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**Admiralty**

Vessel owner’s cost to post substitute security to obtain ship’s release from arrest during pendency of maritime lien action not recoverable as costs upon prevailing (Watford, J.)

**Bunker Holdings Ltd. v. Yang Ming Liberia Corp.**

9th Cir.; October 11, 2018; 16-35539

The court of appeals affirmed in part a judgment. The court held that ship owner’s costs to post a substitute security to obtain the ship’s release from arrest during the pendency of a maritime lien action are not recoverable as costs when it prevails in the underlying action.

Yang Ming Liberia Corp. contracted with fuel supplier O.W. Bunker Far East (Singapore) Pte. Ltd. (OWB Far East) to provide marine fuel to Yang Ming’s ship, the M/V YM Success. OWB Far East, in turn, contracted with Bunker Holdings Ltd. to supply the fuel. Bunker Holdings supplied the fuel and billed OWB Far East for payment. OWB Far East filed for bankruptcy without making payment. Bunker Holdings pursued payment from Yang Ming by filing a maritime lien action against the ship.

The district court rendered judgment in favor of Yang Ming and ordered Bunker Holdings to pay the $54,000 in costs incurred by Yang Ming to post substitute security in the from of a letter of undertaking to secure the ship’s release from arrest during the pendency of the underlying action.

The court of appeal affirmed in part and reversed in part, holding that the district court properly found that Bunker Holdings was not entitled to a maritime lien against the YM Success. A supplier is entitled to a maritime lien against a vessel on the order of the owner or a person authorized by the owner.” OWB was neither the owner of the YM Success nor a person authorized by the owner, as listed in 46 U.S.C. §31341(a). Because OWB Far East was not acting as Yang Ming’s agent and lacked authority to bind the vessel, its contract with Bunker Holdings could not give rise to a maritime lien in Bunker Holdings’ favor. The district court nonetheless erred in awarding Yang Ming its costs in securing the ship’s release. Federal courts may not award costs beyond those mentioned in 28 U.S.C. §1920 unless another federal statute authorizes them to do so. Premiums paid on undertakings or bonds are not included among the six categories of taxable costs mentioned in §1920. The district court therefore lacked authority to award Yang Ming the costs it incurred in posting the letter of undertaking. The court opined that this was an inequitable result, given that a marshal’s expenses for arresting and holding a ship may be taxed as costs, and are often greater than the cost of posting substitute security. It was nonetheless bound to apply the law as currently written.

**Criminal Law**

Petitioner seeking conditional release from NGI commitment entitled to independent expert and appropriate interim confinement during hearing (Slough, J)

**People v. Endsley**

C.A. 4th; October 10, 2018; E068576

The Fourth Appellate District reversed a trial court order. The court held that the trial court erred in denying appointment of an independent expert and in failing to oversee the designation of appropriate interim confinement for a petitioner seeking conditional release from commitment as a person found not guilty by reason of insanity.

Marc Endsley was committed to the state hospital in 1997 after being found not guilty of murder by reason of insanity (NGI). In 2015, Endsley filed a petition for conditional release. The state hospital opposed the petition. Endsley requested the appointment of an independent evaluator. The trial court denied the request. Endsley also requested to testify remotely by telephone to avoid being transferred from state hospital to jail before his hearing. Endsley argued that, under In re Lee (1978) 78 Cal.App.3d 753, an NGI may not be housed in jail pending hearing on a petition for release. Construing Endsley’s objection to jail as a refusal to testify in person, the trial court denied his request to testify remotely.

After hearing, the court denied Endsley’s petition.

The court of appeal reversed, holding that the trial court erred in failing to honor Endsley’s statutory right to safe interim confinement so that he could testify at his hearing. Endsley had the right to appear and testify at his hearing. Under Penal Code §§1026.2(b) and (c), he also had the right to local confinement, in a safe and therapeutic setting while awaiting and during hearing. Although the hospital or community program director is charged with making such arrangements, the trial court is responsible for overseeing the process from beginning to end. Here, the record contained no indication that any of the requirements in §§1026.2(b) and (c) were followed, or that the trial court was even aware of its statutory obligations. The trial court also erred in denying Endsley the assistance of an independent medical expert. Although §1026.2 is silent on the appointment of experts, an NGI, like an SVP has the right to appointment of an independent expert. The trial court’s errors could not be deemed harmless. Endsley’s hearing consisted solely of evidence produced by the state; it was impossible to know how Endsley’s testimony or that of an independent expert might have impeached or weakened the state’s case. The court reversed with directions that the trial court appoint an independent expert and comply with the requirements of §§1026.2(b) and (c).
Criminal Law

Evidence supported law enforcement officers’ convictions for conspiracy and civil rights violations (Watford, J.)

**United States v. Gonzalez**

9th Cir.; October 10, 2018; 15-50483

The court of appeals affirmed judgments of conviction and sentence. The court held that the evidence was sufficient to support three law enforcement officers’ convictions for conspiracy and civil rights violations.

Gabriel Carrillo and his girlfriend went to the Los Angeles County Men’s Central Jail to visit Carrillo’s brother. After the girlfriend was found to have smuggled a cell phone into the jail, sheriff’s sergeant Eric Gonzalez directed one of his deputies to get Carrillo from the visitors’ lobby and bring him to the break room. Carrillo was brought in handcuffs to the break room, where he was searched. When Carrillo made a comment perceived by Deputy Sussie Ayala to be offensive, she summoned additional officers over her radio and told them what Carrillo had said. Deputy Fernando Luviano and another deputy knocked Carrillo to the floor, where they and others punched and kicked him repeatedly. Carrillo, who remained handcuffed and unable to defend himself, suffered bone fractures, trauma to the head and face, a broken nose, and multiple lacerations. Sergeant Gonzalez, who had witnessed the entire incident, concocted a story to explain the officers’ use of force and dictated it to his officers. Each of their use-of-force reports was consistent with the story fabricated by Gonzalez. When the truth finally came out, Gonzalez, Luviano, and Ayala were tried before a jury on charges of (1) conspiring to deprive Carrillo of his civil rights, (2) willfully depriving Carrillo of his right to be free from the use of excessive force, and (3) falsifying reports to obstruct an investigation. The conspiracy was alleged to have two objects: (1) to deprive Carrillo of his Fourth Amendment right to be free from the use of excessive force, and (2) to deprive Carrillo of his due process right not to be prosecuted on the basis of falsified evidence.

The jury found all three defendants guilty as charged.

The court of appeals affirmed, holding that there was no error in defendant’s conviction for conspiracy. According to defendants, the conviction for conspiracy needed to be set aside because the first object was unsupported by sufficient evidence, and it was unclear for the general verdict whether the jury relied on this object or the second object in finding defendants guilty. The flaw in defendants’ argument, the court explained, was their assumption that whenever one object of a multiple-object conspiracy is not supported by sufficient evidence, a general verdict must be set aside. Not so—reversal is required only if one of the objects of the conspiracy is legally deficient. Here, defendants did not allege that the first object was legally deficient. Nor could they.

Rather, they contended merely that it was unsupported by sufficient proof. Even if this were true, because they freely conceded that the evidence was sufficient to prove the second object, the general verdict was sound. Their remaining claims of error were similarly unavailing.

Education Law

**UCSB student denied any semblance of fair hearing on accusation of sexual misconduct (Gilbert, P.J.)**

**Doe v. Regents of the University of California**

C.A. 2nd; October 9, 2018; B283229

The Second Appellate District reversed a judgment. The court held that the disciplinary proceeding against a University of California undergraduate student accused of sexual misconduct was utterly devoid of any semblance of due process.

John Doe and Jane Roe were undergraduate students at the University of California, Santa Barbara. Jane attended a gathering with John’s girlfriend and other students. She became intoxicated and lay down under the covers on a bed in the living room. John, who shared the house with his girlfriend and another roommate, returned home, also intoxicated, and lay down, fully clothed, on top of the covers on the far side of the mattress, with his back to Jane. Sometime later, Jane woke up screaming, claiming that John had sexually assaulted her. According to John’s girlfriend and the other roommate, who had never left the room and were sitting on a couch talking a couple of feet away, Jane’s account was physically impossible—John had not moved from the moment he lay down until he was awakened by Jane’s screaming. Two days after the alleged incident, Jane was medically examined by the Santa Barbara County Sexual Assault Response Team (SART). She later filed a complaint with the university. After hearing, the university’s Sexual/Interpersonal Violence Conduct Committee sustained the allegation and John was suspended.

John filed a petition for writ of administrative mandate, which the trial court denied.

The court of appeal reversed, holding that John was denied due process. Among the evidence introduced against John at hearing was a detective’s testimony regarding Jane’s SART report, which, according to the detective, supported Jane’s claims. The SART report itself was not introduced, nor was a copy of it provided to either John or the committee. To argue that it was fair to allow the detective to testify about the contents of the SART report, but preclude the accused and the trier of fact from seeing the report, strained credulity. John’s lack of access to the report prevented effective cross-examination and hampered his ability to present a defense. The committee nonetheless relied on the report, sight unseen,
in sustaining Jane’s allegation. The committee’s consideration of the SART evidence without giving John timely and complete access to the report was prejudicial error requiring reversal. The committee erred further in not allowing non-expert testimony regarding the hallucinogenic side effects of an anti-depressant Jane was taking, even though the delayed disclosure of the name of the drug effectively prevented John from retaining an expert. The committee’s refusal to allow John’s attorney to participate in the hearing, while allowing UCSB’s general counsel to actively participate, contributed to the unfairness of the proceeding, as did its selective application of the rules of formal evidence. These and other errors made it impossible for either John or Jane to receive a fair hearing.
COUNSEL

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Bram M. Alden (argued), Assistant United States Attorney, Criminal Appeals Section; Lawrence S. Middleton, Assistant United States Attorney Chief, Criminal Division; United States Attorney’s Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

WATFORD, Circuit Judge:

A group of law enforcement officers brutally beat Gabriel Carrillo, a visitor to the Los Angeles County Men’s Central Jail, while he was handcuffed. The defendants are three of the officers who played a role in the beating: Eric Gonzalez, a sergeant with the Los Angeles County Sheriff’s Department, and two deputies under his supervision, Fernando Luviano and Sussie Ayala. Ayala instigated the beating, Luviano physically participated in it, and Gonzalez summoned additional officers to the scene and oversaw the cover-up afterwards. A jury found the defendants guilty of violating Carrillo’s civil rights and falsifying reports to conceal their wrongdoing. On appeal, the defendants challenge mainly the sufficiency of the evidence to support their convictions and the district court’s refusal to dismiss an allegedly biased juror shortly after trial began. We affirm across the board.

I

On the day of the beating, Carrillo and his girlfriend, Griselda Torres, were visiting Carrillo’s brother at the jail. Gonzalez and Ayala were standing in an employee break room when another deputy, Pantamitr Zunggeemoge, brought Torres into the room to determine whether she had smuggled a cell phone into the facility in violation of jail regulations. After a search confirmed that she had, Torres told the officers that her boyfriend also had a cell phone. Gonzalez ordered Zunggeemoge to get Carrillo from the visitors’ lobby and bring him to the break room.

Zunggeemoge located Carrillo, cuffed his hands behind his back, and brought him to the break room. Once inside, Zunggeemoge pushed Carrillo face-first against a refrigerator and proceeded to search him while Gonzalez, Ayala, and Torres looked on. When Carrillo questioned the purpose of the search, Zunggeemoge lifted Carrillo’s arms “all the way up so he could feel some pain.” After Zunggeemoge finished the search, Carrillo said to Torres, “If I wasn’t in handcuffs, this...
Gonzalez’s report stated that he had summoned additional force reports repeating the agreed-upon cover story and de

dhand as a weapon by wildly swinging it at the officers. The

the incident, and he had used the handcuff dangling from his

attempted to escape from their custody. According to the re

port falsely stated that Carrillo had attacked the officers and

detained for possessing a cell phone and had been knocked

to prepare the primary incident report and largely dictated its

the ranking officer, led the effort. He directed Zunggeemoge

medical attention, the officers huddled up to concoct a story

days later.

that Torres could not recognize him when she saw him a few

lacerations. Carrillo’s face was so disfigured by the beating

insult to injury, Luviano pepper-sprayed Carrillo in the face,

head was “bouncing off the floor from the punches.” To add

consciousness; he testified at trial that when he came to, his

in punching and kicking Carrillo. At one point Carrillo lost

a fight with an inmate. Two more deputies arrived and joined

the code “415,” a call indicating that a deputy is involved in

Carrillo’s facial wounds soon covered the floor.

Sergeant Gonzalez, who had been watching these events

After Torres was escorted out, Luviano punched the still-

handcuffed Carrillo in the right side of his face. Luviano and

Zunggeemoge then knocked Carrillo to the ground. Unable

to break his fall, Carrillo landed on his face and stomach. Luviano and Zunggeemoge began punching Carrillo in the

head, back, ribs, and thighs as he lay on the floor. Blood from

Carrillo’s facial wounds soon covered the floor.

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handcuffed Carrillo in the right side of his face. Luviano and

Zunggeemoge then knocked Carrillo to the ground. Unable

to break his fall, Carrillo landed on his face and stomach. Luviano and Zunggeemoge began punching Carrillo in the

head, back, ribs, and thighs as he lay on the floor. Blood from

Carrillo’s facial wounds soon covered the floor.

In all, the beating lasted about 45 seconds. Throughout, Carrillo remained handcuffed and unable to pose any resist

ance. As a result of the beating, he suffered bone fractures, trauma to the head and face, a broken nose, and multiple

lacerations. Carrillo’s face was so disfigured by the beating that Torres could not recognize him when she saw him a few
days later.

After Carrillo was carried out of the break room to receive medical attention, the officers huddled up to concoct a story

that would justify their use of force. Sergeant Gonzalez, as the ranking officer, led the effort. He directed Zunggeemoge

to prepare the primary incident report and largely dictated its

contents. The report truthfully stated that Carrillo had been

detained for possessing a cell phone and had been knocked to

the floor, punched in the face, and pepper-sprayed. But the

report falsely stated that Carrillo had attacked the officers and attempted to escape from their custody. According to the re

port, only one of Carrillo’s hands had been handcuffed during

the incident, and he had used the handcuff dangling from his

hand as a weapon by wildly swinging it at the officers. The

officers’ use of force, under this telling, had been necessary to

subdue a combative and resistant suspect.

Each of the three defendants prepared their own use-of-force reports repeating the agreed-upon cover story and de

scribing their involvement in the incident. Of particular note, Gonzalez’s report stated that he had summoned additional

officers to the scene and directed them to use force against Carrillo. Ayala’s report stated that she had helped Luviano

and Zunggeemoge knock Carrillo to the floor. None of the

witnesses who testified at trial corroborated Gonzalez’s claim

that he had directed officers to use force or Ayala’s claim that

she had used force against Carrillo.

Gonzalez also directed Zunggeemoge to prepare a probable cause declaration for use in prosecuting Carrillo. The ac

count in the declaration tracked the false narrative contained in the officers’ reports. Based on the declaration, the district

attorney’s office charged Carrillo with assaulting and resisting an officer and attempting to escape from custody.

Prosecutors dropped the charges against Carrillo after in

criminating text messages between Gonzalez and another

deputy surfaced, triggering an investigation into the circum

stances leading up to the beating. The other deputy, who had

arrested Carrillo’s brother two days before the beating, sent

Gonzalez a text message attaching the booking photo of Car

rillo’s brother showing his face cut and bruised. Gonzalez

responded by sending the deputy Carrillo’s booking photo, which showed even more extensive injuries to Carrillo’s face.

Gonzalez joked, “Looks like we did a better job . . . . Where’s

my beer big homie.”

The federal government charged Gonzalez, Luviano, and Ayala with violating Carrillo’s civil rights and falsifying re

ports of the beating. Count One of the indictment charged Gonzalez and Ayala with conspiring to deprive Carrillo of

his civil rights, in violation of 18 U.S.C. § 241. Count Two

charged all three defendants with willfully depriving Car

rillo of his right to be free from the use of excessive force, in

violation of 18 U.S.C. § 242. And Count Three charged each


After a five-day trial, the jury found the defendants guilty

on all counts. The district court denied the defendants’ post-

trial motions for judgment of acquittal or, in the alternative, a

new trial. The court sentenced Gonzalez to 96 months of im

prisonment, Luviano to 84 months, and Ayala to 72 months.

On appeal, the defendants each filed separate briefs adv

ancing an assortment of arguments. Gonzalez and Ayala

challenge the sufficiency of the evidence to support their con

victions under 18 U.S.C. § 241. Luviano and Ayala challenge the sufficiency of the evidence to support their convictions

under § 1519. All three defendants contend that the district
court should have dismissed an allegedly biased juror shortly

after the trial commenced. Gonzalez and Ayala contest one

aspect of the jury instructions on the § 242 charge. Gonzalez

contends that the government committed misconduct during

closing arguments by asking the jury to draw factual infer

cences that the prosecutor knew to be false. And finally, Ayala

challenges the substantive reasonableness of her 72-month

sentence.
II

We begin with Gonzalez’s and Ayala’s challenge to the sufficiency of the evidence supporting their convictions under 18 U.S.C. § 241. As relevant here, § 241 prohibits two or more persons from “conspiring . . . to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.” Count One charged Gonzalez and Ayala with a § 241 conspiracy that had two objects: (1) to deprive Carrillo of his Fourth Amendment right to be free from the use of excessive force; and (2) to deprive Carrillo of his due process right not to be prosecuted on the basis of falsified evidence. The jury returned a general verdict finding both defendants guilty of Count One as charged. Gonzalez and Ayala concede that there was sufficient evidence to support the second object. They contend that the verdict on Count One must nevertheless be reversed because there was insufficient evidence to support the first object and the jury’s general verdict makes it impossible to tell which of the two objects the jury agreed upon.

A

Before addressing the defendants’ sufficiency challenge, we begin by rejecting the flawed premise of their argument. Gonzalez and Ayala assume that whenever one object of a multiple-object conspiracy is not supported by sufficient evidence, a general verdict must be set aside. The Supreme Court foreclosed that very argument in Griffin v. United States, 502 U.S. 46 (1991). There, the Court held that reversal is required only if one of the objects of the conspiracy is legally deficient—for example, because the conduct underlying the object is protected by the Constitution, occurred outside the statute of limitations, or “fails to come within the statutory definition of the crime.” Id. at 59. In that scenario, if the basis for the jury’s verdict is unclear, reversal is required because we do not expect jurors to be able to determine “whether a particular theory of conviction submitted to them is contrary to law.” Id.; see also Yates v. United States, 354 U.S. 298, 312 (1957). The rule is different when all objects of the conspiracy are sound as a legal matter, but one of them lacks adequate evidentiary support. Because “jurors are well equipped to analyze the evidence,” we can be confident that the jury chose to rest its verdict on the object that was supported by sufficient evidence, rather than the object that was not. Griffin, 502 U.S. at 59. In this latter scenario, the verdict stands.

This case is controlled by Griffin. Gonzalez and Ayala do not contend that either object of the conspiracy charged in Count One was legally deficient. They do not, for example, assert that the jury instructions improperly defined the elements of the crime. They argue only that the first object, concerning Carrillo’s right to be free from the use of excessive force, was not supported by sufficient proof. Even if we agreed with them on that point (which we don’t, for reasons explained below), they would not be entitled to reversal of their convictions on Count One. The evidence was sufficient to prove the second object, as they freely concede. That suffices to sustain the jury’s general verdict against the challenge Gonzalez and Ayala assert. See id.

Although the Supreme Court’s 1991 decision in Griffin provides the rule that controls here, Gonzalez and Ayala contend that our court established a contrary rule in United States v. Manarite, 44 F.3d 1407 (9th Cir. 1995). In that case, they say, we reversed a general verdict convicting the defendants of a multiple-object conspiracy where two of the five objects (mail and wire fraud) were not supported by sufficient evidence. Gonzalez and Ayala are wrong. In Manarite, we held that the fraudulent scheme underlying the mail and wire fraud objects “did not constitute mail or wire fraud as a matter of law.” Id. at 1413. To put it in the language of Griffin, the conduct charged by the government, even if proved by sufficient evidence, did not “come within the statutory definition of the crime.” 502 U.S. at 59. Because the jury could not have been expected to recognize that legal deficiency, we reversed the defendants’ convictions. We did not hold—and indeed, in light of Griffin, could not have held—that the defendants were entitled to reversal of their convictions because the evidence was insufficient to prove the charged conduct itself.

In short, we affirm Gonzalez’s and Ayala’s conspiracy convictions under § 241 regardless of whether there was sufficient evidence to support the first object of the charged conspiracy, since it is undisputed that sufficient evidence exists to support the second object.

B

We must nonetheless resolve Gonzalez’s and Ayala’s sufficiency challenge because their convictions for the substantive offense charged in Count Two are predicated on Pinkerton v. United States, 328 U.S. 640 (1946). Under Pinkerton, a defendant may be found guilty of a criminal offense committed by his co-conspirators if (1) the offense was committed during the course and in furtherance of the conspiracy, (2) the defendant was a member of the conspiracy at the time the offense was committed, and (3) the offense fell within the scope of the unlawful agreement and could be “reasonably foreseen as a necessary or natural consequence of the unlawful agreement.” Id. at 647–48; see United States v. Gadson, 763 F.3d 1189, 1215 (9th Cir. 2014). Here, the government argued at trial that if Gonzalez and Ayala conspired to deprive Carrillo of his right to be free from the use of excessive force, as charged in the first object of Count One, they were also guilty under Pinkerton of the substantive offense committed by their co-conspirators as charged in Count Two. Gonzalez and Ayala do not contest these general principles. They contend that Pinkerton liability cannot apply because the government failed to prove that they in fact conspired to commit the first object of the conspiracy as charged in Count One.

The same general rules governing proof of conspiracies elsewhere in the criminal law apply under § 241, although no overt act is required. United States v. Skillman, 922 F.2d
1370, 1375–76 (9th Cir. 1990). In order to convict Gonzalez and Ayala of violating § 241 based on the first object of the charged conspiracy, the government had to prove: (1) that two or more persons agreed to deprive Carrillo of his right to be free from the use of excessive force, and (2) that Gonzalez and Ayala knowingly joined the agreement and intended to deprive Carrillo of his right to be free from the use of excessive force. See id. at 1373. In evaluating a sufficiency-of-the-evidence challenge, we ask whether, viewing the evidence in the light most favorable to the government, any rational jury could have found each element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The first element requires proof of an agreement among the conspirators to commit a crime—here, a violation of 18 U.S.C. § 242. The government does not need to prove the existence of an express agreement; a tacit agreement will suffice. United States v. Reese, 2 F.3d 870, 893 (9th Cir. 1993). A tacit agreement may be inferred from the conspirators’ conduct as well as other circumstantial evidence. United States v. Duenas, 691 F.3d 1070, 1085 (9th Cir. 2012).

None of the officers involved in the beating ever said to each other, “Let’s get together and use excessive force against Carrillo.” But there was more than sufficient evidence of a tacit agreement to do just that. Ayala instigated the beating by summoning other officers to the break room, despite the fact that Carrillo was handcuffed, under control, and not being combative. When Luviano and the other officers arrived, Ayala made clear that she had summoned them not to help quell a fight, but to start one. She informed the assembled officers, in a manner that the jury could conclude was intended to goad her colleagues into taking retaliatory action, that Carrillo had said he would fight the officers if he weren’t in handcuffs. One of the officers suggested that they remove Carrillo’s girlfriend from the break room, thereby eliminating the only non-officer witness to what was about to happen. Everyone present understood at that point that Carrillo would be taught a lesson for making his remark. After acting together to punish Carrillo for his perceived insolence, the officers then engaged in a concerted effort to cover up their wrongdoing.

A rational jury could infer from this evidence that the officers tacitly agreed to use excessive force against Carrillo. The officers shared a common motive—to punish Carrillo. They acted together to achieve that objective by repeatedly punching and kicking him. And they huddled together afterward to come up with an agreed-upon story that would justify their actions, a story each of the officers repeated in the falsified reports they submitted. Taken together, these facts—a common motive, joint action in pursuit of a common objective, and a coordinated cover-up—suffice to support the existence of a conspiracy. See, e.g., United States v. Navarrette-Aguilar, 813 F.3d 785, 794 (9th Cir. 2015); United States v. Smith, 294 F.3d 473, 478–79 (3d Cir. 2002); United States v. Davis, 810 F.2d 474, 477 (5th Cir. 1987).

With respect to the second element, a rational jury could also have found that Gonzalez and Ayala knowingly joined the conspiracy and intended to deprive Carrillo of his right to be free from the use of excessive force. As to Gonzalez, the jury could rely on the fact that, after witnessing the events that led to Carrillo’s beating, Gonzalez summoned additional officers to the break room even though he knew there was no legitimate law enforcement purpose for doing so. Carrillo was already on the ground in handcuffs being pummelled by multiple officers. Viewed in the light most favorable to the government, Gonzalez’s summoning of additional officers proved that he shared the other officers’ desire to see Carrillo punished and that he wanted to make sure the objective was achieved. In addition, Gonzalez stated in his report that he directed the officers under his command to use force against Carrillo. Gonzalez contends that the government cannot rely on this statement because the indictment charged Gonzalez in Count Three with having falsified his report. But the jury could reasonably conclude that some of the statements in Gonzalez’s report were accurate, even if the report falsely recited other facts in an attempt to justify the officers’ actions. Finally, Gonzalez’s participation in a coordinated cover-up with the officers who inflicted the beating strengthened the inference that he was in on the agreement to use excessive force against Carrillo, rather than merely present at the scene of a crime committed by others.

The evidence also supports the jury’s finding that Ayala knowingly joined the conspiracy and shared the intent to see Carrillo punished through the use of excessive force. As noted above, a rational jury could conclude that she instigated the beating by summoning additional officers to the break room for no legitimate reason, and by goading her fellow officers into assaulting Carrillo without justification. That was enough to make her a member of the conspiracy; she need not have intended to participate in the unlawful assault herself. See Ocasio v. United States, 136 S. Ct. 1423, 1429 (2016); United States v. Whitney, 229 F.3d 1296, 1301–02 (10th Cir. 2000). As with Gonzalez, Ayala’s participation in the coordinated cover-up further supports the inference that she acted in concert with the other officers to use excessive force against Carrillo and was not merely an uninvolved bystander who happened to witness his beating.

III

We turn next to Luviano’s and Ayala’s argument that the evidence is insufficient to sustain their convictions under 18 U.S.C. § 1519. That statute provides:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contempla-
The district court properly instructed the jury that the government bore the burden of proving that: (1) the defendants knowingly falsified a record or document; (2) the defendants acted with the intent to impede, obstruct, or influence an actual or contemplated investigation; and (3) the investigation concerned a matter within the jurisdiction of the U.S. Department of Justice or the Federal Bureau of Investigation. See United States v. Katakos, 800 F.3d 1017, 1023 (9th Cir. 2015). The court also properly instructed the jury that the government did not need to prove that the defendants knew about a pending federal investigation or that they intended to obstruct a specific federal investigation. Luviano and Ayala do not contest these instructions. They contend only that the evidence was insufficient to satisfy the elements as defined.

Viewed in the light most favorable to the government, the evidence introduced at trial amply supported the defendants’ convictions. Luviano and Ayala filed their own narrative reports that provided a false account of the events leading up to Carrillo’s beating, and the evidence leaves no doubt that the defendants knew their reports were false when they prepared them. The evidence also established that the defendants prepared their reports with the intent to obstruct a contemplated investigation into whether the force used against Carrillo was reasonable. The whole point of the officers’ efforts to concoct a false cover story was to make it appear as though the force they used was justified, thereby shielding them from the punishment that would likely follow if the truth were revealed. And as to the third element, the defendants stipulated that the “matter” at issue here—an inquiry into whether the officers’ actions violated Carrillo’s civil rights—falls within the jurisdiction of both the U.S. Department of Justice and the FBI.

In the face of this plainly sufficient evidence, Luviano and Ayala assert three legal arguments concerning the scope of § 1519. First, they argue that § 1519 applies only to financial records or documents, not to reports prepared by law enforcement officers. They base that argument largely on the fact that Congress enacted § 1519 as part of the Sarbanes-Oxley Act of 2002, which was “intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing.” Yates v. United States, 135 S. Ct. 1074, 1081 (2015) (plurality opinion). But the text of § 1519 covers “any record, document, or tangible object,” and the statute’s intent clause encompasses the intent to impede, obstruct, or influence the investigation of “any matter within the jurisdiction of any department or agency of the United States.” If Congress had intended to limit the statute’s scope to records or documents of a financial nature, it could not have chosen language more ill-suited to convey that narrow focus. Nor is there anything in the legislative history of § 1519 that supports the defendants’ restrictive reading of the statute. Indeed, the relevant Senate report indicates that the drafters intended the statute to have a decidedly more expansive reach. See S. Rep. No. 107-146, at 14 (2002) (“Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States . . . .”). We therefore hold what several other circuits have assumed to be true: Reports prepared by law enforcement officers qualify as “records” or “documents” under § 1519. See United States v. McQueen, 727 F.3d 1144, 1151–53 (11th Cir. 2013) (upholding § 1519 conviction predicated on falsified police report); United States v. Moore, 708 F.3d 639, 649 (5th Cir. 2013) (same); United States v. Moyer, 674 F.3d 192, 206–08 (3d Cir. 2012) (same); United States v. Gray, 642 F.3d 371, 374–79 (2d Cir. 2011) (same).

Second, Luviano and Ayala argue that the government failed to prove that they “falsified” their reports. In their view, that term covers only the alteration of existing records or documents, not the wholesale fabrication of new ones. That would be an odd distinction for Congress to draw in a statute designed to punish efforts to obstruct investigations conducted by the federal government. After all, government investigations can be obstructed just as readily by creating false documents as by altering documents that already exist.

We agree with the Second Circuit that Congress did not draw the implausible distinction the defendants have proposed. As the court explained in United States v. Rowland, 826 F.3d 100 (2d Cir. 2016), the word “falsify” has two meanings relevant in this context: (1) to modify or tamper with an object, and (2) to make false representations. Id. at 108. The first definition supports the defendants’ argument, but the second one obviously does not. A defendant can make false representations both by modifying an existing document in a way that obscures the truth, and by creating a fabricated document from whole cloth. We think Congress used the term “falsifies” to encompass both of these acts, a reading that again is supported by the statute’s legislative history. See S. Rep. No. 107-146, at 12 (proposed statute “would clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence”) (emphasis added). We join the Second Circuit in holding that § 1519 prohibits the creation of false documents and the alteration of existing documents. Rowland, 826 F.3d at 108–09.

Finally, Luviano and Ayala argue that the government failed to prove that they acted with the requisite intent. They contend that they lied in their reports solely to support the prosecution of Carrillo on false charges, not to obstruct or impede an investigation into their own wrongdoing. Viewed in the light most favorable to the government, a rational jury could conclude that the evidence showed otherwise. Zung-geemoge testified that the officers falsified their reports to justify their use of force against Carrillo. He explained that the officers needed to lie about what happened because the force they used was excessive and they would get in trouble...
if the truth were known. This evidence supported the jury’s finding that the defendants contemplated an investigation into their use of excessive force and falsified their reports to obstruct or impede such an investigation.

In a supplemental letter submitted after the close of briefing, Luviano and Ayala cite United States v. Johnson, 874 F.3d 1078 (9th Cir. 2017), in support of their position. That case is of no help to them. Johnson involved a different obstruction-of-justice statute that requires proof of an intent to hinder, delay, or prevent the communication of information “to a law enforcement officer or judge of the United States.” 18 U.S.C. § 1512(b)(3). In Johnson, we held that this statute requires the government to prove a “reasonable likelihood” that the information in question would have reached a federal officer. 874 F.3d at 1081 (citing Fowler v. United States, 563 U.S. 668, 677–78 (2011)). Section 1519 does not contain an element requiring such proof. To sustain a conviction under § 1519, it is enough for the government to prove that the defendant intended to obstruct the investigation of any matter as long as that matter falls within the jurisdiction of a federal department or agency. Moyer, 674 F.3d at 209–10; United States v. Gray, 692 F.3d 514, 519 (6th Cir. 2012). The defendant need not know that the matter in question falls within the jurisdiction of a federal department or agency. McQueen, 727 F.3d at 1152; Moyer, 674 F.3d at 208. As discussed above, the government introduced more than enough evidence to prove that the defendants acted with the intent required under § 1519.

IV

All three defendants challenge the district court’s denial of their request to dismiss a juror for actual or implied bias shortly after the trial began. A district court’s actual bias determination is reviewed for abuse of discretion because assessing a juror’s impartiality often turns on an evaluation of the juror’s demeanor and credibility. United States v. Gonzalez, 214 F.3d 1109, 1112 (9th Cir. 2000). A district court’s implied bias determination involves a mixed question of law and fact that we review de novo. Fields v. Brown, 503 F.3d 755, 770 (9th Cir. 2007) (en banc).

The issue of alleged juror bias arose in the following circumstances. During opening statements, the government displayed a photograph of Carrillo’s face taken shortly after the beating. The photograph, which was later admitted into evidence, graphically depicted the injuries Carrillo sustained as a result of the beating. The next day, after the first few witnesses had been called, the district court received a note from one of the jurors. The juror stated that seeing the image of Carrillo’s disfigured face “sickened and saddened my core being”; the image, she said, “kept replaying in my head throughout the night.” The juror explained that she understood all of the instructions the court had given; that she would “continue to listen to the facts as presented”; and that she understood the government bore the burden of proving the defendants’ guilt beyond a reasonable doubt. “However,” the letter concluded, “the grotesque image of injuries sustained by Gabriel Carrillo is weighing heavy on my heart and I felt compelled to share my struggles with you.”

After reviewing the letter with counsel, the district court conducted an extensive colloquy with the juror outside the presence of the other jurors. When first asked by the court whether she could consider all of the evidence and render a fair and impartial verdict, the juror responded, “Cognitively, yes. Emotionally, I’m not sure.” When the court followed up and asked whether she would be able to keep her emotions in check and not allow them to override her ability to reason objectively and impartially, the juror said, “I would like to say yes, I could.” But, she added, “I was not able to sleep last night. I did not eat dinner.” Later in the colloquy, the juror said that she would “listen to all the evidence as it’s presented.” In response to the court’s final question, which asked whether the juror believed she could continue to serve by not allowing any single item of evidence “to totally override your reasoning, your analysis, your impartiality,” the juror answered without qualification, “Yes.” On the basis of this last answer and an assessment of the juror’s demeanor, the district court concluded that the juror could be fair and impartial. The court accordingly denied the defendants’ request to dismiss her.

The defendants contend that the record establishes both actual and implied bias that compelled the juror’s dismissal. Actual bias exists when, as the term suggests, a juror is in fact biased for or against one of the parties, thereby precluding her from rendering a fair and impartial verdict. Fields, 503 F.3d at 767. Most of the cases in which actual bias has been found involved jurors who either stated that they could not be impartial or who, after expressing views adverse to one party, equivocated when asked if they could set aside those views and evaluate the evidence fairly and impartially. Id. Implied bias is different. It is a legal doctrine under which bias will be conclusively presumed in certain circumstances even if the juror professes a sincere belief that she can be impartial. Dyer v. Calderon, 151 F.3d 970, 981–82 (9th Cir. 1998) (en banc).

We can quickly dispose of the claim that the record warrants a finding of implied (presumed) bias. Implied bias arises only in a few “extreme situations.” Fields, 503 F.3d at 770. We have held that bias will be presumed “where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.” Id. (internal quotation marks omitted). Examples of such relationships include having a relative who is a participant in the trial, or having had “some personal experience that is similar or identical to the fact pattern at issue in the trial.” Gonzalez, 214 F.3d at 1112; see Dyer, 151 F.3d at 982; Tinsley v. Borg, 895 F.2d 520, 528 (9th Cir. 1990). Bias will also be presumed when “the juror is aware of highly prejudicial information about the defendant,” which no ordinary person could be expected to put aside in reaching a
had asked about her emotions, whereas the prosecutor had n.4. When the trial court inquired about this apparent juror said that she could be impartial “on the facts.” Id

could be impartial, given that the victim’s daughter had been Risley court’s conclusion.

in the record that would justify second-guessing the district concluded that her assurance was credible. We see nothing court had the opportunity to assess the juror’s demeanor and stated that she could evaluate all of the evidence impartially, trol. After a dialogue with the court, the juror unequivocally could do so “cognitively.” The only question was whether the juror expressed initial reservations about her ability to do so impartially evaluate all of the evidence presented. While the court did not raise concerns about her impartiality was her strong reaction to an item of evidence properly admitted at trial. Without more, that reaction cannot be the basis for an implied bias claim. One of the primary functions of the Federal Rules of Evidence, particularly Rules 403 and 404, is to prevent the admission of evidence that might render jurors unfairly biased against one of the parties. We do not presume that jurors become “biased” as a result of exposure to evidence properly put before them. Here, the photograph depicting Carrillo’s injuries was properly admitted as an exhibit at trial, so no presumption can arise that jurors exposed to it would be unable to decide the case fairly and impartially. The juror’s reaction to the photograph could at most support a claim of actual bias, to which we turn next.

We do not think the record supports a claim of actual bias either. To be sure, the juror in question raised concerns about her ability to remain impartial after seeing the photograph of Carrillo. But the district court conducted a thorough colloquy with the juror to determine whether she could still fairly and impartially evaluate all of the evidence presented. While the juror expressed initial reservations about her ability to do so on an emotional level, she maintained throughout that she could do so “cognitively.” The only question was whether the juror could set aside her emotional reaction to the photograph and allow her cognitive assessment of the evidence to control. After a dialogue with the court, the juror unequivocally stated that she could evaluate all of the evidence impartially, notwithstanding her strong reaction to the photo. The district court had the opportunity to assess the juror’s demeanor and concluded that her assurance was credible. We see nothing in the record that would justify second-guessing the district court’s conclusion.

The facts of this case are similar to those in Bashor v. Risley, 730 F.2d 1228 (9th Cir. 1984), where we also rejected a claim of actual bias. There, during voir dire, defense counsel in a murder case asked a juror whether she thought she could be impartial, given that the victim’s daughter had been a student in the juror’s dance class. Id. at 1236 n.3. The juror candidly responded that she did not think she could be. Id. When questioned by the prosecutor, however, the same juror said that she could be impartial “on the facts.” Id. at 1236 n.4. When the trial court inquired about this apparent inconsistency, the juror responded that the defense attorney had asked about her emotions, whereas the prosecutor had asked about her ability to evaluate the facts. Id. at 1237. The juror confirmed that she could put her emotions aside, and the trial court ultimately concluded that she could be impartial. After conducting an independent review of the record, we upheld the trial court’s ruling. We reasoned that the juror had recognized her responsibility to decide the case based on the evidence presented at trial, and we emphasized that when the juror was advised of her duties she assured the judge that “she could be a fair juror and decide the case on the proved facts.” Id.

The same analysis governs here. Like the juror in Bashor, the juror in our case made statements, both in her note to the court and at the outset of the colloquy, that raised legitimate concerns about her ability to render a fair and impartial verdict. But after questioning the juror to explore those concerns, the district court received the juror’s unqualified assurance that she could decide the case impartially based on the evidence presented. As in past cases involving similar facts, the court did not abuse its discretion in concluding that no actual bias had been shown. See United States v. Alexander, 48 F.3d 1477, 1484 (9th Cir. 1995); United States v. Daly, 716 F.2d 1499, 1507 (9th Cir. 1983).

The defendants make one last argument, which is that the district court should have conducted further inquiry into the same juror’s alleged bias later in the trial. They assert that, during the government’s case-in-chief, the juror looked away when (1) the photograph depicting Carrillo’s injuries was again displayed, and (2) the government played a videotape of an interview that sheriff’s deputies conducted with Carrillo shortly after he was beaten. This behavior, the defendants contend, constituted further evidence of actual bias that the district court was obligated to investigate.

The district court did not abuse its discretion in concluding, without further investigation, that the juror’s conduct did not amount to evidence of actual bias. The court was not required to make any further inquiry into the juror’s reasons for looking away from the photograph because that same photo had been the basis of the earlier colloquy. Thus, the court already knew “the exact scope and nature of the bias allegation.” United States v. Smith, 424 F.3d 992, 1011 (9th Cir. 2005) (internal quotation marks omitted). As to the suggestion that the juror may have looked away from the video of Carrillo’s interview, the court pointed out that the juror could still hear the audio of the interview. And if she did not want to look at Carrillo’s bloodied and battered image in the video, it was presumably for the same reasons she did not want to view the photograph again. In these circumstances, the district court had no obligation to engage the juror in a second round of questioning.

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Gonzalez and Ayala argue that the district court gave the jury faulty instructions with respect to Count Two, which charged a violation of 18 U.S.C. § 242. (We need not decide whether Luviano preserved this argument on appeal since the argument fails in any event. Luviano did not raise this
argument in his opening brief, and he did not join the arguments raised by his co-defendants until his reply brief.) The defendants do not challenge the instructions given on the offense’s core elements. Instead, they focus on a provision of § 242 that increases the maximum term of imprisonment “if bodily injury results from the acts committed in violation of this section.” The district court instructed the jury on this element of the offense as follows: “If you find a defendant guilty as charged in Count Two of the indictment, you must then determine whether the government has proven beyond a reasonable doubt that Mr. Carrillo suffered a bodily injury, and that the bodily injury resulted from acts committed by that defendant.”

The defendants argue that this instruction was deficient because it did not require the jury to find that each defendant’s acts were the “proximate cause” of Carrillo’s injuries. The defendants did not request an instruction on proximate cause, so we review only for plain error. United States v. Vincent, 758 F.2d 379, 383 (9th Cir. 1985).

The “bodily injury” element of § 242 is similar to a comparable provision found in 21 U.S.C. § 841, a statute criminalizing the distribution of certain controlled substances. Section 841 provides for enhanced penalties “if death or serious bodily injury results from the use of such substance.” § 841(b)(1)(C). In United States v. Houston, 406 F.3d 1121 (9th Cir. 2005), we held that Congress’ use of the phrase “results from” indicates that proof of but-for causation alone is required. We explicitly rejected the defendant’s contention that proximate cause also had to be shown. Id. at 1124. Because § 242 employs the same “results from” phrase we construed in Houston, the district court’s failure to give a proximate cause instruction cannot be deemed an error so obvious that it should have been avoided even without an objection having been made.

The defendants argue that Burrage v. United States, 571 U.S. 204 (2014), requires a contrary result. In that case, the Supreme Court considered the same statutory provision at issue in Houston and held, as we did, that the statute’s plain language requires a showing of but-for causation. Id. at 214. The Court expressly declined to address whether proximate cause must also be shown. Id. at 210. As a result, nothing in Burrage calls into question the reasoning or result in Houston.

VI

Gonzalez asserts that the government committed misconduct during closing arguments by asking the jury to draw inferences from the evidence that the prosecutor knew to be false. Specifically, the government argued that Gonzalez could be found guilty of violating §§ 241 and 242 on the theory that he ordered his subordinates to use excessive force against Carrillo. As the basis for this argument, the government relied on Gonzalez’s use-of-force report, in which Gonzalez stated that he personally directed deputies to use force against Carrillo. On appeal, Gonzalez contends that the government’s argument was improper because the prosecutor knew that Gonzalez’s report was false. Gonzalez did not object to the statements he now challenges, so we review only for plain error. See United States v. Geston, 299 F.3d 1130, 1134 (9th Cir. 2002). There was no error, plain or otherwise.

Gonzalez is correct that a prosecutor may not ask the jury to draw inferences that the prosecutor “knows to be false, or has very strong reason to doubt.” United States v. Blueford, 312 F.3d 962, 968 (9th Cir. 2002). But the prosecutor did not cross that line here. The prosecutor had a good-faith basis for arguing to the jury that Gonzalez directed others to use force because Gonzalez’s own use-of-force report said that is what he did. As Gonzalez points out, none of the witnesses who testified at trial corroborated that assertion, which certainly undercuts the strength of the inference that can be drawn from the statements in Gonzalez’s report. Still, notwithstanding the absence of witness corroboration, Gonzalez’s own lawyer argued that Gonzalez had in fact directed others to use force. Gonzalez’s lawyer argued that everything Gonzalez said in his report was true, presumably to help win his client’s acquittal on the offense charged in Count Three. The government was entitled to argue, and the jury was entitled to find, that some aspects of Gonzalez’s report were true while others were false, based on the totality of the evidence introduced at trial. The government did not commit misconduct by inviting the jury to credit as true something that Gonzalez’s own lawyer asserted was true.

VII

Finally, Ayala contends that her 72-month sentence is substantively unreasonable. There is no merit to this argument. The court granted Ayala a downward departure from the 87–108 months she faced under the Sentencing Guidelines. Although a below-Guidelines sentence is not immune from challenge, such a sentence will rarely be substantively unreasonable. See United States v. Armstrong, 620 F.3d 1172, 1179 (9th Cir. 2010).

The district court adequately explained why it believed the sentencing factors described in 18 U.S.C. § 3553(a) justified a departure down to 72 months but no lower. Most significantly, Ayala instigated the assault on Carrillo, first by summoning additional officers to the break room for no legitimate law enforcement purpose, and then by goading her colleagues into attacking Carrillo while he stood defenseless in handcuffs. Ayala not only failed to report the gross abuse of authority she and her colleagues had participated in; she affirmatively tried to cover up their wrongdoing by filing a false report, which she knew would be used to support Carrillo’s prosecution on felony charges that were completely fabricated. The district court properly concluded that Ayala’s actions exhibited “a profound disrespect for the law” and the people Ayala was sworn to serve. The court did not abuse its discretion when it sentenced her to 72 months in prison.

AFFIRMED.
"provided necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342(a).

Bunker Holdings provided “necessaries” to a “vessel,” as the statute requires, because bunkers are considered necessaries and the YM Success qualifies as a vessel. The only issue is whether Bunker Holdings provided the bunkers “on the order of the owner or a person authorized by the owner.” On cross-motions for summary judgment, the district court held that Bunker Holdings could not satisfy this last requirement. We agree with that conclusion.

The relevant facts are not in dispute. The owner of the YM Success, Yang Ming Liberia Corp., ordered the bunkers from O.W. Bunker Far East (Singapore) Pte. Ltd., which we will refer to as OWB Far East for short. Under the terms of their contract (simplified somewhat), Yang Ming agreed to buy 3,500 metric tons of fuel oil from OWB Far East for delivery to the YM Success on specified dates at a price of $498.00 per metric ton. The contract designated OWB Far East as the “seller” and Yang Ming as the “buyer.” Yang Ming knew that in all likelihood OWB Far East, a fuel broker, would not supply the bunkers itself, but it did not direct OWB Far East to select any particular supplier. OWB Far East decided to purchase the bunkers from Bunker Holdings, and those two companies entered into their own separate contract. Under the terms of their contract, Bunker Holdings agreed to sell 3,500 metric tons of fuel oil to OWB Far East at a price of $480.33 per metric ton. Bunker Holdings then supplied the bunkers to the YM Success and billed OWB Far East for payment. Shortly thereafter, OWB Far East filed for bankruptcy, leading Bunker Holdings to pursue payment through this maritime lien action against the ship.

Unable to rely on the statutory list of persons with presumed authority to bind the vessel, Bunker Holdings grounds
its claim on our decision in Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky, 869 F.2d 473 (9th Cir. 1988). There, we ruled that the plaintiff was entitled to a maritime lien in circumstances not unlike those present in this case. Bulkferts, the subcharterer of the Ken Lucky, placed an order for bunkers with Brook Oil, which in turn placed an order with the plaintiff, Marine Fuel. Id. at 475. Marine Fuel was the entity that actually supplied the bunkers to the vessel. Id. We held that Marine Fuel was entitled to a maritime lien, but we based our holding on a critical factual admission made by the defendant. The defendant admitted that Marine Fuel sold the bunkers to Bulkferts, pursuant to an order originating from Bulkferts. Id. at 476–77. Based on that admission, we treated the case as though Bulkferts had ordered the bunkers directly from Marine Fuel and hence assumed that Marine Fuel had supplied the bunkers “on the order of” Bulkferts. Since Bulkferts was one of the entities with presumed authority to bind the vessel, see id. at 476 & n.3, each of the statutory requirements for a maritime lien was satisfied. In ruling for Marine Fuel, we explicitly refrained from considering whether Brook Oil was authorized to bind the ship as Bulkferts’ agent. Id. at 477.

Bunker Holdings cannot rely on our decision in Ken Lucky because the critical factual admission present there is absent here. Yang Ming never admitted that it ordered the bunkers from Bunker Holdings; it has asserted throughout, and the undisputed facts confirm, that it ordered the bunkers from OWB Far East. In contrast to the single transaction we assumed was involved in Ken Lucky, two independent transactions are involved in this case: one between Yang Ming and OWB Far East, and a second transaction between OWB Far East and Bunker Holdings. That key factual difference renders this case distinguishable from Ken Lucky.

In our view, this case is controlled not by Ken Lucky, but instead by our decisions in Port of Portland v. M/V Paralla, 892 F.2d 825 (9th Cir. 1989), and Farwest Steel Corp. v. Barge Sea-Span 241, 828 F.2d 522 (9th Cir. 1987). In both of those cases, ship owners entered into contracts with general contractors for repair of the vessels. The general contractors, in the course of performing their work, negotiated separate agreements with subcontractors for certain necessities, which the subcontractors provided to the vessels. We held that the subcontractors were not entitled to a maritime lien because they had contractual relationships only with the general contractors, and in most cases “a general contractor does not have the authority to bind a vessel.” Port of Portland, 892 F.2d at 828; see Farwest Steel, 828 F.2d at 526. There is one exception to that general rule, which applies when the vessel owner directs the general contractor to use a particular subcontractor. In such a scenario, the general contractor essentially acts as the owner’s agent and thus exercises authority to bind the vessel. Farwest Steel, 828 F.2d at 526.

The general rule stated in Port of Portland and Farwest Steel governs this case because OWB Far East occupied a position no different from that of a general contractor. Understand its contract with Yang Ming, OWB Far East assumed the obligation to supply bunkers to the YM Success. OWB Far East entered into a separate contract with Bunker Holdings to assist OWB Far East in fulfilling its own contractual obligations to Yang Ming. OWB Far East was not acting as Yang Ming’s agent and lacked authority to bind the vessel, so its contract with Bunker Holdings could not give rise to a maritime lien in Bunker Holdings’ favor. The exception to the general rule does not apply because Yang Ming did not direct or require OWB Far East to purchase the bunkers from Bunker Holdings.

In sum, we agree with the district court’s conclusion that Bunker Holdings is not entitled to a maritime lien against the YM Success. In so holding, we join three other circuits that have reached the same conclusion on nearly identical facts. See Valero Marketing & Supply Co. v. M/V Almi Sun, 893 F.3d 290, 294–95 (5th Cir. 2018); ING Bank N.V. v. M/V Temara, 892 F.3d 511, 521–22 (2d Cir. 2018); Barcliff, LLC v. M/V Deep Blue, 876 F.3d 1063, 1071 (11th Cir. 2017).

The one remaining issue concerns the district court’s award of costs. After Bunker Holdings arrested the YM Success at the outset of this action, the parties agreed that Yang Ming could secure the ship’s release by posting substitute security in the form of a letter of undertaking for $2.4 million. See 28 U.S.C. § 2464(a); Supplemental Admiralty and Maritime Claims Rule E(5). Yang Ming paid approximately $54,000 to keep the letter of undertaking in place during the 17 months this action remained pending in the district court. The court awarded Yang Ming that amount as a taxable cost under Rule 54(d)(3)(B) of the Local Rules of Civil Procedure for the Western District of Washington, which provides that “[r]easonable premiums paid on undertakings or bonds or security stipulations shall be allowed where the same have been furnished by reason of express requirement of law, rule, or court order.” The court viewed the cost of obtaining the letter of undertaking as “tantamount to a premium on an undertaking, bond, or security.”

Bunker Holdings argues that the costs award is invalid because Local Rule 54(d)(3)(B) lacks statutory authorization, at least as applied in admiralty and maritime cases. We agree with Bunker Holdings on this point. Federal courts may not award costs beyond those mentioned in 28 U.S.C. § 1920 unless another federal statute authorizes them to do so. See Taniguchi v. Kan Pacific Saipan, Ltd., 499 U.S. 83, 86 (1991); see Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 86 (1991); see Barcliff, LLC v. M/V Deep Blue, 876 F.3d 1063, 1071 (11th Cir. 2017). Premiums paid on undertakings or bonds are not included among the six categories of taxable costs mentioned in § 1920. A separate statute, 28 U.S.C. § 1925, does authorize the Supreme Court to promulgate rules specifying additional categories of costs that may be awarded in admiralty and maritime cases. But thus far the Supreme Court has not issued a rule allowing a party to recover as a taxable cost the expenses incurred in posting a bond or other security under 28 U.S.C. § 2464 and Supplemental Rule E(5). The district court therefore lacked authority to award Yang Ming
the costs it incurred in posting the letter of undertaking in this case.

Although we are constrained by precedent to rule as we have, this strikes us as an undesirable result. When a ship is arrested and held in the marshal’s custody, the marshal’s expenses may be taxed as costs. 28 U.S.C. § 1921(a)(1)(E). Posting substitute security to allow for the vessel’s release avoids those expenses, often at a lower cost. If the plaintiff can be forced to bear the marshal’s expenses when the ship remains in custody, a district court should have the discretion to award a prevailing ship owner the expenses it incurs to post substitute security allowing for the ship’s release. Courts sitting in admiralty have historically awarded such costs to prevailing ship owners, see, e.g., The South Portland, 95 F. 295, 296 (D. Wash. 1899), but that was before the Supreme Court held that each item of a costs award must be grounded on an explicit grant of statutory authority. A return to that earlier tradition seems warranted, but it will require action either by Congress or by the

Supreme Court pursuant to its delegated rulemaking authority under 28 U.S.C. § 1925. Until then, we do not think district courts may allow prevailing ship owners to recover as a taxable cost the expenses incurred in posting substitute security, even if a local court rule purports to authorize such an award. Accordingly, we reverse the district court’s award of costs to Yang Ming.

AFFIRMED in part; REVERSED in part.

The parties shall bear their own costs on appeal.

Cite as 18 C.D.O.S. 10044

MICHAEL APELT, Petitioner-Appellee/Cross-Appellant,

v.

CHARLES L. RYAN, Respondent-Appellant/Cross-Appellee.

Nos. 15-99013, 15-99015
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:98-cv-00882-ROS
Filed October 11, 2018
Before: Jerome Farris, Consuelo M. Callahan, and John B. Owens, Circuit Judges.
Order; Dissent by Judge Paez

ORDER

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

PAEZ, Circuit Judge, joined by W. FLETCHER and BERZON, Circuit Judges, dissenting from the denial of en banc rehearing:

This case should have been reheard en banc to correct the serious legal errors committed by the panel in evaluating the prejudice that resulted from the glaring ineffective assistance of counsel provided at the penalty phase of a capital trial.1 Given his death sentence, Michael Apelt was entitled to appellate review that meaningfully engaged with the significant mitigation evidence developed in state court post-conviction proceedings and that adjudicated each of his claims for relief. As a result of our failure to go en banc, we have left in place an opinion that not only misconstrues well-established Supreme Court precedent about the humanizing effect of mitigation evidence, but also employs dehumanizing language to condemn Apelt in a manner that does not belong in a court of law. Accordingly, I respectfully dissent from the denial of rehearing en banc.

1. In fact, we recently granted en banc review in a death penalty case that raises similar legal errors. See Andrews v. Davis, 866 F.3d 994 (9th Cir. 2017), reh’g en banc granted by 888 F.3d 1020 (9th Cir. 2018).
I.

The district court granted habeas relief on one issue, ineffective assistance of counsel (“IAC”) at sentencing. *Apelt v. Ryan*, 148 F. Supp. 3d 837 (D. Ariz. 2015), vacated, 878 F.3d 800 (9th Cir. 2017). Apelt was represented by Michael Villareal at his trial for the first-degree murder and conspiracy to commit first-degree murder of Cindy Monkman, his wife of a few months. Villareal also represented Apelt in his first unsuccessful post-conviction relief (“PCR”) petition. In his second PCR petition, in which he was represented by new counsel, Apelt argued that Villareal’s failure to investigate and present mitigating evidence during sentencing denied Apelt effective assistance of counsel in violation of the Sixth Amendment. In response to the state’s appeal, and in support of the district court’s judgment, Apelt argued that the Arizona superior court’s conclusion that he did not suffer from Villarreal’s alleged deficient performance at sentencing was objectively unreasonable under 28 U.S.C. § 2254(d)(1). In the alternative, he raised a second issue: that the Arizona superior court’s decision—reached without an evidentiary hearing despite significant evidence of a childhood filled with pervasive physical and sexual abuse that left Apelt “mentally disturbed” and suicidal—was objectively unreasonable under 28 U.S.C. § 2254(d)(2).

The panel held, correctly, that Villarreal was grossly ineffective for failing to meaningfully investigate any mitigation evidence that could spare his client’s life. *Apelt v. Ryan*, 878 F.3d 800, 828–31 (9th Cir. 2017). As the district court aptly summarized:

Villareal did not collect records from social service agencies, welfare agencies, doctors, hospitals, or employers. Villareal did not interview potential mitigation witnesses, including Apelt’s family members, or consult with any mental health experts. Villareal did not obtain Apelt’s readily-available medical health records from the Pinal County jail which described Apelt receiving various medications as well as Apelt’s placement on suicide watch. And Villareal did not present a single witness at the sentencing hearing. This was deficient performance.

*Id.* at 820. The record shows that Villareal knew about Apelt’s “difficult childhood” in Germany and other indicia of psychiatric issues, but did not take the steps necessary to investigate his client’s background for sentencing. *Id.* at 829–31. Villarreal also acknowledged that his failure to investigate mitigating evidence was not a strategic choice. *Id.* at 830. Thus, the panel rightly agreed with the district court that Villarreal’s performance “fell below an objective standard of reasonableness,’ even in 1989.” *Id.* at 831.

Given the extent of Villarreal’s deficient performance in his representation of Apelt, the panel seriously erred in concluding that Apelt did not suffer prejudice as a result of his counsel’s IAC at sentencing. *Id.* at 831–34. The panel’s discussion in the third step of the *Strickland* analysisaggerately misapprehends the role of mitigation evidence in capital cases. The panel’s approach cannot be squared with the Supreme Court’s longstanding emphasis on the humanizing effect of such evidence—no matter the underlying the offense—for individuals like Apelt.

A.

The panel’s first error was to conflate legal culpability with moral culpability, thereby minimizing the role of mitigation evidence. To the extent the panel refers to mitigation in its analysis, it is to conclude that the record evidence does not provide sufficient “explanation” for Apelt’s conduct. *Id.* at 834. The panel insists: “none of the proffered mitigating evidence excuses Apelt’s callousness, nor does it reduce Apelt’s responsibility for planning and carrying out the murder.” *Id.* (emphasis added). Mitigation evidence, however, is not consigned to such a limited role.

At the guilt phase of a capital murder trial, a central question is whether the defendant had the capacity to understand what he was doing when he acted. At the penalty phase, the defendant’s mitigation evidence asks in addition whether there is something humanizing about the defendant and his background such that the judge or a member of the jury would be inspired to spare the defendant’s life in an act of mercy. See *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016); *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam).


3. While Apelt’s first attorney spells his last name “Villarreal,” it is sometimes spelled “Villareal” in the record.
Mitigation evidence can be used to excuse or explain a heinous crime. See, e.g., Perry v. Lynaugh, 492 U.S. 302, 319 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002). However, “while demonstrating such a causative ‘nexus’ between painful life experiences and the commission of the offense is one way in which mitigating evidence can be expected to alter a sentencing outcome, it is certainly not the only one.” Doe v. Ayers, 782 F.3d 425, 462 (9th Cir. 2015) (citing Tennard v. Dretke, 542 U.S. 274, 286 (2004)). Mitigation evidence also functions to allow the jury to make a “reasoned moral judgment” about whether a defendant deserves mercy in spite of his conduct. Doe, 782 F.3d at 462 (quoting Sawyer v. Whitley, 505 U.S. 333, 370 (1992)).

Capital crimes are by their nature horrific, but not all defendants who commit such crimes are sentenced to death. Some are spared. This exercise of mercy could stem from a defendant’s tragic past and his endurance of unconscionable abuse, his cognitive defects, or some other personal, humanizing characteristic that has nothing to do with undermining or rebutting the prosecution’s case. See, e.g., Williams v. Taylor, 529 U.S. 362, 398 (2000) (“Mitigating evidence unrelated to dangerousness may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case.”). The panel’s decision, however, acknowledges none of the humanizing effects of mitigation evidence.

B.

Rather than substantively engage with the mitigating evidence that Apelt presented, the panel characterizes him as an irredeemable “monster” and suggests that no amount of mitigation could have outweighed the nature of the premeditated murder of his wife. Apelt, 878 F.3d at 834. This approach contravenes well-established Supreme Court precedent that the prejudice analysis is meant to be one of fact-specific balancing. See Wiggins v. Smith, 539 U.S. 510, 534 (2003) (“In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.” (emphasis added)).

Indeed, the Supreme Court has described the Strickland inquiry as requiring a “probing and fact-specific analysis.” Sears v. Upton, 561 U.S. 945, 955 (2010). Like the state court’s analysis in Sears, the panel’s prejudice analysis here was “truncated.” Id. Apelt pointed to cases like Wiggins and Williams for instances when courts have found prejudice, notwithstanding the brutality of the underlying murder. The panel, however, rejected this argument, emphasizing that Apelt’s situation can be distinguished because the murder he committed “was premeditated and calculated.” Apelt, 878 F.3d at 833. Such a flawed prejudice analysis erroneously suggests that defendants convicted of premeditated murder can never demonstrate prejudice for purposes of their IAC claims.

I do not dispute that the premeditated murder and death of Cindy was horrible. Apelt and his brother arrived in the United States from Germany and almost immediately began lying to women, in an attempt to marry a woman for her money. A few months after Apelt met Cindy, they married and applied for life insurance policies at Apelt’s insistence. The day after the policies were approved, Apelt and his brother took Cindy to the desert and killed her, leaving stab wounds on her chest and back, bruises on her face and body, and nearly severing her head. After Cindy’s death, Apelt acted as though nothing had happened: he went to a restaurant where he claimed not to know of her whereabouts, cried in front of police officers and at Cindy’s funeral, and flew to Los Angeles where he paid a homeless man to record a fake threatening voicemail on Cindy’s answering machine. After rehashing this evidence of premeditation, the panel concluded—without any reference to the specific mitigation evidence developed in Apelt’s second state post-conviction proceeding—that “[n]othing in the record indicates that any explanation for why Apelt became a monster would have changed the sentence.” Id. at 834.

But Supreme Court precedent is clear: “the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice.” See Wong v. Belmontes, 558 U.S. 15, 26 (2009) (per curiam) (citing Strickland v. Washington, 466 U.S. 668, 695–96 (1984)). By focusing on the premeditated nature of the murder, to the exclusion of the mitigating evidence Apelt presented, the panel skirts Supreme Court precedent. The panel’s approach creates the functional equivalent of a categorical bar to demonstrating prejudice when a defendant is convicted of premeditated murder. This would contravene decades of Supreme Court precedent and this court’s understanding of the fact-specific inquiry required in capital cases. See, e.g., Porter, 558 U.S. at 42 (concluding that the state court was objectively unreasonable for finding no prejudice in case involving murder that was “premeditated in a heightened degree” in light of extreme child abuse and heroic military service); Bemore v. Chappell, 788 F.3d 1151, 1170, 1174, 1176 (9th Cir. 2015) (holding that even though there was evidence that “the killing was done in a calculated manner,” it was objectively unreasonable for the state court to have concluded that the “compelling” mental health evidence would not have persuaded at least “one juror … to show mercy and vote against a capital sentence.”).

II.

Giving full effect to Apelt’s mitigation evidence, the district court correctly determined that the Arizona superior court’s finding of no prejudice was an unreasonable application of Strickland under § 2254(d)(1). “This is not a case in _
which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge."’” Porter, 558 U.S. at 41 (quoting Strickland, 466 U.S. at 700)). As in Porter, the sentencing judge at Apelt’s “original sentencing heard almost nothing that would humanize [Apelt] or allow [the judge] to accurately gauge his moral culpability.”’ Id. A constitutionally sufficient mitigation case would have considered the following: 

Apelt grew up in “crass poverty” in Germany. He was the youngest of seven children and an unwelcomed surprise; after the birth of her sixth child, Apelt’s mother underwent an unsuccessful sterilization procedure, and Apelt believed “his father had hated him from the beginning.” All of Apelt’s siblings “immediately after reaching emancipation, left home in order to escape the abusive, sexually abusive and violent situations” in their household. The record describes Apelt’s father as “tyrannical” and an alcoholic who used “brutal force” and beat his family “with an iron rod.” Apelt’s father subjected his wife to “continuous marital rape,” and made sexual advances on his daughters as well. A social worker reported from co-workers’ observations “how bad the situation really was in the family.”

As a young boy, Apelt was raped twice by older men. The first time occurred when he was seven years old: he was abducted from his backyard and driven to another house where he was raped by an older man. Apelt was raped a second time when he was thirteen, when he was tricked by an older man on the way home from school and lured into a cellar where he was then raped at knifepoint.

According to Apelt’s mother, her son had “physically and mentally extremely suffered during his compete childhood.” She recollected that Apelt’s school reported that he “was mentally disturbed.” The record also indicates that Apelt had “attempted to slash his wrists” at a young age and that mental conditions “abounded in this family.”

The Supreme Court has long recognized the “powerful” mitigating effect of a defendant’s “severe privation and abuse,” “physical torment, sexual molestation, and repeated rape” during his childhood years—all of which were present here and none of which go to causation of the murder. Wiggins, 539 U.S. at 534–35; see also Eddings v. Oklahoma, 455 U.S. 104, 112 n.7 (1982) (“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of human-kind.”) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)) (emphasis added). In fact, the Supreme Court has repeatedly emphasized how it is objectively “unreasonable to discount to irrelevance the evidence of [an] abusive childhood.” Porter, 558 U.S. at 41, 43 (holding it was error for the Florida Supreme Court to discount the mitigation evidence from post-conviction hearing because the “kind of troubled history” involving extreme abuse at the hands of a parent and subsequent alcohol abuse and brain damage is extremely “relevant to assessing a defendant’s moral culpability”).

The panel reasoned that “presenting Apelt’s upbringing and activities in Germany to explain how Apelt became a calculating killer arguably could weigh in favor rather than against the death penalty.” Apelt, 878 F.3d at 834. In other words, the panel suggests that given how utterly horrific Apelt’s life was growing up, he is simply beyond rehabilitation. Id. (citing Cullen v. Pinholster, 563 U.S. 170, 201 (2011)). This kind of reasoning contravenes the well-established understanding of mitigating evidence. See Porter, 558 U.S. at 43 (noting that “the jury might find mitigating the intense stress and mental and emotional toll” that defendant faced). Moreover, the Supreme Court has emphasized that the fact that some “adverse evidence” may come “along with this new mitigation evidence” does not mean the petitioner cannot demonstrate prejudice. Sears, 561 U.S. at 951. “This evidence might not have made [Apelt] any more likable to the [sentencing judge], but it might well have helped the [judge] understand [Apelt], and his horrendous acts.” Id. (emphasis added).

Due to trial counsel’s deficient performance in failing to investigate Apelt’s background, the sentencing judge never heard the details of Apelt’s childhood. The judge heard no testimony as to the “gross poverty, alcoholism, and violence which included emotional, physical and sexual abuse” Apelt endured, nor his “history of mental illness,” including “attempted suicide” in Germany. Apelt, 878 F.3d at 815. The evidence developed in Apelt’s second PCR proceeding “adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the [sentencing judge].” Rompilla v. Beard, 545 U.S. 374, 393 (2005). While “it is possible that [the judge] could have heard [all of the mitigating evidence] and still have decided on the death penalty, that is not the test.” Id. Rather, the test is one of “reasonable probability,” in other words, “probability sufficient to undermine confidence in the outcome.”’ Strickland, 466 U.S. at 694.

6. Pursuant to § 2254(d)(1), our review is limited to the record that was before the Arizona superior court that adjudicated Apelt’s penalty-phase IAC claim, which he advanced in his second PCR petition. See Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011). As discussed infra, there was further mitigating evidence uncovered during Apelt’s later Akino proceedings.

7. When analyzing the prejudice prong, the panel suggests that the review of the state court decision is “doubly deferential.” Apelt, 878 F.3d at 832 (citing Pinholster, 563 U.S. at 190). However, the Supreme Court’s “doubly deferential” language emerged exclusively in the context of assessing counsel’s performance. See Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (“Judicial review of a defense attorney’s summation is therefore highly deferential—and doubly deferential when it is conducted through the lens of federal habeas.”) (emphasis added); see also Hardly v. Chappell, 849 F.3d 803, 825 (9th Cir. 2016) (“Double deference references to the layering of the reasonableness test from § 2254(d) on top of another reasonableness test, such as the deficiency prong of Strickland’s two part standard. Because only the prejudice prong is at issue here, double deference does not apply.”) (emphasis
was objectively unreasonable for the Arizona superior court to conclude there was not a reasonable probability that the sentencing judge would have made a deliberate moral judgment to impose life in prison rather than death after hearing evidence regarding Apelt’s horrific childhood.

III.

At the very least, rehearing en banc was necessary to correct the panel’s failure to address Apelt’s claim under 28 U.S.C. § 2254(d)(2): that the Arizona superior court’s decision—reached without holding an evidentiary hearing—was based on an unreasonable determination of facts. Inexplicably, the panel’s decision completely omits mention, let alone analysis, of Apelt’s § 2254(d)(2) argument. The panel had an obligation to address Apelt’s argument—one which he did not waive—on its merits rather than expecting the parties to read some sort of conclusion from the opinion’s silence on the issue.

Under Arizona Rule of Criminal Procedure 32, a petitioner is entitled to an evidentiary hearing on any colorable claim for relief. The bar to obtaining an evidentiary hearing under Arizona law is therefore lower than that required for a showing of prejudice under Strickland—it requires only that, taking the petitioner’s allegations as true, the outcome “might have changed.” Compare Strickland, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”) with State v. Schrock, 719 P.2d 1049, 1057 (Ariz. 1986) (“A defendant is, however, entitled to a hearing when he presents the trial court with a colorable claim, that is a claim which if his allegations are true might have changed the outcome.”).

In his second PCR petition, Apelt sought an evidentiary hearing for, among other claims, his IAC in sentencing claim. That PCR petition relied on the same evidence discussed above: that Apelt had endured a horrific childhood of physical and sexual abuse at the hands of both his alcoholic father and the two adult men who raped him, leaving him mentally disturbed to the point of attempting suicide. The state court denied Apelt’s request, concluding primarily that the claim was defaulted under Arizona Rule of Criminal Procedure 32.2(a)(3). The state court concluded in the alternative that his IAC claims were not “colorable” because Apelt did not “make a sufficient preliminary showing” of deficient performance and prejudice. This conclusion, that Apelt did not present even a colorable claim, however, was objectively unreasonable under 28 U.S.C. § 2254(d)(2), for the same reason that the state court’s decision denying Apelt’s IAC claim was objectively unreasonable under § 2254(d)(1). See Atwood v. Ryan, 870 F.3d 1033, 1050 (9th Cir. 2017) (“The ‘ultimate question’ is whether a state court was ‘unreasonable in holding that an evidentiary hearing was not necessary in light of the state court record.’”) (quoting Hibbler v. Benedetti, 693 F.3d 1140, 1148 (9th Cir. 2012)).

It was especially unreasonable to fail to hold an evidentiary hearing because Apelt’s post-conviction evidence in his second PCR petition strongly suggested that there was more mitigating evidence to be discovered. See Apelt, 878 F.3d at 814–16; supra at 11–12; cf. Woods v. Sinclair, 764 F.3d 1109, 1127–28 (9th Cir. 2014) (concluding “there was no defect in the state supreme court’s factfinding process” under § 2254(d)(2) where the court denied an evidentiary hearing to develop a Brady claim based on a DNA report because “there [was] nothing … in the record to suggest that such a report existed” and “all [Woods] could offer was speculation that an evidentiary hearing might produce testimony” helpful to the claim).

Lastly, we know that there was in fact much more mitigating evidence to be discovered. Because the Arizona superior court’s denial of Apelt’s IAC claim without an evidentiary hearing was an unreasonable determination of the facts under § 2254(d)(2) and an unreasonable application of Strickland under § 2254(d)(1), we may review Apelt’s penalty-phase IAC claim de novo. This means we are no longer “limited to the record that was before the state court that adjudicated the claim on the merits.” Cullen, 563 U.S. at 181. The full record clearly illustrates that Apelt was prejudiced by Villarreal’s failure to investigate and present mitigating evidence regarding his harrowing childhood and the lasting effects of the abuse he endured.

In April and May 2007, the Arizona superior court conducted an evidentiary hearing on Apelt’s separate Atkins claim, which separately established these facts after the court had denied his IAC claim:

Apelt was the product of rape, and his parents referred to him as an unwanted “hate child.” Apelt’s “birth was terribly difficult,” and he was born bluish green, probably due to asphyxia. He was extremely undernourished as a child, during which time he suffered daily abuse at the hands of his father, Rudi Sr., a former Nazi and alcoholic. Apelt’s father beat his wife and seven children “with anything he could get his hands on,” and frequently beat Apelt to the point of unconsciousness. He and a group of men dressed in dark uniforms would tie up Apelt and his brother Rudi in the basement and torture them, beating them on their genitals. Once, when Apelt’s friends tattooed a rose on his arm, Rudi Sr. burned

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8. Contrary to the state’s assertion, Apelt clearly preserved this claim. Apelt raised the claim in district court that “the state court’s denial of relief without granting an evidentiary hearing rendered the court’s decision procedurally unreasonable, thereby satisfying § 2254(d)(2).” There is also no procedural issue under Harrington v. Richter, 562 U.S. 86 (2011): the state court adjudged the merits of Apelt’s request for an evidentiary hearing with respect to his IAC claim when it concluded that he failed to “allege [a] colorable claim[.]” Because he had “fail[ed] to make a preliminary showing” of deficient performance and prejudice. The state court’s alternative determination that Apelt had procedurally defaulted his request for an evidentiary hearing based on his IAC claim does not bar our review because his default is excused under Martinez, supra at 4 n.2. See Apelt, 878 F.3d at 824–28.
it off with a red-hot iron. When Apelt started screaming, his father punched him in the mouth. Apelt still has a scar from the burn.

In addition to physical abuse, Rudi Sr. drugged his children with sleeping pills, tranquilizers and alcohol. He chained his children up in the basement, leaving them for multiple days, sometimes without food or water. He also force-fed Apelt’s mother sleeping pills, causing permanent damage to her throat, and raped Apelt’s sisters when they were young teens.

While there was one reference to a suicide attempt in the second PCR record, the Atkins record reveals that Apelt had attempted suicide multiple times growing up. The first time was when Apelt was seven years old, right after he was raped. He mixed pills and alcohol because he feared his father would beat him to death out of shame. Similarly, Apelt cut his right wrist after being raped again at age thirteen. He was hospitalized multiple times and recommended for treatment at a special institution for the seriously mentally disturbed.

Apelt suffered from delayed development as well. He was sent to a “Sonderschule” or special education school for intellectually disabled children, and his own brother described him as having “zero IQ” growing up. A registered nurse working at the psychiatric hospital in which Apelt was treated in 1985 and 1986 explained that Apelt suffered from severe nightmares, memory loss, and deep depression as a result of the “abusive treatment he endured as a child.”

These are just a few details to provide a window into Apelt’s traumatic childhood and the lasting effects of the persistent campaign of abuse he suffered. The role such mitigation evidence could have played at sentencing cannot be minimized or overlooked as the panel has done. While there was substantial evidence of premeditation in Apelt’s case, “there is clearly a reasonable probability” that “[h]ad the judge … been able to place [Apelt]’s life history on the mitigating side of the scale,” the sentencing judge “would have struck a different balance.” Porter, 558 U.S. at 42 (quoting Wiggins, 539 U.S. at 537).

IV.

Instead of substantively engaging with Apelt’s arguments, the panel simply concluded that “[n]othing in the record indicates that any explanation for why Apelt became a monster would have changed the sentence.” Apelt, 878 F.3d at 834. Once the panel characterized Apelt as a monster, the result was inevitable. This was no true balancing analysis by the panel. This was judicial condemnation.

As my final point, I do not believe that it is ever appropriate to disparage the parties who come before us as “monsters,” regardless of the circumstances. See Darden v. Wainwright, 477 U.S. 168, 180 (1986) (remarking that the prosecutors’ “use of the word ‘animal’” to describe the defendant was “undoubtedly … improper”); see also Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999) (observing that characterizations of the defendant as a “monster” “have no place in a courtroom”). To my knowledge, no other circuit court has referred to a death-sentenced prisoner in this manner before. Indeed, we should strive to treat all individuals who come before us with basic respect and courtesy as parties of the court. It was unnecessary for the panel to address Apelt in a dehumanizing manner. Such language, in my view, does not belong in a court of law.

For all the reasons above, I respectfully dissent from the denial of rehearing en banc.
FACTUAL AND PROCEDURAL BACKGROUND

John Doe and Jane Roe (Jane) were undergraduate students at UCSB. On the night of June 26, 2015, Jane attended a birthday party for John’s girlfriend (eyewitness one) that was held in the apartment John shared with eyewitness one and another roommate (eyewitness two). Jane was intoxicated and decided to lie down under the covers on a mattress against the living room wall.

John returned home also intoxicated and wanted to lie down. Eyewitness one told him to lie down on the mattress for a nap because they were going to the beach later. He lay down fully clothed on top of the covers facing the wall with his back to Jane. Eyewitnesses one and two were talking, sitting on the couch, approximately two-and-a-half feet away.

Jane alleged that while she was asleep on the mattress, John sexually assaulted her. She alleged he aggressively fondled and sucked her breasts while she was in an incapacitated state and unable to consent; removed the bottom half of her clothing; and penetrated her vagina and anus with his fingers and/or penis without her consent.

On June 28, 2015, two days after the alleged assault, Jane was medically examined by the Santa Barbara County Sexual Assault Response Team (SART). She reported the sexual assault to campus police, but declined to divulge the identity of the suspect or location of the sexual battery. On June 30, 2015, Jane’s complaint was sent to UCSB’s Title IX office. The office attempted to contact Jane for further information, but she did not respond and the file was closed.

One month later, on July 31, Jane informed campus police that she wished to proceed with her complaint. On August 3, 2015, the Title IX office initiated an investigation.

On September 16, 2015, the Office of Judicial Affairs (OJA) notified John that he was being placed on interim suspension pending an investigation into the incident, and was not allowed on campus or permitted to live in UCSB housing.

John contested the interim suspension and denied that he assaulted or had sexual contact with Jane. He attended an informal hearing with Suzanne Perkin, the assistant dean of students, on September 29, 2015. At that time, he submitted a statement to the OJA, as well as eyewitness statements and photographs to support his claim that he had not committed any of the alleged acts. On October 1, 2015, Perkin e-mailed campus police Detective Dawn Arviso to “reconfirm that there is physical evidence of an assault in this case.” The detective replied by e-mail that “[t]he SART report states ‘bruising and laceration noted in anal area.’” The detective, however, did not provide the SART report to Perkin. The detective’s e-mail about the SART report was not disclosed to John or his counsel until several months later. Therefore, John could not respond to the SART report while attempting to contest his interim suspension. On October 5, 2015, the vice chancellor consulted with Perkin and then upheld John’s interim suspension with modifications.
According to UCSB, the Santa Barbara County Sheriff’s Department requested that the Title IX office place its investigation on hold from November 4, 2015, to December 15, 2015. It was not until May 17, 2016, nearly a year after the alleged assault, that the Title IX office concluded its investigation and issued a report finding Jane’s claims were substantiated. The investigation took 173 working days (nearly 10 months) from the date the investigation was initiated (August 3, 2015) to the date the report was issued (May 17, 2016), excluding the time the investigation was placed on hold.

UCSB’s written policies require prompt investigation of complaints for sexual harassment and sexual violence. (U.C. Policy - Sexual Harassment & Sexual Violence (2014) § (V) (B)(4)(g) [“The investigation shall be completed as promptly as possible and in most cases within 60 working days of the date the request for formal investigation was filed. This deadline may be extended on approval by a designated University official” (italics added)].) The record does not reveal the reason for the delay here.

UCSB charged John with violating sections 102.08 and 102.09 of UCSB’s Student Conduct Code. Section 102.08 prohibits “[p]hysical abuse, sexual assault, threats of violence, or other conduct that threatens the health or safety of any persons.” Section 102.09 prohibits conduct amounting to sexual harassment. Violations of the Student Conduct Code that warrant a suspension or dismissal from UCSB are heard by the Sexual/Interpersonal Violence Conduct Committee (Committee).

On June 29, 2016, one year after the alleged conduct, John was notified that a hearing before the Committee was scheduled for July 12, 2016, to determine if he had violated the Student Conduct Code. John was notified that he had until July 11, 12 days later, within which to submit any information he wanted the Committee to review, along with the name and contact information of any witnesses. His witness list and information would be combined with the initial incident report, the Title IX officer’s investigation notes and report, and UCSB’s internal correspondence and notifications to the parties to create the “hearing packet.” John was advised that if he wished to review the hearing packet in advance of the hearing, he could make an appointment to review it with the director of judicial affairs in her office prior to the hearing, or he could review it at the hearing.

On July 6, 2016, John submitted his list of exhibits, evidence, and witnesses for the hearing. Jane submitted no witness information or evidence at that time.

On the afternoon of July 11, 2016, the day before the scheduled hearing, the Committee Chair continued the hearing to August 16, 2016, “to ensure all requested information is gathered, made available for review in a timely manner to all parties prior to a hearing, and available for review by the [Committee] during the hearing.” John objected to the continuance, explaining that he and his witnesses had already made travel arrangements. He stated that rescheduling created a hardship and prejudiced his defense; his key witness (eyewitness one) would be studying abroad after July 26th and would be unable to attend the hearing. The OJA overruled his objection, explaining the Committee had “the right to postpone the hearing for a reasonable period of time to allow consultation with University General Counsel.”

Prior to the August 16th hearing, Jane submitted her list of witnesses and two documents -- the cover page of her SART report and a second SART document that listed her current medications. John submitted a list of witnesses, detailed declarations from his roommates (eyewitnesses one and two), photographs of the living room, and the report of a polygraph examiner.

On August 16, 2016, a two-member Committee conducted a hearing to determine if John had sexually assaulted Jane in violation of the Student Conduct Code.

Testimony at the Administrative Hearing

Our review of the evidence is hindered by the state of the administrative record. The Student Conduct Code requires the OJA or UCSB’s general counsel to audio record the proceeding and keep summary minutes of the hearing. (UCSB Student Conduct Code, § D, subd. 1.d(2)(c)(iv).) Nothing in the administrative record indicates an audio recording of the proceeding was made, and there is no transcript of the hearing. The minutes of the hearing included in the administrative record set forth the testimony, but are replete with redactions and ellipses. This court, therefore, is unable to determine whether portions of the testimony were omitted from the minutes.

Jane explained that she was good friends with John and eyewitness one and had spent the night at their apartment many times. She testified that on the night of the incident, she drank wine and mango margaritas, played beer pong, and “hung out” in the living room with the eyewitnesses and others attending the party. At some point, she felt “pretty drunk” and decided to lie down on the mattress of the bottom bunk bed situated against the wall in the living room. The bottom bunk had a full size mattress and was barely three feet from the couch. Eyewitness one lent Jane pajamas and she lay on her side under the covers facing the back of the couch. The room was well lit and quiet. Several lamps were on and no music was playing.

Jane testified that, as she was sleeping in the bunk bed, “an intense, throbbing pain jerked [her] out of [her] sleep.” She felt her “shirt scrunched up to her neck” and could tell her “stomach and breasts were exposed.” She was “completely disoriented and unsure where [she] was or who was touching [her].” She said she “feared for [her] life, not knowing when this person would stop.” She stated she “started to panic . . . yet [she] was frozen, paralyzed.” She “pretended to be asleep [so] this person would eventually leave [her] alone.” Jane testified that she could hear two people sitting on the couch

1. The administrative record does not include documentation of any such request by the sheriff’s department.
next to her. She opened her eyes and realized she was in the living room. She said the two people on the couch were immersed in deep conversation. Jane said, “I resumed to act as though I was asleep. The sucking and biting went on for several minutes. . . . [H]e unhooked my bra; I realized this wasn’t going to end.” She heard the click of a cell phone camera and believed her assailant was taking photos of her naked breasts.

John testified that his assailant pulled her shirt down to cover her breasts and then pulled the blanket over to cover her. She wondered if she should yell out for attention in the hope that someone would hear her. She rolled over onto her back and the assailant briefly stopped. She then felt “fingers penetrating [her] vagina and anus.” Eventually, the person assaulting her got up and she realized it was John. She said she was in a complete state of shock and disbelief that a good friend was assaulting her.

Jane said that John returned to the bed and the assault continued. Jane did not want a confrontation and did not want anyone to know. She felt pain in her anus again, “worse pain that [she] felt in [her] life.” She started to mumble, hoping it would appear she was talking in her sleep. Eyewitness one came over to check on her. Jane stated she told eyewitness one “in French that [she] did not feel good and wanted to go home.” Eyewitness one got Jane water and then returned to the couch. Jane stated her “attempt at being rescued and going home [was] futile,” the “fear was debilitating,” she knew “her behind me is hurting me badly,” this time in English. Jane tried to reassure her, telling her she “must be having a bad dream” and that her pants were still on. Jane testified eyewitness one did not speak. She thought Jane was having a bad dream, and John was still asleep facing the wall. She said he usually “sleeps like a rock.” She denied screaming or crying out when Jane woke up. She said she did not see or hear any sexual assault and maintained it was physically impossible for any of Jane’s allegations to be true.

Eyewitness one stated that due to John’s condition, his movements are not smooth or fluid. “[I]t would have been impossible for him to make any kind of movements toward [Jane], who was under [the] covers, without being noticed by me and my other roommate, and [he] certainly could not unhook a bra . . . .” When she and eyewitness two returned to the apartment after walking Jane home, they examined the mattress, sheets, and cover “for any visible signs or smells of bodily fluids” consistent with anal or vaginal penetration, but found none. Eyewitness one said Jane was her best friend at the time. She reiterated that if John had done anything, “I would have been on [Jane’s] side.”

In response to questions from the Committee, eyewitness one stated that when Jane got up from the bed, she was wearing a short sleeve shirt and underwear, but not the pajama bottoms. Eyewitness one said that frequently when Jane slept over, she would remove her pajama bottoms if she was hot.

Eyewitness two provided a declaration in which he corroborated eyewitness one’s testimony and maintained that what Jane described was “not physically possible.” John produced the sofa and mattress at the hearing to demonstrate the proximity of the eyewitnesses.

Dr. Louis Rovner, a polygraph examiner, testified by telephone. John’s counsel retained him to administer a polygraph examination of John. Rovner holds a B.A., M.A., and a Ph.D. in Biopsychology. He is a member of the Panel of Experts of the Los Angeles County Superior Court, Criminal Division. He has published numerous articles about polygraph-related issues for scientific and professional journals.

Rovner opined that John’s complete denial of the allegations against him was truthful. Rovner testified that given John’s score on the exam, he was “absolutely certain” John was telling the truth when John responded to his questions about the night in question. The Committee asked if it would affect the test result if the person was intoxicated during the events he or she was questioned about. Rovner responded
that any opinion from him on that question “would be pointless speculation.”

**The SART Report Evidence**

Prior to the August 16th hearing, Jane submitted to the Committee two pages from the SART report. The first page is the cover page, containing only Jane’s name. The second page identifies the name of the medical professional who performed the SART exam (Cynthia Hecox), and notes that Jane was taking Viibryd, a prescription antidepressant.² In the recommendation section on the second page, it states that Jane “was advised to take [a] warm bath in Epsom salt and relax anal muscles to help soothe discomfort.” These two pages were included in the hearing packet. The record does not include details regarding how or when the hearing packet for the August 16th hearing was given to John. John states he received it the night before the hearing.

At the hearing, the Committee questioned Detective Arviso about the e-mail she sent to Assistant Dean Perkin on October 1, 2015. The e-mail reads: “[T]he SART report states ‘there was bruising/laceration noted in the anal area.’” But the two pages of the SART report submitted by Jane do not contain this information. The Committee relied on the detective’s recollection that this statement was in fact in the SART report. The Committee asked the detective if there were any other details from the report that could be shared. The detective testified, “I’m not able to disclose anything in great detail . . . case is open criminally; limits what I am able to share.” The Committee then asked the detective whether this reference to “bruising/laceration” was unusual in a SART report. She testified that “it is not uncommon when there is an assault that this verbiage would be seen in a SART report,” and stated the findings of the SART exam were consistent with the allegations in this case.

When questioned by John about how the “anal area” was defined in the SART report (i.e., was the bruising and laceration inside or outside), the detective stated: “That’s exactly how it was written; my understanding looking at this particular sentence in exam . . . within the butt cheeks; I don’t know what damage was done internally.” The Committee then inquired: “Why was the sentence that you sent to Ms. Perkin from the [SART] exam the only portion that was shared or could be shared?” The detective responded that the information in the SART report was confidential because it was an ongoing investigation.

The detective testified that other than this “small snippet” that she selected from the report, it would not be “appropriate to disclose what additional findings came through [the] SART exam.” When John asked if the findings in the SART report could have been caused by anything other than what Jane alleged, the detective said: “Well that’s a rough question for me to answer; I would say the findings in [the SART report] certainly could have occurred based on [the] allegations in [the] criminal case; I don’t know what else could have caused it. . . . It’s out of my realm, my scope to answer the questions.” The complete SART report was not produced at the hearing or disclosed to John or his counsel.

**The Viibryd Evidence**

John was aware that Jane was taking an antidepressant prior to the hearing, but states he did not learn the name of the medication until the night before the August 16th hearing, when he received the hearing packet.

At the hearing, John asked Jane about the possible side effects of Viibryd, and its side effects when combined with alcohol. Jane refused to answer the question, stating, “It’s my private medical information.” John, attempting to explain his line of questioning, stated that Viibryd “has many side-effects” that “become severe when alcohol is consumed . . . such as hallucinations and sleep paralysis and night terrors.”

John’s mother attempted to testify about the side effects of Viibryd. She called the manufacturer of Viibryd that morning and wanted to testify about what she had learned from the manufacturer. The Committee Chair stated he could not accept this information in this format. When John persisted in asking his mother about Viibryd and the effects of sleep paralysis, the chair stated UCSB’s general counsel advised him not to accept the testimony. John again asked his mother about the side effects of Viibryd, and general counsel interjected, stating: “You’re trying to circumnavigate the procedures here. You do not have the expertise to lay the foundation for this type of evidence. We appreciate you feel you wish you had more time on the SART exam but you [had] the opportunity to look at it prior to the hearing, but you can’t backdoor this. If you have other relevant questions as to your mother having experience with your [central nervous system] diagnosis, that would be appropriate.” John was not allowed to introduce any evidence about Viibryd.

**The Committee’s Findings**

The Committee found by a preponderance of the evidence that John violated the Student Conduct Code. The Committee noted that both John and Jane “agreed that the room was well lit during the incident, and there was little ambient noise in the apartment . . . .” The Committee found that “it would have been possible for an assault as described to occur without the attention of witnesses who were facing each other and conversing.” The Committee concluded that “[t]he results of the physical SART exam corroborate the report of vaginal and/or anal penetration with fingers and/or a penis.” Relying in part on the SART report, the Committee rejected John’s theory that Jane’s use of alcohol while taking Viibryd caused Jane to hallucinate the incident. The Committee found the SART report supported the claim that a physical assault was committed, and, therefore, the use of Viibryd was unlikely to have caused Jane to fabricate the report. The Committee

² The second page of the SART report and minutes of the committee hearing refer to “Vybryyd.” The superior court confirmed that the correct spelling for the medication is “Viibryd,” and refers to it as such. For clarity, we use the spelling used in the superior court.
found Jane’s “testimony and evidence provided throughout the investigation and hearing” more consistent than John’s.

The Committee believed John suffered from a hereditary neurological disorder that causes tremors, but it concluded that “the condition would not necessarily make the assault as described impossible, and it may have even exacerbated the physical sensations [Jane] described and physical evidence described in relation to the incident.” The Committee rejected the polygraph evidence because John was drunk at the time of the incident and “there is no scientific evidence regarding the validity of polygraph examinations in this scenario.”

The Committee recommended John be suspended for two years (eight quarters), starting Fall 2016. On September 2, 2016, the vice chancellor of student affairs notified John that she agreed with the Committee’s recommended sanction. John sought review of the vice chancellor’s decision. The chancellor affirmed the sanction, but adjusted the suspension to include the time John had already served on interim suspension. Therefore, his eight-quarter suspension was effective Fall 2015 through Summer 2017.

**The Superior Court Proceedings**

John filed a petition for a writ of administrative mandate in the superior court to challenge UCSB’s decision. (Code Civ. Proc., § 1094.5.) John contended he was deprived of due process during the administrative proceeding because, among other reasons, the Committee chose to apply the rules of evidence on an ad hoc basis and to withhold critical and exculpatory evidence. He argued he had not been able to see the SART report, about which the detective testified, and was not allowed to present evidence about the side effects of Viibryd.

At the hearing in the superior court on April 13, 2017, John’s counsel informed the court that the Santa Barbara County District Attorney’s Office had decided not to pursue any charges against John. John’s counsel argued that a short continuance would allow John to get a copy of the SART report for the court’s consideration. The superior court declined to continue the hearing or take further evidence outside the administrative record. A complete copy of the SART report is not included in the record on appeal.

The superior court denied the petition for a writ of mandate, noting that “[t]he better practice may have been to find a way to let [John] see the SART report or exclude any reference to a small portion of the findings in the report given out of context.” Nevertheless, the court concluded the admission of a small portion of the SART report and the detective’s testimony were not prejudicial because the SART exam was not the sole supporting evidence for the Committee’s conclusions. The court also concluded John had not demonstrated he was prejudiced by the timing of the Committee’s disclosure, the day before the hearing, of Jane’s use of Viibryd or its exclusion of his mother’s testimony.

**DISCUSSION**

John argues UCSB deprived him of his due process right to a fair hearing because it withheld critical evidence, improperly excluded relevant evidence, and selectively applied the formal rules of evidence. He also argues UCSB abused its discretion by reaching findings that were not supported by substantial evidence in light of the whole record.

**Standard of Review**

“The scope of our review from a judgment on a petition for writ of mandate is the same as that of the trial court.” (Department of Corrections & Rehabilitation v. State Personnel Bd. (2015) 238 Cal.App.4th 710, 716.) Our review appears to be an amalgamation of the three standards of review that govern appellate practice. We determine “whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.” (Code Civ. Proc., § 1094.5, subd. (b).) “Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Ibid.) We review UCSB’s findings for “substantial evidence in the light of the whole record.” (Id., subd. (c).)

We review the fairness of the administrative proceeding de novo. (Doe v. Regents of University of California (2016) 5 Cal.App.5th 1055, 1073.) “The statement’s requirement of a ‘fair trial’ means that there must have been a ‘fair administrative hearing.’” (Doe v. University of Southern California (2016) 246 Cal.App.4th 221, 239, quoting Gonzalez v. Santa Clara County Dept. of Social Services (2014) 223 Cal. App.4th 72, 96.) “[T]he University’s rule-making powers and its relationship with its students are subject to federal constitutional guarantees.” (Goldberg v. Regents of University of California (1967) 248 Cal.App.2d 867, 875.) In disciplining college students, the fundamental principles of fairness require, at a minimum, “giving the accused students notice of the charges and an opportunity to be heard in their own defense.” (Id. at p. 881; Goss v. Lopez (1975) 419 U.S. 565, 581 [42 L.Ed.2d 725, 738].) “Where student discipline is at issue, the university must comply with its own policies and procedures.” (Doe, at p. 1073.) “[T]he formal rules of evidence do not apply . . .” (Id. at p. 1095.)

**UCSB Rules**

UCSB’s Student Conduct Code provides: “Students who are subject to University discipline shall be afforded procedural due process, which is a basic principle underpinning the proper enforcement of University policies and campus regulations. The primary purpose of any University disciplinary proceeding is to determine the guilt or innocence of the accused student. Deviations from established procedures shall not invalidate a finding of a hearing body unless the deviation significantly affected the result. It is recognized that University faculty, staff, and students are principally engaged
in the business and the pursuit of education, and are not legally trained personnel. As such they should be guided more by principles of fairness and common sense than by formal rules of evidence or procedure.” (Id., § B.)

The Student Conduct Code requires UCSB and its designated officials to “[m]onitor the process to ensure the maintenance of procedural due process.” (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(c)(iii).) “Proceedings will provide a prompt, fair, and impartial investigation and resolution.” (OJA Sexual/Interpersonal Violence Response Procedures for Sexual Assault (rev. Feb. 25, 2014) Proc. & Process When Reporting to Univ.)

In disciplinary hearings, the Committee “[s]hall receive verbal and documentary evidence of the kind on which reasonable persons are accustomed to rely in serious matters and may exclude irrelevant or unduly repetitious evidence.” (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(d)(iv).) An accused student “[s]hall have the right to confront and question all witnesses.” (Id., subd. 1.(d)(2)(a)(v).)

“The accused has the right to due process as outlined in the Campus Regulations. Among these rights are: [¶] (i) The right to written notice of the charges, [¶] (ii) To be accompanied at the hearing by an advisor of his/her choice, [¶] (iii) To be present for the duration of the hearing, [¶] (iv) To produce witnesses and evidence pertaining to the case, [¶] (v) To question all witnesses, [¶] [and] (vi) To simultaneously with the accuser, be informed in writing of the outcome of any institutional disciplinary proceeding, the institution’s procedures for appealing the results of the proceeding, any change to the results that occur prior to the time that such results become final, and when such results become final.” (OJA Sexual/Interpersonal Violence Response Procedures for Sexual Assault, supra, Proc. & Process When Reporting to Univ., Rights of the Complainant.)

**Lack of a Fair Hearing**

**Limited access to the SART report**

John contends he was deprived of a fair hearing when the Committee allowed the detective to testify about a single phrase from the SART report without requiring production of the entire report to the Committee and to him. Without access to the complete SART report, John did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The accused must be permitted to see the evidence against him. Need we say more?

The Committee need not strictly adhere to the “formal rules of evidence or procedure,” but these rules serve as a guide for the Committee to arrive at a decision based on “principles of fairness and common sense.” (UCSB Student Conduct Code, § B.) We refer to these rules to illustrate where fairness is lacking.

For example, the best evidence rule (now the secondary evidence rule in California) precludes oral testimony to prove the content of a writing. (Evid. Code, § 1523.) “The principal rationale advanced for the best evidence rule is to insure that the trier of fact is presented with the exact words of a writing.” (Grad & Prairie, The Best Evidence Rule: A Critical Appraisal of the Law in California (1976) 9 U.C. Davis L.Rev. 257, 258.) “[T]he chance of error is substantial when a witness purports to recall from memory the terms of a writing. [¶] The rule is also thought to help prevent fraud.” (Id. at p. 259.) “The final rationale offered for the rule is that inspection of an original document could reveal valuable information not disclosed . . . .” (Ibid.) This is because it is unfair to have a witness testify about the contents of a writing without producing the actual writing for examination.

Here, the only substantive portion of the SART report considered by the Committee, and provided to John prior to the hearing, was the phrase quoted in the detective’s e-mail of October 1, 2015. Without the complete SART report, the trier of fact was left to rely on the detective’s recollection and veracity. To argue that it is fair to allow the detective to testify about the contents of the SART report, but preclude the accused and the trier of fact from seeing the report, strains credulity. (See Goss v. Lopez, supra, 419 U.S. at p. 582 [42 L.Ed.2d at p. 739] [student must be told “the basis of the accusation”].)

In addition, the rule of completeness, Evidence Code section 356, would have allowed John to inquire into the whole of the SART report, once a portion of the report was quoted during the detective’s testimony. “The purpose of Evidence Code section 356 is ‘to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.’” (People v. Clark (2016) 63 Cal.4th 522, 600.) It was unfair to allow the detective to select and describe only a portion of the SART report, without producing the complete report. John’s lack of access to the entire report prevented effective cross-examination and hampered his ability to present a defense.

Here, the detective testified that the single phrase in the SART report was consistent with Jane’s allegations. But when questioned by John about other potential causes of the SART finding, the detective said it was outside the scope of her expertise. The detective’s inability to answer whether the finding in the SART report could be caused by anything other than Jane’s allegations underscores the unfairness of allowing the detective to testify about the report when she had not authored the report or conducted the medical examination, and was unqualified to give an expert opinion on causation. Allowing the detective to select and describe a portion of the report denied John the opportunity to effectively challenge the evidence used to determine his guilt. (Cf. Doe v. Regents of University of California, supra, 5 Cal.App.5th at p. 1098 [unlike this case, failure to disclose interview notes not before the hearing panel did not prevent the student “from having a meaningful opportunity to present his defense”].)

The Committee relied on the SART evidence to find that John sexually assaulted Jane and violated the Student Conduct Code. It concluded that this evidence corroborated Jane’s “report of vaginal and/or anal penetration with fingers and/or
a penis.” The Committee also found that John’s “theory that Jane’s antidepressant combined with alcohol precipitated the incident is unlikely, especially when combined with the findings of the physical SART exam . . . .” The SART report was critical evidence, but the Committee did not have the report. At a minimum, UCSB should have required the detective to provide a complete copy of the SART report.

The Committee should not have considered the SART evidence without giving John timely and complete access to the report. (See Doe v. University of Southern California, supra, 246 Cal.App.4th at p. 247 [“common law requirements for a fair hearing under Code of Civil Procedure section 1094.5 do not allow an administrative board to rely on evidence that has never been revealed to the accused”].) Without this evidence, the Committee could have concluded there was not a preponderance of evidence that John violated the Student Conduct Code. The error was prejudicial and requires reversal.

**Other Cumulative Errors**

In the event of a future administrative hearing in this case, we discuss additional cumulative errors that occurred at the hearing.

John contends that UCSB’s untimely disclosure of the Viibryd evidence deprived him of the opportunity to obtain an expert to testify about the side effects of Viibryd, and the opportunity to effectively cross-examine Jane. He also argues UCSB inconsistently applied its policies and procedures and selectively applied formal evidentiary rules, to his detriment. We agree. While UCSB’s rules provide “no formal right to discovery,” the Committee’s rulings during the hearing placed John in a catch-22; he learned the name of the medication Jane was taking too late to allow him to obtain an expert opinion, but the Committee precluded John from offering evidence of the side effects of Viibryd without an expert. (Doe v. Regents of University of California, supra, 5 Cal.App.5th at p. 1095.)

The Committee recognized the relevance of the Viibryd issue, but it rejected John’s claim about insufficient notice by stating John “already had knowledge” about Jane’s use of antidepressant medications; he just did not know what exact medication she was taking until the night before the hearing. No reputable expert could have offered an opinion without knowing the exact medication Jane was taking. Because no formal right to discovery exists in UCSB’s student conduct hearings, and the formal rules of evidence do not apply, John should have been allowed to introduce evidence of the side effects of Viibryd through his mother’s testimony or some other informal method.

Moreover, John’s counsel was not allowed to actively participate in the hearing. “Students are to represent themselves. The role of the attorney or advisor is therefore limited to assistance and support of the student in making his/her own case.” (UCSB Student Conduct Code, § D, subd. 1.(d)(2)(a)(ii); Doe v. Regents of University of California, supra, 5 Cal. App.5th at pp. 1082-1084 [student not deprived of fair hearing where counsel not allowed to actively participate].) The Committee, however, permitted UCSB’s general counsel to actively participate and to make formal evidentiary objections. This unfairness is magnified when UCSB’s general counsel is allowed to make formal evidentiary objections, which UCSB’s policies and procedures do not permit. A student, whose counsel cannot actively participate, is set up for failure because he or she lacks the legal training and experience to respond effectively to formal evidentiary objections.

The Committee also selectively applied the formal rules of evidence to John’s detriment. The Committee precluded John’s mother from offering testimony about the side effects of Viibryd based on a lack of foundation. But it allowed the detective to offer an expert medical opinion on causation, even though she was not a medical expert and had not authored the SART report.

Finally, the Committee inexplicably allowed Jane to decline to respond to John’s questions about the side effects of Viibryd on the ground that it was her “private medical information.” This deprived John of his right to cross-examine Jane and impeded his ability to present relevant evidence in support of his defense. (See, e.g., Doe v. Claremont McKenna College (2018) 25 Cal.App.5th 1055, 1070 [when a disciplinary determination turns on the complying witness’s credibility, the accused student is entitled to a process by which the complainant answers his questions]; Doe v. Regents of University of California, supra, 5 Cal.App.5th at p. 1084.) Here, John could not present evidence of the side effects of Viibryd through his mother’s testimony and Jane was not required to answer his questions.

The Committee’s refusal to hear John’s evidence of the side effects of Viibryd was prejudicial. Jane’s behavior, as described by eyewitness one, was consistent with John’s theory that Jane was experiencing the side effects of consuming alcohol while taking Viibryd.

Without hearing all of John’s evidence, the Committee rejected John’s defense, concluding that Jane’s allegations were corroborated by the physical finding in the SART report. Thus, the error in excluding John’s evidence of the side effects of Viibryd was compounded by admitting only a portion of the SART report.

The Committee reached a significant finding based on nothing more than speculation. While it believed John suffered from a hereditary neurological disorder that causes tremors, it concluded “the condition would not necessarily make the assault as described impossible, and it may have even exacerbated the physical sensations [Jane] described and physical evidence described in relation to the incident.” We question the committee’s expertise to arrive at this startling conclusion.

It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee’s determination of the credibility of the witnesses. Credibility cannot be properly decided until
the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses’ credibility. In this respect, neither Jane nor John received a fair hearing.

In light of our conclusion, it is unnecessary to discuss John’s remaining contention concerning sufficiency of the evidence.

**DISPOSITION**

The judgment is reversed and the matter is remanded to the superior court with directions to grant John’s petition for a writ of administrative mandate. John is awarded costs on appeal.

CERTIFIED FOR PUBLICATION.

GILBERT, P. J.

We concur: YEGAN, J. PERREN, J.

Cite as 18 C.D.O.S. 10057

**THE PEOPLE,** Plaintiff and Respondent, v. **MARC ANTHONY ENDSLEY,** Defendant and Appellant.

No. E068576
In The Court of Appeal of the State of California Fourth Appellate District Division Two
(Super.Ct.No. FSB07901)
APPEAL from the Superior Court of San Bernardino County.
Lorenzo R. Balderrama, Judge. Reversed with directions.
Filed October 10, 2018

COUNSEL

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

**OPINION**

This is Marc Anthony Endsley’s second appeal challenging the denial of his Penal Code section 1026.2 petition for conditional release from the state hospital. (See Pen. Code, § 1026.2 subds. (a)-(m), unlabeled statutory citations refer to this code.) Endsley was committed to the state hospital in 1997 after a jury found him not guilty of the first degree murder of his father by reason of insanity (NGI).

In his first appeal, he argued the trial court erred by summarily denying his petition without a hearing. (See People v. Soiu (2003) 106 Cal.App.4th 1191, 1198 (Soiu) [trial court may not deny § 1026.2 petitions for conditional release “without holding a hearing at which [the NGI petitioner] would be present”].) In People v. Endsley (2016) 248 Cal.App.4th 110 (Endsley I), we agreed he was entitled to a hearing and—interpreting section 1026.2, subdivision (l), which prohibits a trial court from ruling on an NGI’s application for release without first reviewing the state hospital’s recommendation on the appropriateness of release—held it was the duty of the trial court, not the NGI, to procure the recommendation. On remand, the trial court obtained the recommendation, held a hearing at which the state’s experts testified against release, and again denied the petition.

Before issuing that ruling, the court denied Endsley’s request for an independent expert to assist him in demonstrating he was ready for outpatient treatment. The court also denied Endsley’s request to testify remotely by telephone to avoid being transferred from state hospital to jail before his
hearing. To support his request to testify remotely, Endsley argued NGIs could not be housed in jail pending hearings on their petitions for release from state hospital commitment under the holding of In re Lee (1978) 78 Cal.App.3d 753 (Lee). Taking Endsley’s objection to jail as a refusal to testify in person, the trial court denied his request to testify remotely and proceeded to rule on the petition.

In this appeal, Endsley challenges the denial of his two prehearing requests, arguing the trial court violated his constitutional rights to testify at his hearing and to the assistance of an independent medical expert. Endsley argues the court erred by ruling on his request to testify remotely without first ensuring the selection of a confinement facility that could “continue [his] program of treatment,” as required by section 1026.2, subdivisions (b) and (c). He also argues the holding in People v. McKee (2010) 47 Cal.4th 1172 (McKee) that sexually violent predators (SVPs) have a due process right to the appointment of an independent expert to assist them in petitioning for conditional release from involuntary civil confinement should extend to NGIs seeking conditional release. For the reasons explained below, we agree with both of Endsley’s contentions. We will therefore reverse the denial of his petition and remand to the trial court with directions set out in part III, post.

I

FACTUAL BACKGROUND

Endsley was committed to the state hospital in 1997 and remained there until 2012, when the trial court granted his petition for conditional release and placed him on outpatient status in San Bernardino County’s conditional release program (CONREP). However, less than a year later, the court recommitted Endsley to the state hospital based on reports he was refusing to process his anger and aggression toward CONREP for restricting his access to violent video games.

As we recounted in Endsley I, the periodic progress reports after his recommittal reflected Endsley was making steady progress on his anger and aggression issues. (Endsley I, supra, 248 Cal.App.4th at p. 115.) By October 2014, his treatment team had formally referred him to CONREP. His evaluator concluded he was “ready for placement in [CONREP]” and could “hopeful[ly]” be released “in the relatively near future.” (Id. at pp. 115-116.) A March 2015 progress report noted he was demonstrating “more insight and control over his thoughts than in the past.” (Id. at p. 116.)

In May 2015, Endsley filed a petition for conditional release under section 1026.2 and alleged his sanity had been restored such that he would not pose a danger to himself or others if placed in outpatient treatment. The petition requested a hearing and the appointment of an independent medical expert. (Endsley I, supra, 248 Cal.App.4th at p. 116.) That same month, the trial court summarily denied the petition without stating its reasons. Endsley appealed, and the People responded that summary denial was proper because he failed to submit the state hospital medical director’s recommendation on the appropriateness of relief along with his petition. (Id. at pp. 114-115.) The People’s argument required us to interpret the meaning of section 1026.2, subdivision (l), which provides, “If the application for the release is [made by the NGI as opposed to the person in charge of treatment], no action on the application shall be taken by the court without first obtaining the written recommendation of the medical director of the state hospital or other treatment facility or of the community program director where the person is on outpatient status.”

In June 2016, we issued Endsley I, where we held that Endsley was entitled to a hearing on his petition and that section 1026.2, subdivision (l) requires the trial court, not the NGI, to obtain the medical director’s recommendation. (Endsley I, supra, 248 Cal.App.4th at pp. 114-115.) Following remand, in September 2016, the trial court ordered the state hospital to submit a report containing its recommendation on Endsley’s petition by October 26, 2016. In February 2017, with the report still outstanding, the trial court revisited its order, this time with a deadline of March 8, 2017. Sometime between March 10 and 17, the state hospital filed its report. Dr. Laguitan, a state hospital psychiatrist and the author of the report, concluded Endsley was not ready for conditional release to CONREP and recommended retaining and treating him.

At a hearing on March 17, 2017, Endsley raised the issue of an independent expert, stating, “I would strongly like to object to the lack … of … any independent evaluators at all being appointed to come and see me. I believe it’s a violation of my due process rights as … the only reports the Court interpret the meaning of section 1026.2, subdivision (l), which provides, “If the application for the release is [made by the NGI as opposed to the person in charge of treatment], no action on the application shall be taken by the court without first obtaining the written recommendation of the medical director of the state hospital or other treatment facility or of the community program director where the person is on outpatient status.”
video games.” In April 2016, he wrote a letter to hospital administration in which he “voiced his unwillingness to comply with anticipated changes in unit policies” and used “hostile and threatening language directed towards staff.”

The prosecutor presented the testimony of Dr. Laguitan from the state hospital and Dr. Smith, a psychologist working for CONREP. Both believed Endsley could not be safely treated in an outpatient facility because he did not respond well to authority, refused to discuss the anger he still harbored towards CONREP, and was not participating in group therapy. They believed his refusal to process his anger in a therapeutic setting posed a danger that he would relapse to violence while in outpatient treatment.

At the end of the first day of the hearing, the court advised Endsley to discuss with his counsel whether he wanted to testify. The court said, “But we would need to transport you down here for that purpose, but you can think about it, at least over the next several days.” Endsley responded, “I would very much like to testify in my case; however, pursuant to [Lee, supra, 78 Cal.App.3d at p. 753] … I cannot be housed in county jail.” Endsley sought permission to testify remotely from the hospital’s video conferencing facilities. The prosecutor objected, and the court deferred its ruling to allow defense counsel to research whether Endsley had a right to testify remotely.

Endsley’s counsel reported the fruits of her legal research at the close of the prosecution’s evidence. She said the authority she had found indicated Endsley was not entitled to testify remotely, but the trial court could exercise its discretion and allow him to do so. The prosecution again objected, arguing Endsley should have to “be present and feel the same process that everyone else who has to testify goes through.” The court agreed, stating, “[I]n this kind of case, where Mr. Endsley is petitioning for conditional release … the Court itself would like to see him in person when he testifies.” The court explained its practice was to allow remote testimony only when both parties agreed.

The court then asked “So, Mr. Endsley, did you want to come down to testify in your hearing or not?” and Endsley replied, “Well, your Honor, I’m going to be blunt here. I think at this point it’s pretty obvious that this is a kangaroo court. Nothing I’ve requested has been granted. I haven’t been given my independent evaluators … [¶] … I can testify if I can do it over the phone or via [video]. But no point in sitting in jail for four months just so I can do this case … and then just rot in jail for four months. I’m a mental patient.”

The court responded, “Well, given that Mr. Endsley has decided not to come down to testify, I will give my ruling, then.” Based on what is described as “overwhelming evidence” from the state against conditional release, the court denied Endsley’s request for an independent expert and then denied his petition.

### II

#### DISCUSSION

NGIs are “persons who initially have been found to have committed a criminal act, but whose mental condition warrants a period of confinement for treatment in a state institution, in lieu of criminal punishment.” (In re Moye (1978) 22 Cal.3d 457, 463.) An NGI’s involuntary civil confinement is thus “for purposes of treatment, not punishment.” (Id. at p. 466; see also People v. Buttes (1982) 134 Cal.App.3d 116, 122 [NGIs are “found not guilty of committing the crime and cannot be punished by incarceration in prison … [as] the insane defendant can never be sent to a prison”].)

Because their hospitalization is for treatment not punishment, there are two ways an NGI may be released from commitment—either upon expiration of “the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted” (§ 1026.5, subd. (a)(1)), or upon a finding their sanity has been “restored,” meaning they “no longer [pose] a danger to the health and safety of others, due to mental defect, disease, or disorder” (§ 1026.2, subd. (e)). For Endsley, restoration of sanity under section 1026.2 is the only route to release because the longest term of imprisonment for first degree murder is imprisonment for life. (§ 190, subd. (a).)

Obtaining restoration-of-sanity release under section 1026.2 is a two-step process initiated when either the NGI or the person in charge of their treatment petitions the court for release. (§ 1026.2, subd. (a).) First, the NGI must be approved for and successfully complete one year of outpatient treatment (or less if the community program director recommends release sooner). Then, the court must hold a trial to determine whether the NGI can safely be returned to the community or whether they still pose a danger to others based on their mental illness or disorder. (§ 1026.2, subd. (e).) Section 1026.2 therefore envisions two factfinding proceedings—a hearing on the defendant’s petition for conditional release, commonly called the “outpatient placement hearing,” and a restoration of sanity trial. (Soiu, supra, 106 Cal.App.4th at p. 1196.) An NGI denied outpatient placement may reapply for conditional release after one year. (§ 1026.2, subd. (j).) Likewise, an NGI who has successfully completed outpatient placement and is denied full release may reapply for full release after a year. (Ibid.) Here, Endsley filed his own petition for release, which remains in step one, the outpatient placement hearing.

#### A. Designation of Local Facility for Prehearing Confinement (Section 1026.2, Subdivisions (b) and (c))

NGIs have the right to appear and testify at the outpatient placement hearing. (Soiu, supra, 106 Cal.App.4th at p. 1198; People v. Tilbury (1991) 54 Cal.3d 56, 69 [those petitioning for conditional release under § 1026.2 are entitled to “the substantial procedural safeguards associated with trials, including, among other things, the right to counsel, to a de-
tached and neutral judicial officer, to present evidence, and to cross-examine adverse witnesses.”)
To facilitate the appearance of an NGI who is being treated outside the county of the trial court, subdivisions (b) and (c) of section 1026.2 establish mandatory procedures for local, interim confinement.
As we explained in *Endsley I*, section 1026.2, subdivision (b) requires the community program director, with the help of the state hospital, to select a confinement facility capable of continuing the NGI’s treatment while he or she awaits and attends the outpatient placement hearing. (*Endsley I, supra*, 248 Cal.App.4th at p. 117, citing § 1026.2, subd. (b).) Section 1026.2, subdivision (b) says: “Pending the hearing, the medical director or person in charge of the facility in which the person is confined shall prepare a summary of the person’s programs of treatment and shall forward the summary to the community program director or a designee and to the court. The community program director or a designee shall review the summary and shall designate a facility within a reasonable distance from the court in which the person may be detained pending the hearing on the application for release. The facility so designated shall continue the program of treatment, shall provide adequate security, and shall, to the greatest extent possible, minimize interference with the person’s program of treatment.” Section 1026.2, subdivision (c) prohibits the court from detaining an NGI in jail unless the jail can continue their program of treatment and ensure the safety of the NGI as well as the other inmates. Finally, if during the NGI’s local confinement the court receives evidence the treatment facility or jail is failing to meet these requirements, “the court shall order the person transferred to an appropriate facility [and] make any other appropriate order, including continuance of the proceedings.” (§ 1026.2, subd. (c)).

The pre-hearing confinement provisions in section 1026.2, subdivisions (b) and (c) were enacted in response to *Lee*, a 1978 decision in which the court held that NGIs seeking release from state hospital commitment cannot be confined in jail pending a hearing on their petitions but instead must be placed in a local treatment facility approved for the involuntary treatment of mental illness under the Lanterman-Petris-Short (LPS) Act. (*Lee, supra*, 78 Cal.App.3d at p. 760.) In

1. Section 1026.2, subdivision (c) states in full: “A designated facility need not be approved for 72-hour treatment and evaluation pursuant to the Lanterman-Petris-Short Act (Part 1 commencing with Section 5000 of Division 5 of the Welfare and Institutions Code). However, a county jail may not be designated unless the services specified in subdivision (b) are provided and accommodations are provided which ensure both the safety of the person and the safety of the general population of the jail. If there is evidence that the treatment program is not being complied with or accommodations have not been provided which ensure both the safety of the committed person and the safety of the general population of the jail, the court shall order the person transferred to an appropriate facility or make any other appropriate order, including continuance of the proceedings.”

2. The LPS Act (Welf. & Inst. Code, § 5000 et seq.) “governs the involuntary treatment of the mentally ill in California.” (*Conservatorship of Stam T.*, (1994) 8 Cal.4th 1005, 1008.) “Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program.” (*Ibid.*).
Endsley with what amounted to a take-it-or-leave-it option regarding jail confinement, the court demonstrated it was unaware section 1026.2 gives NGI petitioners the right to local confinement in a safe and therapeutic setting. Because it was based on a legal misconception, we are compelled to conclude the court’s decision not to allow Endsley to testify was an abuse of discretion. On remand, if Endsley desires to testify, the trial court must follow the procedures set forth in section 1026.2, subdivisions (b) and (c) and oversee the designation of an appropriate facility to house him pending his hearing. If after that process Endsley still refuses to testify in person, he will at least have made a knowing and intelligent waiver of his rights, at which point the trial court has discretion whether to allow him to testify remotely. (See In re Nada R. (2001) 89 Cal.App.4th 1166, 1176 [reviewing for abuse of discretion trial court’s refusal of telephonic testimony].)

B. Right to Appointment of Independent Expert

Whether indigent NGIs seeking release from civil confinement are entitled to the appointment of an independent expert to assist them with their section 1026.2 petitions is an issue of first impression. Section 1026.2 is silent on the appointment of experts, and the only case to even mention the issue is Soiu, where the court held the NGI was entitled to a hearing on his petition for conditional release, and in so holding noted “the trial court can [on remand] consider [his] request for appointment of a medical professional to assist in the outpatient placement hearing.” (Soiu, supra, 106 Cal. App.4th at p. 1201, italics added.)

Given the lack of authority directly on point, Endsley argues the holding in McKee—which involves the statute governing the release of SVPs from involuntary civil commitment—supplies the basis for concluding NGIs are entitled to an independent expert at the outpatient placement hearing stage. SVPs and NGIs face an essentially identical statutory framework for obtaining release from involuntary civil commitment. Just like for NGIs under Penal Code section 1026.2, there are “‘two ways [an SVP] can obtain review of his or her current mental condition to determine if civil confinement is still necessary. [First,] [Welfare and Institutions Code] section 6608 permits a defendant to petition for conditional release to a community treatment program.... [Second,] [Welfare and Institutions Code] section 6605 [requires] an annual review of a defendant’s mental status that may lead to unconditional release.’” (McKee, supra, 47 Cal.4th at p. 1186.)

Also, as with release under Penal Code section 1026.2, an SVP may petition for conditional release on his or her own, “with or without the recommendation or concurrence of the Director of State Hospitals.” (Welf. & Inst. Code, § 6608, subd. (a).)

In McKee, the California Supreme Court considered the constitutionality of Proposition 83, which amended the term of an SVP’s civil confinement from a fixed two years (at the end of which the prosecution had to prove beyond a reasonable doubt that the defendant still met the definition of an SVP) to an indefinite commitment “from which the [defendant] can be released if he proves by a preponderance of the evidence that he no longer is an SVP” (McKee, supra, 47 Cal.4th at p. 1184.) McKee, a recently-committed SVP, argued the amendment violated federal due process because, among other things, it made no provision for the appointment of an independent expert to assist indigent SVP’s petition for conditional release. “As [McKee] points out, although [Welfare and Institutions Code] section 6605, subdivision (d) mandates the appointment of experts when the [Department of Mental Health] authorizes an indigent inmate to petition for release, [Welfare and Institutions Code] section 6608, subdivision (a) merely provides that petitioner has the right to counsel, with no mention of experts, when he petitions without the [Department of Mental Health’s] approval.” (Id. at p. 1192.)

The Court agreed that access to an independent medical expert is crucial for SVPs seeking release from involuntary civil confinement. “[E]xpert testimony is critical in an SVP commitment proceeding, in which the primary issue is not, as in a criminal trial, whether the individual committed certain acts, but rather involves a prediction about the individual’s future behavior.” (McKee, supra, 47 Cal.4th at p. 1192, italics added.) The Court reasoned, “If the state involuntarily commits someone on the basis of expert opinion about future dangerousness, places the burden on that person to disprove future dangerousness, and then makes it difficult for him to access his own expert because of his indigence to challenge his continuing commitment, that schema would indeed raise a serious due process concern.” (Ibid., italics added.) The Court further observed that “the denial of access to expert opinion when an indigent individual petitions on his or her own to be released”—as opposed to when the person in charge of their treatment “authorizes” the petition—could pose “a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed.” (Id. at p. 1193.) Citing the rule that we should “construe statutes when reasonable to avoid difficult constitutional issues,” the Court interpreted the SVP statute “to mandate appointment of an expert for an indigent SVP who petitions the court for release.” (Ibid.) After McKee, the Legislature amended the statute to explicitly provide that an SVP petitioning for conditional release “shall have the right to the appointment of experts, if he or she so requests.” (Welf. & Inst. Code, § 6608, subd. (g).)

The due process concern articulated in McKee applies with equal force to NGIs seeking conditional release. As the Court observed, a finding that a person meets the definition of an SVP is “the functional equivalent of the NGI acquittal.” (McKee, supra, 47 Cal.4th at p. 1191.) NGIs, like SVPs, are involuntarily confined based on expert opinion regarding their future dangerousness. In addition, both groups face a two-step process for release that requires them to successfully complete outpatient treatment in the community and demonstrate to the court they are no longer a danger to the
community based on their mental illness. Although Penal Code section 1026.2 does not have a provision similar to Welfare and Institutions Code section 6605 mandating the appointment of an expert when the person in charge of treatment authorizes the petition for release, we do not think this distinction affects the due process analysis. The “serious due process concern” identified in *McKee* was the existence of a statutory scheme that “places the burden on [the civil committee] to disprove future dangerousness, and then makes it difficult for him to access his own expert because of his indigence to challenge his continuing commitment.” (*McKee*, at p. 1192.) We conclude the only way to avoid that exact problem in the NGI setting is to interpret Penal Code section 1026.2 to mandate the appointment of an expert for indigent NGIs petitioning for conditional release, if the NGI so requests.

The People do not disagree that *McKee* supports interpreting section 1026.2 to include the right to an appointment of an independent expert. Instead, they contend the error in denying Endsley’s request was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 because the trial court found the state’s evidence “overwhelming.” (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1194 [*Chapman* test applies to federal constitutional error in civil commitment cases].) This argument does not satisfy us that the error was harmless beyond a reasonable doubt. The trial court concluded the state’s case was overwhelming after a hearing consisting solely of state-produced evidence. Endsley did not testify at his hearing nor was he able to produce the opinion of his own expert. We simply cannot know how the proceedings may have differed had he been appointed an expert to help him prepare and present his challenge to continued commitment. For example, we cannot know what the expert would have testified or how it might have impeached or weakened the state’s case.

The People’s assertion that nothing Endsley could have done would have impacted the court’s conclusion is only speculation. As *McKee* explains, access to an independent expert is of fundamental importance in situations like this where a person’s freedom from involuntary state-imposed confinement hinges on their ability to disprove the opinions of the state’s experts. (*McKee, supra*, 47 Cal.4th at p. 1192.) Endsley should receive the opportunity to support his petition with expert opinion. We cannot conclude beyond a reasonable doubt that he could not, with the help of an independent medical expert, alter the trial court’s conclusion about his suitability for outpatient treatment.

III

DISPOSITION

We reverse the denial of the petition for conditional release. We direct the trial court to grant Endsley’s request for an independent expert to assist him in demonstrating he is ready for outpatient treatment. Additionally, if Endsley desires to testify at his outpatient placement hearing, we direct the trial court to oversee the designation of an appropriate facility to house him pending his outpatient placement hearing, in accordance with the procedures set out in section 1026.2, subdivisions (b) and (c).

CERTIFIED FOR PUBLICATION

SLOUGH J.

We concur: MILLER Acting P. J., CODRINGTON J.
THE PEOPLE, Plaintiff and Respondent,

v.

CHRISTOPHER BAILEY, Defendant and Appellant.

No. B275818
In The Court of Appeal of the State of California
Second Appellate District
Division Three
Los Angeles County Super. Ct. No. TA138992
Filed October 10, 2018

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

BY THE COURT: *

It is ordered that the opinion filed September 20, 2018, is modified as set forth below. There is no change in the judgment.

On page 15, third and fourth lines, change “[failure to request clarification where a juror’s response to polling was ambiguous];” to “[failure to object to incomplete jury polling];”

*EDMON, P. J., LAVIN, J., EGERTON, J.