd. (b) (3).) Subdivision (h) of the statute carves out three categories of inmates who are not entitled to receive a youth offender parole hearing: (1) inmates serving a third strike sentence; (2) inmates sentenced to life without the possibility of parole for crimes committed as adults; and (3) inmates who, at age 26 or older, commit an additional crime that requires malice aforethought or that results in another life sentence. (Pen. Code, § 3051, subd. (h).)

These two statutes can be reconciled. The carve-out provision in Penal Code section 3051, subdivision (h), denies the three categories of inmates listed there *any youth offender parole hearing at all*. By contrast, an inmate like Jenson, who committed a life crime while 25 or younger, *will* receive his youth offender parole hearing after 25 years. The board may grant that inmate parole. But that grant does not mean that the inmate now does not have to serve his consecutive *Thompson* term for a crime committed when he was 26 or older.¹⁸ Here, Jenson was nearly thirty years old when—according

17. The board was unable to locate the court of appeal's decision affirming Jenson's conviction, so the commissioners asked Jenson if Diggs had identified him at trial.

18. Under *In re Trejo* (2017) 10 Cal.App.5th 972, Jenson does not have to serve his *Thompson* terms for the felonies committed in prison when he was 21 years old.

to his own account—he went and procured a knife (showing planning and not simply an impulsive act), and then stabbed an officer in the neck, nearly killing him. At that age, Jenson was fully an adult, and the Legislature’s concerns for the “diminished culpability of juveniles as compared to adults,” the “hallmark features of youth,” and the recognition that “children are constitutionally different from adults for purposes of sentencing” (*In re Trejo*, at pp. 980–981, 987) no longer apply.

Consider this hypothetical: A 25-year-old man shoots and kills someone. A jury convicts him of first degree murder and finds the gun allegation true. The defendant also has a prior strike—let’s say for robbery, when he was 24. The court sentences him to life with a minimum eligible parole date of 80 years (25 years to life for the first degree murder, doubled because of the strike prior, plus 25 years for the intentional discharge of the gun causing death, plus a five-year prior under Penal Code section 667, subdivision (a)). Twenty years later, at the age of 45, the inmate sexually assaults a fellow inmate, or a guard. He is convicted of that crime, his sentence to be served consecutively. The inmate nevertheless will receive a youth offender parole hearing 25 years after his commitment for the murder. The board may grant him parole on his life case, effectively knocking 55 years off of his sentence. But the inmate still must serve his *Thompson* term for the sexual assault. Read this way, consistent with their plain language, Penal Code section 1170.1, subdivision (c), and section 3051 are not inconsistent. The inmate gets a hearing after 25 years, effectuating the Legislature’s concern for youthful offenders, and the inmate still must serve his term for his in-prison crime committed as a fully grown adult, effectuating the Legislature’s purpose of deterring prison inmates from committing more crimes while in custody.

Finally, Penal Code sections 3041 and 3046 do not change this analysis. Penal Code section 3046 generally addresses parole for defendants sentenced to life. Subdivision (c) provides that an inmate found suitable for parole after a youth offender parole hearing “shall be paroled regardless of the manner in which the board set release dates pursuant to subdivision (a) of Section 3041, subject to subdivision (b) of Section 3041 and Sections 3041.1 and 3041.2, as applicable.” (Pen. Code, § 3046, subd. (c).) Penal Code section 3041 sets forth the workings of parole generally. Section 3041, subdivision (a)(4), states, “Upon a grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date” (Pen. Code, § 3041, subd. (a)(4).) Penal Code sections 3041.1 and 3041.2 have to do with the Governor’s right to review parole decisions.

Neither Penal Code section 3041 nor section 3046 mentions section 1170.1(c). Again, a grant of parole to an inmate like Jenson does not mean the inmate now is relieved of his

obligation to serve his *Thompson* term for a crime committed when no longer a “youth.” Returning to the hypothetical inmate discussed above, these statutes work this way: Under Penal Code section 3046, subdivision (c), the inmate may be paroled from his life sentence after 25 years, without having to wait for his previous minimum eligible parole date of 80 years. But he is “paroled” to his *Thompson* term, in Department of Corrections terms. By contrast, an inmate serving a life sentence for a crime committed when 25 or younger who does *not* commit any in-custody crime, and therefore owes no *Thompson* term, is released immediately under Penal Code section 3041, subdivision (a)(4); he does not have to serve his remaining time for—for example—his gun use causing the victim’s death or for his prior strike.

In sum, in my view, the Legislature—in enacting Penal Code section 3051—cannot have meant to give inmates who committed their controlling offense at age 25 or younger a free pass for any and all future crimes committed in prison when they cannot be considered “youth” by any definition of the word, statutory or otherwise. I do not believe our Legislature intended implicitly to repeal Penal Code section 1170.1, subdivision (c), or to change the law so that a youth offender who later, at nearly 30 years of age, attacks a guard with a knife, almost killing him, does not have to serve his *Thompson* term for that crime. Construing the two statutes in this reasonable and common sense manner consistent with their apparent purpose and the legislative intent underlying them promotes the wise policies of both leniency toward youthful offenders and the protection of inmates, guards, and other corrections staff from crimes committed in prison by fully grown men and women. Respectfully, this interpretation “comports most closely with the apparent intent of the Legislature, with a view toward promoting, rather than defeating, the general purpose of the statute[s]” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1313.) I would deny Jenson’s petition.

EGERTON, J.

Cite as 18 C.D.O.S. 5608

VON BECELAERE VENTURES, LLC,
Plaintiff and Respondent,

v.

JAMES ZENOVIC, Defendant and
Appellant.

No. D072620

In The Court of Appeal of the State of California

Fourth Appellate District

Division One

(Super. Ct. No. 37-2017-00011817-CU-CD-CTL)

APPEAL from an order of the Superior Court of San Diego
County, Ronald L. Styn, Judge. Affirmed.

Filed June 6, 2018

COUNSEL

Law Office of Johanna S. Schiavoni, Johanna S. Schiavoni; Purdy & Bailey, Micah L. Bailey and Mark Serino for Defendant and Appellant.

Niddrie Addams Fuller Singh and Rupa G. Singh for Plaintiff and Respondent.

OPINION

INTRODUCTION

James Zenovic doing business as James Zenovic Construction (Zenovic) appeals an order denying his petition to compel arbitration in an action filed by Von Becelaere Ventures, LLC (VBV) in San Diego County. The trial court determined Zenovic waived his right to compel arbitration by filing a separate complaint in Orange County to foreclose on a mechanics lien without complying with provisions in Code of Civil Procedure section 1281.5¹ to preserve his arbitration rights. Zenovic contends the court misread and misapplied section 1281.5, which he contends should only apply to the mechanics lien action and should not operate to preclude arbitration of the separate action filed by VBV. We disagree. We conclude section 1281.5 “means what it says: A party who files an action to enforce a mechanic’s lien, but who does not at the same time request that the action be stayed pending arbitration, waives any right to arbitration.” (*R. Baker v. Motel 6* (1986) 180 Cal.App.3d 928, 929 (*Baker*)). We, therefore, affirm the order.

BACKGROUND

A

VBV entered into a construction contract with Zenovic to construct a single-family residence on property owned by

VBV in Laguna Beach. VBV and Zenovic both maintain addresses in San Diego County.

The construction contract contained an arbitration agreement stating, “If any dispute arises concerning this Contract or the interpretation thereof, or concerning construction of the Improvements, or the Limited Warranty, customer service, defects, damages, or obligations therewith (a ‘Construction Dispute’), such Construction Dispute will be settled by binding arbitration.”

B

Apparently, a dispute arose between the parties. Zenovic recorded a mechanics lien in Orange County on March 20, 2017, asserting VBV owed \$449,126.96 for work furnished at the property.

VBV filed a construction defect complaint on April 3, 2017, in the Superior Court of San Diego County (San Diego action) asserting causes of action for breach of contract; negligence; an accounting; violations of Business and Professions Code section 7000, et seq.; breach of the covenant of good faith and fair dealing; aiding and abetting fraud; aiding and abetting breach of fiduciary duty; and violation of Penal Code section 496. VBV alleged Zenovic breached the construction contract by “(a) failing to properly perform and construct the Work; [¶] (b) failing to hire properly licensed and insured subcontractors; [¶] (c) failing to comply with proper license and insurance requirements; [¶] (d) failing to obtain written subcontract agreements; [¶] (e) failing to properly supervise the Work; [¶] (f) failing to maintain and provide upon request proper accounting records; [¶] (g) failing to properly manage expenses and allowing gross overages; [¶] (h) failing to comply with requirements regarding change orders, improperly billing for extra work and improperly categorizing work as extra work which should have been covered under the contract as included work; and [¶] (i) improperly filing and asserting an untimely mechanics lien and threatening to file suit to foreclose on the improper lien.”

VBV’s third cause of action for an accounting alleged it overpaid Zenovic as a result of “fraudulent, incomplete and inaccurate billing” for the project and sought a “complete and accurate accounting of the cost of work.”

The sixth cause of action for aiding and abetting fraud alleged the defendants conspired to defraud VBV with excessive billing for which VBV paid, and “subsequently improperly recorded an untimely Mechanics Lien against the Residence in the amount of \$449,126.96. Defendants then demanded [VBV] pay the sum of \$648,811.43 or they would file a lawsuit to foreclose on the Mechanics Lien.”

A few days after being served with the San Diego action, Zenovic filed on April 7, 2017, a complaint in the Superior Court of Orange County (Orange County action) asserting causes of action for breach of contract, reasonable value, account stated, open book account, abuse of process, foreclosure on mechanics lien, and breach of the covenant of good faith and fair dealing. Zenovic alleged VBV refused to pay

¹ Further statutory references are to the Code of Civil Procedure unless otherwise stated.

money due under the construction contract for labor, materials, and services provided for construction of the residence. Zenovic sought to foreclose on the mechanics lien.

About a month later, Zenovic filed a motion to compel arbitration in the San Diego action. He contended VBV's entire complaint was arbitrable because the allegations for each cause of action qualified as a "Construction Dispute" under the terms of the arbitration agreement, including VBV's causes of action for accounting, aiding and abetting fraud and breach of fiduciary duty based on allegations of mismanagement of construction and billing practices, and violation of Penal Code section 496 based on allegations of theft of construction funds.

Thereafter, the parties submitted a stipulation to the Orange County Superior Court agreeing to transfer the Orange County action to San Diego County Superior Court and requesting the two actions be consolidated. The Orange County court ordered the Orange County action transferred to San Diego County Superior Court and to be related to the San Diego action.

The court denied Zenovic's petition to compel arbitration of the San Diego action finding Zenovic waived the right to compel arbitration by failing to comply with section 1281.5, subdivision (a), when filing the Orange County action. Because Zenovic waived the ability to enforce the arbitration provision, the court also denied the petition to compel arbitration as to codefendants Union Site Contracting and Joseph Zenovic finding there is a possibility of conflicting rulings on a common issue of law or fact. Union Site Contracting and Joseph Zenovic are not parties to this appeal.²

DISCUSSION

Zenovic contends section 1281.5 applies only to an action to enforce a mechanics lien and should not operate to waive his right to arbitrate other contractual disputes. We disagree.

I

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] "When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling." " (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 375.)

II

Section 1281.5, subdivision (a) states: "Any person who proceeds to record and enforce a claim of lien by commencement of an action pursuant to Chapter 4 (commencing with Section 8400) of Title 2 of Part 6 of Division 4 of the Civil

Code, does not thereby waive any right of arbitration the person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce the claim of lien, the claimant does either of the following: [¶] (1) Includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action. [¶] (2) At the same time that the complaint is filed, the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien."

A

Zenovic contends the title of the statute has some significance. However, as enacted and amended by the Legislature, section 1281.5 never contained a title. (See Stats. 1977, ch. 135, § 1, pp. 571–572; Stats. 1989, ch. 470, § 1, p. 1677; Stats. 1998, ch. 931, § 122, p. 6466; Stats. 2002, ch. 784, § 82, p. 4765; Stats. 2003, ch. 22, § 1, pp. 97–98; Stats. 2010, ch. 697, § 25 (SB 189).) Titles inserted by publishers in commercial versions of the statute do not indicate legislative intent and are not binding on the court. (*In re Halcomb* (1942) 21 Cal.2d 126, 130; see *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602; Cal. Style Manual (4th ed. 2000) § 2:15 [B], p. 102.) In any event, "a provision's title 'is never allowed to enlarge or control the language in the body of the [provision].'" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1096, fn. 2.)

B

Zenovic cites to the portions of the statute referring to the commencement of an action to enforce a mechanics lien to argue the statute governs only actions to enforce mechanics liens, not other issues. However, Zenovic's narrow reading overlooks the pertinent language of the statute, which states a party who files an action to enforce a mechanics lien "does not thereby waive *any right of arbitration the person may have pursuant to a written agreement to arbitrate*" if the party complies with one of the two enumerated provisions to stay the mechanics lien. (§ 1281.5, subd. (a), italics added.)

Section 1281.5, subdivision (a), contemplates a mechanics lien action will be separate from an action to resolve otherwise arbitrable disputes. It makes no difference if the arbitration action is initiated in a different venue or which party initiates the arbitration action. By its plain terms, the statute permits a contractor to take advantage of the statutory mechanics lien process while preserving the contractual right to arbitrate disputes as provided in the arbitration agreement. The purpose of the alternative stay procedures articulated in section 1281.5, subdivision (a), is to hold the mechanics lien process in abeyance "pending the arbitration of *any* issue, question, or dispute that is *claimed to be arbitrable under the agreement* and that is *relevant to the action to enforce the*

2. Union Site Contracting and Joseph Zenovic separately appealed the order denying the motion to compel arbitration and a subsequent order awarding attorney fees. That appeal will be considered separately. (*Von Becelaere Ventures, LLC v. James Zenovic et al.*, D073108.)

claim of lien.” (§ 1281.5, subds. (a)(2), (b), italics added.) However, a party who commences a mechanics lien action without complying with either of the stay provisions waives any such right to arbitration.

“[P]rior to the enactment of section 1281.5 in 1977, the filing of an action on a contract without seeking to preserve arbitration constituted a waiver of a contract provision for arbitration.” (*Baker, supra*, 180 Cal.App.3d at pp. 930–931.) The *Baker* court cited *Titan Enterprises, Inc. v. Armo Construction, Inc.* (1973) 32 Cal.App.3d 828, 830, in which a subcontractor filed an action against the contractor seeking to enforce a mechanics lien and thereafter demanded arbitration of the same dispute. The *Titan* court concluded the filing of the action on the mechanics lien without attempting to preserve the right to arbitration amounted to a waiver. (*Id.* at p. 833.)

The *Baker* court explained, “The rule in *Titan* created a ‘damned if you do damned if you don’t’ situation for a plaintiff wishing to file a mechanic’s lien, and to arbitrate his claim. If the time limits for filing a mechanic’s lien were not followed, an action to enforce the lien could not be maintained. But, if the action to enforce the mechanic’s lien was properly brought, the materialman would waive any rights to arbitration. Section 1281.5 came to the rescue. The legislative counsel’s comment to the section points out that the filing of an action to enforce the lien does not constitute waiver of the right to arbitrate provided the claimant applies for a stay. (Legis. Counsel’s com.; Stats. 1977, ch. 135, Assem. Bill No. 322.)” (*Baker, supra*, 180 Cal.App.3d at pp. 930–931.) The *Baker* court concluded section 1281.5 “means what it says: A party who files an action to enforce a mechanic’s lien, but who does not at the same time request that the action be stayed pending arbitration, waives any right to arbitration.” (*Id.* at p. 929.)

The only other reported case interpreting section 1281.5 is *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1226–1227 (*Kaneko*), which held the mere filing of an application for a stay of proceeding under section 1281.5 did not automatically create a stay. “The sole effect of filing the application for a stay under section 1281.5 is to preclude a finding of waiver of the right to arbitrate because of the filing of a complaint to enforce a mechanics’ lien.” (*Id.* at p. 1227.) However, the *Kaneko* court went on to conclude the failure to implement the application for stay and actually obtain a stay order within a reasonable period of time waived the right to arbitration. (*Id.* at pp. 1228–1229.)

In this case, Zenovic did not file the Orange County action to enforce the mechanics lien until after VBV filed the San Diego action. VBV’s action alleged disputes regarding Zenovic’s billing practices and specifically included allegations related to Zenovic’s actions in recording and attempting to enforce his mechanics lien. In his motion to compel arbitration, Zenovic agreed all of VBV’s causes of action qualified as arbitrable construction disputes. Yet, Zenovic neither included an allegation in the complaint filed in the Orange

County action stating he did not intend to waive any right of arbitration and intended to seek a stay of the Orange County action (§ 1281.5, subd. (a)(1)), nor filed an application for stay at the time he filed the complaint in the Orange County action (§ 1281.5, subd. (a)(2)). His failure to do so waived the right to arbitrate construction disputes under the terms of the construction contract.

C

The finding of waiver does not conflict with the parties’ contractual agreement, as Zenovic contends. The construction contract contained a paragraph stating, “Despite the Arbitration of Disputes provision hereinabove, Contractor shall have the right to preserve and pursue any statutory mechanic’s lien and/or stop notice rights that Contractor may have separate and apart from the arbitration provisions hereof; provided, however, that the Arbitrators shall make a final determination of the amounts due and owing from Owner to Contractor, which determination shall be binding upon Owner and Contractor, and may be enforced as a judgment in a court of competent jurisdiction.”

This clause does not mean Zenovic could choose not to arbitrate his mechanics lien issue without impairing his right to arbitrate other construction disputes. This clause allowed Zenovic to comply with statutory provisions to record a mechanics lien and commence an enforcement action for that lien. However, the second portion of the clause required Zenovic to submit to arbitration the issue of the amounts due and owing. The arbitrator’s decision on that issue would then be enforceable by a court of competent jurisdiction. Had Zenovic preserved his arbitration rights by complying with section 1281.5, subdivisions (a)(1) or (a)(2), he would have complied with both the statute and the arbitration agreement by obtaining a stay for an arbitrator to decide the amounts due. His failure to do so further supports waiver.

DISPOSITION

The order denying the petition for arbitration is affirmed. VBV shall recover its costs on appeal.

McCONNELL, P. J.

WE CONCUR: HUFFMAN, J., O’ROURKE, J.

Cite as 18 C.D.O.S. 5611

**In re the Marriage of SUMMER and
ROBERT TURFE.**

SUMMER TURFE, Respondent,

v.

ROBERT TURFE, Appellant.

No. B276665

In The Court of Appeal of the State of California

Second Appellate District

Division Three

(Los Angeles County Super. Ct. No. BD561532)

Filed June 8, 2018

**ORDER MODIFYING OPINION AND
DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

BY THE COURT:

It is ordered that the opinion filed herein on May 30, 2018, be modified as follows:

On the caption of the opinion, after Honey Kessler Amado, insert a semi-colon and add “Feinberg Mindel Brandt & Klein, and Wallace S. Fingerett” so that counsel listing for Respondent reads as follows:

Honey Kessler Amado; Feinberg Mindel Brandt & Klein, and Wallace S. Fingerett for Respondent.

On page 8 of the opinion, in the first sentence of the first full paragraph, delete the words “found she was not credible with respect to her fidelity, but” so that the sentence reads as follows:

With respect to wife’s credibility, the trial court “found her to be a credible witness on the issue of the Mahr Agreement and [found] that she did not engage in any misleading or deceptive conduct in order to induce [husband] to marry her.

The petition for rehearing is denied.
[There is no change in the judgment.]

EDMON, P. J., EGERTON, J., DHANIDINA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.